

COMMENTS FROM
ADVISORY COMMITTEE
TO THE CGLG AND PREMIERS
ON SECOND DRAFT OF THE
CH ANNEX AGREEMENTS
CONSULTATION ^{GO DOWN} → AUG 29, 2005

Council of Great Lakes Governors
AUGUST 30, 2005

ADVISORY COMMITTEE COMMENTS
ON REVISED DRAFT ANNEX 2001 IMPLEMENTING AGREEMENTS

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GREAT LAKES UNITED COMMENTS ON REGIONAL AGREEMENT	—

August 29, 2005

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

Subject: Comments of the Agricultural Partnership for Great Lakes Basin Conservation
regarding Annex 2001

The following comments represent the collective agreement of an Agricultural Partnership for Great Lakes Basin Conservation. In October 2004, the partnership offered solution oriented comments regarding initial Annex 2001 draft implementing agreements. We remain engaged in this iterative process to offer solutions that protect the Great Lakes while enhancing the viability of Great Lakes Basin agriculture.

The Partnership reaffirms a collective belief that Great Lakes Basin agriculture and the Great Lakes fresh water system are diverse drivers for the health and economy of the Great Lakes Basin. We reaffirm our support for the Great Lakes states and Canadian Provinces retaining authority to control, protect, and conserve the Great Lakes. With these ideals, the following represents the Partnership's comments pertaining to the implementation documents as released for public comment on June 30, 2005.

To begin, the partnership appreciates the efforts of the Council of Great Lakes Governors to address several concerns offered by the Partnership on October 18, 2004. These include:

- Agriculture will not be held to an improvement standard that exceeds conservation measures and efficient use.
- The regional review threshold for consumptive uses increased to 5 million gallons per day.
- Inclusion of the term "Generally Accepted" in reference to water consumed.
- An increased focus on efficient use of water. Efficient water use better depicts the desired goals of Annex 2001 and agriculture's role in Annex 2001 implementation. Rather than fractioning water use into hard to define components, a focus on efficiency keeps a producer's attention on water use variables to which water conservation and management principles can be applied.
- Retention of the term common distribution system as a defining parameter of a withdrawal.
- Determination of cumulative impacts is the responsibility of the jurisdiction and not individual water users.

With these positive changes to the implementing documents, the Partnership expresses the following concerns:

A primary concern of the partnership with the recently proposed Annex 2001 implementation documents is the loss of jurisdiction flexibility to implement non-regulatory approaches to water management. Annex 2001 guided the states to "seek and implement, if necessary, legislation establishing programs to manage and regulate new or increased withdrawals of Waters from the Great Lakes Basin". Section 4.8 of the Great Lakes Basin Compact states "Each party, within its jurisdiction, shall have the power and its duty shall be to manage and regulate all New or Increased Withdrawals of 100,000 gallons per day". We believe this language exceeds implementation of Annex 2001 and limits state flexibility to offer management approaches other than regulatory approaches such as permits. We reaffirm our belief that management and regulation of the waters of the Great Lakes Basin does not require water use permitting. While water permitting programs are accepted, proven approaches to water management in some jurisdictions, alternatives to permitting should be allowed in other jurisdictions. Burdensome regulation will challenge the competitiveness of Great Lakes Basin Agriculture. Regulation of all New and Increased withdrawals is not necessary to protect the Great Lakes. Mandating water conservation through regulation in a water rich region will not foster a water conservation ethic in the Basin. We ask that these concerns be addressed in the final implementing documents.

We remain concerned about the level of understanding of agricultural water use reflected in the implementation documents. As a "one size fits all" regulatory approach to Great Lakes water use is inappropriate, so is the blanket application of terminology to all sectors of water use. Agriculture is different from other uses as all water withdrawn is intended to be "consumed" and return flow minimized. The proposed implementation documents acknowledge that water returned to the source watershed via infiltration shall be considered part of return flow. This infers that transpiration is not part of consumptive use determination where existing consumptive use coefficients include transpiration. We concur with this notion and believe the implementation documents should explicitly state that consumptive use does not include water used by plants, including transpiration.

In past comments, we asked for the inclusion of jurisdiction developed generally accepted water use allowances for agricultural practices in lieu of existing consumptive use coefficients and return flow requirements. We believe that progress was made with the inclusion of the term "generally accepted" in the current proposal, although misapplied to a consumptive use coefficient. Developed generally accepted allowances would be based in conservation, could maximize water use efficiency by focusing on evaporation reduction and scheduling and could account for flow to groundwater via infiltration. Flexibility must be included in any final documents for jurisdictions to develop management approaches to address these concerns.

We are concerned about new language in this proposal that endorses a precautionary approach to water management in the absence of science and evidence of impact. Water policy must be science based.

The partnership is disappointed with the reduction of the water use averaging period as we believe that the 120 day period better reflects the seasonality of agricultural water use. We call for a return to a 120 day averaging period, or greater.

Agricultural proposals that implement jurisdiction approved water conservation measures and follow developed generally accepted water use allowances for agricultural practices for all withdrawals exhibit due diligence for their withdrawal responsibilities and should be considered

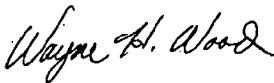
in compliance with conservation measure and ecological impact application requirements. Attainment of due diligence is not intended to allow a farmer an unreasonable use of water but to acknowledge the attainment of a performance based standard and good faith effort in the event the use is scientifically found to be seriously contributing to an ecological impact.

The definition of withdrawal should be changed to only include man-made, inorganic mechanisms. As defined, a plant could be considered a withdrawal.

Farmers remain concerned about submitting water use data. We believe all information gathered should only be used for increasing knowledge of Great Lakes water resources and not be used for litigation purposes or water allotment. The process by which farmers submit information should be transparent, but gathered information should not be in the public domain.

Thank you for this opportunity to comment and the attention to our past offered solutions. We remain concerned that the broad application of Annex 2001 principles to agriculture is not simple, lacks a clear understanding of agricultural water use and has the potential to put Great Lakes Basin agriculture at a competitive disadvantage with agriculture outside of the Great Lakes Basin. We ask that final implementation documents provide jurisdictions flexibility to address these concerns.

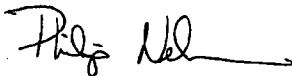
Regards,



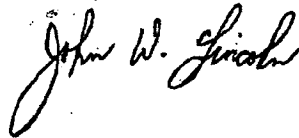
Wayne H. Wood, President
Michigan Farm Bureau



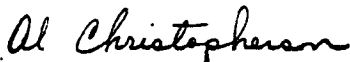
Bob Peterson, President
Ohio Farm Bureau




Phillip Nelson, President
Illinois Farm Bureau



John W. Lincoln, President
New York Farm Bureau



Al Christopherson, President
Minnesota Farm Bureau



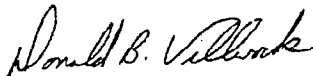
Elwood Kirkpatrick, President
Michigan Milk Producers Association



Ron Bonnett, President
Ontario Federation of Agriculture



Carl T. Schaffer, President
Pennsylvania Farm Bureau



Donald B. Villwock, President
Indiana Farm Bureau

Jody E. Pollok, Executive Director
Michigan Corn Growers Association

Richard E. Leach
Director of Community & Government Relations
Michigan Sugar Company

Ben Kudwa, Executive Director
Potato Growers of Michigan

Allyn J. Anthony, Executive Secretary
Michigan State Horticultural Society

Phillip J. Korson II, President/Managing
Director
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Tim Andrews, President
Michigan Cattlemen's Association

George E. House, Executive Director
Michigan Allied Poultry Industries

James E. Byrum, Executive Vice President
Michigan Bean Shippers Association

Sam Hines, Executive Vice President
Michigan Pork Producers Association

Amy Frankman, Executive Director
Michigan Nursery and Landscape
Association

Ben Kudwa, Executive Director
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Denise Yockey, Executive Director
Michigan Apple Committee

Jim Schiller, President
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Gail Frahm, Executive Director
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Dave Trink, Director of Research
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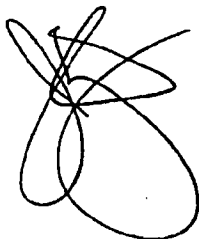
AL Peterson

Alan Peterson, President
Minnesota Irrigation Association

Adoree L Miron

Adoree Miron, President
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John Bakker, Executive Director
Michigan Asparagus Advisory Board
Michigan Plum Advisory Board
Michigan Onion Committee



James E. Byrum, President
Michigan Agri-business Association

Tom Smith

Tom Smith, Executive Director
Michigan Turfgrass Association

ALLIANCE FOR THE GREAT LAKES

ENSURING A LIVING RESOURCE FOR ALL GENERATIONS

August 23, 2005


Mr. David Naftzger
Executive Director
Council of Great Lakes Governors
35 E. Wacker Drive, Suite 1850
Chicago, IL 60601

Re: Comments on the Draft Annex 2001 Implementing Agreements


Dear Mr. Naftzger:

I have enclosed a written copy of the public comments that I submitted orally at the Wisconsin DNR's "Listening Session" held at the Wisconsin State Fair Park in West Allis, Wisconsin on August 22, 2005. These comments were submitted on behalf of the Alliance for the Great Lakes (formally known as the Lake Michigan Federation). Kindly include these in the record of public comments pertaining to the Council of Great Lakes Governors' Draft Annex 2001 Implementing Agreements. Thank you.

Very truly yours,


Gary Ballesteros
Vice-President, Policy
Alliance for the Great Lakes

Enclosure



ALLIANCE FOR THE GREAT LAKES

ENSURING A LIVING RESOURCE FOR ALL GENERATIONS

Testimony of Gary Ballesteros
Vice-President for Policy and Member, Board of Directors
Alliance for the Great Lakes
on the
Draft Great Lakes Basin Water Resources Compact & Agreement
Hearings before the Council of Great Lakes Governors
Wisconsin State Fair Park
August 22, 2005

Good evening, my name is Gary Ballesteros, and I am Vice-President of the Alliance for the Great Lakes, (formerly known as the Lake Michigan Federation). I am also a practicing attorney specializing in environmental law. In my day job I serve as the Associate General Counsel of Rockwell Automation here in Milwaukee where I am in charge of Rockwell's overall environmental compliance programs.

But I'm speaking tonight on behalf of the Alliance for The Great Lakes, the oldest citizen action group on the Great Lakes. As an organization, the Alliance has been actively involved in Great Lakes protection since its founding in 1970. We are pleased to be here tonight to talk about some of the most exciting and promising preservation opportunities that have hit the Great Lakes in many years.

I am here tonight to offer a few words of support; and some suggestions for improvement to the Great Lakes Basin Water Resources Compact and Agreements, which was formerly referred to as the "the Annex 2001". (For simplicity's sake; I'll refer to this mouthful of

agreements as “the Compact”). I personally have been following the Compact developments with great interest for the past four years, and was one of the first to write a scholarly article for the legal profession analyzing some of the interesting legal and constitutional issues involved with the Compact (See 32 Env’tl. Law Reporter 19527, at 10611 (May 2002)). But it is not intellectual or professional curiosity that drives my interest and passion for the Compact.

Here in our backyards we have one of the natural wonders of the world, a gift of nature, and an economic engine for our region – the Great Lakes. Their beauty and bounty enriches our lives. These precious waters are a resource for us to use and protect. Today, persistent pollution, invasive species, and the interests of those who would export or waste our precious lake waters for a profit threaten our Great Lakes. Though more than 40 million residents drink it every day, there is no plan (yet) that will ensure the long-term protection and sound management of our Great Lakes water – but the Compact holds great promise to fulfill that needed role.

Water is the underpinning to our economy in the Upper Midwest and some jurisdictions already have strong water protections on the books—Minnesota and Ontario for example. These laws make great sense; and despite critics’ cries to the contrary they have not led to any job loss or economic harm. Moreover, with political representation shifting away from the Great Lakes states, a strong homegrown policy is the best way to ensure we’re allowed to manage our waters for ourselves. As such, let me first of all and most importantly emphasize that the Alliance fully supports and commends the governors’ strong, bi-partisan efforts to shield the Great Lakes from exports and wasteful water uses here at home. We believe the Compact is a significant first step in this direction. As such, we applaud the governors for their efforts and we have urged all of our

many members to support the governor's efforts politically with their votes, their positive comments in these hearings, and with additional outreach efforts.

Having said that, we believe there are a few areas in which the Compact could be made even stronger to provide true protections and sound management; and I'll devote the remainder of my time to briefly highlight our suggestions for improvement.

1. The Compact and Agreement Must Work to Restore the Great Lakes

When the Annex was first unveiled in 2001, the governors promised the residents of our region a "restoration standard"—formerly called the "improvement standard." In other words, the original goal was not just to protect the Lakes, but to actually improve them and make them better. Unfortunately, through the long process leading to the current draft of the Compact, the restoration standard has been stripped out. If our generation is going to leave the Great Lakes better than the way we found them, we believe the governors must make good on their original promise and reinstate strong restoration provisions.

2. The Public's Right To Enforce Water Protections Must Be Assured

The draft Compact includes a provision that allows stakeholders—businesses, citizens, and municipalities alike, —to challenge unlawful water use. We commend the governors and premiers for including this provision since poll after poll continue to show the public—in our region and across the country—support full implementation of laws to protect water. And historically, the ability of citizens to directly enforce environmental laws through Citizen Suit

provisions has been overwhelmingly successful in virtually all of the existing federal environmental laws (such as the Clean water Act, the Clean Air Act, the Superfund law, etc.)

However, the draft Compact only allows enforcement in instances where a water withdrawer proceeds without a permit. But there are many other foreseeable instances where aggrieved parties may be impacted and should have the right to sue to enforce the Compact. For example, aggrieved parties should be able to:

- Ensure water withdrawers are complying with the terms of their permits. It's not enough to ensure that parties simply obtain a permit – you must be able to enforce compliance with the permit as well.
- Ensure individual state standards are at least as protective as the minimum protections provided by the Compact.
- Ensure that the public under the Public Trust Doctrine is able to protect its right to healthy, safe, and clean public trust resources such as water.

As I mentioned, these types of citizens' suit provisions have existed under state and federal law—such as the Clean Water Act—for decades. We see no reason to now limit the public's right to enforce basic protections for their own natural resources in this context.

3. Water Conservation Requirements Must Be Strengthened

The goal of the Compact should be to provide an incentive for prospective water withdrawers to conserve water so they never need to access new or increased quantities of Great Lakes water and be subject to the Compact in the first place. If the Compact imposes strong water conservation provisions on existing users, that will be the best defense against water withdrawal challenges under constitutional and international trade laws. After all, how can we

tell other places they can't have our water if we're squandering it here at home? We suggest that the Compact should require, not simply suggest, conservation measures.

We also believe that, similar to laws such as the Clean Water Act and Clean Air Act that require the use of "best available technologies", the Compact should be "technology forcing," driving water conservation practices and technology to perform better over time. Therefore, the Compact should articulate clear water conservation goals and timelines, similar to those in federal statutes mentioned above.

4. The Compact Should Be Implemented As Soon As Possible

The Compact should be implemented and enforceable now. Water is becoming more valuable globally and in the region, not less valuable. The time to stop talking and start acting is well overdue. Currently the draft allows ten years after the effective date of the Compact for implementation. This, we believe, is unnecessary and unacceptable and the time frame should be substantially shortened or eliminated altogether.

5. The Compact Should Not Allow Perpetual Exceptions To The Diversion Ban

If an exception to the ban on diversions is granted, it should not be granted in perpetuity. As management of Great Lakes Basin waters evolves, it may be necessary to scale back water uses as we learn more about our impact on Great Lakes Waters and react to the unknown impacts associated with climate change. Therefore, any exception to the rules should be granted with the proviso that the exception can always be revoked by the States.

Conclusion

In conclusion, we thank you the governors for striving to develop the world-class protections our Great Lakes waters need and deserve. With the above recommendations, we believe this can be achieved. We will also be submitting more detailed comments with specific language recommendation for your consideration. On behalf of the Alliance for the Great Lakes, thank you for this opportunity to comment.



August 29, 2005

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

Dear Mr. Naftzger:

The Alliance of Automobile Manufacturers ("The Alliance") appreciates this opportunity to present its views on the Great Lakes Charter and the commitments and directives of the Great Lakes Charter Annex 2001 ("Annex 2001").

The Alliance is a trade association of nine car and light truck manufacturers including BMW Group, DaimlerChrysler, Ford Motor Company, General Motors, Mazda, Mitsubishi Motors, Porsche, Toyota and Volkswagen. Alliance member companies have approximately 1,338,700 employees in the United States, of which, over 664,000 employees are located in the Great Lakes states. Nationwide, the Alliance members have more than 250 facilities in 35 states. With over 70 percent of Alliance facilities located in Great Lakes states, water use regulations and restrictions could seriously impair the ability of Alliance members to manufacture in this region. Numerous Alliance member company facilities are covered by the Annex 2001 agreement and therefore the Alliance has a direct interest in this proposal.

The Alliance commends the Council of Great Lakes Governors for its effort to protect, conserve, restore, and improve the Great Lakes Basin for future generations, as well its efforts to enhance and improve the economy in the Great Lakes region. The main concerns the Alliance members have is the recent change in the language referring to "grandfathered" facilities and how the proposal deals with water conservation efforts. To alleviate these concerns, the Annex 2001 agreement should:

- Maintain "grandfathered" status for existing users.
- Recognize past water conservation efforts.

1. THE ANNEX 2001 SHOULD MAINTAIN THE "GRANDFATHERED" STATUS FOR EXISTING USERS

In the previous drafts, existing uses were "grandfathered" and subject to much less regulation than they are in the June 30, 2005 draft Compact and Agreement documents. The requirement that existing uses of greater than 100,000 gallons per day be "registered" may add unnecessary burden on facilities. Many existing facilities currently report water use to their County and/or State. These water use requirements are adequate and do not need to be duplicated under this proposal. Under the Compact there is a requirement that existing users report not only the withdrawal, but also details regarding exact location.

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the capacity of the system, description of the uses, location of uses, and place of discharge. The imposition of additional data collection and reporting is unnecessary and places additional burden on industrial facilities already facing serious economic challenges. Not only does this involve additional burden on facility staff, but it could result in capital cost expenditures as users will be required to install new measuring equipment and adopt new ridged data collection, quality assurance and instrumentation calibration/maintenance programs typical of other environmental monitoring protocols. The resulting expense and administrative burdens will be significant.

Additionally, existing facilities will be required to implement water conservation programs. The scope of these programs to be applied to existing users "may include:"

- Permitting and enforcement,
- Technical standards,
- Reporting requirements,
- Technical assistance and guidance, and
- Public education.

These requirements go far beyond those described by Working Group members during previous discussions with the Advisory Committee. The Advisors were told that conservation programs for existing users, where no new or increased withdrawal was sought, would be limited to Jurisdictional information campaigns and user response on a voluntary basis.

The Alliance recommends that to avoid substantial burdens on existing users, the requirements for existing users need to be scaled back to the simple registration and voluntary conservation provisions initially discussed.

2. THE ANNEX 2001 SHOULD RECOGNIZE PAST WATER CONSERVATION EFFORTS

Water conservation is a key component in the Regional review process. The Decision Making Standard, however, does not indicate how, or even if, previous water conservation efforts will be taken into consideration—a serious deficiency that must be remedied.

Alliance member companies, for instance, have been implementing water conservation measures for several years, with many individual facilities making significant reductions in water usage. These facilities should be able to expand their operations and use additional water, while still being below their historic permit level, without triggering the 100,000-gpd "increased use" threshold.

As a specific example, consider that in 1998, facility "A" uses 4,000,000 gpd to manufacture automobile engines. Through the efforts of its water conservation plan, it consequently decreases its water usage to 3,000,000 gpd. If that facility wishes to expand its operation and increase its water usage to 3,500,000 gpd, it should be exempt from the jurisdictional review process because its water usage is still below the previous historic permit level. Thus, when facilities are required to determine whether or not the 100,000 gpd increased use threshold will be exceeded, they should be allowed to use their permitted value, or if not permitted, their historical maximum as the criteria value, rather than being forced to use a value set at a certain date or period.

The Alliance looks forward to working with the Council of Great Lakes Governors to protect the waters of the Great Lakes Basin.

Sincerely,



Terry Behrman
Manager, Environmental Affairs

August 30, 2005

Mr. David Naftzger
Executive Director
Council of Great Lakes Governors
35 E. Wacker Drive, Suite 1850
Chicago, Illinois 60601

RE: Comments Directed to Proposals of Great Lake Basin Sustainable Resources Agreement and a Great Lakes Basin Water Resources Compact

Dear David:

The American Chemistry Council ("ACC"), Pennsylvania Chemical Industry Council Chemical Industry Council of Illinois, Ohio Chemistry Technology Council, Michigan Chemistry Council, and the New York State Chemical Alliance are collectively referred to as the "SCIC" submitting to the Council of Great Lakes Governors ("the Council") its comments on the proposed implementing documents for the Great Lakes Charter Annex 2001. ACC is pleased to participate in the Advisory Committee to the Water Management Working Group formed by the Council for implementation of the Annex. ACC and the SCIC represent a major stakeholder group in the Great Lakes region.

The American Chemistry Council represents the leading companies engaged in the business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$462 billion a year enterprise and a key element of the nation's economy. It is the nation's #1 exporting sector, accounting for 10 cents out of every dollar in U.S. exports. Chemical companies invest more in research and development than any other industry.

ACC and the SCIC would like to thank the Working Group for including our organization in the development of the Annex 2001 agreements and decision-making standard.

We are responding to two documents that were posted on the Council of Great Lake Governors website on June 30, 2005. The two documents, a *Great Lakes Basin Sustainable Resources Agreement* ("the Agreement") and a *Great Lakes Basin Water Resources Compact* ("the Compact"), are the subjects of our comments.

ACC and the SCIC agree with some of the elements contained within the proposed Agreement and Compact. In general, ACC and the SCIC concurs with a number of findings (“[r]ecognizing that”) in the Preamble to the Agreement and we note the emphasis on “sustainable development” in the Preamble. We are disappointed, however, that the Compact fails to recognize the principles of sustainable development either explicitly or in its approach. It appears that sustainable development principles are not a paramount consideration in the implementing provisions and articles of either the Compact or the Agreement.

In regard to specific provisions, ACC and the SCIC agrees that protection of the Great Lakes Basin resources should be achieved through control of substantial water loss to the Basin so that diversion and, if necessary, water consumption are a better basis than simply total withdrawal. ACC and the SCIC also agree that it is appropriate to apply different management and regulatory criteria for diversions and consumptive uses. We are pleased to find that the “Improvement Standard” proposed in last year’s draft implementation documents is no longer included among the conditions in the “Decision-making Standard”. Such standard appeared arbitrary and subject to abuse by the various review bodies. It also tended to commoditize the resource.

There are also some significant issues of concern within the proposed documents that ACC and the SCIC believes should be modified, as discussed briefly below.

- The current health of the Great Lakes Basin does not warrant the emphasis on the precautionary principle to the exclusion of a sound scientific approach. Rather, the provisions should take an adaptive implementation approach with higher thresholds and fewer or less restrictive criteria initially, while developing a body of knowledge as a foundation for the future framework of the Annex. ACC urges the Council to reconsider whether the complex and burdensome regulatory framework proposed is scientifically justified for the low thresholds of water consumption set forth in the Agreement and Compact.
- The implementing provisions should focus on water-quantity-issues rather than imposing yet another layer of water quality-based requirements on top of those already in place.
- The decision-making criterion of “No Significant Individual or Cumulative Impact” may be impossible to meet, depending on the subjective determination of significance by the review authority (*i.e.*, jurisdictional or Regional Body).
- There does not appear to be a distinction in the degree of analysis required for relatively small projects (*e.g.*, new or increased withdrawals nearer the 100,000 gpd threshold) as compared with larger projects. Such effort is likely to be unaffordable for smaller projects.
- ACC and the SCIC are not confident in the capability of the review authorities to determine appropriate conservation standards for our industry or those of our suppliers and customers. We believe that this is another provision for which an adaptive implementation approach should be taken. The basis for conservation practices within various industries should be developed over time, with a finding of good-faith effort expected initially.

ACC and the SCIC noted three provisions of specific concern for which the Water Management Working Group may not have considered the consequences. We believe these provisions require substantial clarification:

1. The requirement that return flow from Intra-Basin Transfers "shall meet all applicable Water quality standards": This suggests that water quality standards must be met at the end of the pipe, rather than considering mixing zones and receiving water impacts. This is an unreasonable and unnecessary burden on the discharger. As discussed above, there is no need to impose any water quality restrictions through the Annex implementing documents since all discharges are subject to existing state and federal discharge permitting requirements.
2. The requirement that Intra-Basin Transfers (that would result in New or Increased Consumptive Use 5 million gallons per day or greater) "ensure that the Return Flow shall be to the Source Watershed": This is an internal contradiction. By definition "Intra-Basin Transfer means the transfer of Water from the watershed of one of the Great Lakes into the watershed of another Great Lake." If the Return Flow was to the Source Watershed, it would not be an Intra-Basin Transfer.
3. In the provisions regarding Bulk Water Transfer, "[a] Proposal to Withdraw Water and to remove it from the Basin in any container greater than 5.7 gallons (20 liters) shall be considered to be a Proposal for a Diversion." Despite verbal assurances to the contrary made to the Advisory Committee by the Water Management Working Group, ACC is concerned that this provision could be construed to encompass any product formulation that incorporates water withdrawn from the Basin. It is imperative that the intent be clarified in writing in the implementing documents.

In addition to the comments provided above, ACC and the SCIC would like to note that a number of its representatives and members have been involved in the development of the comments being submitted by the Coalition of Great Lakes Industries. ACC and the SCIC support these comments in general.

ACC and the SCIC appreciate the Working Group's willingness to allow our representatives to engage in both the development and the comment processes for the Annex 2001 implementing documents. If you would like to discuss our comments in more detail, please feel free to contact Genise Smith-Watkins at (651) 222-8628.

Very truly yours,

Gordon Fry on behalf of Genise Smith-Watkins



August 29, 2005

Mr. David Naftzger
 Executive Director
 Council of Great Lakes Governors
 35 E. Wacker Drive, Suite 1850
 Chicago, IL 60601

Dear Mr. Naftzger:

This letter contains comments on the June 30, 2005 Draft Annex 2001 Implementing Compact and Agreement Documents filed on behalf of the American Forest & Paper Association (AF&PA). AF&PA is the national trade association of the forest, pulp, paper, paperboard and wood products industry. We represent member companies engaged in growing, harvesting and processing wood and wood fiber, manufacturing pulp, paper and paperboard products from both virgin and recycled fiber, and producing engineered and traditional wood products. Our members operate numerous facilities within all eight Great Lakes States and the two Canadian provinces within the Great Lakes Basin and represent a substantial share of the industrial base in the Region.

The Pulp and Paper Sector has a Critical Need for Water

Water is a critical and essential raw material for the manufacture of paper. The cellulosic material that makes up a sheet of paper must be hydrated by water in order to form the bonds needed to permit the individual fibers to stick together. Water is needed in the chemical processes that produce the pulp for the papermaking process. Also, water is used for cooling purposes in essential power plant and other mill operations. The vast majority of the water used in the manufacture of paper is treated and returned back to the basin. The Great Lakes Region has been North America's leading producer of paper products, in large part, because of the industry's ability to rely on the availability of large volumes of water. The Region faces stiff competition in today's global economy and must work to maintain a business climate that creates opportunities for financial success in the market place. We do not question the positive aspects of water conservation, and as discussed below, the industry has dramatically cut back its water use. However, the Parties must recognize that mandatory reductions will have significant cost implications that my further degrade the pulp and paper industry's global competitiveness. Lastly, questions arise as to what conservation technologies the Parties would promote and selection of appropriate technologies for each industry sector.

Annex 2001 Requirements Do Not Assure Continued Water Supplies for Industry

The draft Annex 2001 Compact and Agreement documents contain new complex regulatory requirements that put into question industry's ability to continue to rely on Great Lakes water supplies. This outcome is not because the water resources can no longer provide the water needed,

but because of the uncertainties associated with the proposed Annex 2001 water withdrawal permitting processes.

Existing Users are Potentially Impacted by Annex 2001 Implementation

The requirements relating to existing water users are of major concern. The amount and technical nature of information required to "register" existing withdrawals is more than can be recorded on a simple "post card" or a one to two page information form. The additional water flow monitoring and reporting requirements will force expenditures for new measuring equipment and recordkeeping systems. We are particularly concerned about the mandate that the Parties develop "performance standards" for water conservation. (Agreement, Article 303, page 14). We do not think it appropriate for the Parties to mandate the amount of water industrial facilities in the Great Lakes may use in their manufacturing processes.

Moreover, additional water conservation requirements will place additional burdens on an industry sector that is already an extremely efficient water user. As a condition of membership, AF&PA member companies adhere to a set of Environmental, Health, and Safety (EHS) principles which include support for continuous improvement in the industry's environmental, health and safety record. Reduction of water discharges, and therefore water use (as measured by reductions in treated wastewater discharges) is one of the areas in which the industry has demonstrated significant improvement. Industry discharges, (i.e. water use) has decreased by over 49 percent since 1975. Rates declined by 4.8 percent between 2000 and 2002 (latest available figures). A more complete picture of these accomplishments can be found in the AF&PA 2002 EHS Verification Report that can be found at:

[http://www.afandpa.org/Content/NavigationMenu/Environment and Recycling/Environment, Health and Safety/Reports/2002EHSReport.pdf](http://www.afandpa.org/Content/NavigationMenu/Environment%20and%20Recycling/Environment,%20Health%20and%20Safety/Reports/2002EHSReport.pdf)

Voluntary Programs and Existing Regulatory Requirements Must Satisfy Annex Objectives

The establishment of State and Provincial technical standards as well as permitting, and enforcement programs suggested in the Agreement draft as elements of water conservation programs (Appendix I, Procedures Manual, Part 2, C. page 39) are duplicative and unnecessary in sectors like the pulp and paper industry where successful voluntary programs exist. Allowances must be made in the Annex 2001 processes to allow for substitution of these voluntary efforts for the more expensive directives contained in the current draft.

In the U.S., tracking of wastewater discharge volumes is a requirement in each mill's NPDES (National Pollutant Discharge and Elimination System) permit. This information serves as an adequate surrogate for water intake data and for detecting changes in incoming flows. Annex 2001 requirements relating to existing water uses should be simplified to allow for use of available pump curve and/or mill water balance information to determine withdrawal rates for "registration" of existing withdrawals and rely on wastewater discharge data to track water intake trends. As mentioned above, any substantial changes in wastewater discharge (already reported to State water quality agencies) would serve to indicate a corresponding change in withdrawals.

The Annex New/Increased Withdrawal Permit Process is a Major Additional Regulatory Process for the Pulp and Paper Industry

Because of the importance of water in the pulp and papermaking sector, AF&PA member mills will be substantially impacted by the Annex 2001 implementing process for permitting new and/or increased withdrawals. Pulp and paper operations involve large scale water withdrawals. Consumptive uses include evaporation by paper dryers, evaporative losses from cooling processes and wastewater treatment lagoons, and incorporation into products if market pulp is sold. Return flows are often some distance from points of withdrawal due to the need for large land masses for plant buildings and structures and wastewater treatment ponds and lagoons.

Consequently, the complex permitting process delineated in the Standard, with its many tests and demonstrations will be time consuming and costly. The industry continues to face global competition and to consolidate domestic manufacturing activities and up-grade facilities to take advantages of current technology economies. As this occurs, new production lines will be proposed at existing mills and although rarely, perhaps a few entirely new mills will be proposed to replace older ones in other parts of the country.

It is not just these major changes or investments that trigger expensive permitting and regulatory requirements. Any proposed new or increased withdrawal of 100,000 gallons per day or greater average in any 90-day period must be regulated by the Originating Party and must meet the Standard to be approved (Agreement Article 205, page 9). Industry mills do not necessarily need to be adding new major manufacturing lines or building new mills in order to trigger this extremely low threshold. Less significant changes can require use of an additional 100,000 gallons per day.

For example, the average mill in the Great Lakes basin withdraws nearly 14,000 gallons per ton of product and makes almost 500 tons of product every day. Therefore, a production increase of only 7 tons per day (less than 2%) could result in an increased withdrawal of 100,000 gallons per day. This kind of production increase could be achieved by relatively small changes in a mill to remove bottlenecks in production; like addition of pulp or processing chemical storage capacity, improvement of pulp washing efficiency, a change in a component on a paper machine that had limited the speed at which it could run, or even addition of an aerator to the wastewater treatment system. Moreover, an increase in water withdrawal of 100,000 gallons per day is so small that larger mills may not even be able to detect it. For a mill producing 1000 tons of product per day, an increased withdrawal of 100,000 gallons per day would probably represent less than a 1% increase, an amount that may be less than the precision of the mill's flow measurement equipment.

If new investments are to be made in the Great Lakes Region (even modest ones), simpler more efficient permitting and regulatory systems are absolutely necessary, not more extensive ones. Lastly, the requirements described in the new draft Annex documents will substantially delay permitting for such new facilities – perhaps as much as a year or more.

Incremental Upgrades and Plant Expansions are Penalized by Annex Standards

In the pulp and paper sector, it is typical that expansions and new facilities are constructed and brought on line incrementally over a period of several years. The requirement that applications for new or increased withdrawals "shall be considered cumulatively within ten years of any application" (Agreement Article 207, page 10) serves as a disincentive to building both the second and first phases of a mill modernization project. Should there be a prospect of triggering Regional Review for the second phase of a project, with its implied more stringent approval criteria, the first phase of the project may also be placed in jeopardy. Often the full economic advantage of a development cannot be realized until all phases of the project have been completed.

AF&PA Supports Workable Coordinated Water Management Activities within the Great Lakes Region

AF&PA has been directly involved in the Annex implementation process through representation on the Working Group's Advisory Committee by Mr. Ron Budzik. We recognize and appreciate the extensive efforts invested in the Annex process by Working Group members. We support important changes made in the current draft documents that address some of our concerns regarding previous provisions. Specifically:

- We support removal of the Improvement Standard from the draft. It was, and remains, unworkable. Improvements will indeed result from coordinated water management by the Region's jurisdictions.
- We support efforts to limit the number of projects that become subject to Regional Review. As explained elsewhere within these comments, there is still much to do in this regard.
- AF&PA continues to agree that management decisions regarding water use should be made within Great Lakes jurisdictions rather than at the Federal level. However, when instituting a water management system that maintains that authority, we must not "lock-up" the resource and adversely impact economic development prospects within the Region.

AF&PA Shares the Concerns of Industry at Large

AF&PA and its members have participated in the review of Annex 2001 documents conducted by the Council of Great Lakes Industries (CGLI). We are aware of detailed comments prepared by CGLI and we support them. In particular the points made by CGLI on the following issues are of special interest to AF&PA:

- Industry's access to water must not be impeded. Limiting the availability of water to support industrial processes is flawed policy.
- Any change in policy that clouds existing rights to use water is also flawed.
- Processes implemented to permit and track water uses must be simple and efficient. The approaches proposed in the latest Annex documents do not appear to meet those standards.
- Water withdrawal permitting processes for projects that do not threaten the integrity of the Great Lakes Basin should not be subject to Regional Review, regardless of the quantities involved.

Mr. David Naftzger

August 29, 2005

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- The extremely low trigger levels upon which the applicability of Annex 2001 water management standards are particularly troublesome and cause a substantial portion of the cost/benefit imbalance present within the current drafts.
- Permitting processes should not be so encumbered by extremely broad objectives and criteria that they become easy targets for legal challenge. The proposed process appears to do so.
- Existing water users should be grandfathered and not subject to extensive monitoring, reporting, permitting, and conservation requirements. Data needed for Regional water management purposes should be collected as efficiently as possible. Conservation efforts that promote and encourage water use stewardship should be based on voluntary principles.
- In regards to water quality issues, Annex processes must rely on existing environmental regulatory programs to conduct these assessments. Any project for which valid environmental permits have been or can be issued should be judged acceptable from the standpoint of chemical and biological integrity.
- Establishment of a new Regional regulatory body such as the Regional Council proposed by the new draft documents should be avoided. Coordination of all aspects of Great Lakes Basin watershed management can be more effectively and efficiently accomplished through consultation among the many existing jurisdictions and legislated programs.
- A workable alternative to the process described in the June 30, 2005 draft implementation documents is needed.

AF&PA is available to assist the Working Group in preparing a more workable water management plan that will both protect the resource and support economic development efforts. Please let me know how we can most effectively do so.

Sincerely,



Jerry Schwartz,
Senior Director
Water Quality Programs

cc: Governor Rod R. Blagojevich
Governor Mitch Daniels
Governor Jennifer Granholm
Governor Tim Pawlenty
Governor George E. Pataki
Governor Robert Taft
Governor Edward G. Rendell
Governor Jim Doyle

**CENTRAL LAKE COUNTY
JOINT ACTION WATER AGENCY
Lake Bluff, Illinois**

August 29, 2005

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

Re: Public Comment - Great Lakes Basin Water Resources Compact/Agreement

Dear Mr. Naftzger:

The opportunity to provide comments concerning the proposed Annex 2001 implementing documents is appreciated. These comments apply to the revised June 30, 2005 drafts of the proposed *Great Lakes Basin Sustainable Water Resources Agreement* (the "Agreement"), the related *Appendix 1, Procedures Manual* ("*Procedures Manual*"), and the draft *Great Lakes Basin Water Resources Compact* (the "Compact").

The American Water Works Association (AWWA) submitted public comments on October 18, 2004 in response to the first draft of the Annex 2001 implementing documents released in 2004. After reviewing those comments, and the recently released second draft of the proposed Annex 2001 implementing documents, I find that AWWA's October 2004 comments, except those regarding an improvement, are still applicable. As the AWWA member to the Council's Advisory Group, I urge the Council's careful consideration of AWWA's public comments.

I am offering supplemental and additional comments for the Council's Working Group members to consider as they review public comment for possible revisions to the most recent version of the draft documents. These additional comments are based in part on the results of a Forum attended by public water suppliers from Wisconsin, Illinois and Indiana.

Removal of the "Improvement Standard" from individual withdrawals

The removal of a requirement to provide an improvement is strongly endorsed. It was a well-meaning concept that was not capable of definition or administration. It is felt that there are alternatives available for meeting its objectives.

Water conservation - Economic feasibility

The conservation provisions in Article 303 require each state and province to develop and implement Water conservation programs. Conservation, when discussed in the context of the

implementing documents proposed in 2004, was not to be considered an improvement. Conservation provisions in the 2005 draft require states to develop programs that will ensure improvement of water and water dependent natural resources, protect the integrity of the ecosystem, and retain and restore surface and ground water quantity. It is essential that the desire to include an improvement facet in conservation not lead to conservation requirements that are not economically feasible.

Basin Boundary – Separate Groundwater Divide

Annex 2001 includes the tributary ground waters of the Great Lakes basin within the definition of the waters of the Great Lakes, as it should. Nevertheless, due to a lack of sound science-based information, the Council proposes administering the jurisdictional boundary of the Great Lakes waters at the surface watershed boundary. Where sound science-based data on the tributary groundwater boundary is available, or developed in the future, states should use such data and identify the ground water boundary as separate from the surface water divide.

Return of water to the source watershed

Article 203, 3 of the Agreement requires the return of withdrawn water to the “Source Watershed.” The term “Source Watershed” is defined by Article 103 as “the watershed from which a Withdrawal originates.” That definition goes on to state:

“If Water is Withdrawn directly from a Great Lake or from the St. Lawrence River, then the Source Watershed shall be considered to be the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. If Water is Withdrawn from a watershed of a stream that is a direct tributary to a Great Lake or a direct tributary to the St. Lawrence River, then the Source Watershed shall be considered to be the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively, with a preference to the direct tributary stream watershed from which it was Withdrawn.”

This definition is open to interpretation (Is a “direct” tributary only the last one before reaching one of the five lakes?) that could lead to rejection of otherwise acceptable withdrawal proposals. Or it could lead to proposals being modified to meet this requirement that might not be in the best environmental and/or economic interests of a local area. Flexibility could be introduced with an exception, and the following is suggested for Article 203, 3: “All Water Withdrawn from the Basin, less an allowance for Consumptive Use of the applicable water sector, shall be returned to the Source Watershed or an alternate location within the Great Lakes watershed providing a positive ecological impact or having no significant negative ecological impact and being significantly more economical.”

Withdrawals by communities that straddle the basin

The inclusion of an exception for communities that straddle the Great Lakes watershed is welcomed, especially the retention of state jurisdiction. However, the impact of two of

the requirements for such a withdrawal make the use of this provision by such communities unlikely. It is an exception that is not an exception.

Article 201, 1 requires that return flow not include any Water from outside the basin. Return flow from a community system would typically come from a sanitary water treatment system. A significant issue for such systems is ground water infiltration, or water that seeps into the collecting sewers from the surrounding ground. The collecting pipes unintentionally function like farm field tiles, and are collecting water from shallow aquifers. While well-managed sanitary treatment systems attempt to minimize this flow, it would be costly and impractical to require no infiltration.

Regionalization of sanitary treatment facilities is not uncommon. In such instances, the community providing the water supply does not provide the sanitary treatment services. And the regional sanitary treatment provider may treat waters from different sources. The restriction on Water from outside the basin in return flow could distort the practical provision of sanitary treatment services in straddling communities. The more likely probability is that the requirement precludes the use of this exception.

The comments above regarding the return of water to the Source Watershed also apply here. Additional flexibility in a straddling community is even more important so that environmental impacts on adjacent watersheds can be managed. Strict application of the proposed language implies a lack of concern for conditions in adjacent watersheds. In the pursuit of Great Lakes water, a community could meet the provisions of these documents while causing significant environmental damage to adjacent watersheds. If other regulations would prevent that damage, it is likely the overall impact would be to preclude the community's pursuit of Great Lakes water through the exception.

It has been suggested that the prohibition on water from outside the basin in return flow is out of concern for invasive species or microorganisms. Return flow, at least from a community water system, would be returning only after treatment that provides a sufficient barrier against such an occurrence.

The language for straddling communities does not provide such communities with a meaningful exception. It would be significantly more viable if return flow could include waters from other sources, and if Basin Water could be used to mitigate circumstances in adjacent watersheds, while still requiring Return Flow to equal the withdrawal less consumptive uses. }

Withdrawals by communities in Counties that straddle the basin

The conditions for a withdrawal by a community outside the basin but in a straddling county make it unlikely that this provision will ever be used. Modification of the requirements as suggested above for straddling communities would be essential. The requirement for a community to be without an adequate supply of water and have no reasonable water supply alternative suggests that they must be facing existing or imminent ecological damage to the hydrology or other environmental aspects of their watershed before precautionary approval of the use of Great Lakes water would be approved. Unless the use of this exception can be

demonstrated to be practical, the documents would probably be stronger, and certainly not misleading, without these provisions.

Avoid rigid criteria

The Manual, page 29, lists criteria for decision-making; followed by physical, chemical and biological factors that a withdrawal must meet to satisfy the criteria. The presumption is that if one factor is not met, the withdrawal is not permitted. This portion of the draft is confusing and open to unnecessary interpretation. It should be amended for clarity and to ensure flexibility. In some cases, it can be interpreted as setting an absolute standard that is improbable of being attained. Good environmental management requires flexibility, not absolute decision standards.

The introductory sentence to the three criteria areas says: "A Water Withdrawal Proposal will be considered to have a significant ecological impact if there is a *significant* change to any of the following parameters:" (emphasis added) The word "significant" can be implicitly added at the front of most of the subsequent criteria without confusion. It is safe to assume that is the intent, until the last criteria under Physical Criteria is reached. There, the word "significant" is explicitly included at the beginning of the criteria. Does that mean it should not be implicitly added to the criteria above it. If not, the implication is that the word "no" should be implied before all of the other criteria. That would make compliance with some of them virtually unattainable.

And, the application of the word "significant" to the three criterion that start with the words "Introduction of ..." dose not provide a satisfactory result. Two of these criterion are under Biological Criteria. It would not seem to be in the best interests of the Great Lakes to assume the intent is to allow the introduction of insignificant levels of invasive species and harmful microorganisms as there probably is no such thing.

The third difficult implied application of the word "significant" is to the Chemical Criteria "Introduction of potentially harmful toxins, contaminants and excessive nutrients." It might work, but trying to interpret "significant" on its own is difficult enough. Trying to interpret "potentially significant" is too problematic. Many substances are *potentially* harmful. Fluoride is clearly toxic at certain concentrations. The debate continues as to whether the amount of fluoride added by many water utilities for dental health is harmful. The "potential" is there.

The changes listed below are suggested so that the implicit addition of the word "significant" to each criterion can be done without confusion or conflict, and the suggested flexibility provided. Change #1: Delete the word "significant" from the last criterion under Physical Criteria. Change #2: Add to the criteria area's introductory sentence the following - "...to any of the following parameters, or any change where so indicated." Then add the word "Any..." to the beginning of the two Biological Criteria that start with "Introduction of..." Change #3: The Annex 2001 implementing documents are quantity driven, not quality driven, and should not be used as a means of addressing perceived shortcomings in other regulations. The second Chemical Criteria should be stricken and reliance placed on compliance with other regulatory water quality program standards such as the NPDES permit process.

Drop the precautionary approach

The Agreement preamble purports to establish a mandate to “act with precaution” in water management, with no definition. The Compact also refers to promoting a “precautionary approach.” To explicitly include such language implies always erring on the side of caution. When there are so many existing gaps in scientific knowledge about the Great Lakes, that suggests a significant preference for not utilizing the waters of the Great Lakes. It sends a message that the Region intends to be very timid about economic development until it is certain as to what is sustainable. The Annex 2001 implementing documents, and subsequent state enabling legislation, should be developed to be effective without such language.

Change in ownership

Article 207, 3 states that a change of ownership of an entity holding an approval “shall not require Regional Review, provided that the facts, conditions or other criteria upon which that approval was based have not changed.” Again, some flexibility is needed. It is unlikely that no facts, conditions or other criteria would have changed. The question is one of significance. The following amendment is suggested for Article 207, 3: “... provided the facts, conditions or other criteria upon which that approval was based have not materially changed.”

Limitations on legal enforcement

Section 7.3 of the Compact allows any “aggrieved person” to commence an action to enforce its terms. If this permits citizens at large to bring legal enforcement action an amendment is suggested to preclude such authority. The Compact and related documents and standards are open to a very high level of interpretation on which reasonable people can disagree. Without reasonable limits on access to legal challenges, timely action on withdrawal requests, reliance on jurisdiction and council decisions, and effective management of withdrawals could be severely impacted. This is felt to be more likely, rather than less likely, in light of the “precautionary approach language used in the documents.

The opportunity to submit these comments is appreciated. If there are any questions, please contact me at 847/295-7788, X304 or at EDG@CLCJAWA.COM.

Sincerely yours,

F. Edward Glatfelter
AWWA Advisory Group Member
Past President, West Shore Water Producers Association
Chair, Illinois Section, AWWA Water Utility Council
Executive Director, Central Lake County Joint Action Water Agency, Lake Bluff, Illinois



**American Water Works
Association**

Government Affairs Office
1401 New York AVE, NW, Suite 640
Washington, DC 20005
(202) 628-8303 Fax: (202) 628-2846

October 18, 2004

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

RE: Comment on the Great Lakes Basin Water Resources Compact and Agreement

Dear Mr. Naftzger,

The American Water Works Association (AWWA) appreciates the opportunity to review and comment on the Great Lakes Basin Water Resources Compact and Great Lakes Basin Sustainable Water Resources Agreement.

The American Water Works Association (AWWA) is an international non-profit, scientific and educational society dedicated to the improvement of drinking water quality and supply. Our 57,000-plus members include more than 4,700 utilities that provide more than 80 percent of drinking water produced in the United States and 40 percent of drinking water produced in Canada. We appreciate your review and consideration of the attached comments.

If there are any questions regarding these comments, please contact Ed Glatfelter, AWWA's representative on the Advisory Group, or Steve Via, AWWA staff, at (202) 628-8303.

Best regards,

- / signed 10/18/04 /-

Thomas W. Curtis
Deputy Executive Director

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<http://www.awwa.org>

AMERICAN WATER WORKS ASSOCIATION
BEFORE THE
THE COUNCIL OF GREAT LAKES GOVERNORS

PUBLIC COMMENT ON
GREAT LAKES BASIN WATER RESOURCES COMPACT

OCTOBER 18, 2004

INTRODUCTION

Founded in 1881, the American Water Works Association (AWWA) is the world's largest and oldest scientific and educational association representing drinking water supply professionals. The association's 57,000 members comprise administrators, utility operators, professional engineers, contractors, manufacturers, scientists, professors and health professionals from throughout the US, Canada and around the world. The association's membership includes more than 4,700 utilities that provide more than 80 percent of drinking water produced in the United States and 40 percent of drinking water produced in Canada. AWWA and its members are dedicated to providing safe, reliable drinking water to people throughout North America (including the Great Lakes basin).

At the request of the Council of Great Lakes Governors (Council), AWWA identified a volunteer to serve on an advisory group to assist the Council in preparing a model for decision-making to implement Directive 3 of the Great Lakes 2001 Charter Annex. In mid-July, the Council released drafts of two documents (Great Lakes Basin Water Resources Compact and Great Lakes Basin Sustainable Water Resources Agreement) for public review and comment through October 18, 2004. AWWA, as an international organization and as a matter of policy, does not impose its views on individual states, provinces, or regional concerns. However, we are pleased to provide comments based on some of the basic concepts that our members believe are critical to water resource management and are applicable to Directive 3. We have also added some observations that AWWA has made over the course of Advisory Group discussions to date.

ADVISORY GROUP TO THE COUNCIL'S WORKING GROUP

The Council of Great Lakes Governors should be commended for engaging in an active outreach program involving interested stakeholders in developing the draft implementing agreements. AWWA appreciates the Council's inclusion of the AWWA in the advisory committee process. AWWA is concerned, however, that the draft implementing agreements do not adequately address drinking water supply issues. One reason may be that drinking water suppliers were underrepresented in the stakeholder process. For example, only two representatives on the Advisory Group were public water system operators.

Consequently, the proposed implementing documents lack clarity regarding issues fundamental to the provision of an adequate water supply to affected communities. In light of that circumstance,

AWWA invites the Council to carefully consider these comments as it recommends these documents to governors, premiers, and Congress.

DRAFT IMPLEMENTING AGREEMENTS

In finalizing the draft implementing documents and supporting materials, the documents must provide greater clarity and efficiency on a number of issues that directly affect public water systems making withdrawals now or in the future. As noted above, clarity will serve to facilitate discussion by relevant policy makers, and is also essential to achieving the Council's goals of durability, simplicity, and efficiency as articulated in 1999:

"... It must be durable. The framework for decisions must be able to endure legal challenges based upon, but not limited to, interstate commerce and international trade. It must be constitutionally sound on a bi-national basis, and the citizens of the Basin must support this framework.

It must be simple. The process for making decisions and resolving disputes should be straightforward, transparent and based on common sense.

It must be efficient. Implementation of the decision making process should engage existing authorities and institutions without necessitating the establishment of new and large bureaucracies. The decision making process should be flexible and responsive to the demands it will confront."¹

As the Council seeks input from the water supply community and revises the Compact and Agreement, we offer the following comments for your consideration:

Provide a technical and scientific basis. Directive #5 of the 2001 Annex recognizes the need for sound data to underlie implementation of the Annex (i.e., "Develop a decision support system that ensures the best available information."). This same recognition is likewise applicable to the standard developed under Directive #3. Much information is insufficient in many areas affected by the proposed documents, including, but not limited to, consumptive use levels and tributary groundwater determination. The Compact and Agreement should identify funding sources for the development of sound, science-based information.

Consistency between documentation and presentation of administrative process. Presentations by participants in the Water Management Working Group indicate there are already varying interpretations of the draft documents. Language in the Compact and Agreement are inconsistent with the flexibility envisioned by members of the Water Management Working Group. If priorities and areas of flexibility are not included within the guiding documents, the Council will not achieve the objectives of durability, simplicity, and efficiency. Moreover, clear communication with the drinking water supply community is critical to ensuring that the water supply community can provide sound advice to local elected officials and, through those officials, to state government and elected officials.

¹ A Statement on Protecting the Great Lakes: Managing Diversions and Bulk Water Exports, October 15, 1999

The requirements and duties that apply in specific instances cannot be readily determined in many situations from the Compact and the Agreement. Achieving the goals of durability, simplicity, and efficiency necessitate greater consistency and transparency in the implementing agreements.

Concepts critical to "administrative" process require clarity. Several central concepts within the Compact, Agreement, and supporting documents require specific attention to address concerns within the public water system community. These concepts are:

1. Baseline. Defining what constitutes the "baseline" for existing withdrawals from the Great Lakes Basin.
2. Improvement. Describing what is an "improvement", when an "improvement" would be required, and how long an "improvement" should be maintained. When consensus on a definition of improvement is not achievable, clarification could occur by a listing of examples.
3. Boundary. Describing the boundary of the Great Lakes basin, in particular what is the boundary for groundwater withdrawals.

Achieving practical implementation. Actually implementing the draft Compact, Agreement, and associated documents entails a substantial procedural burden for both participating states and affected public water systems. It should be clear that there are provisions to assure that state and regional review is coordinated, that regional review occurs in a timely fashion and that the associated public comment process provides timely, constructive input.

Providing appropriate scale and balance. Regulatory provisions, including but not limited to threshold levels, baseline capacities and permitted withdrawal levels, must be developed that bear a rational relationship to the nature of water use by public water supplies. Regulatory systems are generally incapable of responding to changes in public water supply demand as quickly as they can occur. Variability in daily water consumption can be substantial, and short-term trends in water consumption are seldom constant. Managing short-term trends in water withdrawals for compliance with withdrawal limits must never conflict with the essential need for ensuring public health and sanitation. Fiscal planning requires reasonable assurance that the public debt incurred over long periods will provide access to water at quantities commensurate with debt levels and repayment periods.

CONCLUSION

AWWA appreciates the opportunity to submit these comments. If there are any questions regarding these comments, please contact Ed Glatfelter, AWWA's representative on the Advisory Group, or Steve Via, AWWA staff. To assist the Council in identifying the concerns of the public water system community, AWWA urges the Council to work with AWWA Sections located in Great Lakes Basin states and provinces to conduct outreach to public water system community. Points-of-contact are provided in the following table.

State / Province	Contact	Phone Numbers (Voice / Fax)
Illinois	Laurie A. Dougherty, Executive Director	(866) 521-3595 / (866) 521-3591
Indiana	Tim Bumgardner, Section Staff	(317) 745-1124 / (317) 745-3136
Michigan	Eric Way, Secretary-Treasurer	(517) 373-4752 / (517) 241-0325
Minnesota	Jon Eaton, Secretary-Treasurer	(952) 563-4501 / (952) 830-8236
New York	Marian Potter, Executive Director	(315) 455-2614 / (315) 455-2615
Ohio	RaShawn Truss, Section Staff	(614) 265-3180 / (614) 268-3244
Ontario	Susan Poole, Secretary-Treasurer	(416) 252-7060 / (416) 252-3908
Pennsylvania	Don Hershey, Executive Director	(717) 774-8870 / (717) 774-0288
Quebec	Isabelle Bastien, Member Services Coordinator	(514) 270-7110 / (514) 270-7154
Wisconsin	Mike Rau, Wisconsin Section Chair	(414) 540-5106 / (262) 523-7877

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Michigan Section
American Water Works Association
P.O. Box 16337
Lansing, Michigan 48901-6337

August 15, 2005

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

**Re: Comments on June 30, 2005 Annex 2001 Implementing Agreements
Michigan Section – American Water Works Association**

Dear Mr. Naftzger:

The Michigan Section, American Water Works Association (MI-AWWA) greatly appreciates the opportunity to review and comment on the revised Annex 2001 Implementing Agreements, issued June 30, 2005 for public comment. MI-AWWA is comprised of nearly 2,100 members, encompassing many of Michigan's water utilities, from the largest to the smallest. As stewards of the Great Lakes, we believe it is our mission to protect public health while promoting sound water use management practices within our region. We are also committed to ensuring Michigan's economic vitality. In pursuit of this mission, we have provided comment on the previous version of the proposed Implementing Agreements, and trust that our comments were found to be useful in the revision of the Agreements.

MI-AWWA is strongly opposed to water diversions outside of the Great Lakes Basin, and we believe that the newly revised proposals for the Agreements have moved toward a more agreeable approach to out of basin diversions. However, upon review of the revised Agreements, we believe that the Agreements, as revised, remain unnecessarily restrictive to Michigan's water utilities.

Based on our review of the June 30, 2005 proposals for the Great Lakes Water Resources Compact and the Great Lakes Basin Sustainable Water Resources Agreement (herein referred to as the Compact and Agreement, and collectively as the "Agreements"), we offer the following comments and concerns:

Status of Illinois and the Proposed Agreements

Section 4.12 of the Compact and Article 207 of the Agreement refer to US Supreme Court Decree: Wisconsin et al v. Illinois et al, and state that current, new or increased withdrawals, consumptive uses and diversions of Basin water by the State of Illinois shall be governed by the terms of this decree, and that all current, new, or increased withdrawals, consumptive uses, and diversions of Basin water within the State of Illinois shall be allowed unless prohibited by the decree. It appears that none, or possibly very few, of the proposed standards and requirements will apply to water withdrawals within Illinois, and therefore, that a separate set of standards and requirements will apply to Great Lakes water withdrawals within Illinois. The terms of the decree appear to be much more general than the terms and requirements that would apply to the other Great Lakes States/Provinces. We suggest that the Council of Great Lakes Governors provide clear and detailed information on the provisions of the referenced decree and the differences between those provisions and the provisions of the proposed Agreements. In addition, it appears that by governing withdrawals within Illinois by the terms of the referenced decree, the potential exists for diversion of Great Lakes waters outside the limits of the Great Lakes basin (but within the State of Illinois). Further, the terms of the decree appear to limit potential future diversion to a select group of counties in northeastern Illinois, while the proposed Agreements appear to extend this privilege to the

entire State of Illinois. We feel that additional investigation is due this very important change in the revised Agreements. It is not clear why the other Great Lakes States and Provinces should implement standards that differ from one of their Basin neighbors, and at this time, we do not support such an implementation concept.

Averaging Periods

The previous version of the proposed Agreements included a 120 day averaging period for calculation of flows to determine requirements for registration, reporting, regulation, etc. The June 30, 2005 revisions include a 90 day averaging period, thus capturing more water withdrawals. The reasoning for making this change, and therefore subjecting additional smaller public water supply systems to these requirements, is not clear. We are supportive of a rational averaging period that is not arbitrarily applied to all water use sectors, including the potential for different averaging periods for different water use sectors.

Determination of Existing Capacity

Capacity of an existing system is defined as the lesser of withdrawal capacity, treatment capacity, distribution capacity, or "other capacity limiting" factor (Article 207 of Agreement). In most cases, Michigan's public water supply systems were permitted under Michigan's Safe Drinking Water Act, based on capacities of components to meet future projected water demands. A community's ability to finance the construction of water supply systems is also based on the utilization of these previously permitted facilities, up to their permitted capacity. In some cases, especially for intake facilities in the Great Lakes, the ultimate capacity can be much greater than current water demands and much greater than other, more easily expanded system components. The proposed definition of existing capacity may inhibit a community's ability to recoup capital investments in existing facilities, and furthermore, provides uncertainty in assuring new water customers, including adjacent communities, of the ability to provide adequate capacity to meet projected needs. We suggest that determination of existing capacity be based on currently permitted capacity of existing withdrawal facilities.

Definition of Groundwater Divides

Article 207 of the proposed Agreement assumes that groundwater divides are the same as surface water divides. The tools and technology exist for determination of groundwater divides. In fact, Michigan's legislature has provided for the beginnings of detailed mapping and characterization of Michigan's groundwaters. The relation between surface and ground waters is complex, but critical. We suggest that the Council of Great Lakes Governors put effort and impetus into better understanding of the surface water and groundwater relationship before proposing standards and regulatory structures that may be ineffective for certain groundwater supplies.

Consumptive Use Coefficients

We believe that consumptive use coefficients are neither clearly defined nor justified. Appendix 1 of the proposed Agreement cites the Great Lakes Commission Spring 2002 "Consumptive Use Coefficients by Water Use Category..." report as a standard in lieu of a detailed engineering study. However, this report includes a caution regarding the unavailability of data to validate the reported coefficients. In addition, there are many other sources that can justify lower coefficients than those stated in the referenced report. We are concerned that this "fallback" standard may impart unneeded and unwarranted regulatory requirements upon systems that have lesser "consumptive use coefficients", but may lack the necessary resources to provide detailed evaluation of actual values.

Voting Equity and Representation

Section 2.4 of the proposed Compact states that each State/Province is entitled to a single vote in matters before the Great Lakes Basin Water Resources Council (Council), and the rule of decision for most matters is by simple majority. In addition, this Section states that quorum for the transaction of business at any meeting of the Council is a majority of the members; i.e., all members need not be present and represented to render decision on an issue. While we are cognizant of the need to ensure an expeditious process for decisions by the Council, we believe that all members of the Council, i.e. representatives of all Great Lakes States and Provinces, be present to ensure equal say in all decisions before the Council.

Conservation Requirements for Water Utilities

The proposed Agreements call for each State/Province to implement water conservation programs to "retain and restore the quantity of surface water and groundwater in the Basin" (Sections 3.5 and 3.6 of proposed Compact; Article 303 of proposed Agreement). Each State/Province is further charged with reducing demand for water, improving efficiency of use, and reducing losses and waste of water through supply and demand side measures. While we are supportive of the importance and realize the potential benefits of wise and efficient water use for public water suppliers, we caution the Council of Great Lakes Governors of the likely ineffectiveness of regulatory conservation imparted to public water suppliers. Our municipal water supply systems must provide adequate quality and quantity of water, and at sufficient pressure, to ensure safe supply to, and to ensure fire protection of, our communities. Our water supply systems are at the mercy of those to whom we supply water, and any regulated conservation must recognize that demand-side measures are likely more effective than supply-side measures. When a water utility's customers turn on their lawn irrigation systems in the midst of a dry spell, the water utility has no choice but to keep up with that demand. Suggested conservation measures for water utilities in Appendix 1 of the proposed Agreement include "pressure management to reduce volume of water used". Public water supply systems must provide minimum pressures to ensure adequate supply and fire flows, and to protect public health, and any attempt to arbitrarily reduce system pressures may jeopardize utilities' ability to meet these basic goals.

Straddling Community Exception

Section 4.7.1 of the proposed Compact and Article 201 of the proposed Agreement allow for a "straddling community exception" that could allow diversion for public water supply purposes. We are concerned over how a determination will be made, and once allowed, how such an exception will be monitored, to ensure only a true "public water supply" use (no definition of "public water supply use" appears to be included in the proposed Agreements). We suggest that this language be strengthened to emphasize drinking water and fire protection uses (vs. industrial supply, irrigation, etc.). We also suggest that such proposals be subject to Regional Review (currently proposed to be regulated by individual States/Provinces).

Intra-Basin Transfer Exception

Intra-basin transfer exceptions are proposed to be allowed subject to standards and other requirements of the proposed Agreements (Section 4.7.2 of proposed Compact; Article 201 of proposed Agreement). We suggest that these situations are rare for public water supply systems, and where they exist, are done for water quality reasons (related to the return flow), and therefore, should not be defined as a diversion under the terms of the proposed Agreements.

Straddling County Exception

The "straddling county exception" referenced by Section 4.7.3 of the proposed Compact and Article 201 of the proposed Agreement allows diversion of water within a straddling county for public water supply purposes. This provision appears to provide precedent for an ever-expanding definition of area where Great Lakes waters can be diverted, and therefore, we believe that such diversions should be prohibited in all cases. Should this exception remain in any future version of the proposed Agreements, please reference our concerns for the straddling community exception. ✓

Definition of Individual or Cumulative Adverse Impacts

Section 4.9 of the proposed Compact and Article 203 of the proposed Agreement includes an outline of the proposed decision making standard for review of withdrawal proposals, including reference to "individual or cumulative adverse impacts". We are concerned about how adverse impacts will be specifically defined, and the potential cost to water supply systems in proving "no adverse impact" if not specifically defined. The proposed Agreements also include consideration of "potential Cumulative Impacts of any precedent-setting consequences"; this language seems sufficiently vague to eliminate the possibility of any regulatory certainty in water withdrawal proposals. Application requirements referenced in Appendix 1 of the proposed Agreement for showing no adverse impact include documenting of baseline conditions, provision of a projected withdrawal schedule, description of anticipated changes in water quality and water dependent natural resources, description of mitigation measures, and a

"statement of how the Proposal would relate to other existing Withdrawals, Diversions and Consumptive Uses for purposes of enabling the Parties [States/Provinces] to collectively evaluate Cumulative Impacts from this Proposal". These application requirements have the potential to impart a significant financial burden upon a water supply system. We also question how realistic it may be for a Great Lake withdrawal to comply with the excerpted requirement, based on the multitude of other withdrawals within any single Great Lake.

Lake Watershed Assessments of Cumulative Impacts

The required Lake watershed assessments of cumulative impacts in Section 4.13 of the proposed Compact and Article 209 of the proposed Agreement refer to an "incremental Basin water loss" of 50 million gallons per day over a 90 day period, which then triggers the need for such assessments. This criteria appears to assume that water is continually leaving or disappearing from the Basin and not being replenished. We believe that a long-term water balance on a Lake watershed basis would show no net loss of water volume or quantity, other than that associated with short-term lowering of lake levels. For example, a 50 million gallon loss of water from Lake Michigan equates to a lowering of the level of the lake of approximately 3.3 microns. Water is continually leaving and entering the Basin, and any "use" is not resulting in a net loss of water from the Basin. This also calls into question the validity of the concept of "consumptive uses" in regard to the concept of loss of water from the Basin.

Return Flow Requirements

Appendix 1 of the proposed Agreement describes return flow requirements, including guarantee requirements by the withdrawer if the eventual return flow discharge is by other than the withdrawer. This appears to require measurement of quantity and quality of return flow and reporting by the withdrawer. To achieve this in the case of public water supply systems would require detailed intergovernmental agreements when water supply is provided to adjacent communities via wholesale or retail contracts. In addition, we question the feasibility of metering and measuring all return flows, e.g. infiltration return flows via irrigation, septic system seepage, etc. In reviewing proposed withdrawals, the Procedures Manual included in Appendix 1 of the proposed Agreement indicates that the withdrawer must certify that return flow consists of only water withdrawn from the Great Lakes Basin. We suggest that it is impossible for any public water supply system to guarantee that no water from outside of the Basin is included in their return flow (the majority of which would typically be returned through a wastewater treatment facility). A public water supply system has very limited control over what is poured down a drain (or what may be spilled on a lawn and infiltrate into a sewer system, or what may be contained in the rain that falls on the ground and may infiltrate into a sewer system) and from where it may have originated.

Bottled Water Issues

Article 207 of the proposed Agreement indicates that a proposal to withdraw water and remove it from the Basin in a container greater than 5.7 gallons/20 liters is considered a proposal for diversion, and that a proposal to withdraw water and package it within the Basin for human consumption in containers 5.7 gallons/20 liters or less is considered a proposal for consumptive use (which is then managed/regulated by the State/Province). The issue of bottled water is a controversial one in Michigan. We caution close analysis of the intended target of the proposed language, and also caution careful consideration of impacts to public water supplies that may coordinate bottled water programs for the purposes of emergency preparedness.

Exposure to Additional Liability

The enforcement provisions of Section 7.3 of the proposed Compact, especially Paragraph 4 of Section 7.3, appear to open the door for frivolous lawsuits against water withdrawers.

Avoidance of Redundant Regulatory Programs

We caution the Council of Great Lakes Governors, as well as the States and Provinces which may be developing companion legislation to support the eventually adopted Agreements, to pay close attention to existing regulatory programs for public water supply systems. Michigan's drinking water utilities are already heavily, and effectively, regulated, and pay significant fees to the state regulatory agency in support of these existing programs (over \$111,000 per year for the largest systems). Even if any new

regulatory programs are able to avoid redundancy with existing regulatory requirements, any additional requirements applied to public water supplies will place an additional burden upon those utilities.

Details to be Developed at a Later Date

The regulatory provisions of the proposed Agreements in many cases are intended to be detailed by the individual States/Provinces as they enact legislation to implement the general provisions of the proposed Agreements. This leaves open the potential for varying regulations among the States/Provinces, as well as the potential for any State or Province to enact legislation that may be stricter than may have been envisioned or contemplated by the proposed Agreements. We make this statement in recognition that our comments herein may be better served at the time of the Michigan legislature's development of legislation to align our State with the eventual outcome of the Annex process, and in committing MI-AWWA to participation in this process. However, we also make this statement in order to caution the Council of Great Lakes Governors in leaving too many details subject to later decision.

As stated in our September 21, 2004 comments on the previous versions of the proposed Agreements, we believe that the abundance of renewable water sources in our region and in our State provides Michigan, as well as those portions of other States and Provinces within the Great Lakes Basin, with a unique economic advantage in attracting industry and ensuring economic vitality of our communities. The proposed Agreements have the potential to inhibit the ability of our public water supply systems to contribute to the ability of our State and region to attract new industries as well as retain existing industry by requiring lengthy and costly permitting procedures. In addition, we believe that it makes little sense for Michigan to agree to allow other States and Provinces to control our water use needs and eliminate one of our few competitive advantages.

We have prepared our comments herein specifically toward issues affecting the municipal water utility sector, and caution that these comments may not necessarily be applicable to other affected water use sectors. This suggests that a "one size fits all framework for all water use sectors may not be appropriate. MI-AWWA is fully committed to the stewardship of our valuable resources, and is in support of the underlying principles of the Great Lakes Annex. However, we also believe that the Agreements as revised and currently proposed, pose serious concern to many of our water utilities and municipalities, and Michigan in total. We appreciate the opportunity to comment on the latest revision of the proposed Agreements, and are available to discuss our comments and concerns in more detail if desired.

Respectfully,

Michigan Section AWWA



Jim Van De Wege, Chair

cc: Ken DeBeaussaert, Office of the Great Lakes, State of Michigan
Governor's Office, State of Michigan
Michigan Water Utilities



COPY

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

August 16, 2005

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

Sarah Miller
Water Researcher

Paul Muldoon

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

CBC.CA News - Full Story:

Power plants worried as heat wave warms Great Lakes

Last Updated Wed, 20 Jul 2005 18:34:34 EDT
CBC News

Ontario's electricity supply may be in jeopardy because a weeks-long heat wave has warmed waters in the Great Lakes and lowered the levels of northern rivers, a provincial power utility is warning.

- INDEPTH: Blackouts and brownouts

Although temperatures and humidity haven't been as extreme during the past two days, the warmer waters may force some coal and nuclear generating stations to cut their power production, according to Ontario Power Generation.

The water at Toronto's Cherry Beach, which is on Lake Ontario, is about four degrees warmer than it was last summer, for example.

- INDEPTH: Energy conservation

The utility said that similar increases in other parts of the Great Lakes are causing problems for coal and nuclear plants at Nanticoke, Lambton and Pickering. They all use water from the Great Lakes system to cool their generators.

OPG spokesman John Earl said that the warmer the water gets, the less efficiently it cools the generators. That in turn reduces the plants' generating capacity, resulting in less electricity for consumers.

- INDEPTH: Heat waves

Earl said the water can be no warmer than 35 C when it is expelled from the plants. "If we exceed [that temperature],

we would have to ratchet back the amount of generation we could put out."

He said that the power company has come close to that limit a number of times, including once last week.

Warmer water could lead to lingering blackouts

The Independent Electricity System Operator (IESO), which oversees the provincial electricity system, said the warmer waters pose particular concerns – especially if the heat wave continues.

A spokesman, Terry Young, said water doesn't cool off quickly, so any cutbacks in generation could last for some time.

"Instead of just worrying about a peak hour, you are worrying about 24 hours, because you have energy issues throughout those 24 hours," Young said.

He said the warmer waters are one of the reasons that the IESO issued a warning on Monday asking people to cut back on their electricity usage all week.

The IESO said rolling blackouts were still possible if residents, businesses and industry didn't cut back on power use during the week. It has urged consumers to reduce electricity use between 8 a.m. and 10 p.m.

So far this week, the province's power consumption peaked at 25,857 megawatts (MW) on Monday, just short of the record set last week of 26,170 MW.

Northern hydro power drops by a third

Meanwhile, as continued high temperatures fuel the use of air conditioners and other power-sucking devices, low water levels have reduced the amount of power northeastern Ontario can churn out.

- FROM JULY 18, 2005: Heat wave pushing power consumption in Central Canada

Power generation from hydro facilities in the region is down by about a third, Ontario Power Generation said.



August 29, 2005

Mr. David Naftzger
Executive Director
Council of Great Lakes Governors
35 East Wacker Drive, Suite 1850
Chicago, IL 60601

Dear David,

Enclosed please find the Council of Great Lakes Industries' comments on the draft Annex 2001 draft implementation documents: "Great Lakes Basin Water Resources Compact" and the "Great Lakes Basin Sustainable Water Resources Agreement", both dated 30 June 2005.

The CGLI appreciates the amount of work that has gone into these drafts via the Annex 2001 Working Group and the Council of Great Lakes Governors staff, and we appreciate the important changes from the previous versions that have been made in these drafts. Nevertheless, there is still more to be done if this pioneering natural resource regional policy is to be effective. CGLI looks forward to working with you toward that goal.

With thanks for the opportunity to comment, I remain,

Respectfully,

George H. Kuper
President, CGLI

Enc: CGLI Annex 2001 comments

cc: Dr. Sam Speck, Director of Ohio Natural Resources Department and Chairman Annex 2001 Working Group

GHK/jr

Council of Great Lakes Governors

From: David Naftzger [dnaftzger@cglg.org]
Sent: Monday, August 29, 2005 2:35 PM
To: annex2001@cglg.org
Cc: 'Lisa Wojnarowski'
Subject: FW: Annex 2001 comments
Attachments: cover letter to D.Naftzger 29 AUG05.doc; Comments on Draft Annex 2001 docs dd30JUN05.doc

David Naftzger
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From: George H. Kuper [mailto:ghk@cgli.org]
Sent: Monday, August 29, 2005 1:18 PM
To: David Naftzger
Cc: Sam Speck
Subject: Annex 2001 comments

Dave

Attached please find the Council of Great Lakes Industries' comments on the draft Annex 2001 draft implementation documents: "Great Lakes Basin Water Resources Compact" and the "Great Lakes Basin Sustainable Water Resources Agreement", both dated 30 June 2005. Hard copy is in the mail.

The CGLI appreciates the amount of work that has gone into these drafts via the Annex 2001 Working Group and the Council of Great Lakes Governors staff, and we appreciate the important changes from the previous versions that have been made in these drafts. Nevertheless, there is still more to be done if this pioneering natural resource regional policy is to be effective. CGLI looks forward to working with you toward that goal.

Many thanks for the opportunity to comment.

George

George H. Kuper
Council of Great Lakes Industries
3600 Green Court
Ann Arbor, MI 48105
USA
tel: 734 663 1944
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8/30/2005



**Comments Regarding
Annex 2001 Draft Implementation Documents
Dated June 30, 2005**

August 29, 2005

Introduction

These comments are filed on behalf of the Council of Great Lakes Industries (CGLI) regarding the Draft Annex 2001 implementation documents, Great Lakes Basin Water Resources Compact (Compact) and Great Lakes Basin Sustainable Water Resources Agreement (Agreement), dated June 30, 2005. In addition to CGLI members, these comments are submitted on behalf of several additional industry associations and companies who participate in CGLI's Great Lakes Water Management Industry Stakeholders Group. Industry sectors represented by this group include: chemical, iron and steel, petroleum refining, pulp and paper, electric utilities, mining and minerals, shipping and transportation, rubber products, aluminum and other non-ferrous metals, and general manufacturing interests. All are important contributors to the Great Lakes Basin (Basin) economy, all require assured and secure water supplies to support their operations, and in some cases, incorporate into products.

Annex Implementation Measures are of Great Importance to Industry

The CGLI Water Management Industry Stakeholder Group (Industry) appreciates the opportunity to have participated in the Annex 2001 implementing document development process. We recognize that some important changes have been made in the latest drafts.

Industry strongly supports the removal of specific improvement standard provisions from the draft documents. The Governors'/Premiers' Annex 2001 Working Group (Working Group) has correctly recognized that the Standard previously proposed is unworkable and improvements in Great Lakes waters and water dependent resources will result from exercise of sound management principles. The stated purposes of Annex 2001, including improvement, can and will be accomplished without a specifically named improvement provision.

Industry also supports changes in the document that will result in the limitation of the number of applications that will be subjected to Regional review. Not properly limited, Regional review processes will require a new Regional bureaucracy that would be expensive and time consuming for States, Provinces, and applicants to support and respond to. It would also become a serious obstacle to economic development.

An Alternative Annex Process is Needed

Industry remains committed to working with the Governors to come up with Great Lakes water resource protection provisions that meet all of the needs of the Basin. Although the latest drafts include some improvements, the basic approach – one that “locks-up” the resource for protective purposes – continues to be flawed. Representatives of industry and environmental groups, working both independently and together collectively, have proposed alternative processes to those that have been under development by the Working Group. The most recent of these drew heavily from the American Society of Civil Engineers Regulated Riparian Model Water Code and was submitted to the Working Group early in 2005. Industry continues to believe that this alternative embodies the type of program needed to meet the objectives of Annex 2001. And, it will result in a process that will provide much better assurance that water supplies needed to support Industry can be made available. This alternative is supplied in Attachment I and hereby incorporated into these comments by reference.

Overarching Issues Must be Resolved

The reasons that an alternative approach to the June 30, 2005 draft Implementation Documents is needed are illustrated in the discussion below.

1. The importance of continued access to water by industries must be recognized and acknowledged. Providing this access must be stated as a primary objective of the Annex documents. The current drafts fail to do so.
2. Criteria for evaluating "reasonable use" common to the regulated riparian rights basis on which existing water law is based in the Great Lakes States/Provinces have been substantially modified in the draft documents.
3. The proposed new and increased withdrawal permitting process does not distinguish between small or large water withdrawal proposals and requires submission of voluminous support documentation for all. The proposed application and review processes for even small projects would be lengthy, costly, burdensome to States/Provinces and applicants, duplicative of existing environmental regulatory processes, and provide no benefit above those in the suggested alternative approach.
4. The Regional review threshold level for withdrawals involving consumptive uses is still too low to prevent capturing projects that do not warrant this level of review. And, the non-host States and Provinces that would be asked to review these economic development projects can be in competition for them. In these cases, Regional review requirements can set-up conflict of interest situations¹
5. The prescriptive nature of the decision making standard, its procedures manual, and the requirement that the Regional body must find that each jurisdiction's water management program meets or exceeds requirements of the Agreement, limits individual State and Provincial flexibility. States and Provinces are placed in a position of facing legal challenge should they seek to deviate from these prescriptive elements. In addition, should their program be judged to not be sufficient by the Regional body, that jurisdiction is banned from voting on applications, including those for projects that they will want to approve.
6. Some criteria that make up the decision making standard are impossible to meet. For example: those requiring no measurable change, or adherence to specific standards such as consumptive use coefficients.
7. Because of the strict but ill-defined conservation requirements, considerable uncertainty exists over the likelihood of permit approval, particularly with respect to existing withdrawals. Agreement language suggests flexibility in some places and is very explicit in others. Adherence to specific reference materials limits options for applicants, increasing their costs and impacting process design.

¹ For example, the Provinces of Ontario and Quebec are owners and operators of electric utilities that sell electricity in a highly competitive regional electricity market. They would have the unfair advantage of an opportunity to vote on an application from a potentially competing facility.

8. Rather than having been "grandfathered" as in the previous draft, existing withdrawals are now subject to regulation under the standard. This is inconsistent with Annex language.
9. Compact and Agreement language places few limitations on the extent of measures needed to meet the decision making standard. This fails to protect developers, and the States/Provinces that review the projects, from legal challenge of applications, completeness determinations, and final permits.

Issue Discussion and Resolution

1. Assuring Access to Water Supplies:

The Compact and Agreement documents must recognize the importance of maintaining, and supporting all of the competing uses for the Region's water – both now and in the future. They must acknowledge that water resources unique to the Region are an important factor in meeting current and future economic needs. And, the documents should state that assuring long term access to the resource, by industry and others is a stated objective of the documents. This is necessary to provide the legal certainty needed to support permitting decisions regarding water withdrawals.

The Annex 2001 process, to date, has also missed a critical policy opportunity to provide incentives for multiple re-use of Great Lakes fresh water. Water re-use is going to be one important route by which the world's water shortage challenges will be met. Why aren't we pioneering these technological developments with this water policy initiative?

The bountiful supplies of water available to Great Lakes industry is an important advantage that helps attract and support the Region's large manufacturing base. Continued support and revitalization of the manufacturing base is a priority need for economic growth, social progress, and environmental restoration. Although individual members of the Working Group have said that providing an assured source of water to support industry, both now and in the future, is one of their primary objectives, this point is not included anywhere within the Compact or Agreement documents. In fact, just the opposite effect is created. The absence of this stated objective, the very restrictive nature of the water withdrawal approval criteria, and stringent standard of review all add up to locking-up the fresh water resource in the name of protecting it. These provisions suggest that the only way to protect the Region's water resources is to only make them available as a last resort for support of both existing and new industrial activities.

Industry agrees that conservation of water supplies is important, that the supply is limited and must be utilized on a sustainable basis, and that there are many competing interests and needs for this limited supply. However, focusing on limiting, to the maximum extent possible, the water used for industrial purposes is not consistent with the 1985 Great Lakes Charter. That document states that "[t]he multiple uses of these resources for municipal, industrial and agricultural water supply; mining; navigation; hydroelectric power and energy production; recreation; and maintenance of fish and wildlife habitat and a balanced ecosystem are interdependent." The

Agreement and Compact must establish processes that lead to serving all of these needs, not simply "lock-up" use of the resource.

2. Lack of Recognition of Riparian Rights:

Annex Implement Documents should acknowledge the riparian rights basis of Great Lakes Regional common water law and utilize the generally accepted criteria for judging "reasonable use."

Working Group members have said that it is not their intent to deviate from the riparian rights basis on which common water law has been based within the Great Lakes Region. However, the Compact and Agreement requirements have done so.

The Compact, in Article 8, Section 8.1, Effect on Existing Rights, establishes, in paragraph 1, that "[n]othing in this Compact shall be construed to affect, limit, diminish or impair any rights validly established and existing as of the effective date of this Compact...." Paragraph 2, states that "[n]othing contained in this Compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective Parties relating to common law water rights." While these paragraphs seem to acknowledge that underlying legal structures are not being changed, no specific mention of riparian rights is made.

This omission would not be so worrisome if it were not for the structure of the decision making standard as set forth in Compact Article 4, Section 4.9, paragraphs 1 and 2, in the Agreement in Article 203, The decision making standard, paragraphs 1 and 2, and again in Agreement Appendix 1, Procedures Manual Part 1, 1., (A), Effective Use and Conservation of Existing Water Supplies and (B), Quantities that are Considered Reasonable.

These sections of the documents establish that the permit, i.e. the "right," to withdraw water will only be granted when the approving authority determines that the "need" for the water cannot be satisfied via "efficient use and conservation of existing water supplies" and the quantities of water sought are "considered (by the permitting authorities) reasonable for the purposes for which they are proposed."

The Great Lakes States adhere to common law riparian rights water law principles that have been regulated by varying degrees. Typically these principles require that water must be withdrawn for "reasonable use." The criteria used to determine "reasonable use" are multifaceted and often require the balancing of competing factors. "Reasonable use" has been defined by the Water Laws Committee of the American Society of Civil Engineers as "the use of water, whether in place or through withdrawal, in such quantity and manner as is necessary for economic and efficient utilization without waste of water, without unreasonable injury to other water right holders, and consistently with the public interest and sustainable development."² In addition, decision making regarding whether water is used in accordance with riparian principles includes an ability to withdraw water up to the point of "safe yield" of the source and prohibition against interfering with withdrawal rights of others

² The Regulated Riparian model Water code, Water Laws Committee, American Society of Civil Engineers, § 2R-2-20, Reasonable Use.

In contrast, the Agreement and Compact decision making standard differs, It breaks up this combination of criteria into separate pieces and establishes firm endpoints that must be reached for each. It makes no attempt to balance these competing factors, does not recognize the concept of "safe yield" of the water source, and does not include relating the requested withdrawal to the withdrawal rights of others.

3. Proposed Withdrawal Permit Application Requirements are Duplicative of Existing Environmental Permit Processes, Costly, and Time Consuming (Estimated to be up to 28 Months):

Permit application and processing requirements for water withdrawal proposal must be simplified to avoid impacts on economic development efforts.

The permit application requirements contained in Agreement Appendix 1, Procedures Manual, Part 1., 3., Paragraphs A – O are extensive and make no distinction between small projects, large ones and those that must be sent to Regional review. To some extent, the amount of information needed will be self limiting for smaller projects, but the elements of the application and number of demonstrations needed are the same whether the project is large or small. Even applications for minor withdrawals³ require assembling information that:

- Demonstrates "the return flow will be guaranteed"
- Provides a "legal description" of the water source, location of actual withdrawal and, point of measurement of the withdrawal and use
- Provides numerous technical descriptions of water uses, measurement systems and, return systems
- Describes the characteristics of the return flow
- Provides details regarding water conservation measures and programs
- Demonstrates compliance with all laws, international agreements, and the Boundary Waters Treaty of 1909

Providing this information will require utilization of legal counsel and engineering/technical personnel. Preparation of the application will be expensive and can require considerable time, especially when field measurements and technical studies are needed to supply the information needed.

Estimates of the range of costs and time likely to be needed to provide information for the various portions of a typical proposed application are shown in Appendix II to this document. The scope considered for each portion has been derived from the entirety of Agreement Appendix 1, Procedures Manual, Part 1, Preparation of an Application and Review of a Proposal to Withdraw Water, Sections 1 – 3, including all subsections.

The estimates quoted are based on industry personnel experience gained from filing typical environmental permit applications such as those required for wastewater discharges, solid or hazardous waste disposal sites, watershed protection plans, and hydro-geological investigations

³ The 100,000 gallons per day permitting threshold, in an industrial context is an extremely small amount of water, just 69 gallons per minute.

for contaminated site remediation projects. The information sought for water withdrawal permit applications, as outlined in the draft Agreement and Compact, is duplicative of these permitting and approval requirements.

The range in costs and time requirements reflects the fact that smaller projects will require fewer resources and, in some cases, existing information may be available that can be used for the application. However, as is demonstrated by these estimates, even under the best of circumstances, costs and time requirements can still be substantial.

Permitting delay, resulting from the time needed for data collection, data analysis, modeling and interpretation, and assembly of information into permit documents is a very significant issue. No figure is shown in the "Totals" line at the bottom of the chart in Figure I since several of the activities listed can be pursued simultaneously. The best estimate of the time required to prepare the application is to look for the most time-consuming task. Given the information requested regarding the water source, return flow hydrology and, baseline conditions, the required hydrogeologic assessments will become a controlling factor. If this information is available from previously completed watershed or well field assessments it would only need to be checked and verified, and 6 to 9 months would be required to assemble a complete application. Should the information not be available, test wells would have to be drilled, data collected, analyzed, and put in final form. This would increase the application time requirement to between 16 and 28 months.

In addition, the agency will need time to process the application, declare it complete, complete the public notice and public consultation activities, prepare draft permits, and make final decisions. One member of the industry stakeholder group has said that he has informed his company that, should the Annex 2001 implementation process go forward as proposed, they must be prepared to add 24 to 36 months to the environmental permitting process. Such delays are not likely to be experienced in other regions due to water withdrawal permits.

4. Permitting Process Thresholds Much too Low:

Threshold levels should be set such that the States would be totally responsible for developing the application process and approval standards for withdrawals less than tens of millions of gallons of water per day. Detailed Annex 2001 withdrawal application and decision making standard provisions should apply to volumes above this amount. All consumptive use withdrawal applications should be processed at the single jurisdiction level. Regional review should only be necessary for diversion cases.

The extremely low water withdrawal threshold values used to trigger the proposed requirements are, in large part, what makes the current Annex 2001 implementation documents so unfriendly towards economic development

As previously stated, the rigorous standard and permitting process has been applied to all new and increased withdrawals exceeding 100,000 gallons per day. There are just as many hoops to jump through for a 100,001 gallon per day withdrawal as there is a 500 million gallon per day withdrawal. Withdrawals of 100,000 gallons per day to something more substantial, say 10 million gallons per day, should be permitted at the State or Provincial jurisdiction level using an application process and set of decision making standards derived by that jurisdiction. The only

requirement that the Annex 2001 process should place on those withdrawals is that they be permitted and accounted for in a Regional data base. Withdrawals above the 10 mgd level, including those involving consumptive uses, should also be permitted at the State or Provincial jurisdiction level using Annex 2001 implementation permitting standards, specified in implementing documents, simplified over those currently proposed.

Regional review should only apply to diversion issues.

It is easy to understand why people are drawn to the low threshold numbers that appear in the draft documents. The numbers look large. However, to understand them they need to be put in following context:

- 100,000 gallons per day is less than half of the quantity of water contained in a municipal swimming pool.
- One million gallons per day is equivalent to a flow rate of about 700 gallons per minute (over a 24 hour period) or about 1.5 cubic feet per second.
- 100 million gallons per day is equivalent to about 150 cubic feet per second.

As a comparison, the mean recorded flows for key Great Lakes Basin rivers between 1916 and 1997 are⁴:

- St. Mary's River – 76,000 cfs
- St. Clair River – 184,000 cfs
- Detroit River – 189,000 cfs
- Niagara River – 210,000 cfs
- St. Lawrence River – 246,000 cfs

Obviously a proposal to withdraw as little as one mgd from a stream such as Bear Creek, a small tributary to Lake Michigan near Muskegon, Michigan where flow levels reach low levels such as 1.7 cfs, as has occurred this summer⁵, may be significant. But, these issues would be better dealt with by the local jurisdiction and are not of a magnitude to require Regional intervention.

An extreme example of the problems created by the low threshold values contained in the proposal is the bulk water transfer prohibition established by Agreement Article 207, Paragraph 9. Businesses, such as water treatment companies, must ship pieces of equipment or commodities such as water softener resins, membranes, etc. in water to maintain viability. In these cases, the water does not become an ingredient in a product, but serves a critical function in the transport of this material. Under the provisions contained in this paragraph, if container volumes are over 5.7 gallons, this use of water, if it crosses Basin boundaries, would be considered a diversion and be "outlawed." In other words, the Culligan man would be breaking the law as he hauls his water softening units back and fourth across watershed boundaries.

⁴ Source: Protection of the Waters of the Great Lakes, Final Report to the Governments of Canada and the United States, February 22, 2000, International Joint Commission.

⁵ USGS Water Watch – Current water resource conditions, August 11, 2005

5. Prescriptive Decision Making Standard Limits Jurisdictional Flexibility:

The Annex 2001 implementing documents should be focused less on "how" water management programs are to be designed, especially those that will be permitted entirely at the single jurisdictional level.

The required elements of the decision making standard and permit applications are very specifically spelled-out in the Compact and Agreement document. But the Parties to the Compact and Agreement are instructed to collect information from applicants "in such manner ... as the Party shall describe." Yet again, the documents require, in many places, that the review process and decisions be "consistent with" the Compact, Agreement, and Standard of Review. Parties are also free to implement more restrictive provisions since the "Standard is the minimum Standard." Finally, the Regional Body must "[d]eclare whether a Party's programs meet the requirements of this Agreement" (emphasis added). The important point is that it will be the most stringent of all of these inconsistent prescriptions, permissions, standards, and mandates ultimately limit the flexibility of each jurisdiction to design programs or utilize existing programs.

Should the jurisdictions attempt to use their existing programs, as is, and/or impart alternative individuality into their programs, they run the risk of failing to have their programs approved by the Regional Body and/or, even if the Body approves them, face legal challenges by outside interests.

6. Several Criteria are Impossible to Meet:

Annex 2001 implementing documents must not contain absolute criteria and conflicting objectives.

The criteria for demonstrating "no significant individual or cumulative impacts" outlined on page 29 of the Agreement are impossible to meet. They require that there be no "measurable change to the pre-proposal range of variability of the hydrologic regime." Measurable changes are likely, as a result of any water withdrawal activity. But, they may not be significant. They can also be offset by mitigation measures. If jurisdictions are going to be able to issue water withdrawal permits, the standard must not be based on the ability to measure a change but whether or not the net result of the project results in significant change.

Annex 2001 proposal objectives regarding minimization of both withdrawals and consumptive uses appear to be in conflict with one another when applied to some industrial uses. Most notably, when large volumes of cooling water are needed, minimization of withdrawal objectives as stated in Agreement Appendix Part 1, A on page 26 of 39 can dictate the use of cooling tower technologies. But, meeting minimum consumptive use objectives as required in Agreement Appendix 1, Part B on page 26 of 39 would dictate once-through cooling water systems. Neither a potential applicant, nor a potential reviewer could determine whether minimizing withdrawal or minimizing evaporation takes precedent. The potential delays and uncertainty that would likely be caused by this ambiguity and conflict represent additional impediments to economic development.

7. Conservation Requirements Result in Uncertainties and Extra Costs for Applicants:

A much less complicated and much more certain process for selecting required conservation measures that includes re-use evaluation and incentives must be provided in order to keep the conservation standard from becoming a serious impediment to economic development.

The proposed conservation requirements are strict yet not bounded to insure that they remain doable and reasonable. The Standard states that no permit for a new or increased water withdrawal can be issued unless the need for the water cannot be met through "conservation of existing supplies." This begs for a requirement to apply aggressive and not necessarily conventional conservation measures to existing systems and processes. Retrofits of this type carry with them a high degree of risk that conservation equipment will not be compatible with existing systems and processes, may not work, may cause disruptions and lost production, and/or all of the above.

For new construction, the requirements described in Agreement Appendix 1, Part 1, Section E (on page 32 of 39) include substantial uncertainty regarding the outcome of the decision making process. It's anybody's guess what the permit writer might require. No limits have been set. The conclusions from each of the many "evaluations" that must be conducted are also open-ended. The long list of "evaluations" that must be made part of an application package includes:

- Incentives that would motivate water users to implement water saving measures
- The completeness of the list of conservation measures that should be evaluated (One must demonstrate that the list of measures is complete.)
- The savings that can be achieved by the measures
- The scope and magnitude of benefits and costs
- The ease of application of the measures to the new processes
- The relationship of alternatives to other regulatory approvals
- The relative ranking of each of the measures identified

And, these "conservation evaluations" do not evaluate or apply credits for water re-use opportunities as discussed in issue number one, page 4-5 above.

Finally, in each of these "evaluations," disagreements over conclusions reached can delay project processing timelines by many months. Such delays increase costs and jeopardize the ability to take advantage of business opportunity windows.

8. Existing Uses Should be Grandfathered:

To make the requirements consistent with the original Annex process, the requirements for existing users need to be scaled back to the simple registration and voluntary conservation provisions initially discussed.

In the previous drafts, existing uses were "grandfathered" and subject to much less regulation than they are in the June 30, 2005 draft Compact and Agreement documents. The requirement that existing uses of greater than 100,000 gallons per day be "registered" is no longer simple.

Because of the prescriptive nature of information that must be collected and provided regarding existing uses, the "registration" cannot be accomplished via a simple post card or one page form.

Compact Article 4, Section 4.1 requires that existing users report not only the withdrawal, but details regarding exact location, the capacity of the system, description of the uses, location of uses, and place of discharge. Subparagraph 3 of this section stipulates that the information provided be of such quality to "be used to improve the sources and applications of scientific information regarding the waters of the Basin and the impact of the Withdrawals and Diversions from various locations and Water sources on the Great Lakes Basin Ecosystem, and to better understand the role of groundwater in the Basin." To meet these criteria, the information required regarding existing users will have to include scientific, legal, and geotechnical elements. It cannot be just a simple statement of the name of the river or address of the lot on which the well exists.

In addition, subparagraph 2 states that users must "gather accurate and comparable information on all water withdrawals." This means pump curve estimates, judged to be adequate to satisfy previous draft flow reporting requirements, will no longer be sufficient. Existing users will have to install new measuring equipment and adopt new rigid data collection, quality assurance and instrumentation calibration/maintenance programs typical of other environmental monitoring protocols. Expense and administrative burdens will be significant. In other cases, it simply is not possible to provide "accurate" information. And, no criteria are available to describe what is "accurate" information.

Evapotranspiration rates for water from cooling towers, wastewater treatment ponds, and other processes vary widely depending upon factors such as temperature, humidity, levels of contaminants in the recirculated water, etc. Measurements for these kinds of consumptive use cannot be made. Some means for providing estimates must be provided.

Agreement Article 303, paragraph 5, requires the implementation of water conservation programs "for all, including existing Basin water users." The scope of these programs is further defined on the last page of the Agreement document in Appendix 1, Procedures Manual, Part 2, Section 4, Subparagraph C. Direction is given that conservation programs applied to existing users "may include:"

- Permitting and enforcement.
- Technical standards.
- Reporting requirements.
- Technical assistance and guidance.
- Public education.

These requirements go far beyond those described by Working Group members during previous discussions with the Advisory Committee. The advisors were told that conservation programs for existing users where no new or increased withdrawal was sought would be limited to jurisdictional information campaigns with user response on a voluntary basis.

9. Stated Limitations on the Scope of Annex Requirements are Needed:

The uncertainty and exposure to legal challenge must be removed in order to both provide an equitable system of resource governance; and, remove some of the roadblocks to economic development presented by the draft Annex documents.

In spite of the rigor included in Compact and Agreement decision making and application processing procedures, few limitations are placed on the actual measures needed to satisfy Annex requirements. As explained above, many of the Annex document requirements are open for interpretation. This sets the stage for challenge of each decision made within the permitting process. Is the application complete? Has enough or the right hydrogeological information been supplied? Is the list of conservation measures examined complete? Does the applicant have additional options to avoid the withdrawal? Has the applicant really met the Standard?

Detailed Comments Regarding Specific Sections of the Documents

To complete industry's review and comment on the provisions contained in the June 30, 2005 proposed documents, additional comments regarding specific sections of the draft documents follow.

The Compact Document:

Section 1.3, Findings and Purposes, 2., f., page 4 of 18; Section 4.7, Exceptions, 3., e., page 11 of 18: These sections call for a "precautionary approach" or "precautionary principles." No foundation for these terms is available in U.S. laws and regulations. There are no standards for judging decisions made that include the required amount of "precaution." The Privy Council Office of Canada has published "A Framework for the Application of Precaution in Science-based Decision Making about Risk." It stipulates five general principles for application of "precaution" and five principles for "precautionary measures" as part of their Risk Management Framework. There are no standards for the application of "precaution" in the United States, and "precaution" application is limited in Canada, therefore, "precautionary" statements should be removed from the Compact draft.

Article 2, Organization, Section 2.1., Council Created, page 4 of 18: Although the function of the Council is explained in the Compact, the need for this group has not been established. In response to the 2004 draft Annex implementing documents, industry expressed concerns about the creation of a Regional Regulatory Body, the legality of it, the impact of it on individual jurisdictional sovereignty, and the proliferation of bureaucracy that it represents. The proposed Compact creates not one, but two, such bodies. The approach described in Appendix II establishes a consultation approach for seeking input and concurrence on water withdrawal proposals requiring such review and agreement as prescribed by WRDA. This or a similar approach should be used to avoid the sovereignty and jurisdictional conflicts inherent to the Regional Council and Regional Body proposals in the June 30, 2005 Annex draft implementing documents.

Article 2, Organization, Section 2.4., Voting, page 5 of 18: The fact that establishing the Regional Council and Regional Body produces liabilities for the Parties is demonstrated in subparagraph 4 where the act of establishing a budget for the Council is described. No limits are

set. The members of the Council will not necessarily have the authority to commit their respective Parties to an open ended assessment.

Article 3, General Powers and Duties, Section 3.3., Rules and Regulations, page 7 of 18: In addition to financial liabilities placed on the Parties, the Council is also given powers to set fees for applicants in this section. This further increases the uncertainty and costs associated with the need to obtain a permit for water withdrawals under the Annex.

Article 4, Water Management and Regulation, Section 4.4., page 9 and 10 of 18: For some U.S. projects, Regional Council review is also required, following Regional Review, meaning that THREE separate regulatory processes would have to be negotiated in order to achieve State approval. Also, subparagraph 3 gives the Parties the right to unilaterally seek Regional Review for proposals, "after consulting with the Applicant." To improve the certainty of process, some appeal provision must be made available to the applicant.

Article 4, Water Management and Regulation, Section 4.7., page 10-11 of 18: Subparagraph 1., b. states that in the case of a straddling community exceptions, the return flow shall "not include any water from outside of the Basin." This requirement is very likely to be impossible to meet when "co-mingled" water (water from both outside and inside the Basin) are treated in the same wastewater treatment plant. This situation is also very likely to be the case in any straddling community. The requirement should be removed.

In subparagraph 2., c., i., return flows from intra-basin transfer exceptions **must** be to the source watershed. Aside from the fact that this requirement makes the "intra-basin transfer" not really a transfer, this requirement severely limits the likelihood that an intra-basin transfer can be used to meet a critical water need. It may be that there are valid social, economic, or scientific reasons why a particular return flow should not be put back into the source watershed. Opportunities should be given to permit such a transfer when a demonstration can be made that there are sound valid reasons for not returning the water to the source watershed.

The "precautionary approach" language in subparagraph 3., e., must be removed. The use of such open-ended terminology that has no recognized legal or regulatory definition jeopardizes the validity and standing of permit decisions for both applicants and the Parties.

The Agreement Document:

Chapter 1, Article 100, 1, f., Page 3 of 39: The "precautionary approach" language in this list of objectives must be removed. No foundation for these terms is available in U.S. laws and regulations. There are no standards for judging decisions made that include the required amount of "precaution." The Privy Council Office of Canada has published "A Framework for the Application of Precaution in Science-based Decision Making about Risk." It stipulates five general principles for application of "precaution" and five principles for "precautionary measures." There are no standards for the application of "precaution" in the United States, and "precaution" application is limited in Canada.

Article 200, 1, Page 6 of 39 and Article 202, 1, Page 8 of 39: These sections require the Parties to "implement Measures establishing the standard." Measures are defined in Article 103, on

page 5 of 39, to be "any legislation, law, regulation, directive, requirement, guideline, program, policy, administrative practice, or other procedure." This very broad definition of "measures" suggests that jurisdictions can adopt any "directive, requirement, guideline, program, policy, administrative practice, or other procedure" as a "Measure" pursuant to the Agreement and avoid subjecting them to administrative procedures protocols for public review and comment. Such sweeping authority should not be granted by the Agreement.

Article 201, 2, page 7 of 39: For projects involving an Intra-Basin transfer and subject to Regional Review, States and Provinces will be unable to issue a withdrawal permit without first getting 'Regional Body' approval, thereby creating a situation of dual, and non-simultaneous, regulation. Any required local approvals would be needed on top of these.

Article 201, 2, page 10 of 39: The timing of applications as described in this paragraph, especially given the low threshold values discussed in the Overarching Issues section of these comments, above, presents a real disincentive to incremental economic development and business growth by Great Lakes Basin industries. If a facility pursues and obtains a permit for a water withdrawal that results in a 3 mgd consumptive use, then comes back anytime within a 10 year period and wants to double production, Regional review is required. This situation represents a substantial disincentive for the organization to pursue their expansion plans.

Article 201, 9, page 11 of 39: This provision regarding quantities of water that can be removed from the Basin without being considered a diversion must exempt water incorporated into products. Many products that contain water as an ingredient are shipped in containers larger than 5.7 gallons. Drums, tote tanks, tank trucks, and rail cars are used to transport bulk quantities of multitudes of products.

In addition, as explained in the discussion regarding threshold values above, businesses such as water treatment companies, ship pieces of equipment or commodities such as water softener resins that must be suspended in or contain water to maintain viability. These uses of water must also be exempted from any bulk water transfer prohibition.

Article 301, 1, page 13 of 39: The shortening of the averaging period for existing water withdrawals >100,000 gallons per day (69 gpm) to 30 days (rather than 90 days) for triggering "registration" of withdrawals will increase the number of permit applications that will need to be processed.

Agreement Appendix 1, Procedures Manual, Part 1, B, Application Requirements, page 26 or 39: The second paragraph from the bottom of the page under the bulleted section states that industrial water withdrawal applicants "must include a plan that projects water use at the time of application and projected for up to twenty years or for the period for which the approval is being sought" (emphasis added). Most industrial organizations operate on a 5 year business plan. For capital depreciation or other purposes they may make estimates relating to business activities 10 or 15 years in the future. But, given variables in business cycles, changes in competitive situations, fluctuations in raw material costs, etc. accurately projecting out 20 years is not possible. The timeframe for this projected use requirement should be reduced or removed entirely. Twenty year projections would be a guess at best.

Agreement Appendix 1, Procedures Manual, Part 1, D, No Significant Individual or Cumulative Impacts, page 28 of 39: The criteria for decisions regarding significant impacts are extensive and exceed what is needed to evaluate hydrologic aspects of water withdrawal and use. Criteria elements that relate to physical, chemical, and biological criteria are already being addressed through existing environmental permitting processes. It is duplicative to also subject applicants to these review processes for water withdrawal permitting purposes. At the top of page 30, Agreement language states that “[c]ompliance with the originating party’s environmental regulatory requirements (water and air) could contribute to a demonstration of the lack of significant ecological impact.” This language must be made much stronger. “Compliance” with regulatory requirements in cases relating to new or increased water use means that applications, demonstrations, and other information must be submitted to agencies. The agencies must find that environmental standards are met, and that permits can be issued. These processes provide all the assurance needed to justify a water withdrawal permit. Rather than duplicate them, the Agreement must rely on the extensive and well-established environmental impact review programs already in place in order to not over-burden the Parties as well as applicants.

Appendix I

Alternative Proposal

(See Pages 17 – 28)

Draft Concept for Great Lakes Water Management

Background:

In June of 2001, the Governors and Premiers of the Great Lakes Basin committed to a more comprehensive approach to the management of the Great Lakes by signing the Annex 2001 to the 1985 Great Lakes Charter. Implementing the intent of "Annex 2001" requires being responsive to more than just the stipulations outlined in the Annex. A successful implementation will require:

- Building upon and further formalizing the mechanisms envisaged in the 1985 Charter;
- Respecting the sovereignty of each of the signatory States and Provinces;
- Respecting the riparian rights basis of the last 200 years of Great Lakes basin water management legislation;
- Recognizing the critical need for the States and Provinces to grow their economies and provide jobs for their citizens while at the same time protecting their natural resources; and,
- Being responsive to the critical water quantity elements of the Annex.

In being responsive to all these criteria, the following concept draws on a model water management code for eastern States (currently being promulgated by the American Society of Civil Engineers). It is deliberately less prescriptive than other proposals that have been considered thereby allows greater flexibility in implementation. It follows the maxim that the most effective environmental management regime is one where decisions are achieved as locally as possible. And, it respects the potential social and economic growth needs good governance requires in the basin.

The Concept:

1. Distinctions Between Out-of-Basin Diversions and In-Basin Water Uses

- (a) **Distinctions:** Basin water management arrangements should distinguish between (i) out-of-basin diversions of water; and (ii) withdrawals for in-basin water uses (including consumptive uses and intra-basin transfers of water within the Great Lakes Basin).
- (b) **Definitions:**
 - (i) "Out-of-Basin Diversion" or "Diversion" means the amount of water withdrawn from surface water or ground water sources within the Great Lakes Basin and transferred for use outside of the Great Lakes Basin and not returned to the Great Lakes Basin.

- (ii) "Consumptive Use" means the amount of water withdrawn from surface or ground water sources within the Great Lakes Basin and used within the Basin that is lost or otherwise not returned to the Great Lakes Basin due to evaporation, incorporation into products, or other processes.^{6 7}
- (iii) "Intra-basin Transfer" means the amount of water withdrawn from a surface water or groundwater source within the Great Lakes Basin that is transferred from the watershed of one of the Great Lakes into the watershed of another of the Great Lakes or the St. Lawrence River.

2. **Review of Proposals for New or Increased Withdrawals for In-basin Use (Including Consumptive Uses and Transfers of Water Within the Basin).**

(a) ***Process***

- (i) Proposed new or increased withdrawals for use within the Great Lakes Basin, including in-basin consumptive uses and intra-basin transfers, should remain subject to review and approval by the locus jurisdiction, i.e. the State or Province where the project is located, to be conducted under the procedures and provisions of that jurisdiction's water rights scheme and management program.
- (ii) In lieu of creating a new regional entity, implementation of the Great Lakes Charter and Annex 2001 should strengthen, properly staff and fund, and rely upon State and Provincial water management agencies, and utilize the "consultative process" envisioned by the Great Lakes Charter (discussed below) for review of major intra-basin transfers of water.
- (iii) Jurisdictions should be encouraged to consider a water withdrawal / water rights arrangement that incorporates the permitting review criteria set forth below in §2(f).

- (b) ***Threshold Amount for Jurisdictional Review of Withdrawals:*** The recommended threshold for State/Provincial review of withdrawals for in-basin use should be a new or increased withdrawal from one or more points within the same source (e.g., tributary surface watershed or groundwater aquifer), involving a total average daily

⁶ Application of this definition will require development of procedures for calculating or estimating the actual amount of consumptive use in given situations, such as once-through cooling where water is lost via evaporation after the water is discharged back to the source due to heating effects.

⁷ A withdrawal of Great Lakes water to incorporate it into a product or use it to manufacture a product at a location within the Great Lakes basin is not a "diversion," although such withdrawals may involve a "consumptive use." Similarly, a proposal to withdraw Great Lakes basin water and to package it at a location within the Great Lakes basin as a manufactured food product for human consumption in sealed containers that are designed for distribution to, and use by, end-use consumers is not a "diversion," but may be considered a "consumptive use."

withdrawal of more than 'X' gallons per day ("gpd") averaged over any 'Y' consecutive day period. States or Provinces may consider a lower threshold for State/Provincial review of withdrawals for in-basin use in those watershed areas which the State or Province determines to be a "critical area" or "area of special concern." "Critical areas" or "areas of special concern" would be designated, after appropriate evaluations, notice, public comment and other applicable regulatory procedures, where (i) withdrawals are exceeding or threatening to exceed the safe yield of the available surface or ground water resources, or (ii) the watershed has conditions (such as critical habitat for water-dependent endangered species) that require special attention and protection.

- (c) ***Threshold Amount for Regional Consultation Concerning Intra-basin Transfers:*** New or increased withdrawals involving intra-basin transfers, where the amount of increase in transferred amounts (compared to previously permitted values) is greater than 'X' gpd averaged over any 'Y'-day period, would be made the subject of the "consultation process" established pursuant to the Great Lakes Charter.
- (d) ***Regional Consultative Process for Intra-basin Transfers***
- (i) The locus jurisdiction will provide notice of the application for intra-basin transfer above the threshold quantities to other Great Lakes jurisdictions with an invitation to comment. Notice would be provided to the designated water management agency of each State/Province, the offices of the Governors and Premiers of each jurisdiction, and (where appropriate) the International Joint Commission. The locus jurisdiction will solicit and carefully consider the comments and concerns of the other jurisdictions.
 - (ii) Any State or Province which believes itself to be affected positively or negatively by the proposed intra-basin transfer may file a written comment with the locus jurisdiction. Such comments would be submitted within 30 days of the notice issued in accordance with §2.(d)(i) above. Each comment should specifically state the reason(s) for an objection, and copies of any comments should be provided to the locus jurisdiction, all other Great Lakes States and Provinces, and the project applicant.
 - (iii) If objections, including a statement of reasons, are timely raised, the consultative process among the jurisdictions would move forward, either through direct discussions between the locus jurisdiction and the other concerned jurisdiction(s), or through discussion at a Regional Consultative Body (see §2(d)(v) below) that could provide recommendations to the host jurisdiction.
 - (iv) If three or more States or Provinces file objections or a request for regional consultation, the locus jurisdiction would provide notice to each of the other Great Lakes States and Provinces invoking the procedures of the Regional Consultative Body (the "RCB Notice").

- (v) The Regional Consultative Body would be an informal (non-jurisdictional) forum composed of one representative appointed by the Governor/Premier of each State and Province.
 - (1) The Regional Consultative Body would be required to convene and consider the proposed application within 45 days of the RCB Notice.
 - (2) The project applicant would be provided an opportunity to appear before the Regional Consultative Body in order to present the application and respond to any questions or request for further information.
 - (3) Upon a 2/3 majority vote of the States and Provinces, the Regional Consultative Body would provide a written *recommendation* to the locus jurisdiction regarding whether the proposed application should be approved, approved with conditions or denied. In the absence of the Regional Consultative Body taking a position with a 2/3 majority vote, the Regional Consultative Body would report the positions of the participating States and Provinces without a recommendation.
 - (4) Any recommendation from the Regional Consultative Body to deny or impose conditions upon approval of an application shall be accompanied by detailed reasons for the recommendation.
- (vi) Each locus jurisdiction would be pledged to carefully consider the concerns and objections expressed by other Great Lakes States and Provinces, and the recommendations of any consultative process (including any recommendations from the Regional Consultative Body). Any recommendation provided by the Regional Consultative Body would be made part of the administrative record of the locus jurisdiction, subject to applicable rules concerning admission of evidence.
- (vii) If a locus jurisdiction decides, based upon the evidence, to overrule the objections of another Great Lakes State or Province or not to follow the recommendations of the Regional Consultative Body, the locus jurisdiction would be required to set forth the reasons for its decision in writing.
- (viii) The locus jurisdiction will notify, in writing, each affected Great Lakes State or Province of the locus jurisdiction's final decision to issue, issue with conditions, or deny a withdrawal approval that is subject to the consultative procedures.

(e) ***Administrative Procedures and Ultimate Decision-making:***

- (i) In all cases, public comments would be solicited at, and hearings would be conducted, at the *locus jurisdictional level*, following established administrative procedures.
- (ii) Any aggrieved person (including any other Great Lakes State or Province that qualifies as an aggrieved party) objecting to the final decision of the locus jurisdiction would have a right of appeal following the established administrative and judicial appeal procedures governing decisions by the locus jurisdiction.⁸

(f) ***Criteria for Review of Proposed New or Increased Withdrawals for In-Basin Use (Including Consumptive Uses and Transfers of Water within the Basin)***

- (i) The criteria for review of proposed new or increased withdrawals for in-basin use should require a consideration and balancing of multiple factors.⁹
- (ii) Proposals for new or increased water withdrawals for in-basin uses should be approved upon considering and determining that:
 - (1) The proposed use of water is reasonable (see further discussion in §2(f)(iii) below);
 - (2) The proposed withdrawal, in combination with other relevant withdrawals, will not exceed the safe yield of the water source. (For such purposes, "safe yield" of a water source is defined as the amount of water available for withdrawal without impairing the long-term social utility of the water source, including the maintenance of the protected biological, chemical and physical integrity of the source.¹⁰ Safe yield is determined by comparing

⁸ It is believed that under the administrative law of most (if not all) jurisdictions, the agency of another basin jurisdiction would have standing to be heard in an appeal of an administrative decision, providing that the entity was truly aggrieved (i.e., had an immediate and substantial interest that would be affected by the decision). It should be noted that most such permitting decisions would be considered adjudicative, rather than rulemaking or legislative, in nature.

⁹ The review criteria set forth in this section are substantially modeled upon the American Society of Civil Engineers Regulated Riparian Model Water Code ("Model Water Code") and the state statutes from other eastern States that are discussed in the Model Water Code. These review criteria are fundamental re-codifications and re-statements of traditional "riparian rights" principles applied in all or virtually all of the Great Lakes jurisdictions.

¹⁰ The terms "physical integrity", "biological integrity", and "chemical integrity" are further defined in the Model Water Code. They are used in this case as criteria to be applied to "withdrawals", not to be confused with their more frequent use in discharge criteria. "Physical integrity" involves consideration of the volume of water necessary to (a) support commercial navigation; (b) preserve natural, cultural or historic resources as required by applicable federal or State/Provincial law or regulation; (c) provide

the natural and artificial replenishment of the water source to existing or planned consumptive and non-consumptive uses.)

- (3) The proposed withdrawal and use of water are consistent with any applicable State and regional comprehensive water plans and drought management strategies.¹¹
 - (4) The applicant's existing water withdrawal and use (if any) and the applicants proposed withdrawal and use incorporate reasonable and cost-effective methods of conservation.
- (iii) In determining whether a use of water is "reasonable,"¹² the State/Provincial agency would consider and weigh the following:
- (1) The number of persons using the water source, the object, and extent of both the proposed withdrawal and use and of other existing and planned withdrawals and uses of water from the same water source.
 - (2) The supply potential of the water source, considering quantity, quality, and reliability, including the safe yield of hydrologically interconnected water sources.
 - (3) The economic and social importance of the proposed water use and other existing or planned water uses sharing the water source.

adequate recreational opportunities to the public; and (d) prevent serious depletion or exhaustion of the water source (e.g., long-term drawdown of groundwater aquifers). "Biological integrity" involves consideration of the maintenance of water in the source in the volume and at the times necessary to support and maintain wetlands and wildlife in so far as such projection is required by federal or State/Provincial laws or regulations. "Chemical integrity" means maintenance of water in the source in the volume and at the times necessary to enable the water source to achieve water quality standards prescribed in Federal or State/Provincial laws and regulations in light of authorized effluent discharges and other expected impacts on the water source.

¹¹ One of the factors that may be weighed through reference to State and regional comprehensive water plans is whether and to what extent a particular proposal affects short and long-term needs and commitments for the resource. For example, in a particular watershed, a proposal for a major withdrawal might be acceptable in the near term, but may substantially affect or preclude the ability to meet planned and expected demands in the future. These are issues that are best addressed through comprehensive water planning efforts.

¹² The concept of "reasonable use" is a fundamental element of common law riparian rights, and this listing of factors reflects the multiple factors that have been traditionally considered by courts, and more recently by administrative agencies, in determining whether particular water use proposals are "reasonable uses." It should be noted that the primary focus of determining "reasonableness" is on the use *of water* (not the particular products being manufactured using the water) and on the impact of that water use on other uses and the resource.

- (4) The probable severity and duration of any adverse impacts caused or expected to be caused to other lawful consumptive or non-consumptive uses of water by the proposed withdrawal and use under foreseeable conditions, and the proposed plans and arrangements for mitigation of such impacts.¹³
 - (5) The probable effects of the proposed withdrawal and use on the public interest in the waters of the basin, including, but not limited to (a) general environmental, ecological and aesthetic effects; (b) sustainable development; (c) domestic and municipal uses; (d) recharge areas for groundwater; (e) waste assimilation capacity; and, (f) wetlands and floodplains.
 - (6) Whether the proposed use is planned in a fashion that will avoid or minimize the waste of water.
 - (7) Any significant impacts on interstate and inter-basin waters and water uses.
 - (8) The scheduled date the proposed withdrawal and use is to begin, and whether the project time between issuing of the permit and the expected initiation of the withdrawal will unreasonably preclude other possible uses of the water.
 - (9) Any other relevant factors.
- (g) **Exemptions:** The Criteria for Review and the Regional Consultative Process would not apply to withdrawals from the Great Lakes basin for the following purposes:
- (i) Supply of vehicles, including vessels and aircraft, whether for the needs of persons or animals being transported, or for ballast, or other needs related to the operation of such vehicles; or
 - (ii) Use in a non-commercial project on a short-term, non-recurring basis for firefighting or other critical humanitarian purposes.

3. Review of Major Out-of-Basin Diversions.

- (a) **Threshold Amount for Regional Review.** Proposals for new or increased withdrawals from one or more points within the same source (e.g., tributary surface watershed or groundwater aquifer) involving an out-of-basin diversion exceeding a total gross average daily loss rate of 'X' gpd to the basin averaged over any 'Y' consecutive day period, would be subject to regional review under the following processes and review criteria.

¹³ Note: If a proposed new or increased withdrawal would cause significant adverse impacts upon, or interference with, the operation of existing surface or groundwater uses, the project sponsor may be required to provide an alternative water source or other mitigating measures.

- (b) **Review Process.** New or increased Diversions above the threshold amount would be subject to the following application, review and consultation procedures:
- (i) Application for the withdrawal associated with the proposed Diversion would be made to the host State or Province.
 - (ii) The locus jurisdiction will provide notice of the application above the threshold quantities to other Great Lakes States and Provinces with an invitation to comment. Notice would be provided to the designated water management agency of each State/Province, the offices of the Governors and Premiers of each jurisdiction, and (where appropriate) the International Joint Commission. The locus jurisdiction will solicit and carefully consider the comments and concerns of the other jurisdictions.
 - (iii) Any State or Province which believes itself to be adversely affected by the proposed Diversion may file a written objection with the originating jurisdiction. Such objections would be filed within a 30 day time frame. Each objection should specifically state the reasons for objection, and copies of any objection should be provided to the locus jurisdiction, all other Great Lakes States and Provinces, and the project applicant.
 - (iv) If objections, including a statement of reasons, are timely raised, the consultative process among the jurisdictions would move forward, either through direct discussions between the locus jurisdiction and the other concerned jurisdiction(s), or through the Regional Consultative Body.
 - (v) Pending completion of the consultative process, no State should take action to approve or disapprove a proposed diversion application pursuant to the Water Resources Development Act ("WRDA").
 - (vi) If three or more States or Provinces file objections or a request for regional consultation, the locus jurisdiction would provide notice to each of the other Great Lakes States and Provinces invoking the procedures of the Regional Consultative Body (the "RCB Notice").
 - (1) The Regional Consultative Body would be expected and required to convene and consider the proposed application within 45 days of the RCB Notice.
 - (2) The project applicant would be provided an opportunity to appear before the Regional Consultative Body in order to present the application and respond to any questions or request for further information.
 - (3) Upon a 2/3 majority vote of the States and Provinces, the Regional Consultative Body would provide a written recommendation to the locus jurisdiction regarding whether the proposed application should be approved, approved with conditions or denied. In the absence of the Regional Consultative Body taking a position with

a 2/3 majority vote, the Regional Consultative Body would report the positions of the participating States and Provinces without a recommendation.

- (4) Any recommendation from the Regional Consultative Body shall be accompanied by detailed reasons for the recommendation.
 - (vii) Each locus jurisdiction would be pledged to carefully consider the concerns and objections expressed by other Great Lakes States and Provinces, and the recommendations of any consultative process (including any recommendations from the Regional Consultative Body). Any recommendation provided by the Regional Consultative Body would be made part of the administrative record of the locus jurisdiction, subject to applicable rules concerning admission of evidence.
 - (viii) If a locus jurisdiction decides, based upon the evidence, to approve the project despite the objections of another Great Lakes State or Province or not to follow the recommendations of the Regional Consultative Body, it would be expected to set forth the reasons for its decision in writing.
 - (ix) The locus jurisdiction will notify, in writing, each affected Great Lakes States or Provinces of the locus jurisdiction's final decision to issue, issue with conditions, or deny a diversion approval that is subject to the consultative procedures.
 - (x) In all cases, public comments would be solicited at, and hearings would be conducted at, the locus jurisdictional level, following established administrative procedures.
 - (xi) Any aggrieved person (including any other Great Lakes State or Province that qualifies as an aggrieved party) objecting to the final decision of the locus jurisdiction would have a right of appeal following the established administrative and judicial appeal procedures governing decisions by the locus jurisdiction.
 - (xii) Following the decision of the locus jurisdiction, any other State, acting through its Governor, may take formal action to disapprove a diversion pursuant to such authority as is granted pursuant to WRDA. Each such State shall establish procedures that assure due process, including the right to obtain a hearing and judicial review any such action.
- (c) **Criteria for Review.** New or increased diversions would be subject to the following review criteria, requiring the following determinations prior to approval of the proposed project:
- (i) Each of the criteria set forth in §2(f) are considered and satisfied.
 - (ii) There is no reasonable water supply alternative (including efficient use and conservation of existing water supplies and development of additional

water supplies) in the importing basin or watershed. [Note: special consideration should be given for communities and public water systems with service areas that straddle the basin boundary. In such situations, an examination should be made as to the feasibility and cost-effectiveness of development of alternative sources within the entire service area, with the understanding that such systems frequently must combine and balance sources to assure reliable supplies across the service area.]

- (iii) To the extent that existing sources or water supply alternatives are available in the importing basin, but are not capable of meeting the reasonable use needs of the applicant, the diversion proposal shall incorporate a plan for conjunctive and coordinated operation of the existing sources, available water supply alternatives, and the diversion with the objective of reducing, to the maximum extent practicable, withdrawals from and impacts upon the Great Lakes basin.
- (iv) The amounts of Great Lakes basin water to be withdrawn and transferred out of basin are limited to the quantities that are considered reasonable for the purposes for which they are proposed.
- (v) Mitigation measures will be implemented that will effectively offset the impacts to the Great Lakes basin resulting from the proposed diversion.
- (vi) The diversion will be implemented so as to ensure that it will result in no significant unmitigated individual or cumulative adverse impacts to the quantity or quality of the waters or water dependent natural resources of the Great Lakes basin. (If the proposal would create a significant or binding precedent with respect to a type or category of water use, consideration would be given to the potential cumulative impacts of similar such uses in the future.)
- (vii) The diversion shall incorporate a conservation plan demonstrating that reasonable (environmentally sound, technically feasible, and cost-effective) conservation measures will be implemented to minimize the amount of withdrawal, diversion and consumptive use.
- (viii) The proposal shall incorporate a proposal for improvement of the waters and water dependent natural resources of the Great Lakes basin, demonstrating how measures will be implemented to improve the physical, chemical or biological quality or values of the waters and water dependent natural resources of the Great Lakes basin.
- (ix) The diversion will be implemented in a manner that ensures compliance with applicable State, Provincial, and federal laws, as well as binding regional interstate, inter-provincial and international agreements.
- (x) The net amount of the proposed diversion, in conjunction with the net amount of all existing diversions from the basin or from the watershed of

the particular lake from which the water is being withdrawn, will not exceed the diversion limits established pursuant to 3(d).

- (d) **Diversion Limits.** Ideally, the Great Lakes jurisdictions would develop a scientifically-based water budget limit on the total cumulative amount of net diversions (transfers of water out of the basin, net of water returned to the basin) that would be permitted either across the basin as a whole or in the watersheds of specific lakes, and a system for tracking the cumulative net diversions from the basin and each lake's watershed. In the absence of such a water budget, any diversion resulting in a net loss to the basin of 'X' mgd is prohibited. Following adoption of such a water budget, each of the jurisdictions should be pledged to limit the approval of new diversions in accordance with such diversion limits.
- (e) **Exemptions:** The Criteria for Review and the Regional Consultative Process would not apply to withdrawals from the Great Lakes basin for the following purposes:
 - (i) Supply of vehicles, including vessels and aircraft, whether for the needs of persons or animals being transported, or for ballast, or other needs related to the operation of such vehicles; or
 - (ii) Use in a non-commercial project on a short-term, non-recurring basis for firefighting or other critical humanitarian purposes.

4. Conservation Programs

- (a) Each State and Province should pledge to adopt and implement a conservation program consisting of the following elements:
 - (i) Technical assistance to public water supply agencies, municipalities, industries, commercial users, utilities, agriculture and other users regarding available, cost effective methods to conserve water, including methods for more efficient water use, water use recycling, reductions in unaccounted-for water loss, and replenishment and recharge of water resources.
 - (ii) A voluntary water conservation program for all users.
 - (iii) Development of voluntary water use reduction goals for all categories of water use, and publication of information regarding technologies available to achieve those goals.
 - (iv) Water conservation educational programs for households, industries and other water users.
 - (v) Identification of principles, practices and technologies for encouraging and implementing groundwater recharge.

5. Water Use Registration and Data Collection

- (a) Each State and Province should be expected to adopt and implement a water withdrawal registration system that includes, at a minimum, all withdrawals (including existing withdrawals) greater than 'X' gpd in any 'Y' period.
- (b) Each State and Province should adopt and implement arrangements for periodic reporting of the source, amount and location of withdrawals of both surface and groundwater, including the amount of consumptive and non-consumptive uses, the locations and amounts of any waters returned and discharged, and the amounts of water transferred between public water systems via interconnections.
- (c) State and Provincial programs should be allowed to utilize alternative methods, for the monitoring of water withdrawals to obtain a reasonable estimate or indirect calculation of water use, in lieu of direct metering, where such methods are available to provide a reasonably accurate evaluation of withdrawals, consumptive and non-consumptive uses.
- (d) The registration and reporting system should include protection from public disclosure of confidential business information and sensitive information whose disclosure might threaten the security of public water supplies or other sensitive uses. Specific production data for particular companies and facilities should be aggregated (and not ascribed to particular entities) in publicly reported and available information.

Appendix II
Annex 2001 June 30, 2005 Draft Proposal
Permit Application Requirements, Demonstration
Effort and Preparation Costs

Several elements of the applications process described in the Annex 2001, June 30, 2005 draft Procedures Manual will require extensive demonstrations and documentation. The time likely to be needed to gather data and prepare the reports as well as estimates of the cost for this work is shown below.

Element	Requirement Reference	Demonstration	Time Required	Estimated Cost
Basic Applicant Information	Appendix 1, Procedures Manual (App. 1), 3. A-I, Pages 36-37	Legal and exact geographic descriptions of applicant, and water source	1 to 3 weeks (depending on availability of detailed legal and geographic information and measurement details)	\$5,000 to \$50,000
Return Flow	App. 1, 3. J and Section 1 C Page 37 and 27	Evaluate return flow options, conduct impact evaluations on source/receiving watersheds, provide detailed legal and geographic descriptions of return flow location. Provide historic consumptive use information, justify if greater than USGS coefficients.	1 mo. to 12 mos. (depending on if return is to source water or other location, and availability of consumptive use coefficients.)	\$50,000 to \$250,000
Statement of Justification Analysis of Alternative Sources	App. 1, 3, K, Pages 37 and 34-35	Detailed description of need and analysis of alternatives	3 mos. to 6 mos. (depending on need for hydrogeological testing)	\$50,000 to \$100,000
Quantities Considered Reasonable	App. 1, 1, B, Pages 26-27	Project 20 year water use rates, describe proposed use/system and conservation savings	1 mo. to 3 mos. (depending if water use data is available or must be acquired)	\$15,000 to \$50,000
Environmentally Sound and Economically Feasible Water Conservation Measures and	App. 1, 3, L, Pages 37 and 30-34	Describe and implement conservation measures	3 mos. to 6 mos. (depending on complexity of conservation plan required)	\$50,000 to \$100,000 (Not including implementation costs)

Element	Requirement Reference	Demonstration	Time Required	Estimated Cost
Status of Implementation				
Assessment of Impacts	App. 1, 3, M, Pages 37 and 28-30	Describe source and return flow, baseline conditions (i.e. hydrologic flow, water quality, habitat, changes in water and related natural resources, mitigation measures, chemical, physical, and biological conditions and impacts)	16 mos. to 24 mos. (one complete year of hydrologic data needed along with additional ecological studies)	\$250,000 to \$300,000
Compliance with Applicable Laws	App. 1, F, Page 34	Statement regarding compliance with all applicable municipal, State, Provincial and Federal laws as well as Regional, inter-State, inter-Provincial and international agreements, including the Boundary Waters Treaty of 1909	1 to 2 mos. (depending on scope of legal review required)	\$15,000 to \$25,000
Map or Air Photo	App. 1, 3, N, Page 37		2 mos. to 6 mos. (depending on seasonal photo/map requirements)	\$10,000 to 50,000
Totals				\$445,000 to \$925,000

**Alliance for the Great Lakes
Biodiversity Project
Canadian Environmental Law Association
Clean Wisconsin
Environmental Advocates of New York
Erie County Environmental Coalition
Great Lakes United
Lake Erie Region Conservancy
Michigan Environmental Council
Michigan Land Use Institute
Michigan United Conservation Clubs
National Wildlife Federation Great Lakes Office
Ohio Environmental Council
Save the River!
John G. Shedd Aquarium
Tip of the Mitt Watershed Council
Union québécoise de la conservation de la nature
Wisconsin Wildlife Federation**

Environmental Group Comments on the Proposed “Great Lakes Basin Water Resources Compact”

August 29, 2005

General summary

Like its 2004 predecessor, the 2005 proposed compact agreement among the eight Great Lakes states is an important step forward in protecting Great Lakes basin waters from bulk water exports, diversions, and abuse. However, additional changes to the draft document would strengthen its ability to achieve the states’ aim to fully protect the basin ecosystem from damage caused by water withdrawals.

In particular, the compact negotiators should change the definition of “straddling communities” so that the term reflects the original intent of that category of withdrawer: existing urban areas or existing rural water supply systems on the basin watershed divide that are facing water shortages for public supply. Also, the trigger level for requiring that diversions between lakes (“intra-basin transfers”) return water to the source lake watershed should be substantially reduced. The compact should also include a commitment to protecting public trust responsibilities—its absence is indefensible—and the visionary, former “improvement” standard, which we recommend be modified to become a “restoration” standard, should be re-introduced.

Summary of key benefits of the proposed compact

1. **Environmental standards.** The proposed compact provides, for the first time, environmental standards for judging new water withdrawal proposals.
2. **Covering all basin waters.** The proposed compact protects all the waters of the Great Lakes surface water basin, including streams and groundwater.
3. **Clearer diversion protection.** The 2004 drafts proposed no overt restriction on diversions, assuming that return flow and several other ecologically based standards for approving diversions would assure that very few diversions would ever in fact take place, and that those that did take place would be small and nearby. This system had the benefit of being less legally vulnerable to charges of discrimination than the current system of governor veto exercised without required standards, but proved confusing to the public. The 2005 drafts propose a ban with limited nearby exceptions, which, while theoretically discriminatory, may in fact never need to be applied to larger, longer-distance diversion proposals. At the same time, the proposed system better reflects public wishes.
4. **Returning the same and only the same water.** The revised definition of diversion return flow protects the basin against the introduction of invasive species from neighboring watersheds by explicitly requiring that the same water and only the same water be returned.
5. For what would be the first time in history, **the agreements subject water withdrawals for in-basin use, albeit only very large ones, to regional scrutiny.**
6. **Fairly extensive application.** The proposed compact requires most water withdrawals to be registered and many larger withdrawals to be actively managed. This would assure both better knowledge of how the region is using its waters and a way to prevent the worst environmental damage caused by withdrawals.
7. **Stronger water conservation.** The 2005 draft requires states to create and implement conservation plans that will apply to all basin water withdrawers, including existing withdrawers.
8. **Potential basinwide consistency.** The new draft increases the chance that all ten jurisdictions will manage water according to similar standards by declaring that the relatively detailed "Procedures Manual" in the proposed companion agreement between the states and provinces will "guide" the implementation of the standards and decisions to allow particular proposals.
9. **Legally binding.** If approved by Congress and the eight state legislatures, the compact would be legally binding on the states, enabling them to hold each other legally to account for living up to the commitments they have made in the compact.
10. **Greater protection allowed.** The proposed compact properly establishes the new environmental standards as a minimum, not a maximum system of protection, so individual states are free to expand their protections.
11. **Public participation.** The compact provides public notice of water withdrawal proposals and significant avenues for public participation in permitting decisions.
12. **Enforceability.** The compact provides significant means for enforcing the provisions of the compact, including guarantees of citizen standing in court to challenge decisions that may not meet the new standards.

Summary of key problems with the proposed compact

1. **Over-large "straddling communities."** These near-basin areas are exempted from governor veto of proposed diversions. The purpose of this category of diversion was to allow slightly relaxed procedures for communities lying on the basin line with pressing public supply problems. The definition of "straddling community" should limit the areas in question to existing urban areas that cross the basin line or to the reach of existing rural water supply systems that cross the basin line.
2. **Significant diversion between lakes should require return flow.** The current trigger level of 5 million gallons per day of consumptive loss is so large—16 million to 30 million gallons per day for public supply purposes—that it will never be reached. A diversion between lakes has the same impact on bypassed water bodies as a diversion out of the Great Lakes basin as a whole, and should be treated as such.
3. **No "improvement."** The new drafts omit the "improvement" standard promised in the original Annex 2001. Perhaps restated as "restoration," this important advance in protection—the principle that those using nature's bounty should assure the improved functioning and health of that bounty—must be implemented in at least a limited pilot form in this agreement.
4. **Some uses are treated more leniently.** The proposed compact effectively exempts many proposed intermittent and seasonal uses from oversight by averaging over 90 days the size of the daily withdrawals subject to standards—three long months. For smaller source watersheds, especially during the months of low flow, this is a license to cause ecosystem damage. The averaging period should be 30 days.
5. **The ten-year phase-in for application of in-basin standards is too long.** The phase-in of standards for in-basin water withdrawals reviewed by the individual states should be five years rather than ten. The longer phase-in, by permitting such a wide gap between the states' commitment to reform and their implementation of that commitment, invites discord among the states and risks the failure of the compact in the medium term.
6. **Protect the public trust.** The proposed compact must explicitly protect public trust rights and obligations with respect to water. These are one of the few already-existing foundations for the protective purposes of the compact, and must not be accidentally harmed or limited by it.
7. **Return water to its true source.** Rather than requiring return flow only to the watershed of the same lake from which it was taken, the compact should require return as near as possible to the point where the water was withdrawn but certainly at least to the major river watershed. The most extensive ecological damage caused by withdrawals occurs not on a lakewide basis, but usually at the point of removal, especially on smaller rivers or smaller-scale surface waters supported by groundwater.
8. **Permit time limits are needed.** Permits should be granted for five year terms, to allow alteration of permit conditions if climate change impacts and cumulative effects to the ecosystem of increased water withdrawals become apparent.
9. **Assess cumulative effect locally.** The proposed compact would assess the effect of multiple withdrawals approved over years only for the Great Lakes basin as a whole. But these "cumulative effects" should be assessed on the scale at which they are most likely to first

occur—that of the local watershed. The compact should also require, rather than merely allow, amending the rules for judging water withdrawals based on assessments of cumulative effects.

Detailed comments

COMPACT ARTICLE 1

SHORT TITLE, DEFINITIONS, PURPOSES AND DURATION

Section 1.2—Definitions

Problem—Source watershed

The source watershed of withdrawals is defined as the lake watershed. From an ecological point of view, removal of water from a given scale of watershed with return to a different watershed or different scale of the same watershed, is no different from diversion out of the basin—all the water is lost to that watershed. The source watershed should be defined as the smallest scale of watershed from which the withdrawal was taken as defined by the U.S. Geological Survey, but at minimum should be defined as that of the relevant major tributary to the Great Lakes.

Problem—Straddling community

This category of diversion is not subject to governor veto and some other standards applied to "straddling county" diversions. The purpose of this category was relief for communities on the basin line experiencing public supply distress. But the word "town" in the definition is being interpreted by the states to mean "township," the largely rural districts that are the basic division of most counties. As such, the current definition of "straddling communities" includes areas miles from the basin line with no current need or even any current water supply infrastructure. This was not the intended purpose of the "straddling community" concept.

The definition of "straddling community" should limit the areas in question to existing urban areas that cross the basin line or to the reach of existing rural water supply systems that cross the basin line.

Section 1.3—Findings and Purposes

We strongly suggest inclusion of language in this section that reflects state trust responsibilities, for example, as previously found in the 2004 draft of the international agreement, "The Waters and Water Dependent Natural Resources of the Great Lakes Basin are precious public natural resources, shared and held in trust by the Great Lakes States."

COMPACT ARTICLE 3

GENERAL POWERS AND DUTIES

Section 3.3—Rules and regulations

Problem—Guiding state conservation programs

We are concerned by the lack of guidance provided in the draft compact for implementation of comprehensive conservation programs promised by every state in section 3.5.1. Therefore we recommend that implementation of state conservation programs be added the list of duties—currently review of Proposals and implementation of the Standard of Review and Decision—that must be guided by the international Agreement and its Procedures Manual.

Section 3.5—Water Conservation Programs

Problem—Guiding state conservation programs

Even if the comprehensive conservation programs promised by each state are generally guided by the contents of the international Agreement, that agreement contains less apparently applicable detail for implementing such programs than it does for reviewing proposals and implementing the standard. Therefore we suggest adding language to the end of section 3.5.1 that provides slightly more detailed guidance: "State conservation programs will encourage water withdrawers to implement the practices described in Part 1.1.E of the Agreement's Procedures Manual, titled 'Environmentally Sound and Economically Feasible Water Conservation Measures.' Such programs shall produce plans that include goals and associated timelines for achieving average water use efficiencies by each water use sector in the state. These plans shall be updated every five years to reflect best conservation practices."

COMPACT ARTICLE 4

WATER MANAGEMENT AND REGULATION

Section 4.1—Registration and Reporting of Withdrawals

Problem—Reporting watershed scale

As part of the promise to empower the public with annually updated withdrawal information, the compact should require that each withdrawal be listed not only according to geographic location, but also by watershed at the smallest scale, usually sixth-order watershed, indexed by the given state. This will give permitting officials and the public one of the most important pieces of most important pieces of context for evaluating a proposed water withdrawal—the current total state of water withdrawal at the relevant scale: the smallest scale, where any withdrawal has the most potential for impacting the ecosystem.

Problem—Groundwater assessment

This section promises only the most general effort to understand the critical role of groundwater in the Great Lakes basin. The compact should promise complete groundwater mapping of the Great Lakes basin on a specific timeline.

Section 4.2—Party Powers and Duties

Problem—Permit term

The draft compact nowhere discusses the length of time for which permits shall be issued by states for withdrawals covered by the agreement. In order to enable states to effectively manage the basin's waters in accordance with the findings and purposes listed in section 1.3, permit terms should be limited to five years. This would enable states to modify permit conditions in response to the results of the cumulative impact assessments mandated in section 4.13, or if climate change effects begin to take place.

Problem—Enforcement

Section 4.2.4 says that states "may take all enforcement actions" to ensure that withdrawers comply with the terms of their permits. We assume that the states intend for all permit holders to comply with their permits. The language should be changed to say states "shall" take the enforcement actions needed to ensure permit compliance.

Problem—Sequential applications

The compact contains no provisions for preventing applicants from dividing up water withdrawal projects so as to avoid threshold limits in the agreement. The compact should contain language similar to that found in the Article 207 of the state-provincial international agreement to prevent this abuse of the new system.

Section 4.4—Regional Review

Problem—Limited Regional Review

The draft compact provides no flexibility for Regional Review of, and / or a compact vote on, proposals that are not otherwise eligible for such review. Some projects not eligible for Regional Review or compact vote may nonetheless have unusual potential for harm to the Great Lakes – St. Lawrence River ecosystem that might merit such review or vote.

We recommend that any intra-basin diversion and any water withdrawal greater than 5 million gallons per day (*not* 5 million gallons per day consumptive loss) averaged over 30 days not otherwise subject to Regional Review or a vote of the Compact Council should be subject to Regional Review at the request of any two parties to the international agreement and subject to a two-thirds vote of the Compact Council at the request of any two states. Such requests could be contingent on their submission by parties to the agreements within a given time of the project's original proposal, for example, 30 days.

Problem—"may" include public participation

For some reason the outline of actions to be taken by compact parties to implement Regional Review implies that it is optional to provide the public participation that is required of proposals of purely state concern.

Language in section 4.4.1 saying that Regional Review "may" include public participation should instead declare that it "shall."

Section 4.7—Exceptions

Problem—Intra-Basin Transfers

Diversions between Great Lakes, so-called "Intra-basin Transfers," are not subject to regional oversight or return flow until they reach the very large level of 5 million gallons per day of consumptive loss. Since public supplies generally lose 15 percent of their withdrawal consumptively, and at most 30 percent, the intra-basin transfer provisions of the compact and international agreements in effect allow diversions of water between lakes of between 16 million and 33 million gallons per day before triggering regional oversight.

This outrageous provision leads to the absurd situation that a 100,000-gallon-per-day diversion out of Ohio's Lake Erie watershed into the Ohio River basin will be subject to Regional Review and return flow while a 33-million-gallon-per-day diversion from Lake Huron to Lake Ontario, which will cost Lake Erie approximately 300 times as much water, would not be subject to Regional Review or return flow.

We recommend that all intra-basin transfers over 100,000 gallons per day averaged over 30 days should: 1) be used only for public supply purposes, 2) be required to return the unconsumed water to the same lake watershed, and 3) be subject to Regional Review and, in the United States, a unanimous vote of the Compact Council.

After five years of education about the legal vulnerability of the region's current water management system, must it be pointed out that treating in-basin diversions radically differently from out-of-basin diversions is legally risky? Such difference in treatment obviously makes the agreements more vulnerable to legal challenge as not truly environmental agreements but only disguised attempts to keep the economic benefits of Great Lakes water for the region. Lake Erie is not more concerned that its water is taken to the Mississippi River basin rather than to the Lake Ontario basin.

Public opinion prevents the parties from treating diversions and withdrawals for in-basin use relatively equally; the least the parties can do is to treat in- and out-of-basin diversions relatively equally.

Problem—Straddling counties

The creation of the "straddling counties" category solved the problem of public perception that the proposed compact's diversion protections were insufficient while creating the smaller but potentially still significant problem (from the point of commerce law and trade agreements) of treating diversions differently from withdrawals for in-basin use. In addition to treating in- and out-of-basin diversion more equally (see our suggestions under "Problem—Intra-Basin Transfers"), this difficulty could be mitigated by allowing diversions within straddling counties only to those places that are already using, or are planning to use, groundwater that can be shown to flow to the Great Lakes.

Section 4.8. Withdrawals Subject to Management and Regulation

Problem—Averaging

The current draft improves on the previous one in defining the size of withdrawals, and their corresponding degrees of regulation by the parties, according to their average over 90 days instead of the previous 120. However, a large withdrawal that is conducted for only a few weeks a year could have a devastating effect on local ecosystems yet escape scrutiny entirely because, averaged

over 90 days, it appears much smaller than it actually is. The averaging period for determining the size of a withdrawal should be 30 days.

Problem—Implementation timeline

This section requires compact parties to "begin exercising" authority over water withdrawals for in-basin use "no later than ten years from the effective date of this Compact," a date which itself is at least two years away.

This is simply too long. Such a long phase-in period risks disintegration of the commitment which lead to the agreement. The phase-in period should be five years.

Section 4.9—Decision-Making Standard

Problem—Conservation standard

Applicants for water withdrawal permit renewals should be required to demonstrate that water conservation promises made in previous permit applications have been kept.

Problem—"Improvement" standard

A combination of persistent reluctance by the compact parties to carry out this core promise of the Annex 2001 agreement-in-principle, and a concern by some members of the public that the standard somehow would increase the commodification of water, led to the complete deletion of this standard from the agreements. This is unfortunate, as the idea behind the standard was both precedent-setting and, in the long run, essential if people are to continue living on this planet: access to nature's bounty must eventually be made contingent on maintaining that bounty.

The parties should recast the standard as "restoration" and implement it in some form to those who objected to it in its original form. This "restoration" standard, as we could now call it, is a very important collection of bricks in the edifice we are constructing called, "Don't Demand Diversion of Our Water Because We Are World Leaders in Preserving the Hydrological System That Supports Our Regional Ecology."

Section 4.13—Cumulative Impacts

Problem—Scope and followup

While periodic assessment and research into cumulative effects of water withdrawal on the Great Lakes ecosystem are welcome, this section is unlikely to protect the basin from cumulative impacts except in the very, very long term and on the largest scale because it addresses cumulative impacts only at the basinwide level, despite the fact that cumulative impacts are certain to occur first and most severely on the local watershed level, and because it provides only for review of standards, whose revision would be the most indirect and likely ineffective means of reversing and preventing cumulative impacts.

We suggest that 1) cumulative impact assessments be required at the level of each major river watershed, and 2) when such assessments reveal existing or reasonably predictable cumulative impacts, they should trigger the creation of watershed-specific water management plans that would provide guidance for water withdrawal permits issued in that watershed.

COMPACT ARTICLE 6

PUBLIC PARTICIPATION

Section 6.2—Public Participation

Problem—Accessibility of Regional Review comment

Comments on a proposed withdrawal received by the state in which a withdrawal is proposed as part of Regional Review pursuant to Article 503 of the international agreement shall be made publicly available just as any comment received within the state would be.

Added to the end of section 6.2.2 should be the phrase, "directly or via Regional Review."

COMPACT ARTICLE 7

DISPUTE RESOLUTION AND ENFORCEMENT

Section 7.3—Enforcement

Problem—Penalties for permittee noncompliance

The highest priority for this section is ensuring that recalcitrant water withdrawers—those who attempt to avoid compliance with state water withdrawal requirements—are not rewarded for their recalcitrance. Although the existing language is adequate for using court action to compel such withdrawers to comply with state requirements, there is no penalty for refusing to do so. The absence of penalties for refusing to comply with state requirements is bad for the environment, but it also penalizes water users who comply with state requirements at an economic disadvantage relative to those who do not.

This problem is easily fixed by adding the remedy of civil penalties to the end of section 7.3.4. We suggest mirroring language used for this purpose in the U.S. Clean Water Act, which has a long history of case law that provides applicants, states, and the public certainty that the law is being applied according to its intent and equally for all.

We suggest recasting the second of the two sentences that make up section 7.3.4 so that it says, "The available remedies shall include equitable relief and civil penalties. The court may award costs of litigation, including reasonable attorney and expert witness fees, to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate."

Problem—State noncompliance

We believe that this section should provide a public remedy if a state fails to comply with a nondiscretionary duty in the Compact. We assume that this would be rare, but should it occur someday, we think a public remedy is both more expeditious and more practical than the current means of sanction by the states acting collectively.

Once again the Clean Water Act provides a model for achieving the aim we recommend. We suggest adding language to the end the first of the two sentences that make up section 7.3.4 so that it says (with new material underscored), "Any aggrieved Person or the Council may commence a civil action in the relevant Party's courts and administrative systems to compel any Person to comply with this Compact should any such Person, without approval having been given, undertake a New or Increased Withdrawal, Consumptive Use, or Diversion that is prohibited or subject to

approval pursuant to this Compact; or when such Person is a Party, should any such Person fail to perform a non-discretionary duty under this Compact."

COMPACT ARTICLE 8

ADDITIONAL PROVISIONS

Section 8.1—Effect on Existing Rights

Problem—Public trust

Although this section declares that approval of water withdrawal "does not give any property rights, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest in, to or over any land belonging to or held in trust by a Party," neither does this section truly affirm the obligation by the states to act as trustees of Great Lakes basin waters.

The proposed compact should explicitly protect not only public trust rights but also public trust responsibilities. Because public trust and common law share certain characteristics, we suggest substituting the following language for the current subsection 2 of section 8.1 dealing with common law: "Nothing in this compact shall be construed to affect, diminish, enlarge, alter, or impair any rights or limitations established as of the effective date of this compact under state statutory law or common, including water and public trust, law, or any federal common or statutory law."

We have recommended this change in the past, but it has not been accepted. We do not see how the negotiators can defend ignoring this recommendation. It merely affirms the status quo. Failing to include some overt expression of government public trust responsibilities in the document creates a perception among some members of the public that privatizing public resources may part of the motivation for creating the compact.

Introduction

The Great Lakes and St. Lawrence Cities Initiative (GLSLCI) is pleased to submit comments to the Council of Great Lakes Governors (CGLG) on the Great Lakes Basin Sustainable Water Resources Agreement and Compact (the Agreement and Compact). Protection and restoration of this resource is of utmost importance to the mayors of cities all across the Basin because the quality of life for our citizens depends so much on the quality of the Lakes. We applaud the governors and premiers for their extensive efforts to run a very open, transparent, and inclusive process to come up with a water management system that will protect the resource and serve all the citizens.

We submitted comments on the last draft and are pleased to see that they were factored into this draft. We especially appreciate that you have reflected the importance of compliance with municipal laws, as well as federal, state, and provincial laws.

The Agreement

Chapter 1 - No comments

Chapter 2 – This is obviously the heart of the Agreement, as it deals with the key policy decisions that need to be made. With regard to potential diversions, we support the approach of prohibiting them, with very limited exceptions. Especially important are the limitations for public water supply and the requirements for returning the original water to the source watershed in a state of high quality. The exception for a straddling community makes sense, but GLSLCI is concerned about opening the exceptions to an entire county. This could lead to significantly more water diverted from the basin, although the programs of the states and provinces would require that it be returned.

Further, GLSLCI is concerned the exception to allow intrabasin transfers. Similar to the exception for straddling communities, intrabasin transfers make sense in certain circumstances. Our concerns stem largely from the clause which permits medium withdrawals (Section 2-b,ii) with return flow permitted to an alternate basin to the source basin. In particular we are concerned about intrabasin transfers between the Upper Lake (Superior), Middle Lakes (Huron and Michigan) and Lower Lakes (Erie and Ontario). Current and past proposals such as the York Region withdrawal from Georgian Bay highlight the intensity of debate and conflict surrounding diversions. Cumulative impacts of multiple intrabasin transfers and exceptions for straddling communities will be difficult to monitor and reverse if required. We feel that individual and cumulative diversions could result in harmful water level changes to both source and catchments basins resulting in significant economic and ecological impacts.

We think that the threshold for Regional Review of 5 MGD consumptive use is too high, and that 1 MGD consumptive use is a more appropriate number. Depending on where the withdrawal occurs, it could have a significant impact on the source water area. The lower threshold will provide more protection for the resource.

With either the 5 MGD or 1 MGD threshold, however, many cities, especially larger ones, experience significant variations in withdrawals at different times of the year and even on a daily or weekly basis. In order to avoid continuing multiple reviews, the baselines for cities and other users need to be set in a way that recognizes the fluctuations in withdrawals during the course of a year.

The decision making standard in Article 203 is basically sound, and we are strongly supportive of the requirements for water conservation measures. The requirement of compliance with municipal laws in addition to federal and state makes the provision more complete and comprehensive. Although the "resource improvement" provision generated much controversy, this was a unique opportunity to get projects that could benefit the Great Lakes. We believe they should be included. Another concern is consistency in decision making across the basin. Especially where individual jurisdictions are making decisions, there needs to be a mechanism for ensuring consistency. At a minimum, there needs to be an accessible directory of decisions that includes the basis and rationale for the decisions.

The decision to subject the uses and diversions by the State of Illinois to the U.S. Supreme Court consent decree makes sense because of the long history of that matter. However, it is fully appropriate to subject the Illinois users to the water conservation program requirements.

Chapter 3 -

The water management programs of the states and provinces will be the key to the success of this overall effort. It will take a significant resource investment to make this work, and that will be difficult in the current budget climate. The Cities Initiative encourages the states and provinces to make the necessary investments to make the system successful. The cities of the GLSLCI also offer their assistance in the design of the necessary laws and regulations for the programs so that there will be more acceptance of the programs and more effective coverage.

One of the key elements of the system is to establish a good inventory of current withdrawals, as well as the new and increased ones. There should be special emphasis on making sure this information is gathered and maintained properly, as there have been difficulties in doing this in the past.

Another important element in this chapter is water conservation programs. The potential for reducing demand in the future from conservation programs is excellent. The provision makes it clear that the conservation programs apply to the existing users, as well as the new and increased users, which is fully appropriate, as many of the significant gains in conservation can be realized from existing users. Although the provision probably contemplates state and provincial governments working with municipalities, agriculture, industry, and others on the development of these programs, this should be explicit. There is a great deal of experience in conservation programs in municipalities that should be factored in from the very beginning in developing the programs. Also, there will need to be assistance and cooperation in the actual implementation. The states and provinces should take full advantage of the expertise at the municipal level. Public outreach and education is also an important element in all water conservation efforts, and it should be emphasized in this article.. We suggest you add a provision in article 303, section 4, such as "Development and implementation of public outreach concerning conservation at the household level." This should also be added at the appropriate location in the Compact.

The states and provinces should consider what things might appropriately be done at their level of government to help encourage the use of more water conservation equipment and techniques. We also recommend that some type of conservation goals be established for various water users so that there is a concerted effort to get actual reductions in water use. These all must be done in recognition of the economic realities faced by water users. The cities are fully committed to expanding the use of sound conservation measures across the basin, but will need the full support of the states and provinces and the public.

Chapter 4 - no comments

Chapter 5 – The provisions with regard to regional review and the notice, comment, consultation, public participation and other elements are all appropriate. The primary challenge will be timeliness in decision making. The key to success will be to make sure that complete, high quality applications are submitted and that the review process is tracked closely against schedules and milestones.

Chapter 6 – no comment

Chapter 7 – Regarding entry into force in article 710, it is hard to follow what comes into force when, but it may be difficult to do this differently. Of particular concern is the timing for water conservation programs. It appears that the requirement for states and provinces to have programs in place is well over 5 years into the future. In addition, there does not appear to be a deadline by which time water users must implement conservation measures. Much valuable water will be lost in the interim, and we suggest a more ambitious implementation schedule both for the state and provincial programs and for the actual implementation by the users.

Appendix 1 – Some of the information submitted as part of the application process may be sensitive from a security standpoint or because of business confidentiality. State and provincial programs need to have safeguards in place to protect the information.

The Compact

To the extent the Compact tracks the Agreement, we reiterate our comments for the Compact.

Other Comments – One of the key elements of success for a program like water management, especially one that is new, is to establish the credibility of the program and make sure that it is taken seriously. Of necessity, there will be a high degree of reliance on voluntary compliance by the regulated community. The way to ensure a high level of voluntary compliance is to hold violators accountable for not meeting the requirements of the system. The Agreement places very little emphasis on enforcement of the program, and there should be more. At a minimum, the parties to the Agreement need to commit that their programs will be enforceable under their laws and that there will be an investment of resources to ensure compliance.

The science of water balance in the Great Lakes is not as advanced as it should be, especially when looking at the total system of groundwater, tributaries, withdrawals, evaporation, and the many other elements. The signing of this Agreement would be a good opportunity to make a commitment to advancing this understanding. We suggest that the parties do that, and spell out in at least some general way, how that would be accomplished.

The averaging times used in the Agreement are generally 90 day periods, which is an improvement over the 120 period used before, but are remain somewhat high. Consideration should be given to a lower level so that sufficient protection can be provided to the source water area. Also, some parts use 30 day and some parts 90 day, and it is not clear why different averaging times are used.



"Improve the economic well-being of agriculture and enrich the quality of farm family life."

August 26, 2005

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

RE: Comments on Great Lakes Draft Annex Implementing Agreements

Dear Mr. Naftzger:

Please accept these comments from Illinois Farm Bureau regarding the Great Lakes Draft Annex Implementing Agreements. Illinois Farm Bureau is a voluntary, grassroots organization whose members include about three-fourths of the farmers in the state of Illinois. Illinois Farm Bureau recognizes the value of the water resources in the Great Lakes Basin. We believe that our water resources must be protected for future use and that agriculture in the basin must remain viable.

Agriculture's use of water to produce food and fiber is very much in the public's interest, is a reasonable use of water, and provides a benefit to the Great Lakes Basin ecosystem because of our ability to recharge aquifers and provide wildlife habitat.

The Draft Annex Implementing Agreements are the product of much effort by the Water Management Working Group and the Advisory Committee. We appreciated having the opportunity to provide comments during the process of developing the recommendations.

While the basic goals of the Great Lakes Charter Annex of 2001 are good, we believe that some of the recommendations still do not fit with agriculture.

Need Flexibility

There is a difference between the Annex 2001 and the Compact regarding the flexibility to implement water management programs. Chapter 3, Article 300 and Part 2 of the Procedures Manual in Appendix 1 of the Agreement describes a jurisdictional water management program that is very flexible. Management approaches that are non-regulatory are welcomed and encouraged. Section 4.8 of the Compact is much more regulatory in scope, which is of concern to us. States are instructed to develop and implement water management programs to regulate new or increased withdrawals of 100,000 gallons per day or greater average in any 90-day period. The loss of flexibility at the jurisdictional level to implement non-regulatory approaches to water management is a concern. The Compact needs to be changed to reflect a management style more non-regulatory in scope.



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Oppose Permitting

We believe that management of the waters of the Great Lakes Basin does not require burdensome water use permitting. Alternatives to permitting should be allowed in jurisdictions where water use permitting is unacceptable. Burdensome regulation will challenge the economic viability of Great Lakes Basin agriculture. Mandating water conservation through regulation in a water rich region will not foster a water conservation ethic in the Basin. We ask that these concerns be addressed in the final implementing documents. We are opposed to any recommendations that establish a water use permitting system or water fees for agricultural use of water.

Use of Averaging Period

We are opposed to the reduction of the water use averaging period from a minimum of 120 days down to 90 days. The averaging period of a minimum of 120 days more accurately reflects the seasonality of agricultural water use and should be reinstated in the two documents. We actually support extending the length of time to determine whether a threshold amount has been exceeded for agriculture to 365 days (with an average of 100,000 gallons per day for 365 days) for any programs or practices that affect agriculture.

Lack of Understanding Regarding Agricultural Use

The AIA still reflects a lack of understanding of agricultural use of water in the basin. It is inappropriate to have one size fits all regulatory solution for agriculture because of the seasonality water use. A water management system must consider the balance between efficient use of water with the amount of water retained within the basin due to the permeability of open agricultural land. A return to the system from agricultural lands through rainfall, storage, etc. should be part of the water use balance.

In past comments, we asked for the inclusion of jurisdiction developed generally accepted water use allowances for agricultural practices in lieu of existing consumptive use coefficients and return flow requirements. We believe that progress was made with the inclusion of the term "generally accepted" in the current proposal, although it is misapplied to a consumptive use coefficient. Developed generally accepted allowances should be based in conservation, should maximize water use efficiency by focusing on evaporation reduction and scheduling and should account for flow to groundwater via infiltration. Flexibility must be included in any final documents for jurisdictions to develop management approaches to address these concerns.

Science Based Decisions

It is imperative that Great Lakes water policy be based on sound science. The language contained in the draft implementation documents endorses a precautionary approach to water management in the absence of science and evidence of impact. The voluntary collection of data prior to the development of water management policies and regulation is a necessity.

Research

We believe that the importance of research has been neglected. We support continuing research on groundwater availability, recharge, and the efficient use of water resources. We feel that there should be state and federal appropriations to assist in achieving these

Need Confidentiality

Because of confidential business information and concerns with water safety, the public should not have access to a farmer's water use records. Public water supply systems in Illinois have severely limited the amount or kind of information available to the public after September 11, 2001 because of homeland security. We are opposed to the public having access to information that could be used for negative purposes. Confidentiality of sensitive or proprietary information must be maintained.

Basin Divides

There should be recognition in the documents that personal property boundaries often straddle basin divides. These unintended "diversions" are unique but must be considered in the draft implementation documents.

Conservation Measures

We have concerns with the interpretation of some of the conservation technologies that we discussed at various meetings. It should be clear that the technologies listed on pages 30 and 31 are "examples" water conservation measures. Many of these practices will be expensive to implement and producers should have the option to select which practices would fit with their operation. If the phrase "Examples of..." is not inserted into the titles of Table 1 and Table 2, then the following should be deleted:

Delete from Table 1, page 30:

- Low energy precision application of irrigation water
- Canal lining
- Trailwater recovery
- Laser leveling

Delete from Table 2, page 31:

- References to regulation on timing of irrigation.

Any conservation practices implemented by agriculture should be voluntary. Agricultural organizations in various jurisdictions and academic institutions could provide input into the development of examples of practices that would be practical and economically feasible for farmers. Since agriculture already participates in soil and water conservation programs, it would be easy to list these existing programs as examples of conservation practices in the recommendations.

Definition of Consumptive Use

~~The definition of consumptive use as it pertains to agriculture is not accurate. The definition of consumptive use should be the amount of withdrawn water lost to the immediate water environment through evaporation, plant transpiration, incorporation in products or crops, or consumption by humans and livestock.~~

Definition of Withdrawal

The definition of withdrawal should be changed to only include man-made, inorganic mechanisms. As defined, a plant could be considered a withdrawal.

Issues that Move in a Positive Direction

Illinois Farm Bureau does appreciate the following changes to the Draft Agreement to Implement the Annex. These include:

- Agricultural water users should not be held to an improvement standard if they voluntarily implement water conservation measures for efficient water use. A water use project itself should be considered an improvement if it increases the efficient use of water. Improvements should not be considered disincentives.
- The threshold level for regional review of consumptive water usage should remain at 5 million gallons per day.
- The term "Generally Accepted" should be included when referring to water use allowances and water consumption.
- An increased focus should be placed on water use efficiency.
- The term "Common Distribution System" should be retained when defining a water withdrawal.
- Determination of cumulative impacts should be the responsibility of the jurisdiction and not individual water users.

Conclusion

Thank you again for the opportunity to provide comments on the draft recommendations. We do believe that agricultural water use is different, making it difficult to apply many of the Annex principles to agriculture. The recommendations should protect our Great Lakes system but do so in a way that recognizes the importance of the production of a safe, affordable food supply and ensures that agriculture in the basin remains economically viable for the future.

Sincerely,

Nancy Erickson

Nancy Erickson, Director
Natural and Environmental Resources

August 29, 2005

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

Subject: Comments of the Michigan Farm Bureau regarding Annex 2001

The following are the comments of Michigan Farm Bureau regarding the proposed Annex 2001 implementing agreements. Michigan Farm Bureau is submitting these comments independently of comments we have jointly signed with a partnership of agricultural groups regarding Annex 2001 implementing agreements.

Michigan Farm Bureau appreciates the work put into creating these documents. We appreciate the opportunity to advise the working group's efforts. To match these efforts, we continue to work hard to educate our over 47,000 farming member families about Annex 2001 through publications, workshops and our grassroots policy development process. We remain engaged in this process to offer solutions that protect the Great Lakes while enhancing the viability of Michigan agriculture.

We believe the Great Lakes represent a fresh water system that must be conserved and protected for future generations and the future of the agricultural industry. We support the authority of the Great Lakes States and Canadian Provinces to control, protect, and preserve the Great Lakes. **We oppose diversion of water in its natural state from the Great Lakes Basin.** With these ideals, the following are Michigan Farm Bureau's comments pertaining to the implementation documents as released for public comment on June 30, 2005.

We appreciate the efforts of the Council of Great Lakes Governors to address several of our concerns offered on October 18, 2004. These include:

- Agriculture will not be held to an improvement standard that exceeds conservation measures and efficient use.
- The regional review threshold for consumptive uses increased to 5 million gallons per day.

- Inclusion of the term "Generally Accepted" in reference to water consumed.
- An increased focus on efficient use of water. Efficient water use better depicts the desired goals of Annex 2001 and agriculture's role in Annex 2001 implementation. Rather than fractioning water use into hard to define components, a focus on efficiency keeps a producer's attention on water use variables to which water conservation and management principles can be applied.
- Retention of the term common distribution system as a defining parameter of a withdrawal.
- Determination of cumulative impacts is the responsibility of the jurisdiction and not individual water users.

With these positive changes to the implementing documents, Michigan Farm Bureau expresses the following concerns:

A primary concern regarding the proposed Annex 2001 implementation documents is the loss of jurisdiction flexibility to implement non-regulatory approaches to water management. Annex 2001 guided the states to "seek and implement, if necessary, legislation establishing programs to manage and regulate new or increased withdrawals of Waters from the Great Lakes Basin". Section 4.8 of the Great Lakes Basin Compact states "Each party, within its jurisdiction, shall have the power and its duty shall be to manage and regulate all New or Increased Withdrawals of 100,000 gallons per day". We believe this language exceeds implementation of Annex 2001 and limits state flexibility to offer management approaches other than regulatory approaches such as permits. We reaffirm our belief that management and regulation of the waters of the Great Lakes Basin does not require water use permitting. **Burdensome regulation is not necessary to protect the Great Lakes and could challenge the competitiveness of Michigan farms, a loss that should be compensated with public funds. We oppose attempts to limit efficient agricultural water use.** Regulation of all New and Increased withdrawals is not necessary to protect the Great Lakes. We ask that these concerns be addressed in the final implementing documents. *threat*

We remain concerned about the level of understanding of agricultural water use reflected in the implementation documents. As a "one size fits all" regulatory approach to Great Lakes water use is inappropriate, so is the blanket application

of terminology to all sectors of water use. Agriculture is different from other uses as all water withdrawn is intended to be "consumed" and return flow minimized. The proposed implementation documents acknowledge that water returned to the source watershed via infiltration shall be considered part of return flow. This infers that transpiration is not part of consumptive use determination where existing consumptive use coefficients include transpiration. We concur with this notion and believe the implementation documents should explicitly state that consumptive use does not include water used by plants, including transpiration.

In past comments, we asked for the inclusion of jurisdiction developed generally accepted water use allowances for agricultural practices in lieu of existing consumptive use coefficients and return flow requirements. We believe that progress was made with the inclusion of the term "generally accepted" in the current proposal, although misapplied to a consumptive use coefficient. Developed generally accepted allowances would be based in conservation, could maximize water use efficiency by focusing on evaporation reduction and scheduling and could account for flow to groundwater via infiltration. **Flexibility must be included in any final documents for jurisdictions to develop management approaches to address these concerns.**

We are concerned about new language in this proposal that endorses a precautionary approach to water management in the absence of science and evidence of impact. **Water policy must be science based.**

Michigan Farm Bureau is disappointed with the reduction of the water use averaging period as we believe that the 120 day period better reflects the seasonality of agricultural water use. **We call for a return to a 120 day averaging period, or greater.**

Agricultural proposals that implement jurisdiction approved water conservation measures and follow developed generally accepted water use allowances for agricultural practices for all withdrawals exhibit due diligence for their withdrawal responsibilities and should be considered in compliance with conservation measure and ecological impact application requirements. Attainment of due diligence is not intended to allow a farmer an unreasonable use of water but to acknowledge the attainment of a performance based standard and good faith effort in the event the use is scientifically found to be seriously contributing to an ecological impact.

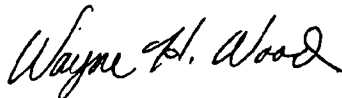
The definition of withdrawal should be changed to only include man-made, inorganic mechanisms. As defined, a plant could be considered a withdrawal.

Michigan Farm Bureau will not accept a water management system that does not balance efficient use of water with the amount of water retained within the basin due to the permeability of open agricultural land.

Farmers are very concerned about submitting water use data. We believe all information gathered should only be used for increasing knowledge of Great Lakes water resources and not be used for litigation purposes or water allotment. The process by which farmers submit information should be transparent, but gathered information ~~should not be in the public domain.~~ **We oppose the use of collected agricultural water use data for regulatory purposes or to advance agendas that are in opposition to efficient agricultural water use.**

On behalf of Michigan Farm Bureau, thank you for this opportunity to comment. Agricultural water use is different, making it difficult to apply many Annex 2001 principles to agriculture. **As demonstrated in these documents, state water uses can be treated differently, such as the Chicago diversion.** The application of Annex 2001 principles to agriculture must be based in common sense and cannot put Michigan agriculture to a competitive disadvantage with agriculture outside of the Great Lakes Basin. We ask that final implementation documents provide jurisdictions flexibility to address these concerns.

Regards,



Wayne H. Wood, President
Michigan Farm Bureau

Keith W. McCoy

Vice President
Resources and Environmental Policy

August 30, 2005

Mr. David Naftzger
Executive Director
Council of Great Lakes Governors
35 East Wacker Drive, Suite 1850
Chicago, IL 60601

Comments on Great Lakes Annex 2001 Implementation Proposals: "Great Lakes Basin Sustainable Water Resources Agreement" and "Great Lakes Basin Water Resources Compact" issued June 30, 2005.

Dear Mr. Naftzger:

The National Association of Manufacturers (NAM) appreciates the opportunity to comment on the proposed implementation documents for the Great Lakes Charter Annex 2001. The NAM is the nation's largest multi-industry trade association, representing small and large manufacturers in every industrial sector and in all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country.

Many of the NAM's member companies have operations in Canada, as well as the Great Lakes States, and they are committed to improving the quality of waters in both nations, including and especially the Great Lakes.

The NAM concurs for the most part that the statement of findings in the Water Resources Compact ("the Compact") and the Preamble to the Sustainable Water Resources Agreement ("the Agreement") present a reasonable rationale for implementation of the Charter Annex 2001. We agree that the water resources of the basin are "a shared public treasure." We appreciate that the Compact specifically mentions some of the various industrial and commercial uses important in the region and we hope that it is fully understood that such uses are crucial to the sustainability of the region. That is, without a sustainable natural resource, such commercial uses would be precluded; but, without sustainable development, there would be no financial support to sustain the resource. In fact, the Preamble to the Agreement specifically discusses the principle of "sustainable development." It is unclear why the Compact does not, but the emphasis of both the Agreement and the Compact on command-and-control regulation rather than "balanc[ing] economic development, social development and environmental protection" suggests that sustainable development is not truly a foundation of the Annex effort.

The NAM also notes that among the "Purposes" identified in the Compact is the intent to retain "State management authority over Water management decisions within the basin." The

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Agreement makes a similar statement regarding "State and Provincial authority" in its list of "Objectives." We are encouraged that the June 2005 proposals appear to have shifted slightly in the direction of jurisdictional authority for water management decisions, but feel that such authority would still be largely usurped by the Regional Body and Compact Council proposed in these implementing documents.

The NAM is greatly concerned by the emphasis in both documents on the "precautionary principle." Considering that there is truly no imminent danger identified for the withdrawal of water in the basin, the NAM believes that the council should emphasize a sound scientific approach to develop the basis for any restrictions determined to be necessary, rather than rushing to the precautionary command-and-control restrictions proposed. This effort should include continued water resources information collection, development of a knowledge base of sector-specific cost-effective conservation practices and development of the tools to evaluate "significant individual or cumulative adverse impacts." Until such knowledge is developed, a more reasoned level of regulatory control should be implemented, emphasizing incentives and voluntary conservation efforts.

We again want to emphasize the need for minimizing regulatory burden in the permitting and decision-making processes, and for avoiding redundancy in regulatory requirements. As stated in prior comments, we are concerned that the implementation process appears to be headed in a direction that would result in substantial disincentives for businesses to expand or locate within the Great Lakes Basin. It is not prudent to move forward on a program of this magnitude without having performed a regulatory impact analysis; that is, an analysis of the benefits and costs of the various elements of the implementation provisions. The NAM believes that a reasonably rigorous evaluation would show substantial regulatory burdens or economic uncertainties that would exclude the region from participation in future sustainable development. We again urge the council to direct its Water Management Working Group to perform such regulatory impact analysis.

In summary, the NAM — while strongly supporting the goals of conservation of the water resources of the Great Lakes Basin — has expressed a number of serious concerns related to the implementation documents. The NAM believes these concerns, together with those expressed in the comments submitted by the Coalition of Great Lakes Industries, to which the NAM and a number of its member companies contributed, are so significant as to render the program unworkable. We strongly believe that the Annex 2001 agreement must reaffirm that control of water resources within the Great Lakes Basin is best accomplished by the Governors/Premiers. It is appropriate for the Great Lakes Basin water resources to be controlled by the respective provinces and states — without relinquishing these responsibilities to the respective federal levels.

Page Three
August 29, 2005

The NAM is very appreciative that the Council of Great Lakes Governors included us as stakeholders within the Great Lakes Basin and allowed us to participate on the Advisory Committee to the Water Management Working Group. There is certainly good evidence that the working group has taken some of our recommendations into account. For example, the inclusion of the term "sustainable development" in the Agreement, the focus on consumptive use rather than withdrawal as the threshold basis for Regional Review and the concept of "Intra-Basin Transfer." We hope that the council will continue to incorporate the recommendations of the NAM into the implementation documents so that the Great Lakes Charter Annex 2001 contributes to a water resource that truly helps sustain the region environmentally, socially and economically.

If you would like to discuss these comments further, please don't hesitate to contact me at (202) 637-3175, or Robert Reich, the representative for the NAM on the Advisory Committee, at (302) 774-8022.

Sincerely,

Keith W. McCoy
Vice President
Resources and Environmental Policy



NATIONAL WILDLIFE FEDERATION®
Great Lakes Natural Resource Center®

August 29, 2005

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

Re: Additional comments of the National Wildlife Federation on Draft Annex 2001 Implementing Agreements

Dear Mr. Naftzger:

The National Wildlife Federation (NWF) appreciates the work of the Council of Great Lakes Governors (Council) Water Management Working Group and the opportunity to participate as a member of the Advisory Committee. NWF's substantive comments are detailed in a separate submission from a coalition of environmental non-governmental organizations. This letter provides additional insight into several comments that NWF wishes to highlight including:

1. The need to include language that will preserve the Great Lakes as part of the public trust in the Great Lakes Basin Water Resources Compact (Compact); and
2. A suggested concept for requiring ecological restoration as a standard in the Compact.

Additionally, NWF has enclosed several attachments: 1) *Suggested Concept for Requiring Ecological Restoration* and 2) USGS Water Resources Investigations Report titled, *Hydrogeology and Simulation of Regional Ground-Water-Level Declines in Monroe County, Michigan*.

NWF would like to see language from the 2004 Draft Great Lakes Basin Water Resources Compact that clarified the waters of the Great Lakes as part of the public trust reinstated in the final Great Lakes Basin Water Resources Compact. Language in the 2004 draft read: "the Great Lakes Basin Water Resources are precious public natural resources, shared and held in trust by the Great Lakes States." This language is necessary to reiterate that the Compact is not intended to interfere with each jurisdiction's public trust responsibilities regarding the Great Lakes.

The Council of Great Lakes Governors made a commitment in the Great Lakes Charter Annex 2001 to decision making standard that included an "Improvement to the Waters and Water-Dependent Natural Resources of the Great Lakes Basin." NWF believes that there is broad support for the general principle that water users should have the duty to leave the Great Lakes public trust resource in as good condition, if not better, than they found it. Attached to this letter, please find a *Suggested Concept for Requiring Ecological Restoration*. This Restoration Standard

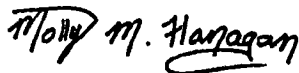
would replace the Improvement Standard in the Compact. Language from the recommendations section of this concept has been incorporated by a number of organizations into the Great Lakes Primer, authored by the Sierra Club of Canada. NWF will forward specific language suggestions for the Compact to the Working Group after consulting with our collaborators across the basin.

The final attachment to this comment letter, *Hydrogeology and Simulation of Regional Groundwater-Level Declines in Monroe County, Michigan*, is included to emphasize the importance of creating a Compact that will manage diversions of water out of the basin *and* create uniform standards for the states to manage in-basin water withdrawals and consumptive uses. Groundwater uses include public supply, self supplied wells, industry, irrigators, and quarry dewatering. The largest groundwater withdrawal in the region during the investigative report was quarry dewatering operations. Water use in Monroe County has caused widespread groundwater level declines. From 1991-2001, water levels in 11 monitoring wells to drop more than 10 feet and the water level in 6 wells to decline more than 20 feet.

This USGS report clearly demonstrates the need for in-basin water management to protect against localized groundwater shortages throughout the Great Lakes basin. The report also makes the connection that local groundwater drawdowns have an impact on the regional groundwater system. NWF applauds the Council's continued commitment to manage all the waters of the Great Lakes regardless of whether it is used inside or outside the Great Lakes basin.

Thank you for this opportunity to present the Council of Great Lakes Governors with our perspective and for your continued work on this critical issue: protecting the waters of the Great Lakes.

Sincerely,



Molly M. Flanagan
Great Lakes Water Resources Advocate



NATIONAL WILDLIFE FEDERATION®
Great Lakes Natural Resource Center®

August 29, 2005

Comments of National Wildlife Federation on Annex 2001 Implementing Agreements:
Attachment 1

**SUGGESTED CONCEPT FOR REQUIRING ECOLOGICAL RESTORATION
IN THE PROPOSED GREAT LAKES BASIN WATER RESOURCES COMPACT
AND GREAT LAKES BASIN SUSTAINABLE WATER RESOURCES AGREEMENT**

While there has been considerable disagreement among the various Great Lakes stakeholders regarding the implementation of the Great Lakes Charter Annex (Annex 2001) "improvement standard," the National Wildlife Federation continues to believe that there is broad support for the general principle that water users should have the duty to leave the Great Lakes public trust resource in as good condition, if not better, than they found it. There at least three basic premises behind this support:

- (1) The fundamental legal notion that the right to use water comes with the responsibility to not harm water-dependent natural resources or other water users;
- (2) The recognition that the Great Lakes ecosystem has experienced significant degradation and would benefit from targeted restoration efforts; and
- (3) While the proposed water management program aims to prevent environmental impacts, for numerous reasons (including incomplete decision-making information, regulatory flexibility, and imperfect operation/enforcement) some level of environmental impact is likely to result from new water withdrawals.

Requiring new water withdrawals to incorporate ecological restoration is consistent with each of the above premises, and would advance the policy goals that the premises are based upon. However, despite general support for ecological restoration, several concerns have been raised regarding implementation of the Annex 2001 improvement standard:

- (1) The regulatory uncertainty and/or cost with implementing an improvement standard, especially when coupled with a new regional review and approval process;
- (2) The belief that "trading improvements for water diversions" is both a bad policy choice for the Great Lakes and an insufficient basis for protection from diversions; and
- (3) The notion that humans cannot "improve" on nature.

NWF believes that these legitimate concerns can be addressed while still incorporating requirements for ecological restoration into the proposed Great Lakes Basin Water Resources Compact and Great Lakes Basin Sustainable Water Resources Agreement.

Recommendation:

- (1) Refer to "ecological restoration" rather than "improvement," to make clear that restoration of natural systems (not improvement on nature) is intended;
- (2) Only require ecological restoration for large in-basin consumptive uses, subject exclusively to state/provincial authority, eliminating the uncertainty of regional approval of a new standard and limiting the initial application to large projects;
- (3) Continue to prohibit diversions, and not allow ecological restoration to justify approval of an exemption from the prohibition on diversions; and
- (4) Allow compliance with the ecological restoration requirement by either incorporating the ecological restoration into the proposed project (perhaps at no cost to the water users, depending on project design) or by assisting local communities within the project watershed with hydrological restoration efforts identified by relevant restoration plans.

NWF hopes that consensus among Great Lakes stakeholders can be reached around this concept. All of the regions citizens, businesses, and governments share the goal and duty of leaving the Great Lakes better than we found them, and we should incorporate this goal and duty into Great Lakes policy.



In cooperation with the Michigan Department of Environmental Quality

Hydrogeology and Simulation of Regional Ground-Water-Level Declines in Monroe County, Michigan

Water-Resources Investigations Report 03-4312

- AVAILABLE UPON REQUEST -

U.S. Department of the Interior
U.S. Geological Survey



The Nature Conservancy
8 South Michigan Avenue, Suite 2301
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tel [312] 759-8017
fax [312] 759-8409

nature.org

August 29, 2005

David Naftzger
Executive Director
Council of Great Lakes Governors
35 E. Wacker Drive, Suite 1850
Chicago, IL 60601

Dear Mr. Naftzger:

Thank you for the opportunity to participate as an advisory member of the Governors and Premiers' Water Management Working Group. The Nature Conservancy continues to support the goal of Annex 2001 to help protect, conserve, restore and improve the waters and water-dependent resources of the Great Lakes basin. Based on The Nature Conservancy's broad experience in protecting aquatic biodiversity and developing ecologically sustainable water management principles and practices, the Conservancy strongly supports inclusion of the following elements in the Annex Compact and Implementing Agreements:

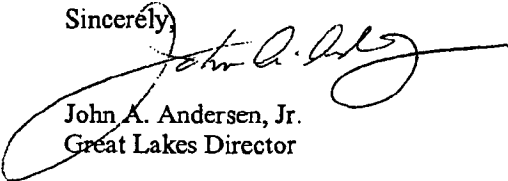
- explicit recognition that the waters of the Great Lakes basin are an interconnected hydrologic system that require cooperative approaches to water management, and a commitment to promote science-based water management across the basin;
- provisions encouraging the implementation of water management approaches designed to prevent significant adverse ecological impacts, both individually or cumulatively, including but not limited to returning water withdrawn from the basin to the source watershed after use to minimize the ecological impacts of water loss;
- provisions providing for assessments of cumulative impacts of water withdrawals at multiple scales, including basin-wide, within tributary watersheds and sub-watersheds;
- development of an enhanced water reporting mechanism for all sectors, including public and private sources; and
- regular review of the effectiveness of the water resources inventory program, jurisdictional water management programs and regional administrative processes.

The Nature Conservancy recognizes sound water management as a necessary component to the health of biodiversity within the Great Lakes basin. Effective water management under the Annex 2001 provisions will require all states and provinces to work cooperatively and to base their actions on the best available science. The Nature Conservancy supports development of consistent standards to guide management of withdrawals from all waters of the Great Lakes basin; we also recognize the need for jurisdictional flexibility in implementing these standards.

The Nature Conservancy will continue to work with policymakers, stakeholders and other interested parties to promote ecologically sustainable water management throughout the Great Lakes basin.

Thank you for the opportunity to submit these comments.

Sincerely,



John A. Andersen, Jr.
Great Lakes Director

The Nature Conservancy's mission is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive.

August 26, 2005

David Naftzger, Executive Director
Council of Great Lakes Governors
35 E. Wacker Drive
Suite 1850
Chicago, IL 60601

Re: Review and Comment on Revised Draft Annex 2001 Implementing Agreements

Mr. David Naftzger:

The Ohio Farm Bureau Federation (OFBF) would like to thank you for the opportunity to review and submit comments on the Revised Draft Annex 2001 Implementing Agreements. These documents were developed as a result of many months of hard work by a host of dedicated individuals and I commend your efforts.

OFBF is the largest voluntary nonprofit agricultural organization in the state of Ohio. Because our members produce virtually every kind of agricultural commodity, OFBF is very interested in the implementation of Annex 2001 and its potential impact on Ohio's agricultural industry.

Our policies recognize the value of Ohio's freshwater resources and that protecting Ohio's water basins from withdrawals and diversions to other regions of North America is necessary to maintaining healthy viable ecosystems. It is our belief that Ohio's fresh water resources must be protected, enhanced and conserved for future generations and for the future viability of Ohio's agricultural industry.

To begin, OFBF appreciates the efforts of the Council of Great Lakes Governors to address several of the concerns offered in our October 15, 2004 comments. These include:

- Agricultural water users should not be held to an improvement standard if they voluntarily implement water conservation measures for efficient water use.
- The threshold level for regional review of consumptive water usage should remain at 5 million gallons per day.
- The term "Generally Accepted" should be included when referring to water use allowances and water consumption.

- An increased focus should be placed on water use efficiency.
- Retaining the term “Common Distribution System” when defining a water withdrawal is an important concept for Ohio agriculture.

With these positive changes to the revised draft agreements, OFBF expresses the following concerns:

- While it may be unintentional, the tones of the two documents (Agreement and Compact) are distinctly different when it comes to water management programs. The language presented in Chapter 3, Article 300 and Part 2 of the Procedures Manual in Appendix 1 of the Agreement describes a state or provincial water management program that is very flexible. Management approaches that are non-regulatory are welcomed and encouraged. Section 4.8 of the Compact is much more prescriptive. States are instructed to develop and implement water management programs to regulate new or increased withdrawals of water. The loss of jurisdictional flexibility to implement non-regulatory approaches to water management is a concern. Regulatory approaches such as water use or withdrawal permits should not be the only water management option available.

The management of the waters of the Great Lakes does not require water use permitting. A water use permitting program is not necessary in order for agriculture to protect and conserve the Great Lakes for future generations. Ohio Farm Bureau policy opposes the establishment of a water use permitting program for the State of Ohio. Such regulation could challenge the regional competitiveness of agriculture.

- The reduction of the water use averaging period from 120 days down to 90 days is a disappointment and a concern. The 120-day water use averaging period more accurately reflects the seasonality of agricultural water use and should be reinstated in the two documents. Reporting periods should adopt this same time frame to ensure consistency.
- Many discussions were held during the development of the draft implementation documents to convey how agricultural water use is different from the other water uses in the Great Lakes Basin. The concepts of seasonal or intermittent water usage along with a high use efficiency associated with agricultural irrigation makes it inappropriate to apply a “one-size-fits-all” regulatory solution. The level of understanding of agricultural water use remains a concern. The water management system must consider the balance between efficient use of water with the amount of water retained within the basin due to the permeability of open agricultural land.
- It is imperative that Great Lakes water policy be science based. The language contained in the draft implementation documents endorses a non-scientific precautionary approach to water management in the absence of science and evidence of impact. The collection

of data prior to the development of water management policies and regulation is a necessity.

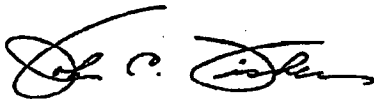
- Agricultural water users implementing water conservation measures approved by the host jurisdiction and following generally accepted water use allowances should be considered in compliance with the conservation, ecological and cumulative impact requirements of Annex. Implementation of an approved plan is not intended to allow a producer an unreasonable use of water. Rather, the intent is to acknowledge the good faith effort made by the producer in the event that his or her use is scientifically found to be seriously contributing to an ecological impact. In this situation, the producer should be relieved of past liability and subject to modification of the previously approved plan.
- Ohio agricultural producers are concerned about submitting water use data that could be freely available to the general public. Information gathered should be used only to increase the knowledge and understanding of Great Lakes water resources. It should not be used for litigation purposes or to establish a water allocation program. The information submittal process should be transparent but confidentiality of sensitive or proprietary information must be maintained. All submitted information should not be in the public domain.
- The two documents recognize that municipal and county boundaries do not follow delineated hydrologic boundaries (straddling communities and straddling counties). This same situation occurs with personal property boundaries. In some situations, agricultural producers are irrigating fields that straddle basin divides. These unintended "diversions" are unique but must be considered in the draft implementation documents and accorded the same exemption consideration as public entities.
- The following modifications to the general definitions are recommended:
 - Consumptive use**—Amount of withdrawn water lost to the immediate water environment through evaporation, plant transpiration, incorporation in products or crops, or consumption by humans and livestock.
 - Withdrawal**—Amount of water diverted by humans from a surface-water source or extracted from a groundwater source.
- Inclusion of the following irrigation water use efficiency terms into the general definition sections of the two documents is recommended:
 - Application efficiency** - The ratio of the average depth of irrigation water stored in the root zone for crop consumptive use to the average depth applied, expressed as a percentage.
 - Conveyance efficiency** - The ratio of total water delivered to the total water diverted or pumped into an open channel or pipeline, expressed as a percentage. Conveyance

losses include evaporation, ditch seepage, operational spills, and water lost to non-crop vegetative consumption.

Irrigation efficiency - The ratio of the average depth of irrigation water beneficially used (consumptive use plus leaching requirement) to the average depth applied, expressed as a percentage.

Thank you once again for the opportunity to comment and to the attention paid to our past concerns. The broad application of Annex 2001 to Great Lakes agriculture is not a simple task. The concepts of seasonal or intermittent water usage along with a high use efficiency associated with agricultural irrigation makes it difficult to apply many of the Annex 2001 principles directly to agriculture. When Annex 2001 principles do get applied to Great Lakes agriculture they must be based on common sense and can not put Ohio and Great Lakes agriculture at a competitive disadvantage. Jurisdictions must be provided the opportunity to incorporate maximum flexibility into Annex implementation.

Sincerely



John C. Fisher
Executive Vice President

JCF/lma

cc: Richard S. Bartz, Chief ODNR/Division of Water



Ontario Federation of Agriculture

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Paula Thompson, Senior Policy Advisor
MNR Water Resources Section, Lands & Waters Branch
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August 26, 2005

Subject: Comments of the Ontario Federation of Agriculture regarding the Great Lakes Basin Sustainable Water Resources Agreement and Great Lakes Basin Water Resources Compact

Dear Ms. Thompson,

It is with pleasure that the Ontario Federation of Agriculture (OFA) provides comments to the "Great Lakes Basin Sustainable Water Resources Agreement and Great Lakes Basin Water Resources Compact".

The OFA is the voice of Ontario's farmers. Supported by over 40,000 individual members and 30 affiliated organizations, the OFA represents farm family concerns to governments and the general public. Constituted in its present form since 1970, the organization has a long history of advocating in the interest of Ontario's farm community, and traces its roots back to the Ontario Chamber of Agriculture established in the 1930's. Active at the local level through 49 county and regional federations of agriculture, the OFA is also a member of the Canadian Federation of Agriculture (CFA), the farmers' voice on national issues.

Agriculture is one of the true economic success stories in Ontario. Diverse in its products and province-wide in scope, agriculture is the cornerstone of many local economies, providing thousands of jobs. Ontario is home to the largest and most diverse agriculture and food sector in Canada.

Much of the success of Ontario's agriculture and food sector can be attributed to product diversity. Our farmers produce a wide range of products, some 200 different agricultural products in all, to satisfy diverse domestic tastes as well as demands from worldwide consumers. Recognizing the benefits of diversification, Ontario farmers have responded by expanding production for niche markets and placing more emphasis on

the marketing of high-value-added products. As a result, there has been substantial growth in the production of soybeans, flowers, nursery stock and lamb.

Farmers rely on the air, soil and water to conduct their business, and as such, have a vested interest in the sustainability of these resources. Because of the nature of agriculture in Ontario, and the fact that farmers interact intimately with the natural environment on a daily basis, an agricultural perspective to water resources management is critical.

Consumptive Use and Agriculture:

OFA is very pleased to see an attempt to recognize the efficient use of water within this latest draft of the Great Lakes Charter Annex. This is an important concept/component of resource use and conservation, and makes sense in an agricultural perspective.

However, the application of consumptive use and current consumptive use coefficients still do not work for agricultural applications. Significant public research is required regarding consumptive uses and the consumptive coefficients applied to agriculture, to get it right for Ontario's climate zone. We further believe that the Great Lakes Charter Annex implementation documents must clearly state that consumptive use does not include water used by plants, including transpiration - at least until appropriate research can be conducted.

We further advocate that jurisdiction approved generally accepted water use practices (Best Management Practices) for agriculture be used in lieu of existing consumptive use coefficients and return flow requirements. These practices are based in conservation principles and maximizing efficiency.

In some instances, Ontario agriculture uses communal systems for irrigating. Essentially communal systems remove water takers from local, small and potentially sensitive water sources and moves them to communally access large and very robust water sources where even the combined withdrawal is miniscule compared to the flow of the source. However this volume of water used by these systems may trigger a Regional Review. It is important that the potential benefits of this system be considered in a regional review. For example, the Communal System operating in Niagara-on-the-Lake schedules irrigation water for 138 growers. The number of agricultural users must also be a stated consideration in Regional Review, as opposed to having 138 individuals drawing water without triggering Regional Review. It is important for regulators to realize that Irrigating for agricultural purposes is both labour intensive and costly. It is not an activity the farmer engages in without due consideration and absolute need.

Article 202: IMPLEMENTATION OF THE STANDARD

Point #2 of Article 202 places Ontario at a competitive disadvantage to the rest of agriculture in the Great Lakes Basin because Ontario has significantly higher standards to meet through the Permit to Take Water (PTTW) Program. This disadvantage must be

recognized. Wherever possible, phase-in of requirements in Ontario must take into account the level of standards in other Great Lakes Basin jurisdictions to minimize this impact.

Article 203: THE DECISION-MAKING STANDARD

#1) As aforementioned, OFA is pleased to see the inclusion of efficiency / efficient use of water included. However, there needs to be greater inclusion of this concept throughout the Annex, especially as it pertains to agriculture. Ontario's farmers have done a great deal of work through Best Management Practices around voluntary implementation of efficient irrigation systems along with successful education and awareness campaigns. This approach could be adopted in other jurisdictions.

#2) Clarification is required on who determines "reasonable quantities" for the use. OFA maintains that decisions based on agriculture uses must be made by individuals knowledgeable about agriculture, and must not be politically motivated. Decisions must be made objectively based on the water issues, and not self-interested agricultural sector motives. The agricultural sector should not be disadvantaged because of influence in the decision making process. Decision-makers at both Regional Review and jurisdictional review must also have some specialty / reasonable expertise in agriculture to make informed decisions on the application. One way to ensure agricultural expertise is to include farmer representation in an advisory capacity.

#4) It must remain very clear that, in Ontario, the Provincial Government remains responsible for determining the cumulative impact. The Provincial Government, specifically through the Ministry of Environment and/or Ministry of Natural Resources holds much of this information, and therefore should be the ones responsible for providing this data around cumulative impacts. The agricultural proponent should not be responsible for reproducing data that the Government already holds. We look forward to the development of a mechanism whereby farmers can access that information easily and free of charge from government to assist them in the application process.

#5) The concept of maximizing efficiency must be added to this section because of the incorrect application of consumptive use to agriculture. Specifically "... to minimize Water Withdrawals or Consumptive Use, *or Maximize Efficiency*".

and?

Article 204 – PROPOSALS SUBJECT TO REGIONAL REVIEW

The averaging period has been decreased from 120 days to 90 days in this draft. OFA still advocates for the 120 day averaging for agriculture, as this is reflective of the growing season and therefore reflective of the period in which water may be drawn.

Who pays for Regional Review has yet to be clarified. It is OFA's position that agricultural proponents who trigger Regional Review not be responsible for additional costs associated with the Review. It would be useful to have some estimates of the cost associated with Regional Review.

Politics must also be taken out agricultural application reviews (see comments for Article 203, #2).

Article 205 - PROPOSALS SUBJECT TO MANAGEMENT AND REGULATION

Ontario is already doing this to significantly higher standards (see comments on Article 202).

Article 207 - DETERMINATION OF WHETHER THE STANDARD APPLIES

#1) In determining capacity for agricultural withdrawals, the decision making process must recognize that agriculture does not draw its fully allotted quantity everyday unlike other industries, because of the seasonal use. This must be considered in issuing agricultural permits.

Article 209 - AMENDMENTS TO THE STANDARD AND MANUAL

While it is an interesting concept, it is unclear as to how climate change can be taken "fully in account". There are many uncertainties and unknowns regarding the magnitude of climate change. An excessively precautionary approach that could undermine agriculture's access to water must be avoided. If climate change is to be incorporated, the best available science must be used. Jurisdictions must also commit to education and awareness campaigns to ensure that all stakeholders have a better understanding of how climate change fits into the Great Lakes Basin Standards. More effort needs to take place around research and gaining a better understanding of conservation.

Article 300 - WATER MANAGEMENT PROGRAMS

Ontario is already doing more than most if not all of the other Parties in terms of having programs to improve the water. Ontario's current contributions must be recognized. Ontario users cannot be burdened with the same levels of improvement in future years as may be demanded of the United States, given their starting point compared to Ontario.

Article 301 - INFORMATION

#2) Ontario agriculture is concerned with the development of a data base repository of information available to the Public. The use of all data collected must be clearly stated. There must be enough flexibility to allow for recognition of security of confidential business proprietary information and information that can be shared to enhance a better understanding of the resource. Ontario agriculture will not support collection of data, or public access to information, that could potentially be used in litigation or for water allotment policy development. There is concern that this process could lead to a water allocation system, which is undesirable.

Article 302 - AVAILABILITY OF APPLICATIONS AND RECORD OF DECISIONS

#1) See comments regarding publicly available information in Article 301 #2.

Article 303 – WATER CONSERVATION PROGRAMS

#2) The OFA is pleased to see reference to improved efficiency. Efficiency is more relevant to agriculture than other measures of water use. At end of day, it will be efficiency demonstrated by the farmer that will result in water conservation, not a regulatory framework per se. In Ontario, farmers have voluntarily adopted many water efficiency programs through Best Management Practices, to great success.

#5) Ontario must ensure that the implementation of water conservation programs recognizes and credits existing water conservation and efficiency measures taken by individuals. This is especially important for Ontario given our extensive work and regulatory requirements in this area. If Ontario is to further develop their water conservation program, it must be done in consultation with agricultural groups and build on the past and existing initiatives, including voluntary measures.

Article 401 - ORGANIZATION AND PROCEDURES OF THE REGIONAL BODY

#9) OFA is pleased to see the inclusion of confidentiality regarding some documents made public. See comments for Article 302, #1.

Article 502 - OTHER NOTICE

#2) Further clarification and parameters are required around "Precedent setting proposals." While the NOVA example is often cited here as what is intended, that does not leave much guidance. For example, would a communal irrigation system in Ontario be a precedent-setting consequence even though it may be a proposal for water withdrawal creating limited impact? We are opposed to this potential interpretation. It is our opinion that a proposal such as this that would create limited impact should not be considered precedent setting to trigger Regional Review.

Article 505 – TECHNICAL REVIEW

It is OFA's position that proponents of agricultural proposals going to Regional Review are not responsible for providing or funding the complete technical review (see comments on Article 203, #4).

#3) Additional information required for independent technical review must not be at the cost of an agricultural proposal proponent.

Article 704 – CONFIDENTIALITY

As mentioned in a number of sections, OFA is concerned about proprietary information being made public. It is our position that data must be presented in aggregate, so as to protect individual agricultural producers. We are pleased that this clause has been included.

APPENDIX 1 – Procedures Manual

General comments on the Appendix 1 and Decision Making:

- i) Decisions regarding agricultural applications must be made by / have significant input from individuals knowledgeable about the industry.

- ii) De-politicization of decisions – Decisions and recommendations must be based on best available science, and not be politically motivated.
- iii) Significant research needs to be conducted on consumptive use coefficients and application of this concept to agriculture in Ontario.

1.A) Criteria for Decisions: Once again, OFA is pleased that the efficient use of water is included as part of the Criteria for Decisions.

1.B) Description of Intent – As per our comments for Article 203, #2 – clarification is required on who decides “quantities that are considered reasonable to meet the requirements of the intended use.”

1.B Application Requirements – OFA is concerned about applications that will look at water-use during a 90-day period without consideration of the industry. Agricultural water use is seasonal in nature, and is only drawn during the growing season. This approach of assessing applications based on 90-day averaging without considering the seasonal nature of agriculture, as compared to an industry that draws water throughout the entire year, is inappropriate.

1.C Return Flow – As discussed above, the efficient use of water for irrigation purposes is to minimize return flow. In other words, irrigators are looking to apply only the quantity of water that the plants require. This unique aspect of agriculture must be recognized when looking at the Return Flow component of an application. We are pleased to see that “Water that is returned to the Source Watershed via non-point sources ... shall be considered part of Return Flow.”

1.D No Significant Individual or Cumulative Impacts – It is OFA's position that information regarding cumulative impacts must be provided by the Provincial Government, as they already hold much of this information. Duplication of information at the cost to the agricultural proponent is unacceptable. (See comments for Article 203, #4). The Ontario government has much of this data and it is their responsibility to put it into a form that is readily available, free of charge.

Criteria for Decisions – As discussed in Article 502 #2, OFA is concerned with the lack of clarification and parameters around “Precedent setting proposals.” While the NOVA example is often cited here as what is intended, that does not leave much guidance. For example, would a communal irrigation system in Ontario be a precedent-setting consequence even though it may be a proposal for water withdrawal creating limited impact? We are opposed to this potential interpretation.

OFA is also concerned with the inclusion of ecological impact, without recognition of steps that farmers may take to minimize their impact. It continues to be our position that jurisdiction-approved water conservation measures (Best Management Practices) for all agricultural withdrawal proposals should be deemed to be in compliance with Annex conservation and ecological impact requirements.

Physical Criteria – How is “Measurable” and “Significant” impacts defined and/or applied in this section?

1.E) *Application Requirements* -

Identify Conservation Goals – The first bullet point in this section should add the words “**or efficiency goals**”. Therefore, it should read “Establish Water use reduction goals (e.g. percent or volume per day) **or efficiency goals**.” As aforementioned, efficiency ‘fits’ much better with agriculture’s use of water, and is an attainable goal for agriculture.

Develop a Water-Use Profile and Forecast - OFA has significant issues with this section. Why is this section devoted almost entirely to agricultural / irrigation issues, when it is a Procedures Manual for all sectors? Much of the information listed to include has nothing to do with the efficient use of water. It is our position that the second sub-point should end at the word “designed” and ~~strikeout all text under the rest of this sub-point.~~ It would therefore read as follows: “For irrigation and other Agricultural uses, the plan should demonstrate that systems are properly designed.” The next text would be the following bullet that begins “Forecast anticipated future Water use/demand ...”

Identify and Evaluate Environmentally Sound and Economically Feasible Water Conservation Measures - When evaluating measures, an additional point is required to recognize the fact that it is possible to reduce impact with other measures beyond just reducing quantity used. The additional point should read “Potential Reduction of Peak Demand”. Many farmers try to spread out their water use. Farmers schedule their irrigation so they are not all taking water at the same time, or they will try to store water in times of plenty for use later. These practices are already incorporated and documented as Irrigation Best Management Practices. OFA is pleased to see that the words “Economically Feasible” remain in the Charter and Procedures Manual.

Further public research is also required in a number of areas associated with agricultural water use. Decisions must be scientifically based, and this research would facilitate the decision-making process. It is also important to include agricultural expertise and continue consultations with the agricultural sector as this initiative goes forward.

OFA would like consideration to be given to prescribing a more appropriate system to agricultural water use throughout the Great Lakes Basin. As discussed in great detail in both this submission, and previous submissions, consumptive use is not appropriately applied to agriculture. A system or approach that recognizes the efficient use of water for agricultural purposes will go much further to meeting the goals and objectives of the Charter, than trying to work agriculture water use in an industrial/commercial model as currently applied.

The presence of a reliable water supply with appropriate quality and quantity is essential to agriculture and we want to ensure that future water resources are not compromised. We are confident that our comments will be given due consideration in protecting the water supply for all.

Sincerely,



Ron Bonnett
OFA President

Cc: David Naftzger, Executive Director, Council of Great Lakes Governors
Honourable Leona Dombrowsky, Minister of Agriculture, Food & Rural Affairs
Honourable David Ramsay, Minister of Natural Resources & Minister
Responsible for Aboriginal Affairs
Honourable Laurel Broten, Minister of the Environment
Ontario Fruit and Vegetable Grower's Association
Ontario Flue-Cured Tobacco Growers' Marketing Board
Ontario Tender Fruit Producers' Marketing Board



Comment on the Proposed “Great Lakes Basin Sustainable Water Resources Agreement”

September 15, 2005

The 2005 proposed agreement between the ten Great Lakes provinces and states, like its 2004 prototype, is an important step forward in protecting Great Lakes basin waters from bulk water diversions and water use abuse. However, additional changes to the draft document would strengthen its ability to achieve the jurisdictions’ aim to fully protect the basin ecosystem from damage caused by water withdrawals.

In particular, the negotiators should change the definition of “straddling communities” so that the term reflects the original intent of that category of withdrawer: existing urban areas or existing rural water supply systems on the basin watershed divide that are facing water shortages for public supply. Also, the trigger level for requiring that diversions between lakes (“intra-basin transfers”) return water to the source lake watershed should be substantially reduced. The agreement should also re-introduce in some form the visionary, previous “improvement” standard, which we recommend be modified to become a “restoration” standard.

MULTIPLE ARTICLES

Weak “seek to” language

Beginning with article 102, “General Commitment,” the proposed international agreement usually uses the language “shall seek to” as the signers’ operative commitment to carry out promised water management reforms. By contrast, the proposed compact agreement just as frequently declares that it “shall be the duty of” its signers to carry out the promises of the compact.

Taken literally, as all formal language between contracting parties should be, the “seek” language is not a commitment to achieve any change in current basin water management practices, only to attempt to do so. The language should be greatly strengthened by eliminating the “seek” language, replacing it with stronger language, perhaps as direct and simple as declaring that the jurisdictions “shall” carry out the agreement commitments rather than “shall seek to.”

NO ARTICLES

Enforcement

Aside from its non-binding character, the proposed international agreement is nearly always stronger than its sister compact by virtue of its incorporation of the Procedures Manual into the agreement itself, rather than by reference as a mere guideline. However, the international agreement is conspicuously weaker than the compact in the area of enforcement.

Article 210 attempts to match the compact’s enforcement section, article 7, by granting the other signers access to provincial court to challenge a decision on a proposed withdrawal. But the international agreement should fully match the compact’s enforcement provisions by extending the

privilege of challenging a water withdrawal decision to impacted citizens. One would think the provinces—the states do not have this problem because of their compact promises—would find it embarrassing to deny their own citizens rights extended to sister governments.

The agreement should also require signers to allow both other signers and its impacted citizens the right to challenge an individual jurisdiction in its courts for failure to carry out the many other, non-decision commitments of the agreement.

Permit terms

The proposed international agreement nowhere discusses the length of time for which permits shall be issued by the jurisdictions for withdrawals covered by the agreement. In order to enable jurisdictions to effectively manage the basin's waters in accordance with its objectives, permit should have terms. We suggest five-year terms. This would enable jurisdictions to modify permit conditions as a reasonably rapid response to the results of the cumulative impact assessments mandated in article 209, or if climate change effects begin to be observed.

ARTICLE 103

GENERAL DEFINITONS

Source watershed

The source watershed of withdrawals is defined as the lake watershed. From an ecological point of view, removal of water from a given scale of watershed with return to a different watershed or different scale of the same watershed, is no different from diversion out of the basin—all the water is lost to that watershed. The source watershed should be defined as the smallest scale of watershed from which the withdrawal was taken as defined by the respective countries' survey agencies, but at minimum should be defined as that of the relevant major tributary to the Great Lakes.

Straddling community

This category of diversion is significant because diversions that fulfill its requirements are not subject to governor veto in the eight-state compact agreement nor to some other standards applied to "straddling county" diversions in both the compact and international agreements. The purpose of the "straddling community" category in the two agreements was relief for communities on the basin line experiencing public supply distress. But the word "town" in the definition of straddling community is being interpreted by the U.S. states to mean "township," the largely rural districts that are the basic division of most U.S. counties. As such, the current definition of "straddling communities" includes areas miles from the basin line with no current need or even any current water supply infrastructure. This was not the intended purpose of the "straddling community" concept.

The definition of "straddling community" in both the international and compact agreements should limit the areas in question to existing urban areas that cross the basin line or to the reach of existing rural water supply systems that cross the basin line.

ARTICLE 201

EXCEPTIONS TO THE PROHIBITION OF DIVERSIONS

Straddling counties

The creation of the "straddling counties" category solved the problem of public perception that the proposed agreement's diversion protections were insufficient while creating the smaller but

potentially still significant problem (from the point of commerce law and trade agreements) of treating diversions differently from withdrawals for in-basin use. In addition to treating in- and out-of-basin diversion more equally (see our suggestions under Intra-Basin Transfers”), this difficulty could be mitigated by allowing diversions within straddling counties only to those places that are already using, or are planning to use, groundwater that can be shown to flow to the Great Lakes.

Intra-Basin Transfers

Diversions between Great Lakes, so-called “Intra-basin Transfers,” are not subject to regional oversight or return flow until they reach the very large level of 5 million gallons per day of consumptive loss. Since public supplies generally lose 15 percent of their withdrawal consumptively, and at most 30 percent, the intra-basin transfer provisions of the international agreement in effect allows diversions of water between lakes of between 16 million and 33 million gallons per day before triggering regional oversight.

This outrageous provision leads to the absurd situation that a 100,000-gallon-per-day diversion out of Ohio’s Lake Erie watershed into the Ohio River basin will be subject to Regional Review and return flow while a 33-million-gallon-per-day diversion from Lake Huron to Lake Ontario, which will cost Lake Erie approximately 300 times as much water, would not be subject to Regional Review or return flow.

We recommend that all intra-basin transfers over 100,000 gallons per day averaged over 30 days should: 1) be used only for public supply purposes, 2) be required to return the unconsumed water to the same lake watershed, and 3) be subject to Regional Review.

After five years of education about the legal vulnerability of the region’s current water management system, must it be pointed out that treating in-basin diversions radically differently from out-of-basin diversions is legally risky? Such difference in treatment clearly makes the agreements more vulnerable to legal challenge as not truly environmental agreements but only disguised attempts to keep the economic benefits of Great Lakes water for the region. Lake Erie is not more concerned that its water is taken to the Mississippi River basin rather than to the Lake Ontario basin.

Public opinion prevents the parties from treating diversions and withdrawals for in-basin use relatively equally, which conveniently allows the jurisdictions to treat diversions quite protectively while treating withdrawals for in-basin use far less protectively. That being the case, the least the parties can do is strengthen the agreements against future legal challenge by treating all diversions, both in- and out-of- basin, relatively equally. This means substantially strengthening the proposed agreement’s treatment of in-basin diversions.

ARTICLE 203

THE DECISION-MAKING STANDARD

Conservation standard

Applicants for water withdrawal permit renewals should be required to demonstrate that water conservation promises made in previous permit applications have been kept.

“Improvement” standard

A combination of persistent reluctance by the parties to carry out this core promise of the Annex 2001 agreement-in-principle, and a concern by some members of the public that the standard somehow would increase the commodification of water, led to the complete deletion of this standard from the proposed agreements. This is unfortunate, as the idea behind the standard was both

precedent-setting and, in the long run, essential if people are to continue living on this planet: access to nature's bounty must eventually be made contingent on maintaining that bounty.

The parties should recast the standard as "restoration" and implement it in some form acceptable to those who objected to it in its original form. This "restoration" standard, as we could now call it, is a very important collection of bricks in the edifice we are constructing that might be named, "Don't Demand Diversion of Our Water Because We Are World Leaders in Preserving the Hydrological System That Supports Our Regional Ecology."

ARTICLE 204

PROPOSALS SUBJECT TO REGIONAL REVIEW

Trigger level

Proposals are theoretically subject to regional review because of their potential ecological significance to the basin as a whole. Total water loss to the basin, the proposed basis for regional review, is one yardstick for measuring potential ecological significance of a proposed project. However, withdrawal quantity is also an important yardstick for roughly assessing potential harm to the basin ecosystem. Proposals as large as 35 million gallons per day could escape regional review under the consumptive loss standard proposed in this section of the agreement. The trigger level should be based on withdrawal quantity, or should have a withdrawal quantity component, and should be substantially lower than the level currently proposed.

Limited review

The draft agreement provides no flexibility for Regional Review of proposals that are not otherwise eligible for such review. Some projects not eligible for Regional Review may nonetheless have unusual potential for harm to the basin ecosystem that might merit such review.

We recommend that any intra-basin diversion and any water withdrawal greater than 5 million gallons per day (*not* 5 million gallons per day consumptive loss) averaged over 30 days not otherwise subject to Regional Review should become subject to Regional Review at the request of any two parties to the international agreement. Such requests could be contingent on their submission by parties to the agreement within a given time of the project's original proposal, for example, 30 days.

ARTICLE 205

PROPOSALS SUBJECT TO MANAGEMENT AND REGULATION

Averaging period

The current draft improves on the previous one in defining the size of withdrawals, and their corresponding degrees of regulation by the parties, according to their average over 90 days instead of the previous 120. However, a large withdrawal that is conducted for only a few weeks a year could have a devastating effect on local ecosystems yet escape scrutiny entirely because, averaged over 90 days, it appears much smaller than it actually is. The averaging period for determining the size of a withdrawal should be 30 days.

ARTICLE 209

AMENDMENTS TO THE STANDARD AND MANUAL

Cumulative impacts

While periodic assessment and research into cumulative effects of water withdrawal on the Great Lakes ecosystem are welcome, this section is unlikely to protect the basin from cumulative impacts except in the very, very long term, and on the largest scale, because 1) it addresses cumulative impacts only at the basinwide level, despite the fact that cumulative impacts are certain to occur first and most severely on the local watershed level, and 2) it provides only for review of standards, whose revision would be the most indirect and likely ineffective means of reversing and preventing cumulative impacts. We suggest that 1) cumulative impact assessments be required at the level of each major river watershed, and 2) when such assessments reveal existing or reasonably predictable cumulative impacts, they should trigger the creation of watershed-specific water management plans that would provide guidance for water withdrawal permits issued in that watershed.

ARTICLES 300 AND 303 AND APPENDIX PART 2

WATER MANAGEMENT AND CONSERVATION PROGRAMS

Conservation program goals

We are concerned by the lack of guidance provided in the draft agreement for water management and conservation programs. The agreement requires only general aims of conservation and protection and contains no specific goals. Will the program review and annual reporting provisions of the appendix admirably hold the parties to account for what might be called their water-management-related program activities, there is no outcome to be held to account for.

The agreement should contain goals in one or more of several possible forms, including: a cap on and reduction in total withdrawal, a cap on and reduction in total loss, and percentage success on a sectoral basis in adhering to consumptive use efficiency targets, among other possible goals.

ARTICLE 301

INFORMATION

Withdrawal watershed location

As part of the promise to empower the public with annually updated withdrawal information, the agreement should require that each withdrawal be listed not only according to geographic location, but also by watershed at the smallest scale, usually sixth-order watershed, indexed by the given jurisdiction. This will give permitting officials and the public one of the most important pieces of context for evaluating a proposed water withdrawal, that is, the current total state of water withdrawal at the relevant scale, which is to say, the smallest scale, where withdrawals have the most potential for impacting the ecosystem.

Groundwater mapping

This section promises only the most general effort to understand the critical role of groundwater in the functioning of the Great Lakes basin ecosystem. The agreement should also promise complete groundwater mapping of the Great Lakes basin on a specific timeline.

ARTICLE 710

ENTRY INTO FORCE

Phase-in period

This section requires agreement parties to begin exercising authority over water withdrawals for in-basin use no later than ten years after the agreement “comes into force,” a date which itself is at least two years away. Such a long phase-in period risks disintegration of the commitment which lead to the agreement. The phase-in period should be five years.

APPENDIX / PROCEDURES MANUAL

Consumptive use coefficients

Return flow is the key conservation requirement of the agreement. Return flow is only as protective as the consumptive use coefficient used to determine the level of required return flow.

Part 1.1.C of the Procedures Manual refers to “generally accepted Consumptive Use coefficients.” As far as we know, scientifically speaking, there is currently no such thing. Also, under the “Criteria for Decisions” subheading of this section, the discussion of determining consumptive use coefficients is vague.

The Procedures Manual or agreement proper should mandate (not “seek to implement”) a joint project to be carried out by the members of the Regional Body for determining and updating consumptive use coefficients. The agreement should mandate the use of the resulting coefficients in setting return flow levels and in judging water conservation efforts by withdrawers and water conservation programs by jurisdictions.