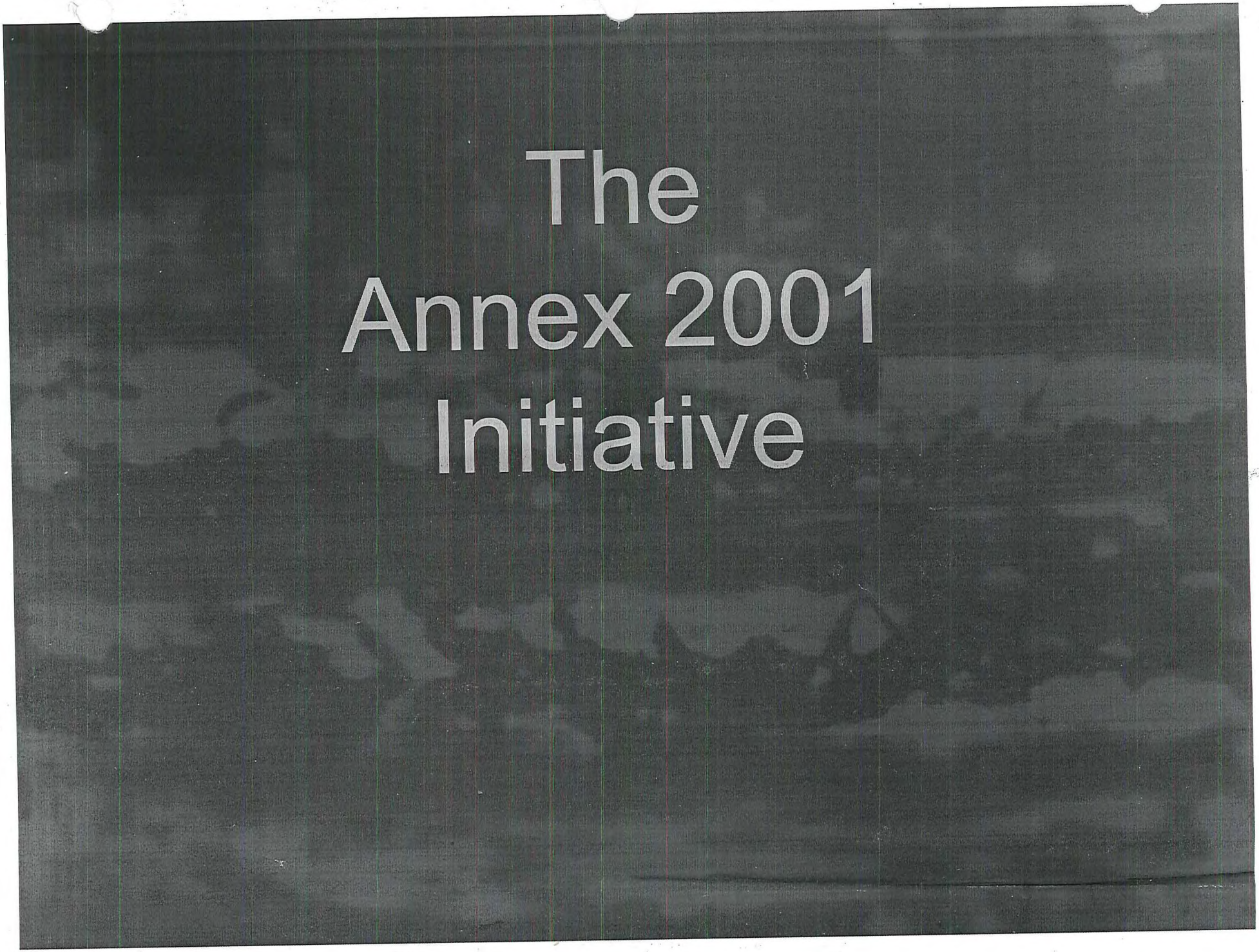
GREAT LAKES BASIN SUSTAINABLE RESOURCES AGREEMENT

RELEASE : JULY 19, 2004

CONSULTATION PERIOD - OCTOBER 18, 2004

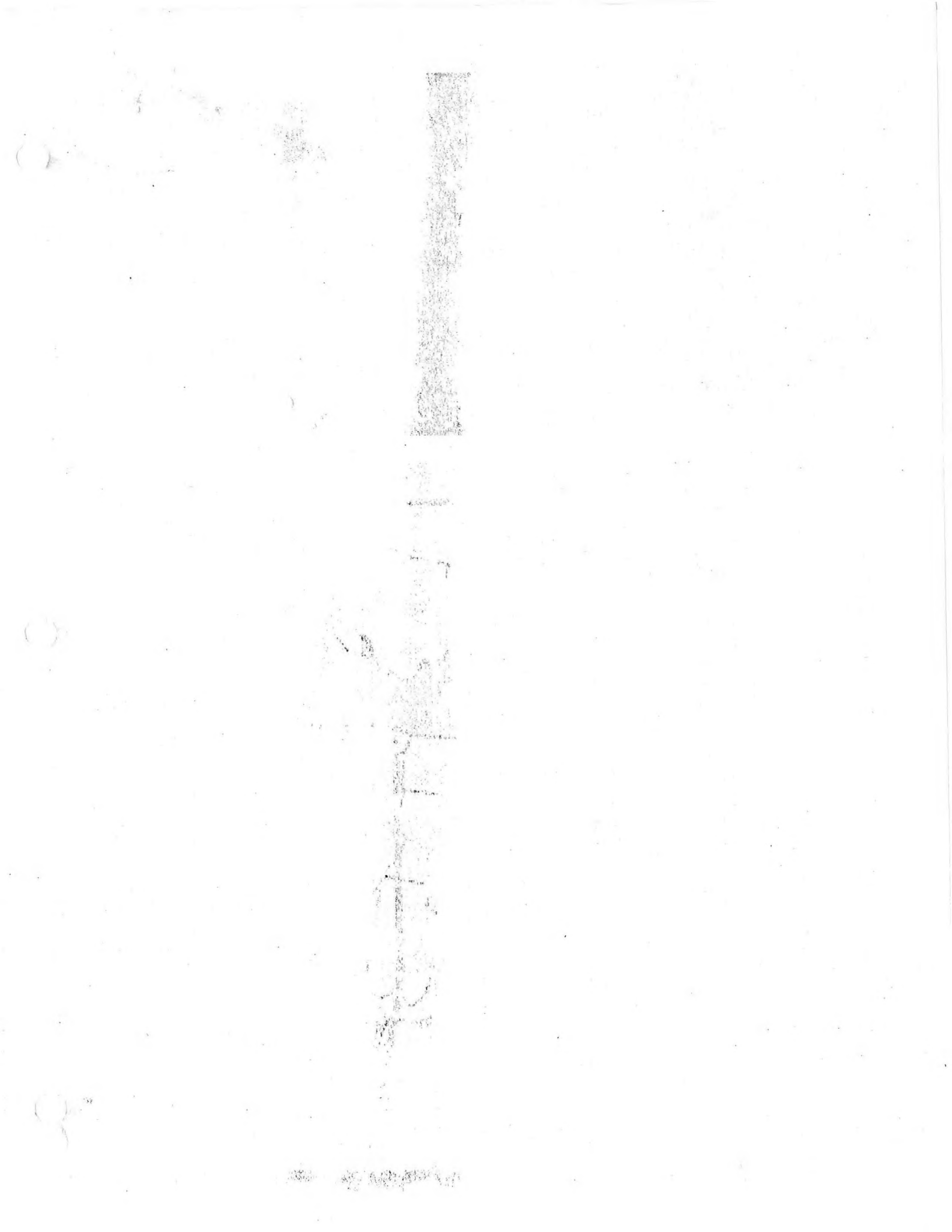

The
Annex 2001
Initiative

Great Lakes United

- Coalition of 170 organizations
- Environmental, hunter-angler, labor
- Canada, United States, First Nations
- Founded 1982
- Offices in Buffalo, Hamilton, Montréal
- Working on quantity issues since 1985

Basin water quantity landmarks

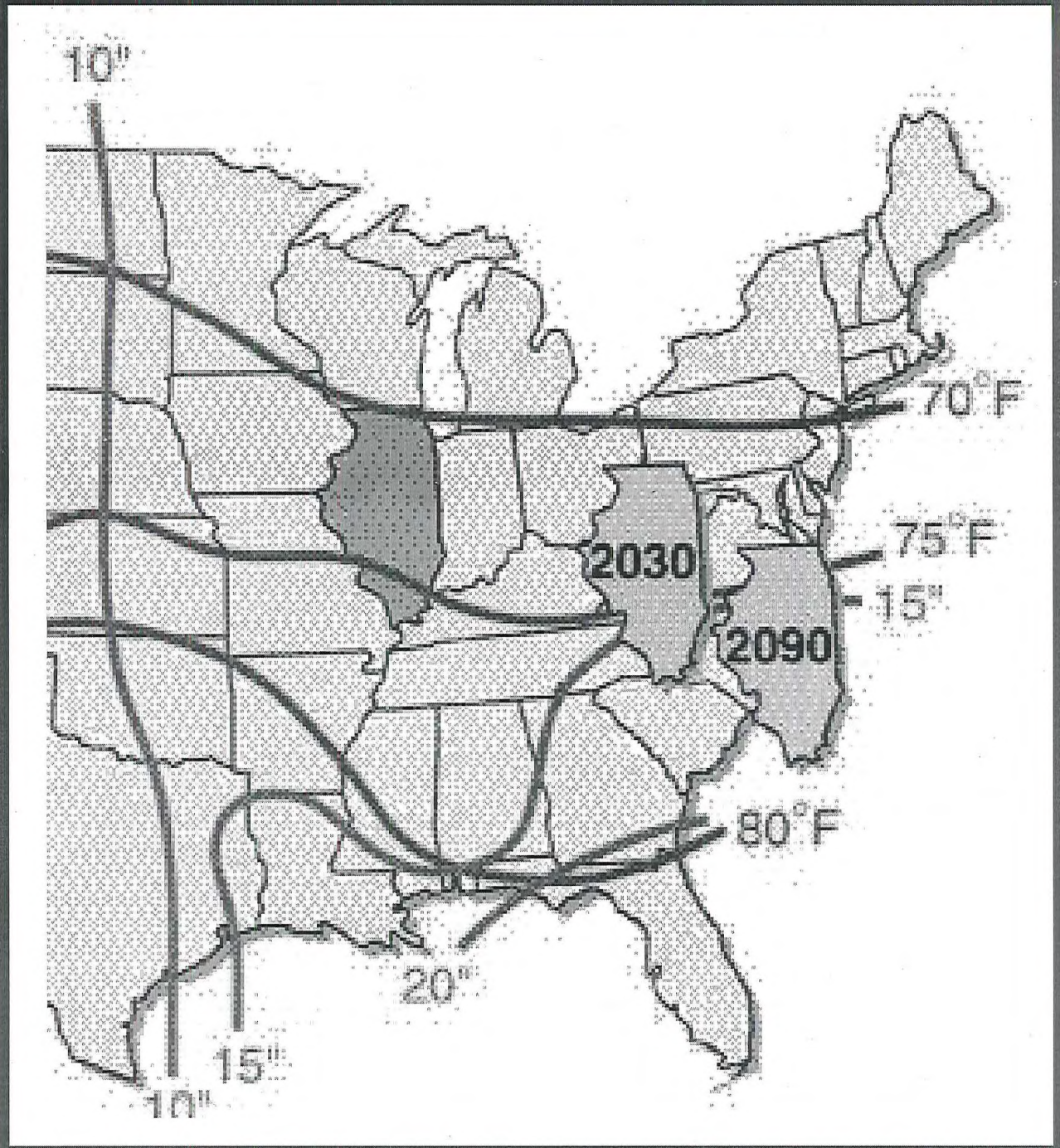
- 1909 Boundary Waters Treaty
- 1985 Great Lakes Charter
- 1986 U.S. WRDA amendment (governor veto)
- Nova Group proposal
- Canada federal / provincial diversion bans



Basin water quantity problems

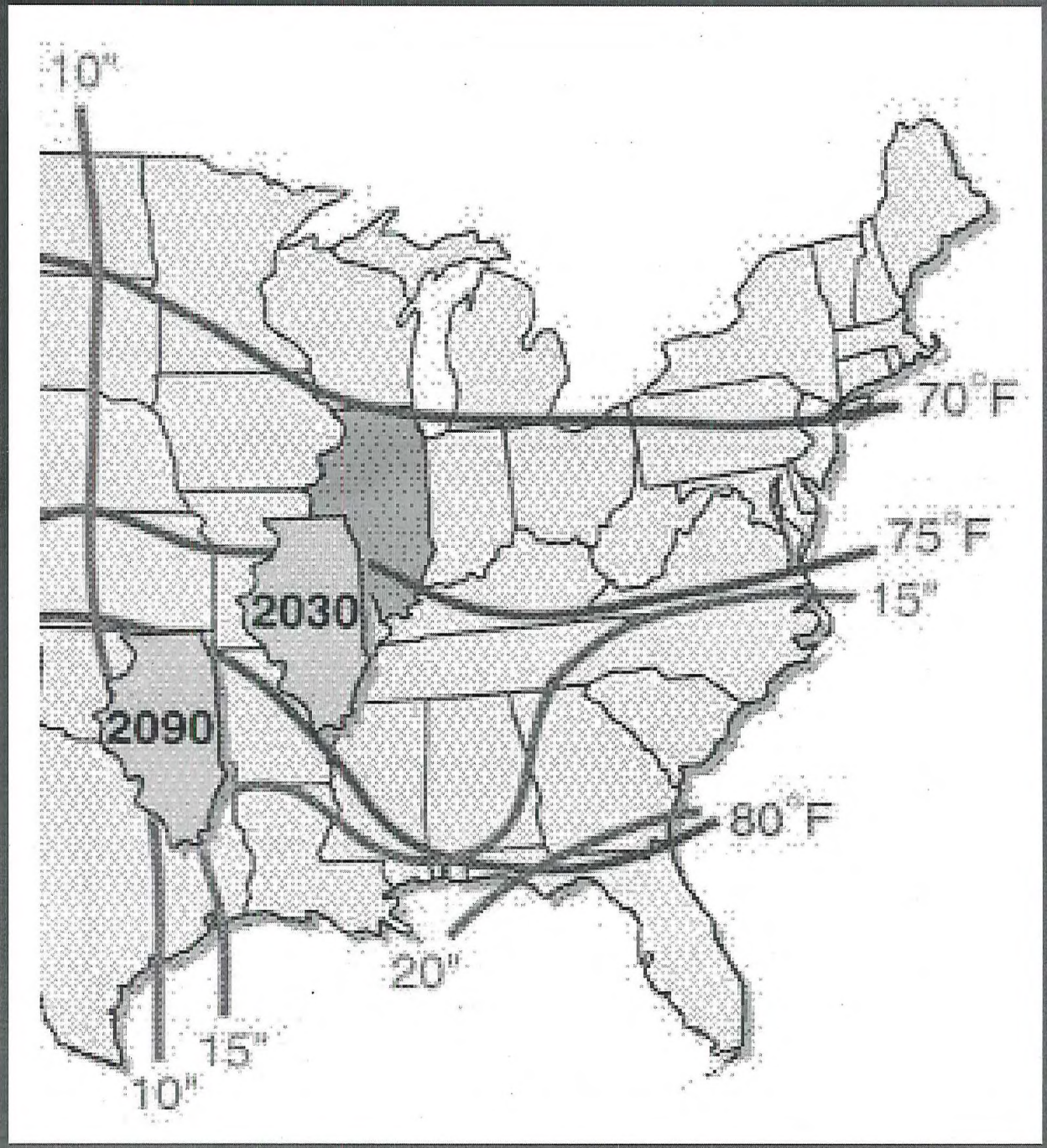
- Existing diversions
  - Chicago, Welland, Ogoki/Long Lac, Welland, London, Pleasant Prairie (WI), Akron (OH)
- Future diversions
  - Mississippi River, U.S. South municipal, U.S. Midwest agricultural, large near-basin municipal
- In-basin water takings
- Climate change

British climate change model

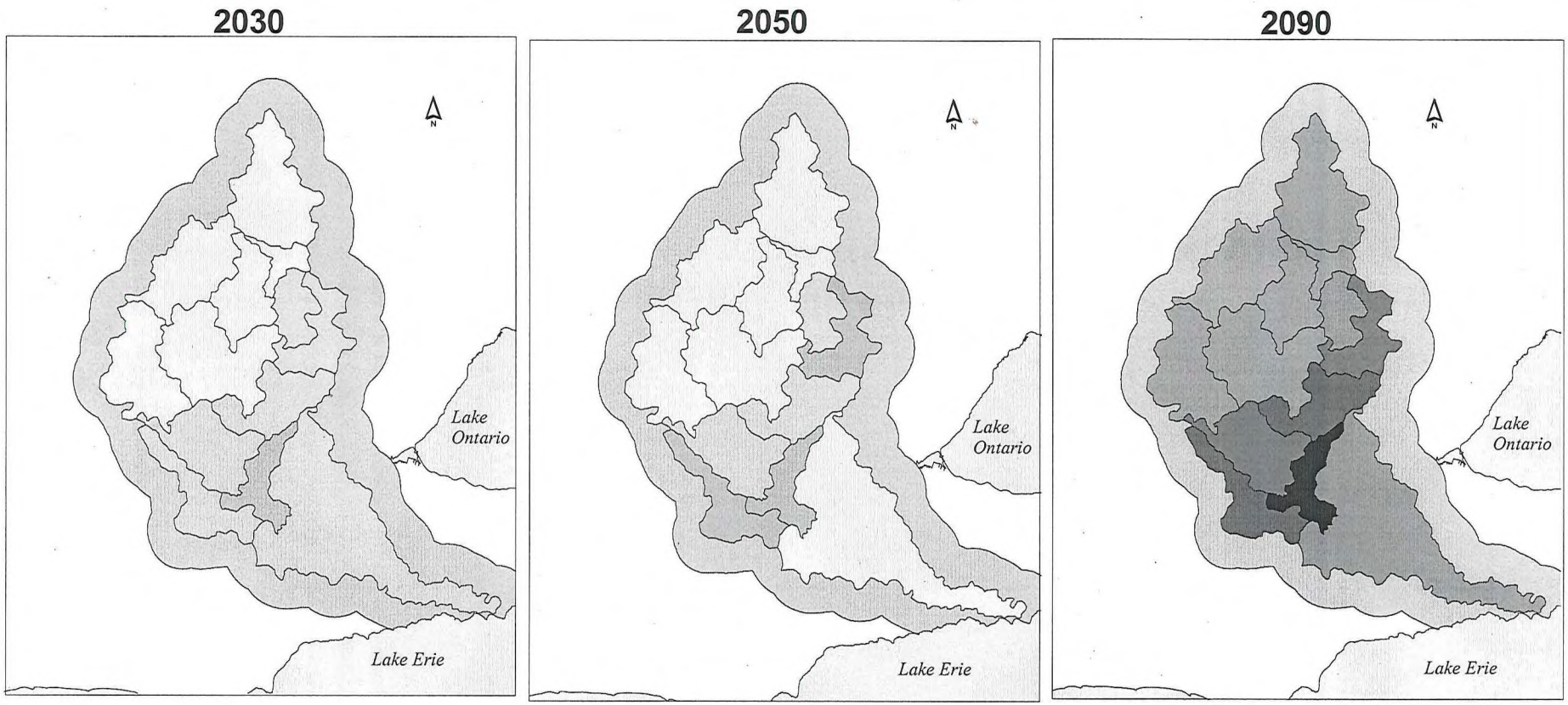




Canadian climate change model



Projected CCCma Differences in Average Groundwater Flow (mm/yr) for 2030, 2050 and 2090



Annex 2001 was prompted by . . .

- The Nova Group incident
- Outpouring of public outrage
- Legal study
  - International trade law threat
  - U.S. “Commerce Clause” law threat
  - Recommendation: judge withdrawals on the basis of ecosystem protection

. . . timeline

- Agreement concluded (possibly June 2004)
- States submit to Congress as a compact (possibly 2004)
- Ratified in state legislatures thereafter (possibly 2005)
- Passed into law in the provinces (possibly 2005)

The timeline . . .

- Draft released for public comment (best guess: February 2004)
- 60-day comment period
- Organizing / education meetings (lead groups / Great Lakes United)
- Hearings (spring 2004)
- Further state / provincial negotiations (based on comments)

New rules

- Conservation
  - "economically feasible"
  - "environmentally sound"
- No "significant adverse impact"
  - individually
  - cumulatively
- Improvement
  - "to the waters and water-dependent natural resources of the basin"

A new system for allowing water takings

- Uniform across the basin
- Binding
- Tough rules for judging proposed new or increased water withdrawals
- Public involvement

Annex 2001 promises . . .

- A binding agreement by 2004
- Apply to all new and increased withdrawals
- Ecosystem rules for withdrawing water
- Potentially significant habitat protection
- "Improvement"
  - not mitigation
  - requires no government funds

Annex 2001 is . . .

- Binational: two provinces, eight states
- Signed June 2001
- Non-binding “agreement in principle”
- Significant input by basin ENGOs

Ecosystem opportunities . . .

U.S.:

- Regulate most withdrawals for the first time

Basin:

- Reduce / prevent ecosystem damage
- Restore the ecosystem (not as mitigation)
- Region shows up on international trade agreement radar
- Unprecedented in the world

. . . and dangers

- Final agreement covers few withdrawals
- Could permit more diversions

More information

- *Water Use and Ecosystem Restoration: An Agenda*
- Web links

  Council of Great Lakes Governors: www.cglg.org

  Great Lakes United: www.glu.org

  Great Lakes Commission: www.glc.org

  Bioscience 1997, "The Natural Flow Regime," www.snre.umich.edu/glpf/naturalflowregime.pdf)

  (U.S. National Assessment: www.usgcrp.gov/usgcrp/nacc/greatlakes.htm)

Thanks to . . .

- Walter and Duncan Gordon Foundation
- The Hahn Family Foundation
- Charles Stewart Mott Foundation
- The Joyce Foundation

MNR ONTARIO NOTICE

REQUEST FOR PUBLIC COMMENT

COUNCIL OF GL GOVERNORS GREAT LAKES WATER MANAGEMENT INITIATIVE

GREAT LAKES WATER RESOURCES COMPACT

GREAT LAKES BASIN SUSTAINABLE WATER RESOURCES AGREEMENT

APPENDIX I
DRAFT DECISION MAKING STANDARD

APPENDIX II
DECISION MAKING PROCEEDURE MANUAL

IJC REFERENCE FEDERAL GOV
MAP OF GREAT LAKES BASINS FAQS ~ FACT SHEET.

CELA

PRESS

CELA-GLU-ENG-OG-ROUP

OTHER'S RESPONSES

AVERY

50,000 litres =
13,200 gallons

Development Process

The Governors and Premiers charged a Water Management Working Group (Working Group) with developing a draft proposal to implement Annex 2001. The Governors and Premiers directed the Council to facilitate this process. The Working Group consists of at least one technical representative from each jurisdiction and one representative designated by each Governor's and Premier's immediate office. For the past three years, the Working Group has been working to develop the implementing agreement(s) including a uniform, resource-based standard.

To meet the Annex commitment to develop a broad based public participation program, an Advisory Committee was created with over twenty representatives comprising a wide range of environmental, agricultural, municipal, shipping and industrial concerns. The Advisory Committee has been asked to share their expertise and provide advice throughout the Annex implementation process. In addition to the Advisory Committee, the Working Group has also sought input from a Resource Group and Observers that include representatives from federal agencies, the International Joint Commission, the Great Lakes Commission and other governmental and related organizations. Finally, the individual jurisdictions have been engaging in ongoing consultation with their relevant Tribes and First Nations while this proposal has been developed.

To facilitate dialogue with the range of interested and affected parties, the Water Management Working Group has also provided project progress reports through periodic updates posted on the Council website and e-mail communiqués.

The Proposal

The draft proposal that is now available for public comment is the result of this process. The draft proposal consists of two elements:

- The Great Lakes Basin Sustainable Water Resources Agreement (the Agreement), a good-faith agreement among the 10 Great Lakes States and Provinces; and,
- The Great Lakes Basin Water Resources Compact (the Compact), an agreement among the 8 Great Lakes States to join together in an interstate compact to enhance joint decision making about the use of Great Lakes water.

The decision making standard to be used in evaluating future new or increased water uses is included in both the Agreement and the Compact.

The Agreement includes the following chapters:

- Preamble
- General Provisions
- The Standard
- Water Management Programs Within the Jurisdictions
- Great Lakes Water Resources Regional Body
- Regional Review
- Dispute Resolution
- Final Provisions
- Appendix 1 –Decision Making Standard
- Appendix 2 - Procedures Manual

The Compact includes the following Articles:

- Short Title, Definitions, Purposes and Duration
- Organization
- Powers and Duties
- Dispute Resolution
- General Provisions
- Effectuation
- Authority to Collect Data
- Regional Review of Proposals and the Standard of Review and Decision
- Jurisdictional Programs and the Standard of Review and Decision
- Additional Provisions

The Working Group continues to examine the relationship of these agreements to any future modifications of major historical diversions. The scope of this discussion includes the role of the Regional Body, the Compact Council, the Regional Review process, the Compact Council Review process, Declarations of Finding and the Decision Making Standard.

Again, this draft proposal is a product of the Working Group to elicit public comment and input. **No final decisions on the proposal will occur until public comments have been received, reviewed and considered by the Working Group.** Following this process, the Working Group will make recommendations to the Governors and Premiers for their consideration.

Issues for Public Comment

The Working Group welcomes comments on all aspects of the draft proposal. Specific issues have been identified where comments are particularly sought to assist the Working Group:

The Agreement:

- Would you recommend changes to the Regional Review Process, including any changes that could help ensure timely, cost-effective review of water use proposals that are subject to regional review?
- Would you recommend changes related to public participation?

The Compact:

- What is your recommendation for voting on New or Increased Diversions of 1 million gallons per day or greater average over any 120-day period and New or Increased Consumptive Uses of 5 million gallons per day or greater average over any 120-day period? Note: The draft proposal would require unanimity among those who register their vote to approve New or Increased Diversions of 1 million gallons per day or greater average over any 120-day period and a super-majority for New or Increased Consumptive Uses of 5 million gallons per day or greater average over any 120-day period.
- Would you recommend changes related to public participation?
- What recommendations do you have for enforcing the terms of the Compact?

Decision Making Standard (Agreement and Compact):

- Would you recommend making changes to the threshold levels for regional review? Note: The draft proposal would subject New or Increased Diversions of 1 million gallons per day or greater average over any 120-day period and New or Increased Consumptive Uses of 5 million gallons per day or greater average over any 120 day period to regional review by all ten jurisdictions. Other proposals would be reviewed by the jurisdiction in which the proposal originates.
- Would you recommend making changes to the requirements included in the Decision Making Standard for determining the adequacy of proposed improvements to the Waters and Water-Dependent Natural Resources of the Great Lakes Basin?
- Would you recommend making changes to the averaging period used to determine the volume of a proposed water use? Note: The draft proposal includes a 120-day averaging period.
- Would you recommend making changes to the definition of "Existing Water Users"? Note: In the draft proposal, this definition is used for determining which new or increased water uses would be subject to the Decision Making Standard.

Public Comment Period

The public comment period on the draft proposal begins on July 19, 2004 and will last for 90 days. The Council will conduct public meetings in Chicago, Illinois on September 8 and in Toronto, Ontario on September 20. The States, Ontario and Quebec will hold public meetings during the public comment period as well.

Comments are requested in the form of recommendations. Because of the number of comments expected, we are unable to send individual responses.

Written comments on the proposal should be sent to:

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

Comments may also be submitted via e-mail to:

Annex2001@cglg.org

Comments can also be submitted online via the Council of Great Lakes Governors' website at http://www.cglg.org. Comments submitted in this manner will also be available for public viewing on our website.

Council of Great Lakes Governors

Fact Sheet: Protecting the Great Lakes through the Annex Implementing Agreements

What we are doing:

- The eight Great Lakes Governors and the Premiers of Ontario and Quebec have come together to create unprecedented protections for the Great Lakes Basin.*
- Through the Council of Great Lakes Governors, the staffs of the Governors and Premiers have worked closely with an Advisory Committee including agricultural, industrial, shipping, municipal, and environmental interests and consulted with Tribes and First Nations to arrive at the best possible protections.

Why we are doing it:

- There are potential threats to the waters of the Great Lakes, and they promise to increase. We are looking ahead and taking protective steps to avoid potential conflicts and shortages and to protect the Great Lakes environment for future generations.
- The Great Lakes resource is critical to our economy, including manufacturing, tourism, agriculture and power supply. We must use the water wisely to help ensure that it remains at healthy levels to maintain a lasting competitive economic advantage in our region.
- These protections ensure that authority over the Great Lakes Basin remains in the region and that the Governors and Premiers are recognized as the primary decision makers and protectors of this valuable resource.

Where we go from here:

- An opportunity for public comment will begin when the draft agreements are released this summer, and will last at least ninety days. There will be multiple public meetings to discuss the documents and receive comments, including regional meetings in Chicago and Toronto. Written comments may also be sent to the Council of Great Lakes Governors or posted publicly on the Council's Web site, www.cglg.org.
- Following the public comment period, the staffs of the Governors and Premiers will determine changes based on public feedback.
- The Governors and Premiers will sign the final agreement, which will provide the framework for each State and Province to pass laws that will protect the Great Lakes Basin today and for future generations.

** The "Great Lakes Basin" is the watershed of the Great Lakes and the St. Lawrence River upstream from Trois-Rivières Québec. This region includes the geographic areas surrounding each body of water where water drains toward the Lakes and the River.*

Council of Great Lakes Governors

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COUNCIL OF GREAT LAKES GOVERNORS

Through the Council of Great Lakes Governors, the region is now setting the pace in the global marketplace and protecting the world's largest single source of fresh water.

Projects

Great Lakes Water Management Initiative

Annex 2001 Implementing Agreements

Representing the eight Great Lakes Governors and the Premiers of Ontario and Quebec, Governor Bob Taft of Ohio and Governor Jim Doyle of Wisconsin, Co-Chairs of the Council of Great Lakes Governors, announced on July 19 the beginning of a 90-day public review period for the draft Annex 2001 Implementing Agreements. The draft Agreements were created to update the way the Great Lakes and the waters of the Great Lakes Basin are managed and protected.

Comments are requested in the form of recommendations. Because of the number of comments expected, we are unable to send individual responses. Written comments on the proposal should be sent to:

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

Great Lakes Water Management Initiative Mer

- ★ Overview
- ★ Legal Structure
- ★ Water Management Working Group Meeting Summaries
- ★ Annex 2001 Implementing Agreements
- ★ Public Commer
- ★ Links/Downloac
- ★ Related Documents

To View the Adobe Acro use the download link t

Get Adobe Acroba Reade



Comments may also be submitted via e-mail to: Annex2001@cglg.org

Comments can also be submitted online. Comments submitted in this manner will also be available for public viewing on our website.

DRAFT ANNEX 2001 IMPLEMENTING AGREEMENTS

- Introductory Statement to the Annex 2001 Implementing Agreements
  - English
  - French
- Draft Great Lakes Basin Sustainable Water Resources Agreement
  - English
  - French
- Draft Great Lakes Basin Water Resources Compact
  - English
  - French

BACKGROUND DOCUMENTS

- For additional information in French, please visit: http://www.menv.gouv.qc.ca/eau/grandslacs/index.htm
- July 19, 2004 Press Release
- Fact Sheet: Protecting the Great Lakes through the Annex Implementing Agreements
- Frequently Asked Questions-Annex 2001 Implementing Agreements
- Background: About the Annex Implementing Agreements
- Great Lakes Basin Map

PUBLIC COMMENTS

- Public Meetings Schedule *(Comming Soon)*
- Submit a comment via the Council's web form
- View submitted comments

Last Updated on July 19.

Regional Leadership ★ Global Impact

KEY Spreadsheet Adobe .pdf Word File Text File External Link

Any Concerns or Problems Regarding CGLG.org's web site Please Report Them Here.

Frequently Asked Questions—Annex 2001 Implementing Agreements

COUNCIL OF GREAT LAKES GOVERNORS

What is the Great Lakes Charter Annex?
The Great Lakes Charter Annex (Annex) is an agreement signed by all eight Great Lakes Governors as well as the Premiers of Ontario and Quebec in 2001 to help protect, conserve, restore and improve the Great Lakes Basin* for future generations.

Why was the Annex created?
There are many threats to the waters of the Great Lakes Basin and they promise to increase. The Great Lakes Basin waters are critical to the health of our region and its economy. The Governors and Premiers created the forward-looking Annex to take steps that will help avoid conflicts and shortages in the future and protect the resource and related ecosystems.

What does the Annex do?
The Annex was the first part of a two-step process. It updated the way the Great Lakes Basin should be protected. However, it did not outline the specifics of how to protect it. After signing the Annex, the Governors and Premiers identified the second step, creating a plan to put the Annex in motion, which would include a common decision-making standard.

What's next?
Since the signing of the Annex, the Governors' and Premiers' staffs have been developing agreements to create a management process for regulating water diversions and withdrawals from the Great Lakes Basin. These agreements will ensure that authority over the Great Lakes remains with the Governors and Premiers. Once signed, the new agreements will provide the framework for each State and Province to pass laws that will protect the Great Lakes Basin.

Who else is involved?
This process has involved a wide range of interested parties participating on the Advisory Committee. Participants range from the environmental and business communities to the agriculture, municipal water supply and shipping industries. Additionally, the Governors' and Premiers' staffs have consulted the Tribes and First Nations throughout the region.

Is this really necessary?
Absolutely. Threats to the water levels of the Great Lakes will undoubtedly increase in the future and we must act now to put the proper measures in place so we are prepared to deal with them.

What does all of this mean for me?
The new agreements will protect the waters of the Great Lakes Basin now and into the future. They will help ensure the Great Lakes remain at safe and healthy levels for future generations.

What happens after the draft agreements are released?
Beginning this summer, there will be regional, State and Provincial public meetings. These meetings will be an opportunity for everyone to view and comment on the work that has been done thus far. Once the public comments have been taken into account, the Governors and Premiers will revise and sign the final agreements.

**The Great Lakes Basin is the region of the Great Lakes and the St. Lawrence River (upstream from Trois-Rivières, Québec) surrounding each body of water, where water drains toward the Lakes and the River.*

June 2004

Council of Great Lakes Governors

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"'Michael Donohue'" <mdonahue@glc.org>,
"Norm Grannemann" <nggranne@usgs.gov>,
"'Stephen Brandt'" <stephen.b.brandt@noaa.gov>,
"'Tracy Mehan'" <mehan.gtracy@epa.gov>
Subject: July 16 Conference Call of the Advisory Committee, Resource Group and Observers
Date: Wed, 14 Jul 2004 17:12:04 -0500
thread-index: AcRpJYsHAJSf48IJT12/sbK8vVgiTgAuNy6g

Good afternoon: As follow-up to yesterday's e-mail, we will be holding a conference call with members of the Advisory Committee, Resource Group and

Observers this Friday, July 16, from 2:00 p.m. to 3:30 p.m. EDT. The call in number is 706-758-0607, and the passcode is 9343903918#. The primary purpose of this call will be to review the draft agreements developed by the Water Management Working Group to implement the Great Lakes Charter Annex 2001 and answer any questions you may have prior to the public release. Consistent with our agreed upon policy, we would ask that you please keep these materials confidential and not distribute them before they are released to the public on July 19.

The agenda for Friday's call is as follows:

1. Roll Call.

2. Discussion of calendar and upcoming events (Sam Speck, Chair, Water Management Working Group).

3. Overview of draft Annex implementing agreements (Sam Speck, Chair, Water Management Working Group).

a. Introductory Statement.

News Release
Communiqué

Ontario

Ministry of Natural Resources **Ministère des Richesses naturelles**

For Immediate Release
September 23, 2004

ONTARIO INVITES PUBLIC COMMENTS ON DRAFT AGREEMENTS TO PROTECT GREAT LAKES WATERS

Province Negotiating With Great Lakes Bordering Jurisdictions: Quebec and Eight States

TORONTO — The Ontario Government is working to ensure negotiations to protect the Great Lakes will strengthen controls on water uses in the Great Lakes Basin, Natural Resources Minister David Ramsay announced today.

"Ontario needs to be part of these negotiations to achieve the best possible protections basin-wide," said Ramsay. "The Great Lakes are a shared resource. By having a voice at the table we can ensure Ontarians' interests are reflected in the final agreements."

The Ontario government supports the general intent of the draft agreements with Quebec and the eight Great Lakes states. The draft agreements include the establishment of a minimum environmental standard for regulating water uses across the basin. There is currently no such standard. The standard would significantly strengthen the control of water uses in many of the Great Lakes states and involve the public and Aboriginal communities in future decisions about water use. Ontario will continue to prohibit water transfers out of the province's three major water basins.

Public meetings have already taken place in Thunder Bay, Sault Ste. Marie, Toronto, Windsor and London. Input received from citizens will help Ontario continue its leadership role as the negotiations progress. "We are pleased by the number of responses so far," said Ramsay. "We want to remind citizens that we will continue to welcome their comments until October 18."

The province is holding another public meeting in Kingston on September 28 from 7 to 9 p.m., as well as meetings with Aboriginal communities and stakeholders on the draft agreements. An overview of the draft agreements will be presented at the meetings, and attendees will be invited to comment and ask questions. Citizens may also forward comments by e-mail to greatlakesannex@mnr.gov.on.ca, through the Environmental Bill of Rights Registry, or by mail. Mailing details and the meeting location are available at http://www.mnr.gov.on.ca/mnr/water/greatlakes/index.html.

"The waters of the Great Lakes Basin are a precious natural resource, vital to the environment and prosperity of the region," said Ramsay. "Our goal is to protect that resource to ensure future generations can enjoy the Great Lakes."

-30-

Contacts:
Media calls only:
Ginette Albert
Minister's Office
(416) 324-2212

Steve Payne
Ministry of Natural Resources
(416) 314-2103

Disponible en français

Ministry of
Natural Resources

Ministère des
Richesses naturelles

Ontario

Natural Resource Management Division
Lands and Waters Branch
P.O. Box 7000, 300 Water Street
Peterborough, ON K9J 8M5
Telephone: (705) 755-1620
Fax: (705) 755-1201

Division de la gestion des richesses naturelles
Direction des terres et eaux
C.P. 7000, 300, rue Water
Peterborough (Ontario) K9J 8M5
Téléphone : (705) 755-1620
Télécopie : (705) 755-1201

August 30, 2004

Ms. Sarah Miller
Canadian Environmental Law Association
Suite 301
130 Spadina Ave.
Toronto, ON M5V 2L4

RECEIVED SEP - 2 2004

Dear Ms. Sarah Miller,

RE : Public Meetings on Draft Great Lakes Charter Implementing Agreements

As follow up to our letter of July 26 2004 regarding the release of draft agreements to implement the Great Lakes Charter Annex, we would like to inform you of the public meetings that will be taking place throughout the province.

Attached you will find a list of Ontario public meetings, at which Ministry staff will be providing an overview of the draft Agreements, followed by questions and answers. An opportunity will also be provided for those of you that wish to share your perspectives on the draft agreements.

We invite you to participate in the public meetings and to comment on the draft agreements. If you are unable to attend a meeting but wish to provide written comments, copies of the agreements and details on how to comment can be accessed at the Ministry's dedicated web page http://www.mnr.gov.on.ca/mnr/water/greatlakes/index.html or by contacting Danielle DuMoulin at (705) 755-1827.

If you have any questions or wish to discuss the agreements, please contact Paula Thompson at (705) 755-1218 or at paula.thompson@mnr.gov.on.ca.

Sincerely,

Rob Messervey
A/Director
Lands and Waters Branch

b. Draft Great Lakes Basin Sustainable Water Resources Agreement.

c. Draft Great Lakes Basin Water Resources Compact.

4. Questions and discussion.

5. Adjourn.

In advance of the call, please find the following documents to be discussed.

1. Introductory Statement.

2. Draft Great Lakes Basin Sustainable Water Resources Agreement.

3. Draft Great Lakes Basin Water Resources Compact.

4. Fact Sheet.

5. FAQ Sheet.

6 reat Lakes Basin map.

We are also preparing a press release and a background information document that will be available on July 19. As always, if you have any questions or

comments, please do not hesitate to contact us. We look forward to speaking with you on Friday. Dave

David Naftzger

Executive Director

Council of Great Lakes Governors

35 E. Wacker Drive, Suite 1850

C. igo, Illinois 60601

Phone: 312-407-0177

Fax: 312-407-0038

E-mail: dnaftzger@cglg.org

ONTARIO PUBLIC MEETINGS
GREAT LAKES CHARTER, ANNEX DRAFT AGREEMENTS

Monday, September 13, 2004 - Thunder Bay
Public meeting 7:00pm-9:00pm
Victoria Inn, 555 West Arthur Street Kensington Room
Phone: (807) 577-8481 Website: www.victoriainn.ca/ThunderBay/

Tuesday, September 14, 2004 - Sault Ste. Marie
Public meeting 7:00pm-9:00pm
Water Tower Inn, 360 Great North Road Courtyard Room
Phone: (705)949-8111 Website: www.watertowerinn.com

Monday, September 20, 2004 - Toronto
Public Meeting and Open House 5:00pm-9:00pm(Presentations at 6 pm)
Regional Meeting Hosted by the Council of Great Lakes Governors
Novotel Toronto Centre, 45 The Esplanade Champagne and Alsace Ballrooms
Phone: (416) 367-8900 Website: www.novotel.com

Tuesday, September 21, 2004 – Windsor
Public meeting 7:00pm-9:00pm
Ramada Plaza Hotel and Suites, 430 Ouellette Ave. Guard Room
Phone: (519) 256-4656 Website: www.ramadawindsor.com

Wednesday, September 22, 2004 - London
Public meeting 7:00pm-9:00pm
Best Western Lamplighter Inn, 591 Wellington Road S. Chelsea 1 Room
Phone: (519) 681-7151 Website: www.lamplighterinn.ca

Tuesday, September 28, 2004 - Kingston
Public meeting 7:00pm-9:00pm
Ambassador Resort Hotel,1550 Princess St. London Room
Phone: (613) 548-3605 Website: www.ambassadorhotel.com

SM

Ministry of
Natural Resources

Natural Resource Management Division
Lands and Waters Branch
P.O. Box 7000, 300 Water Street
Peterborough, ON K9J 8M5
Telephone: (705) 755-1812
Fax: (705) 755-1627

Ministère des
Richesses naturelles

Ontario

Division de la gestion des richesses naturelles
Direction des terres et eaux
C.P. 7000, 300, rue Water
Peterborough (Ontario) K9J 8M5
Téléphone : (705) 755-1812
Télécopie : (705) 755-1627

July 26, 2004

RECEIVED AUG 0 3 2004

Ms. Sarah Miller
Canadian Environmental Law Association
Suite 301
130 Spadina Ave.
Toronto, ON
M5V 2L4

Dear Ms. Sarah Miller,

I am writing to inform you of the progress being made to protect and conserve the waters of the Great Lakes Basin and to seek your input.

Ontario has been actively working with the governments of Quebec and the eight Great Lakes states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin) to develop agreements to cooperatively protect the waters of the Great Lakes Basin. The final agreements, once signed by the Great Lakes premiers and governors, will implement commitments made when they signed the *Great Lakes Charter Annex* in 2001.

I am pleased to inform you that on July 19th 2004 the Minister of Natural Resources, David Ramsay announced the public release of the draft agreements for a 90-day public review period, which continues until October 18th 2004. The draft *Great Lakes Basin Sustainable Water Resources Agreement* sets out a minimum environmental standard for provinces and states to manage and regulate proposed water uses and a process for the "regional review" of major diversion and consumptive water use proposals against the standard.

Ontario is committed to strong protection for watersheds and the conservation of water. Through the draft agreements Ontario hopes to achieve a stronger minimum level of protection and water use regulation by all jurisdictions throughout the Great Lakes Basin. The province will maintain its prohibition of water transfers out of the Great Lakes Basin and Ontario's other major water basins. As well, Ontario recently proposed tough new rules for water takings.

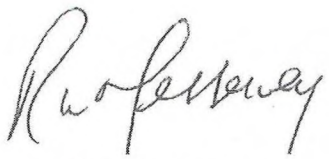
I have enclosed a copy of the news release and backgrounder which provides a brief overview of the draft agreements. Further information, including copies of the draft agreements themselves, may be accessed through the following

dedicated Ministry of Natural Resources website at http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/index.html. The draft agreements have also been posted to the Environmental Bill of Rights Registry, accessible through the above website. If you prefer, you may request a copy of the draft agreements by contacting Danielle Dumoulin at (705)755-1827.

We are interested in your perspectives on this effort to cooperatively protect our shared Great Lakes Basin waters and encourage you to comment on the draft agreements. The views of the public, stakeholders and First Nations peoples are vital to ensuring the final agreements meet the needs of Ontarians. Ontario will be holding meetings throughout the province through the month of September to discuss the proposal and seek public input. As well, the Council of Great Lakes Governors will host a public meeting in Toronto on September 20th, 2004. Details about these meetings will follow.

If you have any questions or would like further information regarding the draft agreements to implement the *Great Lakes Charter Annex*, please contact Paula Thompson at (705) 755-1218.

Sincerely,



Rob Messervey
A/Director
Lands and Waters Branch

News Release
Communiqué

Ontario

Ministry of Natural Resources | Ministère des Richesses naturelles

For Immediate Release
July 19, 2004

McGUINTY GOVERNMENT TO PROTECT GREAT LAKES
Seeks Public's Input To Ensure Draft Agreements Succeed

TORONTO — The Ontario government is seeking public comment on draft agreements negotiated with Quebec and the eight Great Lakes states to protect and conserve Great Lakes Basin waters, Natural Resources Minister David Ramsay announced today.

"Our government recognizes the need to protect Great Lakes Basin waters," said Ramsay. "With these agreements, we are ensuring that future generations will enjoy the Great Lakes."

The draft agreements would implement commitments made in the 2001 Great Lakes Charter Annex to help protect, conserve and restore the Great Lakes Basin for future generations. These include establishing a minimum environmental standard for regulating water uses across the basin.

Ontario, Quebec and the eight Great Lakes states have all committed to strengthening the regulation of water uses, collaborating on reviews of major water uses and on diversions (where water is transferred from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lakes into that of another) and requiring water users to practise conservation and treat and return water after its use.

"The views of our citizens are vital to ensuring the final agreements meet the needs of Ontarians," said Ramsay. "We will continue our dialogue with the other jurisdictions, while seeking public input on how to address potential changes to historical water diversions in the Great Lakes system."

"With the public's input, we will protect our environment and strengthen our communities, providing Ontarians with a quality of life that is second to none," said Ramsay.

-30-

Contacts:
Ginette Albert
Minister's Office
(416) 314-2212
(647) 227-5747 (Cell)

Steve Payne
Ministry of Natural Resources
(416) 314-2103

Disponible en français

www.mnr.gov.on.ca

Backgrounder
Document d'information

Ontario

Ministry of Natural Resources Ministère des Richesses naturelles

July 19, 2004

McGUINTY GOVERNMENT PROTECTS GREAT LAKES

Ontario's Position

Ontario is committed to strong protection for watersheds and the conservation of water. It has prohibited water transfers out of the province's three major water basins and recently proposed tough new rules for water takings in Ontario.

Through Ontario's leadership and collaborative discussions, the eight Great Lake states, Quebec and Ontario have made important commitments. The draft agreements propose that the provinces and states strengthen the regulation of water uses by all jurisdictions, collaborate on state-provincial reviews of major water uses and diversions, and require water users to practise conservation and treat and return water to the basin after use. These combined commitments will increase the protection, conservation, restoration and improvement of Great Lakes Basin waters for future generations.

The province supports the general intent of the draft agreements and recognizes the importance of regional cooperation in conserving and protecting Great Lakes Basin waters. The province believes further dialogue with the other parties is needed to help resolve outstanding issues. These include how the agreements will deal with any future proposals to change major historical diversions like the Chicago Diversion, as well as other issues that may arise during the public consultation.

Great Lakes Charter

The Great Lakes Charter is a good-faith agreement signed in 1985 by the premiers of Ontario and Quebec and the governors of the eight Great Lakes states (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin). The charter aims to protect and conserve the waters of the Great Lakes Basin.[1] It was developed in response to shared concerns about threats to Great Lakes waters from proposals to divert large quantities of water out of the basin, and is intended to help avoid future conflicts and shortages.

Through the charter, the provinces and Great Lakes states have consulted with each other on proposals for major diversions or consumptive water uses. They have also shared information on water use.

Great Lakes Charter Annex

Renewed concerns about proposals to export water in bulk led to the development of a supplementary agreement to the Great Lakes Charter known as the Great Lakes Charter Annex. Signed in 2001 by the same 10 parties (two provinces and eight states), the annex reinforced the principles of the Great Lakes Charter. The parties committed themselves to working out more binding protections within three years, including the development of an environmental standard on which to base decisions on water use.

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[1] The Great Lakes Basin is the watershed of the Great Lakes and the St. Lawrence River upstream from Trois-Rivières, Quebec. The basin includes the geographic areas surrounding each body of water in which water drains toward the Great Lakes or the St. Lawrence River.

Draft Great Lakes Charter Annex Implementing Agreements

The two **draft** agreements released today are intended to implement the Great Lakes Charter Annex. One, called the Great Lakes Basin Sustainable Water Resources Agreement, involves all 10 parties. It is a good-faith agreement which each province and state will seek to implement by developing or modifying appropriate laws and regulations for their jurisdiction. The other, known as the Great Lakes Basin Water Resources Compact, is a binding agreement among the eight Great Lakes states.

Once they are signed, the agreements will set out the minimum environmental standard for provinces and states to manage and regulate proposed water uses. The standard will also be used to guide the review of regionally significant proposals by all 10 jurisdictions. The draft standard is based on the following proposed criteria:

- No reasonable alternative to the proposed use, such as conserving existing water supplies;
- Withdrawal limited to reasonable quantities for intended purposes;
- All water withdrawn returned to the same Great Lake watershed, less an allowance for consumptive use;
- No significant adverse individual or cumulative impacts;
- Conservation plan (for major proposals) or measures;
- Proposals for measures to improve the physical and biological integrity of the basin (for major proposals); and
- Compliance with applicable laws and agreements (for example, Ontario's Water Taking and Transfer Regulation, and the federal International Boundary Waters Treaty Act).

The draft agreements also propose to set up a regional body that would review major proposals for water use against the minimum environmental standard, and would monitor the implementation of the agreement. The proposed process to be used by the regional body for reviewing major proposals for water use includes guidelines for:

- public participation;
- notification of First Nations and Tribes in the Great Lakes Basin;
- technical evaluation of proposals using the environmental standard;
- consensus-building and dispute resolution among the 10 jurisdictions; and
- the issuance of public statements regarding whether proposals meet the standard.

Through the draft agreements, the parties also commit to develop programs to encourage water conservation and a system to enhance the gathering and sharing of scientific information.

Public Consultation on Draft Agreements

The two draft implementing agreements are being released on July 19 in all 10 jurisdictions for a 90-day public consultation. Comments received from the public will be considered in negotiating the final agreements. Once the premiers and governors sign the final implementing agreements, each province and state will seek to implement them by developing or modifying appropriate laws and regulations for their jurisdiction. The states will pass the Great Lakes Basin Water Resources Compact into law.

Through the consultation, Ontario is seeking the views of the public, stakeholders, First Nations and others to help it successfully negotiate the final agreements. Comments can be shared with the Ministry of Natural Resources and the Council of Great Lakes Governors.

The draft agreements are posted for 90 days on the Environmental Bill of Rights Registry for public comment at www.ene.gov.on.ca/envision/env_reg/ebr/english/index.htm. Enter Registry Number PB04E6018. Ontario will hold several public meetings across the province at locations and times to be announced. The Council of Great Lakes Governors will hold a public meeting in Toronto on September 20.

People who wish to comment on the draft agreements should contact the Council of Great Lakes Governors directly by e-mail at Annex2001@cglg.org (electronic comments will be posted to the Council of Great Lakes Governors website at http://www.cglg.org), by fax at (312) 407-0038, or by mail at:

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

Comments should also be sent to the Ontario Ministry of Natural Resources by fax at (705) 755-1267, or by mail at:

Annex Implementing Agreements
Water Resources Section
Ministry of Natural Resources
5th Floor, Robinson Place, South Tower
300 Water Street, P.O. Box 7000
Peterborough, ON K9J 8M5

Materials on the draft agreements may be viewed at:
http://www.mnr.gov.on.ca/MNR/EBR/gl_charter/index.html .

-30-

Contact:
Steve Payne
Ministry of Natural Resources
(416) 314-2103

Disponible en français

October 8, 2004

RE: Invitation to attend Stakeholder Dialogue October 22, 2004

Draft Agreements to Implement the Great Lakes Charter Annex

On July 19, 2004, Minister of Natural Resources David Ramsay announced the release of two draft agreements to implement the Great Lakes Charter Annex of 2001. October 18th will conclude a 90 day public consultation period throughout the Great Lakes Basin regarding the proposed draft agreements. The Ministry of Natural Resources has received many comments through public and aboriginal community meetings across the province and the Environmental Bill of Rights Registry posting, and expect to receive more as the closing date approaches.

Concluding the consultation period, the Ministry would like to conduct a follow up dialogue with key stakeholders in the basin to further discuss the draft agreements and the comments we have received. This session will provide an opportunity for you to discuss your views in a collaborative forum and to share your thoughts and ideas on the path ahead.

We do need to respect the 90 day public review period and encourage all stakeholders to comment by October 18th. To make this a little easier, we are now accepting email comments at <mailto:greatlakesannex@mnr.gov.on.ca> greatlakesannex@mnr.gov.on.ca.

- 925 DIXON ROAD -

We would like to invite you to attend this meeting being held Friday October 22nd at the Travelodge Hotel Toronto Airport from 10 am to 4 pm. P' e confirm your attendance or that of an alternate representative by Friday October 15th to Danielle DuMoulin at (705)755-1827 or by email at danielle.dumoulin@mnr.gov.on.ca.

If you require further information in relation to the agreements, please visit the Ministry's web page at http://www.mnr.gov.on.ca/mnr/water/greatlakes/index.html, or contact Paula Thompson at (705)755-1812 or by email at p .thompson@mnr.gov.on.ca

Sincerely,

Rob Messervey

A/Director

Lands and Waters Branch

Reflecting Working Group Discussion –May 11-13

DECISION-MAKING STANDARD FRAMEWORK

<table>
<tr><th rowspan="2">Thresholds</th><th colspan="2">DECISION MAKING CRITERIA</th></tr>
<tr><th>DIVERSIONS</th><th>WITHDRAWALS, CONSUMPTIVE USES</th></tr>
<tr><td>5 + mgd[2] (19 mld)</td><td colspan="2">Regional Review, Based on <u>Full Standard</u> for Diversions 1+ mgd and Consumptive Uses 5+ mgd[1]:

A. No reasonable alternative, including conservation of existing supplies (for consumptive uses – analysis restricted to conservation)
B. Limited to quantities that are reasonable for the intended purpose
C. All water returned to same Great Lake watershed, less a consumptive use allowance. Preference given to return flow to source watershed
D. No significant adverse impacts (individual, cumulative)
E. Conservation plan demonstrating Environmentally Sound and Economically Feasible Water Conservation Measures
F. Resource Improvement Proposal
G. In compliance with all applicable laws and agreements

Vote of U.S. Interstate Compact Council:
- Diversions: unanimous
- Consumptive uses: supermajority</td></tr>
<tr><td>3 to 5 mgd[2] (11.4 - 19 mld)</td><td></td><td rowspan="3">State, Provincial Management, Regulation of Withdrawals over 100,000 gallons per day

Phase-in[3] of State, provincial management/ regulation of withdrawals over 100,000 gpd, based on Full Standard <u>excluding</u>:
- analysis of alternatives restricted to conservation of existing supplies
- conservation measures only (no conservation plan required)
- resource improvement proposal excluded</td></tr>
<tr><td>1 to 3 mgd[2] (3.8 – 11.4 mld)</td><td>Regional Review, Based on <u>Full Standard</u> (see above) <u>except</u> for (F)Resource Improvement:

F. Originating jurisdiction to certify whether Resource Improvement Proposals are consistent with the standard (i.e. not subject to Regional Review declaration or Compact voting)</td></tr>
<tr><td>Under 1 mgd[2] (3.8 mld)</td><td>State, Provincial Management/Regulation of Diversions, Based on <u>Full Standard</u> (see above)</td></tr>
</table>

[1] Includes combined diversions and consumptive uses –even if individually, proposed diversion or consumptive use components do not trigger regional review

[2] Threshold levels defined as an <u>average in any 120 day period</u> in millions of U.S. gallons per day (mgd) or millions of litres per day (mld)

[3] The phase-in would be completed as soon as possible, but no later than 10 years from the effective date of implementation of the decision making standard.

JURISDICTIONAL MANAGEMENT AND INFORMATION
State, Provincial water use data collection and reporting to a Great Lakes Regional Water Use Data Base Repository and made publicly available for all Withdrawals in excess of 100,000 gallons per day and all Diversions.
The Great Lakes States and Provinces will implement programs to promote Environmentally Sound and Economically Feasible Water Conservation Measures to minimize existing Great Lakes Basin Withdrawals, Consumptive Uses and Diversions.

PROPOSED STANDARD EXEMPTIONS, OTHER CLARIFICATIONS

General Exemptions
To supply vehicles, including vessels and aircraft, whether for the needs of persons or animals being transported or fo. ballast or other needs related to the operation of the vehicles.

To use in a non-commercial project on a short term basis for firefighting or humanitarian purposes

Return Flow Exemption – Diversions Subject to Jurisdictional Review
An individual jurisdiction may grant an exemption to this Return Flow requirement only when the applicant demonstrates that the Diversion of Great Lakes Basin water is less than 250,000 gallons per day (946,000 litres per day) average in every 30 day period and is exclusively for public water supply uses in areas less than 12 miles from the Basin boundary, where adequate quantity of potable-quality water are not available.

Communities Straddling Basin Boundaries
Communities (cities, towns or equivalent) whose existing corporate limits are in part within the watershed of one Great Lake or the St. Lawrence River and whose public water supply and wastewater discharge occur within that same watershed are considered to be entirely within that watershed for the purposes of the standard.

Connecting Channels
For the purposes of determining whether a withdrawal proposal is a new or increased diversion, the watershed of each Great Lakes will include its upstream and downstream connecting channels.

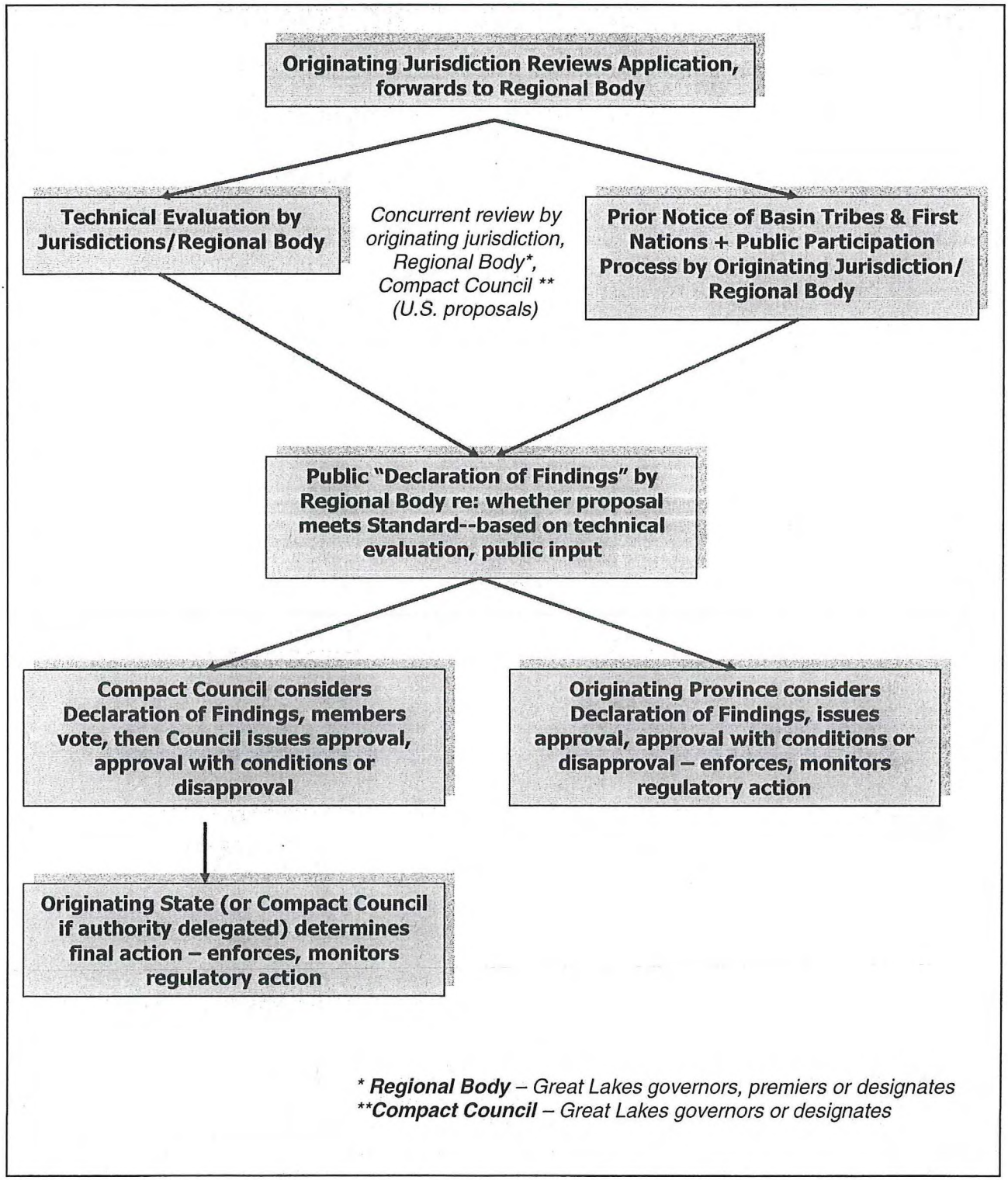
Hydrologic Units
For purposes of determining whether a withdrawal proposal is a new or increased diversion, the Lake Michigan and Lake Huron watershed are considered to be a single hydrologic unit.

Bulk Water Removals
A proposal to withdraw Great Lakes Basin water and to package it in the Basin for human consumption in containers 20 litres or less (5.7 gallons) shall be considered a consumptive use for the purposes of the standard. A proposal to withdraw Great Lakes Basin water and to remove it from the Basin in any container greater than 20 litres shall be considered to be a proposal for a diversion for the purposes of the standard.

Water Supply Pipelines that Cross Out of and Return to the Great Lakes Basin
Transmission of Great Lakes Basin water within water lines that extend outside the Basin as they convey water from one point to another within the Basin will not be considered diversions for the purposes of this agreement, so long as none of the water is used outside the Basin.

PROPOSED REGIONAL REVIEW PROCESS

For Major Great Lakes Basin Diversion & Consumptive Use Proposals



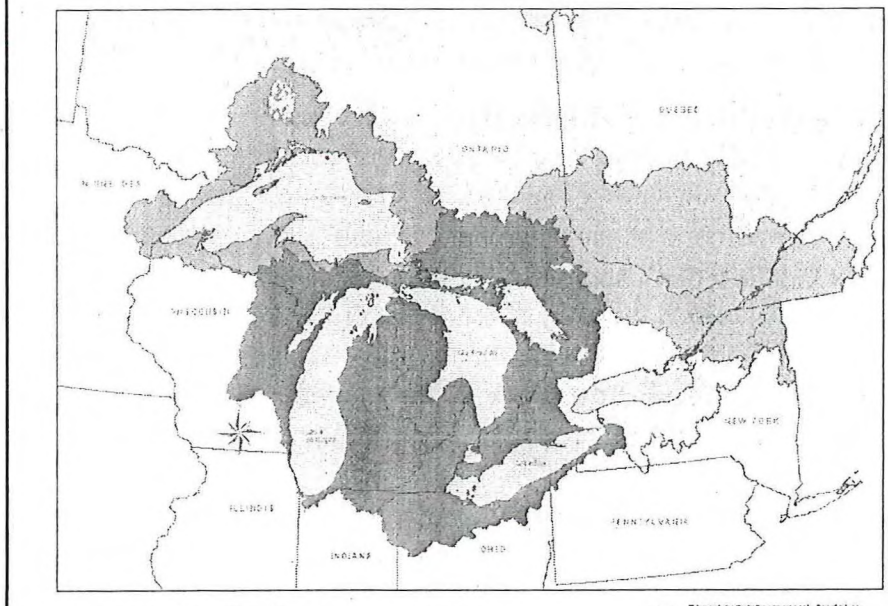
Protecting our Great Lakes Basin Waters

Draft Agreements to Implement the Great Lakes Charter Annex

David de Launay, ADM

STAKEHOLDER DIALOGUE

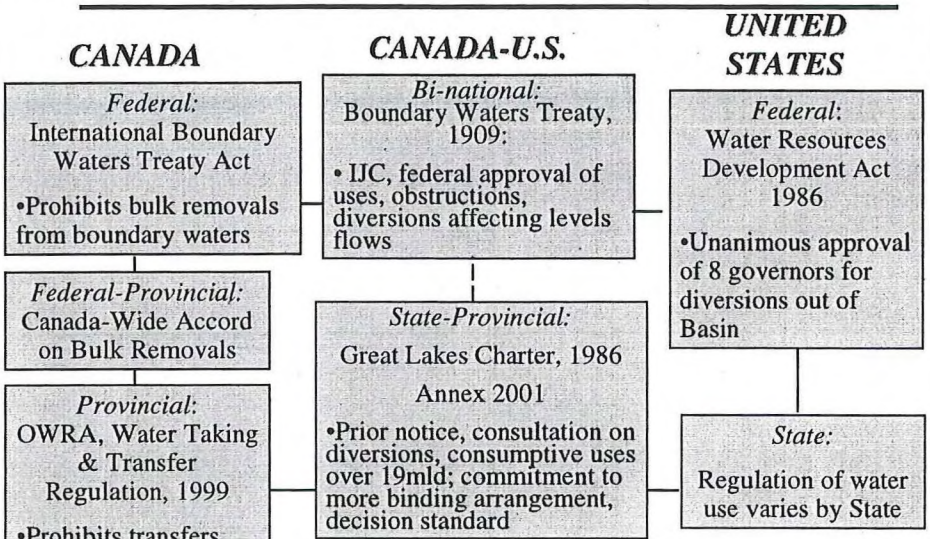
October 22, 2004



Great Lakes Basin

Protecting Great Lakes Basin Waters

Current Protection Shared



3

Protecting Great Lakes Basin Waters

Current Protection Challenges

- **Boundary Waters Treaty –**
  - applies to uses from boundary waters (Great Lakes) only, not Basin tributaries, groundwater; question of whether it applies to Lake Michigan (Chicago diversion)
  - IJC, federal approvals limited to very large uses, diversions that may affect levels or flows of boundary waters
- **International Boundary Waters Treaty Act –**
  - Bulk removals prohibition applies to removals from boundary waters only
  - Applies in Canada only – not to U.S. removals

4

Protecting Great Lakes Basin Waters

Current Protection Challenges

- **U.S. Water Resources Development Act –**
  - Unanimous approval of 8 Gt. Lakes governors applies only to diversions out of Great Lakes Basin, not to consumptive uses
  - No standard to base decisions on – could be vulnerable to U.S. constitutional challenge
  - Diversions have been approved under WRDA (e.g. Pleasant Prairie Wisconsin, Akron Ohio)
  - Does not involve Canadian provinces
- **Great Lakes Charter –**
  - Good-faith commitment to prior notice and consultation only
  - Applies only to major proposals 19 mld + (NOVA export proposal below the trigger for consultation)
  - No standard to base decisions on
- **Water Taking and Transfer Regulation –**
  - Prohibition only applies to out of Basin transfers originating in Ontario

5

Protecting Great Lakes Basin Waters

IJC Protection of Gt. Lakes Waters Report

Among the recommendations of the IJC Report in 2000: that Great Lakes states, provinces:

- not permit any removals of water from the Great Lakes Basin that would endanger the integrity of the Basin ecosystem, ensuring that there is no net loss of water from the Basin (95% minimum return);
- notify each other of any proposals for removals or major consumptive uses, including enhanced public participation;
- establish a standard on which proposals will be evaluated under the Great Lakes Charter;
- develop a comprehensive water conservation program, the Charter Basin Management Program, enhanced water use data and strengthened groundwater research.

IJC released review report Aug. 31 '04, reporting on status of progress toward implementation, reinforcing 2000 recommendations

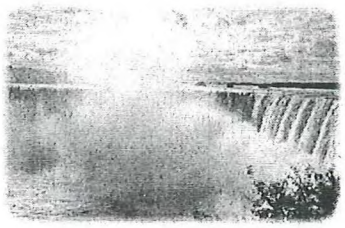
6

Protecting Great Lakes Basin Waters

Great Lakes Charter Annex 2001

- Annex to Great Lakes Charter signed by Great Lakes premiers, governors June 18, 2001 to strengthen Great Lakes protection
- Commits to binding agreements in 3 years, conservation-based standard to review proposed diversions, consumptive uses based on principles of:

  - *Preventing or minimizing Basin water loss*
  - *No significant impacts;*
  - *Improvement to Basin ecosystem;*
  - *Compliance with applicable laws, agreements.*



7

Protecting Great Lakes Basin Waters

Ontario's Objectives

1. Uphold principles of Great Lakes Charter – protection, conservation, cooperation, foundation for regional growth and investment;
2. Guard against diversions, removals while maintaining competitiveness of water users in the Basin;
3. Protect Ontario's interests by maximizing influence on decisions in neighbouring jurisdictions;
4. "Level the playing field" re: strong control of diversions (Ontario prohibition), regulation of water uses by ALL to ensure sustainability;
5. Operate within Ontario's constitutional authority.

8

Protecting Great Lakes Basin Waters

What is on the Table?

Released July 19th 2004 for 90-day review:

- Draft *Great Lakes Basin Sustainable Water Resources Agreement* (good-faith agreement among 8 states, 2 provinces, implemented through domestic legislation)
- Draft *Great Lakes Basin Water Resources Compact* (legally enforceable U.S. Interstate Compact between 8 states)



9

Protecting Great Lakes Basin Waters

Draft State-Provincial Agreement

- Good-faith agreement among Ontario, Quebec and 8 Great Lakes States.
- Sets minimum environmental standard for provinces, states to regulate proposed diversions, consumptive uses.
- Commits to regional collaboration, consensus-building in review of major proposals based on standard.
- *Regional review* includes prior notice and involvement of Basin aboriginal communities, public involvement.
- Sets process for regional dispute resolution, monitoring of implementation, review of provincial and state regulation and conservation programs, monitoring of cumulative impacts.
- Commits to enhanced information gathering and reporting.

10

Protecting Great Lakes Basin Waters

Regional Review Process

Originating Jurisdiction Reviews Application, forwards to Regional Body

Technical Evaluation by Jurisdictions/ Regional Body

Concurrent review by originating jurisdiction, Regional Body, Compact Council ** (U.S. proposals)*

Prior Notice of Basin Tribes & First Nations + Public Participation Process by Originating Jurisdiction/ Regional Body

Public "Declaration of Findings" by Regional Body re: whether proposal meets Standard–based on technical evaluation, public input

STATE

Compact Council considers Declaration of Findings, members vote, then Council issues approval, approval with conditions or disapproval

Originating State (or Compact Council if authority delegated) determines final action – enforces, monitors regulatory action

PROVINCE

Originating Province considers Declaration of Findings, issues approval, approval with conditions or disapproval – enforces, monitors regulatory action

* ***Regional Body*** *– Great Lakes governors, premiers or designates*

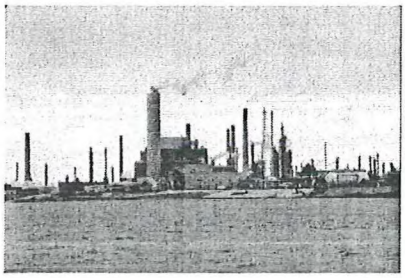
****Compact Council** – Great Lakes governors or designates*

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Protecting Great Lakes Basin Waters

Decision-Making Standard

- Draft agreements include minimum environmental standard for states, provinces to regulate <u>all</u> new or increased diversions, and withdrawals over 100,000 gallons (380,000 litres) per day based on Annex principles
- Standard to guide collective review of major proposals:
  - Diversions 1 million gallons (3.8 million litres) per day or greater;
  - Consumptive uses 5 million gallons (19 million litres) per day or greater



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Protecting Great Lakes Basin Waters

Proposed Standard Criteria

A. No reasonable alternative including conservation
B. Limited to quantities reasonable for purpose
C. Return flow to same Great Lake watershed, less allowance for consumptive use
D. Water conservation plan/measures
E. No significant adverse impact-individually or cumulatively
F. Improvement/restoration proposal (priority on hydrologic improvements)
G. Compliance with applicable laws/agreements (e.g. Boundary Waters Treaty, Ontario Water Taking and Transfer Regulation)

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Protecting Great Lakes Basin Waters

Implementing the Draft Agreements

- Final agreements, once modified, will be signed by Great Lakes premiers, governors.
- U.S. implementation through enforceable Compact between 8 states, approved by U.S. Congress.
- Ontario implementation through modifications to existing laws.
  - Ontario already regulates water takings over 50,000 litres per day.
  - Proposed enhancements to the *Permit to Take Water Program* announced June 2004.
  - Some additional modifications needed to implement agreement and meet the proposed standard.
- Ontario will maintain its prohibition of water transfers out of the province's three major drainage basins –(Great Lakes – St. Lawrence Basin; Hudson Bay Basin, Nelson River Basin)

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Protecting Great Lakes Basin Waters

Public Consultation

- Draft agreements released in all jurisdictions July 19, 2004 (MNR news release July 19, follow-up Sept 23)
- Public meetings held in all jurisdictions
- 2 Regional meetings hosted by CGLG – Chicago, Toronto
- Ontario public meetings – Thunder Bay, Sault Ste. Marie, Windsor, London, Kingston
- Ontario Aboriginal Community meetings – Thunder Bay, Sault Ste. Marie, London, Kingston
- Written submissions
  - Ontario – approx. 90
  - Council of Great Lakes Governors – approx. 1200

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Protecting Great Lakes Basin Waters

What have we heard?

- Ontarians share strong concerns about diversions, bulk removals and (say "no" vs. no net loss vs. return flow)
- Call for more binding control (bi-national solution- e.g. BWT, IJC role vs. veto power to provinces vs. 50:50 weighting of provincial / state "votes" vs. acknowledgement of proposed binding Compact + provincial domestic law)
- Need for broader Aboriginal consultation and involvement
- General support with proposals to strengthen protection or address sector-specific concerns (e.g. agriculture concerned about how consumptive use is defined and estimated)
- Concern about 90 day consultation period, need for more meetings, enhanced communication

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Protecting Great Lakes Basin Waters

What have we heard?

- Some additional comments:
  - *Exemptions* – concern about impacts and implications of diversion exemptions, particularly the Chicago Diversion
  - *Conservation*-need for enhanced commitment for existing and new uses vs. concern about costs
  - *Return flow* – concern about potential loopholes, need to meet quality guidelines of Gt. Lakes Water Quality Agreement, need to return water as close to source as possible, need to factor in invasive species, need for flexibility in return for in-basin uses
  - "*No significant impacts*" – change to no measurable impacts or IJC approach – proponent must demonstrate that removal will not endanger Basin ecosystem integrity
  - *Resource improvement* – reaction polarized from strong concern to strong support

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Protecting Great Lakes Basin Waters

What have we heard?

- Some additional comments (continued):
  - *Public involvement* – support for proposed public involvement vs. need for further enhancement (e.g. following declaration of finding)
  - *Trigger levels* – some calling for reduced trigger levels, some seek consistent triggers for all uses, some seek higher levels
  - *Treatment of in-basin uses vs. diversions* – some support same standard, treatment for all uses; others push for tougher position on diversions, greater flexibility for in-basin uses
  - Need to factor in *climate change*
  - Need for *enhanced science, data* to base decisions
  - Need for *precautionary approach* in face of uncertainties

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Protecting Great Lakes Basin Waters

Next Steps

- Will continue to consider comments that come in (greatlakesannex@mnr.gov.on.ca)
- Ontario assessing public comments, developing negotiating position based on input
- Further Aboriginal dialogue
- Mid-November - meeting of Working Group and stakeholder Advisory Committee to review, discuss public input
- Working Group to resume negotiations in January

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They seem to be inviting public to consider if the system should be applied to existing (historic) divisions

Chicago

Pre Release CGG call
706-758-0607 934903918#
CGG Call July 16th 2004
Paula Thompson

★ David Debruyn
Rob Messervey from
Murray Clarren } ISC
Michael Vepter } Ottawa
Lisa
Jim Chandler

Wendy Leger
Rob Nantkero } Environment Canada

Dale Hennessey
Jim Nicholas

Calendar & Workplans
Sam Speck

have been to Washington/State Department
no concerns.
addressed conference at Mayors this morning.
Calendar workplan July 19th October 18, 2004
Doyle & Yatt announce 2:15 edt at national
governors assc. in Seattle making it
evident this is binational.
at sametime www.cgg.org documents
will be posted
8th Chicago public meetings
30th September (rather than hearings)
ohio - 5 mtgs.
email annex2001@cgg.org
comments
to
governors
live with a comments submission Sam

on CO website. They will be posted
for public viewing
first mtg after review period is over whole group.
working group with advisory committee
to review comments and revise
have revised annex by Spring 2005.

two implementing documents
existing agreement
new compact
binding
common standard (changes have been made)
changed diversion threshold for regional review
changed threshold for consumptive use.

Particular questions to be answered

Why now? we are in a drought and what would
① are water threats in other areas of country
② areas just outside of basin
③ protecting our assets. use it wisely ourselves.
④ maintain authority over resource

www.speakonwaterlaws.org

Windy Legeu
clarification

- 5 million gallons per day ← the consumption not the withdrawals
  allowance for consumptive use.
  coefficient
  withdrawal
  → coefficient
  = amount that will be evaluated,
  if it is over 5mgd.
  ↓
  regional process

Return flow Requirements
statutory & administrative laws

Expect industries will object to
WL. how can water diverted out of the
Basin be returned (anything not used
will/should be returned.
if it leaves yes it is a diversion

— Chicago Diversion exemption if there were a request to increase it....
it would come under decision-making standard.

no French documents yet will be available on Monday. This is number one of the governor's priorities.

GREAT LAKES BASIN WATER RESOURCES COMPACT

WHEREAS, the Great Lakes Basin Water Resources are precious public natural resources, shared and held in trust by the Great Lakes States; and,

WHEREAS, the Signatory Parties recognize the Great Lakes are valuable regional, national and international resources for which the they have a joint responsibility; and,

WHEREAS, the Federal Governments of the United States and Canada through the International Joint Commission have, in partnership with the Great Lakes States and the Provinces of Ontario and Québec, an important, continuing and abiding role in the Great Lakes as boundary waters; and,

WHEREAS, the Waters of the Great Lakes Basin are interconnected and part of a single hydrologic system. The multiple uses of these resources for municipal, industrial and agricultural water supply; mining; navigation; hydroelectric power and energy production; recreation; and, the maintenance of fish and wildlife habitat and a balanced ecosystem are interdependent; and,

WHEREAS, studies conducted by the International Joint Commission, the Great Lakes States and Provinces, and other agencies have found that without careful and prudent management, the future development of Diversions and Consumptive Uses of the Great Lakes Basin Water Resources may have significant adverse impacts on the environment, economy, and welfare of the Great Lakes region; and,

WHEREAS, as trustees of the Great Lakes Basin's natural resources, the Great Lakes States and Provinces have a shared duty to protect, conserve, and manage the renewable but finite Waters of the Great Lakes Basin for the use, benefit and enjoyment of all their citizens, including generations yet to come. The most effective means of protecting, conserving and managing the Water Resources of the Great Lakes is through the joint pursuit of unified and cooperative principles, policies and programs mutually agreed upon, enacted and adhered to by each and every Great Lakes State; and,

WHEREAS, management of the Great Lakes Basin Water Resources is subject to the jurisdiction, rights and responsibilities of the Signatory Parties. Effective management of the Great Lakes Basin Water Resources requires the joint exercise of such jurisdiction, rights and responsibilities in the interest of all the people of the Great Lakes Region, acting in a continuing spirit of comity and mutual cooperation. The Signatory Parties reaffirm the mutual rights and obligations of all Basin jurisdictions to use, conserve and protect Great Lakes Basin Water Resources, as expressed in the Boundary Waters Treaty of 1909, the Great Lakes Water Quality Agreement of 1978, the Great Lakes Charter of 1985, the Great Lakes Charter Annex of 2001, and the principles of other applicable international agreements; and,

WHEREAS, in Section 1962d-20(b)2 of the Water Resources Development Act of 1986, as amended in 2000, the U.S. Congress declared as its "purpose and policy…to encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebéc, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the Withdrawal and use of water from the Great Lakes Basin;" and,

WHEREAS, the Great Lakes States and Provinces have established a set of principles to guide them in developing, maintaining and strengthening the regional management regime for the Great Lakes Basin Ecosystem. Protecting, conserving, restoring and improving the Great Lakes is the foundation upon which decisions concerning water resource management are based.

NOW THEREFORE:

The States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Wisconsin and the Commonwealth of Pennsylvania hereby solemnly covenant and agree with each other, upon enactment of concurrent legislation by the respective State legislatures and consent by the Congress of the United States to this Compact as follows:

ARTICLE 1
SHORT TITLE, DEFINITIONS, PURPOSES AND DURATION

Section 1.1. Short Title. This act shall be known and may be cited as the "Great Lakes Basin Water Resources Compact."

Section 1.2. Definitions. For the purposes of this Compact, and of any supplemental or concurring legislation enacted pursuant thereto, except as may be otherwise required by the context:

Consumptive Use means that portion of Water Withdrawn or withheld from the Great Lakes Basin that is lost or otherwise not returned to the Great Lakes Basin due to evaporation, incorporation into products or other processes.

Council means the Great Lakes Basin Water Resources Council, created by this Compact.

Cumulative Impacts means the impact on the Great Lakes Basin Ecosystem that results from incremental effects of the proposal in addition to other past, present and reasonably foreseeable future proposals regardless of who undertakes the other proposals. Cumulative Impacts can result from individually minor but collectively significant proposals taking place over a period of time.

Diversion means a transfer of Water from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lakes into that of another, by any means.

Environmentally Sound and Economically Feasible Water Conservation Measures means any beneficial reduction in water loss, waste or use accomplished by the implementation of water management practices and water-efficiency measures. Water management practices and water efficiency measures must be economically feasible based on a cost-benefit analysis that includes avoided environmental and economic costs.

Great Lakes Basin means the watershed of the Great Lakes and the St. Lawrence River upstream from Trois-Rivières, Québec within the jurisdiction of the Great Lakes States.

Great Lakes Basin Ecosystem means the interacting components of air, land, water and living organisms, including humankind, within the Great Lakes Basin.

Great Lakes Provinces means the Provinces of Ontario and Quebéc.

Great Lakes ~~Region~~ means the geographic region composed of the Great Lakes States.

Great Lakes States or State means the States of Illinois, Indiana, Michigan, Minnesota, New York, Ohio, and Wisconsin, the Commonwealth of Pennsylvania, collectively or individually.

Improvement to the Waters and Water Dependent Natural Resources of the Great Lakes Basin means additional beneficial, restorative effects to the physical, chemical or biological integrity of the Waters and Water Dependent Natural Resources of the Basin, resulting from associated Environmentally Sound and Economically Feasible Water Conservation Measures, enhancement or restoration measures which include, but are not limited to, such practices as mitigating adverse effects of existing Water Withdrawals, restoring environmentally sensitive areas or implementing Environmentally Sound and Economically Feasible Water Conservation Measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer.

New or Increased Diversion or Consumptive Use means a new Diversion or Consumptive Use or increase in an existing Diversion or Consumptive Use commencing after the effective date of the Standard of Review and Decision.

Person means any person, individual, partnership, corporation, body politic, municipality, State, Province or any other legal entity public or private.

Regional Review means the collective review by all Great Lakes States and Provinces as described in Article 8 of this Compact.

Return Flow means the remaining portion of Water Withdrawn which returns naturally or is returned to the Source Watershed after use and thus becomes available for further use in the Great Lakes Basin.

Signatory Party means a State or Commonwealth party to this Compact.

Source Watershed means the watershed from which the Water Withdrawal originates. 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 the 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 direct tributary stream.

Standard of Review and Decision means the Standard as outlined in Articles 8 and 9 of this Compact.

Water Dependent Natural Resources means the interacting components of land, water and living organisms affected by the Waters of the Great Lakes Basin.

Waters of the Great Lakes Basin or Great Lakes Basin Water means the Great Lakes and all streams, rivers, lakes, connecting channels and other bodies of water, including tributary groundwater, within the Great Lakes Basin.

Withdrawal means the taking of Water from surface or groundwater, by any means.

Section 1.3. Purposes and Findings.
The legislative bodies of the respective Signatory Parties hereby find and declare:

The major purposes of this Compact are to advance the substantial public interest of protecting, conserving and restoring the overall environmental balance and physical, chemical and biological integrity of the Waters and Water Dependent Natural Resources of the Great Lakes Basin; to promote interstate and State-Province comity; to remove causes of present and future controversies; to provide for cooperative planning and action by the Signatory Parties with respect to such Water resources; and, to apply the principle of equal and uniform treatment to all Water users who are similarly situated without regard to established political boundaries.

ARTICLE 2
ORGANIZATION

Section 2.1. Council Created.
The Great Lakes Basin Water Resources Council (hereinafter Council) is hereby created as a body politic and corporate, with succession for the duration of this Compact, as an agency and instrumentality of the governments of the respective Signatory Parties.

Section 2.2. Council Membership.
The Council shall consist of the Governors of the Signatory Parties, ex officio.

Section 2.3. Alternates.
Each member of the Council shall appoint at least one alternate who may act in his or her place and stead, with authority to attend all meetings of the Council and with power to vote in the absence of the member. Unless otherwise provided by law of the Signatory Party for which he or she is appointed, each alternate shall serve during the term of the member appointing him or her, subject to removal at the pleasure of the member. In the event of a vacancy in the office of alternate, it shall be filled in the same manner as an original appointment for the unexpired term only.

Section 2.4. Voting Power.
Each member is entitled to one vote on all matters that may come before the Council.
1) Unless otherwise stated, the rule of decision shall be by a simple majority.
2) The Standard of Review and Decision contained in Articles 8 and 9 of this Compact (Standard) may be revised by regulation duly adopted in accordance with Section 3.6 of this Compact after consultation with the Great Lakes Provinces and upon unanimous vote by all eight Council members.
3) The Council shall annually adopt a budget for each fiscal year and the amount required to balance the budget shall be apportioned equitably among the Signatory Parties by unanimous vote of the Council.
4) The participation of Council members from a majority of the Signatory Parties shall constitute a quorum for the transaction of business at any meeting of the Council.

Section 2.5. Organization and Procedure.
The Council shall provide for its own organization and procedure, and may adopt rules and regulations governing its meetings and transactions, as well as the procedures and timeline for submission, review and consideration of proposals that come before the Council for its review or approval. The Council shall organize, annually, by the election of a chairperson and vice-chairperson from among its members. Each member may appoint an advisor, who may attend all meetings of the Council and its committees, but shall not have voting power.

The Council may employ or appoint professional and administrative personnel, including an Executive Director, as it may deem advisable, to carry out the purposes of this Compact.

Section 2.6. Use of Existing Offices and Agencies.
It is the policy of the Signatory Parties to preserve and utilize the functions, powers and duties of existing offices and agencies of government to the extent consistent with this Compact. Further, the Council shall promote and aid the coordination of the activities and programs of the Signatory Parties concerned with Water resources management in the Great Lakes Basin. To this end, but without limitation, the Council may:
1) Advise, consult, contract, assist or otherwise cooperate with any and all such agencies; and,
2) Employ any other agency or instrumentality of any of the Signatory Parties for any purpose; and,

3) Develop and adopt plans consistent with the Water resources plans of the Signatory Parties.

Section 2.7. Jurisdiction.
The Council shall have, exercise and discharge its functions, powers and duties within the limits of the Great Lakes Basin within the territorial Waters of the Signatory Parties. Outside the Great Lakes Basin, it may act in its discretion, but only to the extent such action may be necessary or convenient to effectuate or implement its powers or responsibilities within the Great Lakes Basin and subject to the consent of the State wherein it proposes to act.

Section 2.8. Status, Immunities and Privileges.
1) The Council, its members and personnel in their official capacity and when engaged directly in the affairs of the Council, its property and its assets, wherever located and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by the Signatory Parties, except to the extent that the Council may expressly waive its immunity for the purposes of any proceedings or by the terms of any contract.
2) The property and assets of the Council, wherever located and by whomsoever held, shall be considered public property and shall be immune from search, requisition, confiscation, expropriation or any other form of taking or foreclosure by executive or legislative action.
3) The Council, its property and its assets, income and the operations it carries out pursuant to this Compact shall be immune from all taxation by or under the authority of any of the Signatory Parties or any political subdivision thereof; provided, however, that in lieu of property taxes the Council may make reasonable payments to local taxing districts in annual amounts which shall approximate the taxes lawfully assessed upon similar property.

Section 2.9. Advisory Committees.
The Council may constitute and empower advisory committees, which may be comprised of representatives of the public and of federal, State, county and municipal governments, water resources agencies, water-using industries and sectors, water-interest groups and academic experts in related fields.

ARTICLE 3
POWERS AND DUTIES

Section 3.1. General.
The Waters and Water Dependent Natural Resources of the Great Lakes Basin within the territorial Waters of the Signatory Parties are subject to the sovereign right and responsibilities of the Signatory Parties, and it is the purpose of this Compact to provide for joint exercise of such powers of sovereignty by the Council in the common interests of the people of the region, in the manner and to the extent provided in this Compact. The Council members shall use the Standard of Review and Decision and procedures

contained in or adopted pursuant to this Compact as the means to exercise their authority to approve New or Increased Diversions or Consumptive Uses.

The Council shall develop and effectuate plans and policies relating to Great Lakes Basin Water Resources. It shall adopt and promote uniform and coordinated policies for Water resources conservation and management in the Great Lakes Basin. It shall encourage the planning, development and operation of Water resources proposals according to such plans and policies.

Section 3.2. New or Increased Diversions and Consumptive Uses.

1) No New or Increased Diversion or Consumptive Use proposal subject to review under Articles 8 or 9 of this Compact shall hereafter be undertaken by any Person unless it shall have been first submitted to and approved by the Great Lakes State in which the Withdrawal occurs. An application for an approval of a New or Increased Consumptive Use or Diversion shall be presented to the State in such manner and with such accompanying information as the State shall prescribe.
2) No Signatory Party shall approve a New or Increased Consumptive Use or Diversion proposal if the Signatory Party determines that the proposal is inconsistent with the Standard of Review and Decision or any implementing rules or regulations promulgated thereunder. The Signatory Party may approve, approve with modifications or disapprove any proposal depending on the proposal's consistency with the Standard of Review and Decision.
3) For any application that is approved, the State shall monitor the implementation of any approved proposal to ensure that it is consistent with the approval and may take all enforcement actions necessary to ensure that the use meets the terms of its approval.

Section 3.3. New or Increased Diversions—Proposals Subject to Regional Review and Council Review.

No New or Increased Diversion subject to Regional Review shall hereafter be approved by any Signatory Party or the Council unless it shall have been first submitted to and reviewed by the Great Lakes States and Provinces and approved by the Council as consistent with the Standard of Review and Decision. Council approval shall be given unless one or more Council Members disapproves.

Section 3.4. New or Increased Consumptive Uses—Proposals Subject to Regional Review and Council Review.

No New or Increased Consumptive Use subject to Regional Review shall hereafter be approved by any State or the Council unless it shall have been first submitted to and reviewed by the Great Lakes States and Provinces and approved by the Council as consistent with the Standard of Review and Decision. Council approval shall be given unless three or more Council Members disapprove.

Section 3.5. General Powers.

The Council may: plan; conduct research and collect, compile, analyze, interpret, report and disseminate data on Water resources and uses; forecast Water levels; conduct special

investigations; institute court actions; design, acquire, construct, reconstruct, own, operate, maintain, control, sell and convey real and personal property and any interest therein as it may deem necessary, useful or convenient to carry out the purposes of the Compact; make contracts; receive and accept such payments, appropriations, grants, gifts, loans, advances and other funds, properties and services as may be transferred or made available to it by any Signatory Party or by any other public or private agency, corporation or individual; and exercise such other and different powers as may be delegated to it by this Compact or otherwise pursuant to law, and have and exercise all powers necessary or convenient to carry out its express powers or which may be reasonably implied therefrom.

Section 3.6. Rules and Regulations.
The Council and each Signatory Party may promulgate and enforce such rules and regulations as may be necessary for the implementation and enforcement of this Compact, including establishing reasonable fees for the review of New or Increased Consumptive Uses and Diversions. The Council may adopt practices and schedules, fees and charges for or in connection with the use, maintenance and administration of facilities it may own or operate, and any product or service rendered. Any rule or regulation of the Council, other than one which deals solely with the internal management of the Council or its property, shall be adopted only after public notice and hearing.

Section 3.7. Public Participation.
It is the intent of the Council to conduct public participation processes concurrently and jointly with processes undertaken by the Signatory Parties and through the Regional Review process. To ensure adequate public participation, each Signatory Party or the Council shall ensure procedures for the review of proposals subject to the Standard of Review and Decision of this Compact consistent with the following requirements:

1) Provide public notification of receipt of all proposal applications and a reasonable opportunity for the public to submit comments before applications are acted upon.
2) Assure public accessibility to all documents relevant to a proposal application, including public comment received.
3) Provide guidance on standards for determining whether to conduct a public meeting or hearing for a proposal application, time and place of such a meeting(s) or hearing(s), and procedures for conducting of the same.
4) Provide the record of decision for public inspection including comments, objections, responses and approvals, approvals with conditions and disapprovals.

Section 3.8. Consultation with Tribes

1) In addition to all other opportunities to comment pursuant to Section 3.7, appropriate consultations will occur with federally recognized Tribes in the originating State for all New or Increased Withdrawals or Diversions that are subject to review by the Council pursuant to this Compact. Such consultations shall be organized in the manner suitable to the individual proposal and the laws and policies of the originating State.
2) All federally recognized Tribes within the Great Lakes Basin shall receive reasonable notice indicating that they have an opportunity to comment in writing to the Council

and other relevant organizations on whether the proposal meets the requirements of the Standard of Review and Decision when a New or Increased Withdrawal or Diversion is subject to Council Review. The notice from the Council shall inform the Tribes of any meeting or hearing that is to be held under Section 3.7 and invite them to attend.

3) The States and the Council shall consider the comments that it receives under this Section before approving, approving with modifications or disapproving any New or Increased Withdrawal or Diversion.

Section 3.9. Enforcement.

1) Any Person aggrieved by any action taken pursuant to the authorities contained in this Compact shall be entitled to a hearing before the Council for a Council action, or for a Signatory Party action pursuant to the relevant Signatory Party's administrative procedures and laws and, after exhaustion of administrative remedies, shall have the right to judicial review of such action in the relevant Signatory Party's court of competent jurisdiction, provided that an action or proceeding for such review is commenced within the timeframes provided for by the Signatory Party's law, or of the Council action in United States District Courts for the District of Columbia or the District Court in which the Council maintains offices, provided such action is commenced within 90 days.
2) Any Signatory Party or the Council may issue such orders and may initiate such actions to compel compliance with the provisions granting authority to each by this Compact, the rules and regulations promulgated thereunder by each, any order or approval issued by each, in any court of competent jurisdiction. For a Signatory Party, jurisdiction is granted to the Signatory Party's judicial system. For the Council, jurisdiction is granted to the court of the relevant Signatory Party, as well as the United States District Courts for the District of Columbia and the District Court in which the Council maintains offices. The remedies available to any such court shall include, but not be limited to, equitable relief and civil penalties.
3) Upon the affirmative vote of seven of the Council members, the Council may petition a court of competent jurisdiction to suspend a Signatory Party's right to vote on the Council if the court finds such party to be in violation of its duties under this Compact, but only after procedures for dispute resolution in Article 4 have been utilized. Such suspension shall be terminated by the court when the party is no longer in violation of this Compact in the manner cited for suspension. For the purposes of this Section, jurisdiction is granted to the United States District Courts for the District of Columbia or the District Court in which the Council maintains offices.
4) Any aggrieved Person or the Council may commence a civil action in the relevant Signatory 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 Diversion or Consumptive Use that is subject to approval pursuant to this Compact. The available remedies shall include equitable relief and the prevailing party may recover the costs of litigation, including reasonable attorney and expert witness fees.

Section 3.10. U.S. Supreme Court Decree: Wisconsin et al. v. Illinois et al.

1) For the Withdrawal of Great Lakes Basin Water by the State of Illinois authorized by the United States Supreme Court decree in Wisconsin et al. v. Illinois et al., no such Withdrawal shall be subject to Articles 8 or 9, except paragraph 9.1 hereunder.
2) If an application is made by any party to the Supreme Court of the United States to amend the decree, the parties to this agreement who are also parties to the decree shall seek formal input from the Canadian Provinces of Ontario and Quebéc, parties to the Great Lakes Basin Sustainable Water Resources Agreement, with respect to the proposed amendment, use best efforts to facilitate the appropriate participation of the Provinces in the proceedings to amend the decree, shall not unreasonably impede or restrict such participation, and consider the extent to which the criteria of the Standard of Review and Decision are relevant and feasible.

Section 3.11. Program Review and Findings.

The Council may periodically in cooperation with the Provinces review its Water management programs and those of the Signatory Parties that are established in this Compact and make findings on whether the Water management program requirements in this Compact are being met.

ARTICLE 4
DISPUTE RESOLUTION

Section 4.1. Good Faith Implementation.

Each of the Signatory Parties pledges to support implementation of all provisions of this Compact, and covenants that its officers and agencies will not hinder, impair, or prevent any other Signatory Party carrying out any provision of this Compact.

Section 4.2. Alternative Dispute Resolution.

1) Desiring that this Compact be carried out in full, the Signatory Parties agree that disputes between the Parties regarding interpretation, application and implementation of this Compact shall be settled by alternative dispute resolution.
2) The Council, in consultation with the Great Lakes Provinces, shall provide by rule procedures for the resolution of disputes pursuant to this section.

ARTICLE 5
GENERAL PROVISIONS

Section 5.1. Meetings, Public Hearings and Records.

1) The Signatory Parties recognize the importance and necessity of public participation in promoting management of the Water Resource of the Great Lakes Basin. Consequently, all meetings of the Council shall be open to the public except with respect to issues of personnel.
2) The minutes of the Council shall be a public record open to inspection at its offices during regular business hours.

Section 5.2. Effect on Existing Rights.

1) Nothing 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 under State or federal law to the Withdrawal of the Water of the Great Lakes Basin.
2) Nothing 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 Signatory Parties relating to common law water rights.

Section 5.3 Confidentiality.

1) Nothing in this Compact requires a Signatory Party to breach confidentiality obligations or requirements prohibiting disclosure, to compromise security or commercially sensitive or proprietary information. GEORGE
2) A Signatory Party may take measures, including but not limited to deletion and redaction, deemed necessary to protect any confidential, proprietary or commercially sensitive information when distributing information to other Signatory Parties. The Signatory Party shall summarize or paraphrase any such information in a manner sufficient for the Council to exercise its authorities contained in this Compact.

Section 5.4. Additional Laws.

Nothing in this Compact shall be construed to repeal, modify or qualify the authority of any Signatory Party to enact any legislation or enforce any additional conditions and restrictions to lessen or prevent the pollution of Waters within its jurisdiction.

Section 5.5. Amendments and Supplements.

The provisions of this Compact shall remain in full force and effect until amended by action of the governing bodies of the Signatory Parties and consented to and approved by any other necessary authority in the same manner as this Compact is required to be ratified to become effective.

Section 5.6. Severability.

Should a tribunal of competent jurisdiction hold any part of this Compact to be void or unenforceable, it shall be considered severable from those portions of the Compact capable of continued implementation in the absence of the voided provisions. All other provisions capable of continued implementation shall continue in full force and effect.

Section 5.7. Effective Date.

This Compact shall become effective when ratified via concurring legislation by the legislatures of each of the eight Signatory Parties and consented to by the Congress of the United States.

Section 5.8. Duration of Compact and Termination.

Once effective, the Compact shall continue in force and remain binding upon each and every Signatory Party unless terminated.

This Compact may be terminated at any time by a majority vote of the Signatory Parties. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE 6
EFFECTUATION

Section 6.1. Repealer.
All acts and parts of acts inconsistent with this act are to the extent of such inconsistency hereby repealed.

Section 6.2. Effectuation by Chief Executive.
The Governor is authorized to take such action as may be necessary and proper in his or her discretion to effectuate the Compact and the initial organization and operation thereunder.

Section 6.3. Entire Agreement.
The Parties consider this Compact to be complete and an integral whole. Each recommendation and provision of this Compact is considered material to the entire Compact, and failure to implement or adhere to any recommendation or provision may be considered a material breach. Unless otherwise noted in this Compact, any change or amendment made by any Signatory Party in its implementing legislation to the Compact or by the U.S. Congress when giving its consent to this Compact is not considered effective unless concurred in by all Signatory Parties.

ARTICLE 7
AUTHORITY TO COLLECT DATA

Section 7.1. Water Resources Inventory.
1) The Signatory Party shall have the authority to develop and maintain, in cooperation with local, State, federal, and private agencies and entities, a Water resources inventory for the collection, interpretation, storage, retrieval exchange, and dissemination of information concerning the Water resources of the Signatory Party, including, but not limited to, information on the location, type, quantity, and use of those resources and the location, type, and quantity of Diversions and Consumptive Uses of Great Lakes Water. All agencies of the Signatory Party shall cooperate with the Signatory Party in the development and maintenance of the inventory.
2) The Signatory Parties shall cooperate with the other Great Lakes States and Provinces to develop a common base of data regarding the management of the Water Resources of the Great Lakes Basin and to establish systematic arrangements for the exchange of those data.

Section 7.2. Registration and Reporting of Withdrawals.

1) Any Person who Withdraws Waters of the Great Lakes Basin within the jurisdiction of the Signatory Party in an amount greater than 100,000 gallons per day average in any 30 day period from all sources, or diverts Water out of the Great Lakes Basin, shall register the Withdrawal or Diversion by a date set by the Council. The person shall register the Withdrawal or Diversion with the Signatory Party using a form prescribed by the Signatory Party that shall include, without limitation, the name and address of the registrant and date of registration; the locations and sources of the Withdrawal or Diversion; the capacity of the Withdrawal or Diversion per day and the amount Withdrawn or Diverted from each source; the uses made of the Water, places of use and places of discharge; and such other information as the Signatory Party may require. All registrations will be required to include an estimate of the volume of the Withdrawal in terms of gallons per day average in any 30-day period in accordance with applicable Signatory Party law.
2) Each registrant will be required to report the volume of the Withdrawal annually in accordance with applicable Signatory Party law.
3) The Great Lakes States will gather accurate and comparable information on all Great Lakes Basin Water Withdrawals in excess of 100,000 gallons per day average in any 30 day period and all Great Lakes Basin Diversions. Users will be required to annually report the monthly volumes of the Withdrawal, Consumptive Use and Diversion in gallons to the State in which the Withdrawal occurs. This information will be annually reported to a Great Lakes Regional Water Use Data Base Repository and will be made publicly available.
4) Information gathered by the Great Lakes States pursuant to this Article will be used to improve the sources and applications of scientific information regarding the Waters of the Great Lakes Basin and the impacts of the Withdrawals and Diversions from various locations and Water sources on the ecosystem, and to better understand the role of groundwater in the Great Lakes Basin. The Great Lakes States will coordinate the collection and application of scientific information to further develop a mechanism by which individual and cumulative impacts of Water Withdrawals and Diversions will be assessed.

ARTICLE 8
REGIONAL REVIEW AND COUNCIL REVIEW OF PROPOSALS AND THE STANDARD OF REVIEW AND DECISION

Section 8.1. Regional Review by the Great Lakes States and Great Lakes Provinces. It is the intention of the Signatory Parties to this Compact to participate in Regional Review of proposals under this Article 8 with the Great Lakes States and Great Lakes Provinces. Regional Review of proposals may include, but not be limited to, notice and consultation and public participation. Signatory Parties and the Council shall consider any findings resulting from such review.

Section 8.2. Council Review for Diversions.
A New or Increased Diversion of 1 million gallons per day or greater average in any 120 day period will be subject to Council Review and declared consistent with the Standard of Review and Decision and approved by the Council as appropriate only when:

1) There is no reasonable water supply alternative within the basin or the watershed of the Great Lake in which the Water is proposed for use, including the efficient use and conservation of existing water supplies; and,
2) The Withdrawal of Great Lakes Basin Water will be limited to quantities that are considered reasonable for the purposes for which they are proposed; and,
3) All Water Withdrawn from the Great Lakes Basin shall be returned to the Great Lakes Basin less an allowance for Consumptive Use of the applicable water use sector. Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water 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 shall be returned to 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; and,
4) The Withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the proposal; and,
5) The Withdrawal proposal shall incorporate a conservation plan, demonstrating how Environmentally Sound and Economically Feasible Water Conservation Measures will be implemented to minimize Water Withdrawals or Consumptive Use; and,
6) The Withdrawal proposal shall incorporate a proposal for an Improvement to 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 integrity of the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and,
7) The Withdrawal will be implemented so as to ensure that it is in compliance with all applicable State and federal laws as well as regional interstate and international agreements.
8) The State in which the proposal originates will be responsible for declaring whether proposals are consistent or inconsistent with the Standard of Review and Decision under Section 8.2 paragraph 6 for New or Increased Diversions 1 million gallons per day or greater average in any 120 day period and less than 3 million gallons per day average in any 120 day period.

Section 8.3. Council Review for Consumptive Uses.
A New or Increased Consumptive Use of 5 million gallons per day or greater average in any 120 day period will be subject to Council Review under this Compact and declared consistent with the Standard of Review and Decision and approved by the Council as appropriate only when:

1) The need for all or part of the proposed Water Withdrawal cannot be reasonably avoided through the efficient use and conservation of existing Water supplies; and,
2) The Withdrawal of Great Lakes Basin Water will be limited to quantities that are considered reasonable for the purposes for which they are proposed; and,
3) All Water Withdrawn from the Great Lakes Basin shall be returned to the Great Lakes Basin less an allowance for Consumptive Use of the applicable water use sector. Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water 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 shall be returned to 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; and,
4) The Withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the proposal; and,
5) The Withdrawal proposal shall incorporate a conservation plan, demonstrating how Environmentally Sound and Economically Feasible Water Conservation Measures will be implemented to minimize Water Withdrawals or Consumptive Use; and,
6) The Withdrawal proposal shall incorporate a proposal for an Improvement to 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 integrity of the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and,
7) The Withdrawal will be implemented so as to ensure that it is in compliance with all applicable State, and federal laws as well as regional interstate and international Agreements.

Section 8.4. Council Review for Combined Diversions and Consumptive Uses.
A New or Increased Diversion and a Consumptive Use where the total combined Diversion and Consumptive Use is 5 million gallons per day or greater average in any 120 day period shall be addressed in the manner prescribed in Section 8.2 or 8.3 as appropriate even though the Diversion component is less than 1 million gallons per day average in every 120 day period and the Consumptive Use component is less than 5 million gallons per day average in every 120 day period.

ARTICLE 9
JURISDICTIONAL PROGRAMS AND THE STANDARD OF REVIEW AND DECISION

Section 9.1. Signatory Party Water Conservation Programs.
The Signatory Parties will implement mutually agreed upon measures to promote the efficient use and conservation of the Waters of the Great Lakes Basin within their

jurisdictions. The Signatory Parties will implement programs to promote Environmentally Sound and Economically Feasible Water Conservation Measures to minimize existing Great Lakes Basin Withdrawals, Consumptive Uses and Diversions.

Section 9.2. Jurisdictional Review for Diversions.
A New or Increased Diversion of less than 1 million gallons per day average in any 120 day period will be managed and regulated by the individual Signatory Party and declared consistent with the Standard of Review and Decision and approved as appropriate only when:

1) There is no reasonable Water supply alternative within the basin or the watershed of the Great Lake in which the Water is proposed for use, including the efficient use and conservation of existing water supplies; and,
2) The Withdrawal of Great Lakes Basin Water will be limited to quantities that are considered reasonable for the purposes for which they are proposed; and,
3) All Water Withdrawn from the Great Lakes Basin shall be returned to the Great Lakes Basin less an allowance for Consumptive Use of the applicable water use sector. Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water 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 shall be returned to 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. An individual jurisdiction may grant an exemption to this Return Flow requirement only when the applicant demonstrates that the Diversion of Great Lakes Basin Water is less than 250,000 gallons per day average in every 120 day period and is exclusively for public water supply uses in areas less than 12 miles from the Basin boundary where adequate quantities of potable-quality water are not available; and,
4) The Withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the proposal; and,
5) Environmentally Sound and Economically Feasible Water Conservation Measures will be implemented to minimize Water Withdrawals or Consumptive Use; and,
6) The Withdrawal proposal shall incorporate a proposal for an Improvement to 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 integrity of the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and,
7) The Withdrawal will be implemented so as to ensure that it is in compliance with all applicable State and federal laws as well as regional interstate and international agreements.

Section 9.3. Jurisdictional Review for Withdrawals.
As soon as possible, but no later than 10 years from the effective date of this Compact, a Withdrawal greater than 100,000 gallons per day average in any 120 day period will be managed and regulated by the individual Signatory Party. Proposals will be declared consistent with the Standard of Review and Decision and approved as appropriate only when:

1) The need for all or part of the proposed Water Withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies; and
2) The Withdrawal of Great Lakes Basin Water will be limited to quantities that are considered reasonable for the purposes for which they are proposed; and,
3) All Water Withdrawn from the Great Lakes Basin shall be returned to the Great Lakes Basin less an allowance for Consumptive Use of the applicable water use sector. Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water 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 shall be returned to 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; and,
4) The Withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the proposal; and,
5) Environmentally Sound and Economically Feasible Water Conservation Measures will be implemented to minimize Water Withdrawals or Consumptive Use; and,
6) The Withdrawal will be implemented so as to ensure that it is in compliance with all applicable State and federal laws as well as regional interstate and international agreements.

ARTICLE 10
ADDITIONAL PROVISIONS

Section 10.1. Cumulative Impacts.
The Great Lakes States in cooperation with the Great Lakes Provinces will collectively conduct, on a Lake watershed and St. Lawrence River Basin basis, a periodic assessment of the Cumulative Impacts of Withdrawals, Diversions and Consumptive Uses from the Waters of the Great Lakes Basin, every 5 years or each time the incremental Basin Water losses reach 50 million gallons per day in excess of the quantity at the time of the most recent assessment, whichever comes first, or at the request of one or more of the Great Lakes States. The assessment will form the basis for a review of the Standard of Review and Decision, Council regulations and their application.

Section 10.2. Exemptions.
Withdrawals from the Great Lakes Basin for the following purposes are exempt from the requirements of Articles 8 and 9.

1) To supply vehicles, including vessels and aircraft, whether for the needs of the persons or animals being transported or for ballast or other needs related to the operation of the vehicles.
2) To use in a non-commercial project on a short term basis for firefighting or humanitarian purposes.

Section 10.3. Applicability.
This Standard of Review and Decision shall be used as a minimum standard. States may impose a more restrictive decision making standard for Water Withdrawals under their authority. States may also, at their discretion, seek Regional Review and advice for any Withdrawal within their jurisdiction that may have the potential to significantly impact the Waters and Water Dependent Natural Resources of the Great Lakes Basin.

JULY 19, 2004
-DRAFT-

GREAT LAKES BASIN SUSTAINABLE WATER RESOURCES AGREEMENT
ENTENTE SUR LES RESSOURCES DURABLES EN EAUX DU BASSIN DES GRANDS LACS

The State of Illinois,

The State of Indiana,

The State of Michigan,

The State of Minnesota,

The State of New York,

The State of Ohio,

The Province of Ontario,

The Commonwealth of Pennsylvania,

The Government of Québec,

The State of Wisconsin,

PREAMBLE

Recognizing that,

The Waters of the Great Lakes Basin are a shared public treasure and the States and Provinces as stewards have a shared duty to protect, conserve and manage these renewable but finite Waters;

These Waters are interconnected and form part of a single hydrologic system;

Protecting, conserving, restoring, and improving these Waters is the foundation of Water resource management in the Great Lakes Basin;

There is a need for the States and Provinces to balance economic development, social development and environmental protection as interdependent and mutually reinforcing pillars of sustainable development;

Even though there has been significant progress in restoring and improving the health of the Great Lakes Basin ecosystem, the Waters and Water Dependent Natural Resources of the Great Lakes Basin remain at risk; and

Sustainable development and harmony with nature and between neighbours require cooperative arrangements for the development and implementation of watershed protection approaches at the Great Lakes regional level.

Reaffirming and acknowledging,

The principles and findings of the Great Lakes Charter and the commitments and directives of the Great Lakes Charter Annex 2001;

The continuing and abiding roles of the United States and Canadian federal governments under the Boundary Waters Treaty of 1909 and other applicable international agreements and the valuable contribution of the International Joint Commission; and

That effective management is dependent upon all Parties acting in a continuing spirit of comity and mutual cooperation.

Agree as follows:

CHAPTER I
GENERAL PROVISIONS

ARTICLE 100
OBJECTIVES

1. The objectives of this Agreement are:

(a) to protect, conserve, restore, improve and efficiently and effectively manage the Waters and Water Dependent Natural Resources of the Great Lakes Basin under appropriate arrangements for intergovernmental cooperation and consultation;

(b) to promote co-operation among the Parties;

(c) to create a co-operative arrangement regarding Water Withdrawal management that is simple, evolving and provides tools for shared future challenges;

(d) to provide common and regional mechanisms to evaluate Water Withdrawal proposals;

(e) to facilitate consistent approaches to Water management across the Basin while retaining State and Provincial management authority over Water management decisions within the Great Lakes Basin;

(f) to facilitate the exchange of data, strengthen the scientific information upon which decisions are made and engage in consultation on the potential effects of proposed Water Withdrawals on the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and

(g) to prevent or minimize significant adverse impacts of Withdrawals on the Great Lakes Basin's ecosystems and watersheds;

2. The Parties shall interpret and apply the provisions of this Agreement in order to achieve these objectives.

ARTICLE 101
SCOPE OF APPLICATION

This Agreement applies to the Waters of the Great Lakes Basin within the Parties' territorial boundaries.

ARTICLE 102
GENERAL COMMITMENT

Each Party shall seek legislative, regulatory or other changes that may be required to give effect to this Agreement.

ARTICLE 103
GENERAL DEFINITIONS

In this Agreement,

"Applicant" means the person who submits a project proposal involving a Withdrawal of Water subject to this Agreement.

"Compact" means the Great Lakes Basin Water Resources Compact.

"Consumptive Use"means that portion of Water Withdrawn or withheld from the Great Lakes Basin that is lost or otherwise not returned to the Great Lakes Basin due to evaporation, incorporation into products or other processes.

"Cumulative Impacts" means the impact on the Great Lakes Basin Ecosystem that results from incremental effects of the project in addition to other past, present, and reasonably foreseeable future projects regardless of who undertakes the other projects. Cumulative Impacts can result from individually minor but collectively significant projects taking place over a period of time.

"Diversion" means a transfer of Water from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lakes into that of another, by any means.

"Environmentally Sound and Economically Feasible Water Conservation Measures" means any beneficial reduction in Water loss, waste, or use accomplished by the implementation of Water management practices and Water efficiency measures. Water management practices and Water efficiency measures must be economically feasible based on a cost-benefit analysis that includes avoided environmental and economic costs.

"Great Lakes Basin" means the watershed of the Great Lakes and the St. Lawrence River upstream from Trois-Rivières, Québec within the Jurisdiction of the Great Lakes States or Provinces.

"Great Lakes Basin ecosystem" means the interacting components of air, land, Water and living organisms, including humankind, within the Great Lakes Basin.

"Improvement to the Waters and Water Dependent Natural Resources of the Great Lakes Basin" means additional beneficial, restorative effects to the physical, chemical or biological integrity of the Waters and Water Dependent Natural Resources of the Basin, resulting from associated Environmentally Sound and Economically Feasible Water Conservation Measures, enhancement or restoration measures which include, but are not limited to, such practices as mitigating adverse effects of existing Water Withdrawals, restoring environmentally sensitive areas or implementing Environmentally Sound and Economically Feasible Water Conservation Measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer.

"Jurisdiction's Waters" mean the Waters within the Great Lakes Basin and the geographic boundaries of the Jurisdiction.

"Manual" means the procedures manual established under Article 202 of this Agreement.

"Measure" includes any legislation, regulation, directive, requirement, guideline, program, policy, administrative practice or other procedure.

"New or Increased Diversion or Consumptive Use" means a new Diversion or Consumptive Use or increase in an existing Diversion or Consumptive Use commencing after the effective date of Paragraph 3 of Article 710.

"Non-governmental organization" means any scientific, professional, business, non-profit, or public interest organization or association that is neither affiliated with, nor under the direction of a government.

"Party" means a State or Province that enters into this Agreement.

"Person" means a human being or a legal person, including a non-governmental organization or a government.

"Province" means Ontario or Québec.

"Return flow" means the remaining portion of Water Withdrawn which returns naturally or is returned to the Source Watershed after use and thus becomes available for further use in the Great Lakes Basin.

"Source Watershed" means the watershed from which the Water Withdrawal originates. 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 the 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 direct tributary stream.

"Standard" means the Decision Making Standard established under Chapter 2 of this Agreement.

"State" means one of the following States: Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania or Wisconsin.

"Technical review" means a detailed review conducted to determine, through an analysis of the criteria set out in the Manual, whether or not an application that requires Regional Review under this Agreement is consistent with the Standard.

"Water" means ground or surface Water contained within the Waters of the Great Lakes Basin, as described in Article 103.

"Water Dependent Natural Resources" mean the interacting components of land, Water and living organisms affected by the Waters of the Great Lakes Basin.

"Waters of the Great Lakes Basin or Great Lakes Basin Water" means the Great Lakes and all streams, rivers, lakes, connecting channels and other bodies of Water, including tributary groundwater, within the Great Lakes Basin.

"Withdrawal" means the taking of Water from surface or groundwater, by any means.

CHAPTER TWO
THE STANDARD

ARTICLE 200
THE ROLE OF THE STANDARD

1. The Decision Making Standard for Regulating Withdrawals from the Waters of the Great Lakes Basin (Standard) is agreed upon by the Parties as a minimum Standard and one of the means by which they will together protect, conserve, restore, improve and manage the Waters of the Great Lakes Basin.
2. The Parties shall seek to adopt and implement measures, as appropriate in each Party's Jurisdiction, that are no less restrictive than those described in the Standard.
3. It is acknowledged that the Parties may implement measures that are more restrictive than the requirements of the Standard. It is also acknowledged that although a proposal is consistent with the Standard it may not be approved under the laws of the originating Jurisdiction.
4. When fully implemented in each Jurisdiction, the Standard will lead to Water Withdrawal management systems that are consistent in their fundamentals across the region.
5. The Standard may be amended periodically in accordance with Article 707 paragraphs 1, 2, and 3 to reflect advancements in science, information and knowledge.
6. The Standard is attached to this Agreement as Appendix 1. It forms part of the Agreement and cannot be amended except according to the rules for amendment of the Agreement in Article 707.

ARTICLE 201
STANDARD APPLICABILITY

The Standard applies to new Water Withdrawals as well as increases to existing Water Withdrawals by providing criteria with respect to:

1. Regional Review of a proposal for New or Increased Diversion of 1 million gallons per day (3.8 million litres per day) or greater average in any 120 day period for consistency with the Standard.
2. Regional Review of a proposal for New or Increased Consumptive Use of 5 million gallons per day (19 million litres per day) or greater average in any 120 day period for consistency with the Standard.
3. Management and regulation within a Jurisdiction of Diversions less than 1 million gallons per day (3.8 million litres per day) average in any 120 day period as set out in the Standard.
4. Management and regulation within a Jurisdiction of Withdrawals greater than 100,000 gallons per day (379,000 litres per day) average in any 120 day period as set out in the Standard.
5. The Parties will collectively conduct, on a Lake watershed and St. Lawrence River Basin basis, a periodic assessment of the Cumulative Impacts of Withdrawals,

Diversions and Consumptive Uses from the Waters of the Great Lakes Basin. The assessment of the Cumulative Impacts shall be done,

(a) every 5 years;

(b) each time the incremental losses to the Basin reach 50,000,000 gallons (190,000,000 litres) per day average in any 120 day period in excess of the quantity at the time of the last assessment; or

(c) at the request of one or more of the Parties.

The assessment of Cumulative Impacts shall form a basis for the review of the Standard and the Manual and their application.

ARTICLE 202
PROCEDURES MANUAL

1. The Procedures Manual (Manual), drafted by the Parties, is to be used as a guide for the implementation of the Standard and in particular the review of the proposals and the preparation of an application. It also gives guidance on the review of their Water management programs.
2. The Manual shall contain specifics and details of items to be considered in determining whether or not a proposal meets the requirements of the Standard.
3. The Manual is attached to this Agreement as Appendix 2. It forms part of the Agreement and cannot be amended except according to the rules for amendment of the Agreement in paragraph 4 of Article 707.

ARTICLE 203
DETERMINATION OF WHETHER THE STANDARD APPLIES TO PROPOSALS TO WITHDRAW WATER

1. The Standard will apply to proposals to Withdraw Water from the Great Lakes Basin in accordance with the appropriate dates as established in Article 710 of this Agreement.

Determining New or Increased Diversions or Consumptive Uses

2. To establish a baseline for determining New or Increased Withdrawals, Diversions and Consumptive Uses, each Party shall develop for their Jurisdiction,

1. a list of existing Water Withdrawal approvals.
2. a list of the capacity of existing systems. The capacity of the existing systems should be presented in terms of Withdrawal capacity, treatment capacity, distribution capacity, or other capacity limiting factors. The capacity of the existing systems must represent the state of the systems on the effective date of Paragraph 3 of Article 710. Existing use determinations will be based upon approval limits or the most restrictive capacity information.

Timing of Additional Applications

3. For the purposes of triggering Regional Review, applications for New or Increased Diversions or Consumptive Uses will be considered cumulatively within ten years of any application as illustrated in the Procedures Manual.

Transfers of Ownership

4. The transfer of ownership of any entity for which an originating Jurisdiction previously approved a Diversion or Consumptive Use above the Regional Review Threshold shall not trigger Regional Review, provided the facts, conditions or other criteria upon which that approval was based have not changed.

Groundwater

5. Initially, the Great Lakes Basin surface Water divide will be used to define the Great Lakes Basin groundwater divide. It is recognized that this approach may not perfectly reflect where the groundwater divide actually exists. The definition of Great Lakes Basin groundwater will be updated as scientific understanding of groundwater flows improves.

Withdrawal systems

6. The total Withdrawals from surface and groundwater resources that supply a common distribution system determine the volume to which the Standard applies.

Communities Straddling Basin Boundaries

7. Communities (cities, towns or the equivalent thereof), whose existing corporate limits are in part within the watershed of one Great Lake or St. Lawrence River and whose public water supply and wastewater discharge occur within that same watershed, are considered to be entirely within that watershed for the purposes of the Standard.

Connecting Channels

8. For the purposes of determining whether a Withdrawal proposal is a New or Increased Diversion, the watershed of each Great Lake will include its upstream and downstream connecting channels.

Hydrologic Units

9. For purposes of determining whether a Withdrawal proposal is a New or Increased Diversion, the Lake Michigan and Lake Huron watershed are considered to be a single hydrologic unit.

Bulk Water Removals

10. A proposal to Withdraw Great Lakes Basin Water and to package it within the Great Lakes Basin for human consumption in containers 5.7 gallons (20 litres) or less shall be considered to be a proposal for a Consumptive Use for the purposes of the Standard. A proposal to Withdraw Great Lakes Basin Water and to remove it from the Basin in any container greater than 5.7 gallons (20 litres) shall be considered to be a proposal for a Diversion for the purposes of the Standard.

U.S. Supreme Court Decree: Wisconsin et. al. v. Illinois et. al.

11. For the Withdrawal of Great Lakes Basin Water by the State of Illinois, authorized by the United States Supreme Court decree in Wisconsin et. al. v. Illinois et. al. as of the effective date of this paragraph, no such Withdrawal shall be subject to Chapter 2 and Chapter 5 of this Agreement.

Exemptions

12. The Standard does not apply to Withdrawals from the Great Lakes Basin for the following purposes:

1. supply of vehicles, including vessels and aircraft, whether for the needs of the persons or animals being transported or for ballast or other needs related to the operation of vehicles.

2. use in a non-commercial project on a short term basis for firefighting or humanitarian purposes.

CHAPTER 3
WATER MANAGEMENT
PROGRAMS WITHIN THE JURISDICTIONS

The Great Lakes States and Provinces shall, as set out in this Chapter, seek to implement mutually agreed upon measures to manage Water Withdrawals, promote the efficient use and conservation of the Waters within their Jurisdictions and improve the sources and application of scientific information for all existing, New or Increased Withdrawals.

ARTICLE 300
WATER MANAGEMENT PROGRAMS

1. The Great Lakes States and Provinces shall seek to implement programs to protect, preserve, restore and improve the Waters and Water Dependent Natural Resources of the Great Lakes Basin.
2. Each Party shall submit a report to the Regional Body (as described in Chapter 4 of this Agreement), in accordance with the Manual, detailing the Water management programs that implement this Agreement in their Jurisdiction.
3. The Regional Body shall forward each report to all members and shall give the members at least 30 days to consider it.
4. Following that period, the Regional Body shall consider the reports submitted by each Party.
5. The Regional Body shall issue a Declaration of Finding on whether the programs in place in a Jurisdiction,
    1. meet or exceed the requirements of this Agreement.
    2. do not meet the requirements of this Agreement.
    3. would meet the requirements if certain improvements were made.
6. Every year following the coming into force of this Chapter, each Party shall give the Regional Body an annual report in accordance with the Manual setting out the changes made that year to the Party's Water management programs.
7. The Regional Body shall distribute the annual reports to its members.
8. A Party may ask the Regional Body to issue a Declaration of Finding respecting the Water management programs in the Jurisdiction of any of the Parties, including themselves, to determine whether the programs,
    1. meet or exceed the requirements of this Agreement.
    2. do not meet the requirements of this Agreement.
    3. would meet the requirements if certain improvements were made.

ARTICLE 301
INFORMATION

1. The Great Lakes States and Provinces shall gather and share accurate and comparable information on all Diversions and Withdrawals in excess of 100,000 gallons per day (379,000 litres per day) average in any 30 day period.
2. Programs in each Jurisdiction shall require users to report their monthly Withdrawals, Consumptive Uses and Diversions on an annual basis.
3. Within 1 year of the coming into force of this Chapter, the Parties shall develop, in accordance with Paragraph 2 of Article 203, a list of:
   (a) all Diversions.
   (b) all Withdrawals in excess of 100,000 gallons per day (379,000 litres per day) average in any 30 day period.
   (c) the information required in Article 203 paragraph 2, subparagraph 1 and Article 203 paragraph 2, subparagraph 2.
4. The Parties shall report the information required to be developed under this Article to a Great Lakes Water Use Data Base Repository and it shall be available to the public.
5. The Parties shall co-ordinate the collection and application of scientific information to further develop a mechanism by which individual and Cumulative Impacts of Water Withdrawals may be assessed.
6. Information gathered shall be used to improve the sources and applications of scientific information regarding the Waters of the Great Lakes Basin, the impacts of Withdrawals from various locations and Water sources on the ecosystem, to better understand the role of groundwater, and to clarify what groundwater forms part of the waters of the Great Lakes Basin.

ARTICLE 302
WATER CONSERVATION PROGRAMS

The Parties shall seek to implement programs to promote Environmentally Sound and Economically Feasible Water Conservation Measures to minimize existing Great Lakes Basin Withdrawals, Consumptive Uses and Diversions.

CHAPTER FOUR
GREAT LAKES WATER RESOURCES REGIONAL BODY

ARTICLE 400
FUNCTIONS OF THE REGIONAL BODY

1. The Great Lakes Water Resources Regional Body (Regional Body) is composed of the Governor or Premier of each of the Parties, or a person designated by each of them.
2. The Regional Body is established to undertake the following duties and responsibilities:
   1. ensure, in accordance with this Agreement, a formalized process with respect to proposals that trigger Regional Review under the Standard and that originate in the Jurisdiction of one of the Parties for a New or Increased Withdrawal of Great Lakes Water and thereby provide an opportunity for concerns in the region to be addressed;
   2. declare whether or not an application for Withdrawal of Water under consideration in a Jurisdiction requiring Regional Review under this Agreement is consistent with the Standard;

3. declare whether programs in a Jurisdiction established pursuant to Chapter 3 meet the requirements of this Agreement;
4. facilitate the development of consensus and the resolution of disputes on matters arising under this Agreement;
5. monitor and report on the implementation of this Agreement by the Parties, including data collection, the implementation of programs in each Jurisdiction to manage and regulate Water Withdrawals, promote Water conservation, and collectively assess the Cumulative Impacts of Withdrawals from the Waters from the Great Lakes Basin;
6. review the Standard and the Manual and their application, and propose amendments pursuant to Article 707;
7. perform any other functions or duties necessary to implement this Agreement.

ARTICLE 401
ORGANIZATION AND PROCEDURES OF THE REGIONAL BODY

1. The Regional Body may establish its own administrative practices and procedures.
2. The Regional Body may create a secretariat by the unanimous consent of its members.
3. The Regional Body shall meet,
   (a) at least once annually; and
   (b) at any other time at the call of the Chair or at the request of two or more Parties.
4. The Regional Body shall keep a complete public record of documents provided to it or generated by it including,
   (a) proposals about which it is notified, whether formally or informally;
   (b) materials provided to the Regional Body in respect of a proposal, under Chapter 5 including the application, the technical review and comments provided by the public;
   (c) comments or objections made in respect of a proposal by members of the Regional Body or Declaration of Finding;
   (d) materials in respect of dispute resolution under Chapter 6; and
   (e) any amendments to the Manual agreed to by the Parties in accordance with paragraph 4 of Article 707.
5. The members shall appoint a Chair and vice Chair through the following process:
   1. For the first year, the Chair and vice Chair shall be members elected by a vote of the members.
   2. Each subsequent year, until all members have served, the vice Chair shall be chosen by drawing lots from amongst those members who have not yet served.
   3. Each member shall serve as Chair immediately after having served as vice Chair.
   4. Each member shall serve as vice Chair and as Chair, each for one year.
   5. Once all members have served as vice Chair and Chair, the original order of serving shall be repeated.
6. In the event that an application for Regional Review originates in the same Jurisdiction as the Chair represents, the role of the Chair of the Regional Body set out in this Chapter shall be filled by another member.
7. Each Party shall bear an equitable share of the costs of the Regional Body to a maximum amount per annum that is agreed upon each year by the Parties.

8. The Parties shall support the Regional Body using existing agency staff and facilities to the greatest extent possible and are encouraged to make additional resources available though partnerships and co-operative arrangements with government agencies, public or private entities, individuals or academic institutions.
9. It is the intent of the Parties that the Regional Body shall conduct public participation and Regional Review processes concurrently and jointly with those undertaken pursuant to the Compact and in the Parties' Jurisdictions to the greatest extent possible.
10. The Parties recognize the importance and necessity of public participation in promoting management of the Water resource of the Great Lakes Basin. Consequently, meetings of the Regional Body, at which official action is to be taken, shall be open to the public except when the Regional Body is meeting in executive session.
11. The minutes of the Regional Body shall be a public record.

CHAPTER 5
REGIONAL REVIEW

ARTICLE 500
REVIEW OF PROPOSALS TO WITHDRAW WATERS FROM THE GREAT LAKES BASIN

1. This Chapter sets out the process to be used by the Parties for Regional Review with respect to proposals for major New or Increased Withdrawals of Water as identified in the Standard.
2. The process provides the Parties an opportunity to address concerns in the region with respect to that proposal.

ARTICLE 501
NOTICE FROM ORIGINATING JURISDICTION TO THE REGIONAL BODY

Notice to the Regional Body of a proposal

1. An originating Jurisdiction shall determine if an application to Withdraw Water from Waters within the boundaries of a Jurisdiction that is under consideration for approval in the Jurisdiction is subject to review by the Regional Body under the terms of this Agreement.
2. If the originating Jurisdiction so determines, it shall provide timely notice to the Regional Body of the proposal before it decides whether or not to approve the application.
3. The notice shall contain all information and documents needed to evaluate whether the proposal conforms with the requirements of the Standard.

ARTICLE 502
VOLUNTARY NOTICE AND CONSULTATION

1. An originating Jurisdiction may at any time, with respect to an application to Withdraw Water from the Jurisdiction's Waters that is under consideration for approval in the Jurisdiction,
    1. provide notice to the Regional Body of the application, even if notification is not required under this Agreement; or
    2. seek Regional Review of the application, even if Regional Review is not required under this Agreement.
2. For example, a Party may provide voluntary notice of a proposal that the Party believes may come forward for Regional Review in the future or of a project that is not subject to Regional Review under this Agreement but nonetheless may be of interest to the Parties.
3. In addition to the requirement to provide a detailed notice of a proposal in accordance with paragraph 3 of Article 501, an originating Jurisdiction may, before that notice is completed, provide preliminary notification to the Regional Body of a possible application to Withdraw Water from the Jurisdiction's Waters.
4. At an originating Jurisdiction's request or by a majority vote of the Regional Body, a regionally significant or potentially precedent setting proposal may be subjected to Regional Review. No such notification to the Regional Body shall be made nor review shall be undertaken without consulting with the applicant.

ARTICLE 503
PUBLIC PARTICIPATION

1. To ensure adequate public participation, the Regional Body will adopt procedures for the review of proposals that are subject to Regional Review in accordance with this Article.
2. If the Regional Body has received notice from the originating Jurisdiction under Article 501 or 502, the Regional Body shall provide notification of a proposal to the public that indicates that the public has an opportunity to comment in writing to the Regional Body on whether the proposal meets the requirements of the Standard.
3. The Regional Body shall hold a public meeting in the originating Jurisdiction in order to receive public comment on the issue of whether the proposal under consideration in the Jurisdiction meets the requirements of the Standard.
4. The Regional Body shall consider the comments received as a result of public notice before issuing a Declaration of Finding.
5. The Regional Body shall forward the comments it receives to the originating Jurisdiction.
6. The Regional Body shall assure public accessibility to documents pertinent to proposals subject to Regional Review including comments, objections, and responses by Great Lakes States or Provinces and public comment itself.
7. Both comments and the Declaration of Finding will be made part of the proposal's administrative record and be accessible to the public.
8. Public access is recognized to be subject to confidentiality obligations set out in Article 704.
9. In addition to the requirements of this Article, the Parties shall seek to provide notice to the public and an opportunity for public input and comment on proposals that are subject to the requirements of the Standard but that are not subject to review by the Regional Body.

ARTICLE 504
TRIBES AND FIRST NATIONS CONSULTATION

1. In respect of a proposal to Withdraw Water to which this Agreement applies, appropriate consultation will occur with Tribes or First Nations in the originating Jurisdiction in the manner suitable to the individual proposal and the laws and policies of the originating Jurisdiction.
2. If the Regional Body has received notice from the originating Jurisdiction under Article 501 or 502, the Regional Body shall provide reasonable notice of a proposal to the Tribes and First Nations within the Great Lakes Basin, indicating that they have an opportunity to comment in writing to the Regional Body on whether the proposal meets the requirements of the Standard.
3. The notice from the Regional Body shall inform the Tribes and First Nations of the meeting that is to be held under paragraph 3 of Article 503 and invite them to attend.
4. The Regional Body shall forward the comments that it receives under this Article to the originating Jurisdiction for its consideration before issuing a Declaration of Finding.
5. The Regional Body shall consider the comments that it receives under this Article before issuing a Declaration of Finding.

ARTICLE 505
CONFORMITY WITH THE STANDARD

Originating Jurisdiction's Technical Review

1. The originating Jurisdiction shall provide the Regional Body with its technical review of the proposal under consideration.
2. The technical review shall thoroughly analyze the proposal and provide an evaluation of the proposal sufficient for a determination of whether the proposal meets the requirements of the Standard.

Independent Assessment

3. Any member of the Regional Body may within 60 days undertake an assessment of its own and the originating Jurisdiction shall assist the member by providing such additional information related to the application of the Standard as may be required in order to do so.
4. At the request of the majority of its members, the Regional Body shall make such arrangements as it considers appropriate for an independent assessment of the proposal, or any aspect of it and shall determine the time by which it shall be completed.
5. All Parties shall exercise their best efforts to ensure that assessments undertaken under paragraphs 3 or 4 do not unnecessarily delay the decision on the application by the originating Jurisdiction. To the extent possible they shall occur within 60 days of the date the notice of the proposal was sent to the Regional Body under Article 501.

ARTICLE 506
DECLARATION OF FINDING

Consideration of the Record

1. The Regional Body shall meet to consider a proposal within 90 days of receiving the technical review of the proposal from the originating Jurisdiction under paragraph 1 of Article 505.
2. The Regional Body, having considered the notice, the originating Jurisdiction's technical review, any other assessment that is made, any comments or objections including the analysis of comments made by the public as well as Tribes and First

Nations, and any other information that is provided under this Agreement may declare that the application under consideration,

1. meets the requirements of the Standard contained in this Agreement.
2. does not meet the requirements of the Standard contained in this Agreement.
3. would meet the requirements of the Standard if certain conditions were met by the applicant or the originating Jurisdiction.

Function of the Originating Jurisdiction with respect to a Declaration of Finding

3. An originating Jurisdiction may decline to participate in a Declaration of Finding made by the Regional Body on an application to Withdraw Waters from within its boundaries.

Declaration of Finding with Consensus

4. The Parties to this Agreement recognize and affirm that it is preferable for all members of the Regional Body to agree whether or not an application meets or does not meet the requirements of the Standard.
5. If the members of the Regional Body who participate in the Declaration of Finding all agree, they shall issue a written Declaration of Finding stating that the proposal,
   1. meets the requirements of the Standard contained in this Agreement.
   2. does not meet the requirements of the Standard contained in this Agreement.
   3. would meet the requirements of the Standard if certain conditions were met by the applicant or the originating Jurisdiction.

Consensus-building

6. In the event that the members cannot agree, the Regional Body shall make every reasonable effort to achieve consensus within 25 days.

Declaration of Finding where there is no Consensus

7. Should consensus not be achieved, the Regional Body may issue a public Declaration of Finding that presents different points of view and indicates each Party's position.

Consideration of the Declaration of Finding

8. The originating Jurisdiction shall consider the Declaration of Finding before deciding whether or not to issue the approval for the Withdrawal of Water under its own legislation.
9. The Regional Body shall release the Declaration of Finding to the public according to procedures that it will develop.

CHAPTER 6
DISPUTE RESOLUTION

ARTICLE 600
GENERAL

1. The Parties undertake to resolve any disputes under this Agreement in a conciliatory, co-operative and harmonious manner.

2. Where dispute resolution is required, the Parties undertake to use the dispute resolution mechanisms provided for in this Chapter to arrive at a mutually satisfactory resolution.
3. The provisions of this Chapter shall not be used to dispute a Declaration of Finding on a proposal that is subject to Regional Review.
4. A person who is not a Party to this Agreement may not seek dispute resolution under this Agreement.

ARTICLE 601
PROCEDURE FOR DISPUTE RESOLUTION

Initial Steps

1. A Party may provide detailed written notice to another Party and to the Regional Body of a dispute that in its opinion requires resolution under this Chapter.

Measures to settle disputes

2. If the dispute is not resolved informally, the Chair of the Regional Body shall initiate the most appropriate measures to resolve the dispute. These measures may include:

    1. the appointment of a panel to hear the Parties to the dispute.
    2. consultation with experts.
    3. establishment of a working or fact-finding group.
    4. the use of dispute resolution mechanisms such as conciliation or mediation.

3. After resolution is attempted by one of the measures suggested in paragraph 2, recommendations shall be made in accordance with directions given by the Chair at the time the measure was adopted. The disputing Parties shall consider the recommendations and exercise their best efforts to settle their dispute.

Reference to Regional Body

4. If the disputing Parties, having considered the recommendations, fail to settle the dispute, any one of them may refer the matter to the full Regional Body. In this case, the Chair of the Regional Body shall, in consultation with the other members who are not involved in the dispute, have the Regional Body take such further steps as he or she considers advisable in the circumstances to resolve the dispute.
5. When those steps have been taken, the Regional Body shall issue its recommendations regarding the resolution of the dispute.
6. The disputing Parties shall consider the recommendations and shall exercise their best efforts to settle.

Role of the Chair

7. In the event that a dispute that involves the Jurisdiction of the Chair of the Regional Body, the role of the Chair set out in this Chapter shall be filled by the vice Chair or failing him or her, another member who is not a Party to the dispute.

CHAPTER 7
FINAL PROVISIONS

ARTICLE 701
REAFFIRMATION OF CONSTITUTIONAL POWERS AND RESPONSIBILITIES

1. Nothing in this Agreement alters the legislative or other authority of Parliament or of the Provincial legislatures or of the federal Government of Canada or of the Provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada.
2. This Agreement is not intended to infringe upon the treaty power of the United States of America, nor shall any term hereof be construed to alter or amend any treaty or term thereof that has been or may hereafter be executed by the United States of America on behalf of the Signatory States.

ARTICLE 702
RELATIONSHIP TO AGREEMENTS CONCLUDED BY CANADA OR THE UNITED STATES OF AMERICA

Nothing in this Agreement is intended to provide nor shall be construed to provide, directly or indirectly, to any person any right, claim or remedy under any international Agreement or treaty.

ARTICLE 703
RELATIONSHIP TO OTHER AGREEMENTS AMONG THE PARTIES

1. The Parties assert that by this Agreement they are fulfilling their existing commitments with respect to each other under the Great Lakes Charter and the Great Lakes Charter Annex.
2. The obligations of this Agreement shall be co-ordinated with any obligations set out in other Environmental and Conservation Agreements between or among the Parties.

ARTICLE 704
CONFIDENTIALITY

1. Nothing in this Agreement requires a Party to breach confidentiality obligations or requirements prohibiting disclosure that it has under its own laws, to compromise security or a person's commercially sensitive or proprietary information of a person.
2. A Party may take measures, including but not limited to deletion and redaction, deemed necessary to protect any confidential, proprietary or commercially sensitive information when distributing information to other Parties. The Party shall summarize or paraphrase any such information in a manner sufficient for the Regional Body to exercise its authorities contained in this Agreement.

ARTICLE 705
MEASURES SUBJECT TO TRANSITIONAL PROVISIONS

Each Party shall, from the date of execution of this Agreement, exercise its best efforts to refrain from taking any action that would defeat the objectives of this Agreement.

ARTICLE 706
APPENDICES

The Appendices to this Agreement constitute an integral part of the Agreement.

ARTICLE 707
AMENDMENTS

1. The Parties may agree in writing to amend this Agreement.
2. An amendment to this Agreement requires the consent of all Parties to the Agreement.
3. When so agreed, and approved in accordance with the applicable legal procedures of each Party, an amendment shall constitute an integral part of this Agreement from the date of its entry into force.
4. Despite paragraph 2, the Manual may be amended on the unanimous written consent of the members of the Regional Body.

ARTICLE 708
WITHDRAWAL AND TERMINATION PROCEDURE

1. Twelve months after it gives written notice to all other Parties, a Party may withdraw from this Agreement.
2. If a Party withdraws, the Agreement shall remain in force among the remaining Parties.
3. This Agreement shall be terminated when all Parties, or all remaining Parties, agree in writing.

ARTICLE 709
LANGUAGE

This Agreement has been made and executed in English and French and both versions are equally authoritative.

ARTICLE 710
ENTRY INTO FORCE

1. The following parts of the Agreement come into force when the Agreement is signed by all the Parties:
    1. Preamble.
    2. Chapter 1 (General Provisions).
    3. Article 200 (Role of the Standard).
    4. Chapter 4 (Great Lakes Water Resources Regional Body).
    5. Chapter 6 (Dispute Resolution).
    6. Chapter 7 (Final Provisions).
2. The following parts of the Agreement shall come into force on the first day of the second month following the date that the last Party has notified the others that it has completed the legal procedures necessary to implement them:
    1. Article 201, paragraphs 1 to 3 (Application of the Standard to Regional Review of Diversions and Consumptive Uses; management of Diversions in a Jurisdiction).
    2. Article 202 (Procedures Manual).
    3. Article 203, except paragraph 2 (determination of whether the Standard applies to proposals).
    4. Chapter 5 (Regional Review).
3. The following paragraph shall come into force on the date that is 1 year after the date paragraph 2 of this Article came into force:
    1. Article 203, paragraph 2 (establishing a baseline to determine New or Increased Diversions or Consumptive Uses).
4. The following paragraph shall come into force on the date that is 5 years after the date paragraph 2 of this Article came into force:

1. Article 201, paragraph 5 (periodic assessment of Cumulative Impacts).

5. The following paragraph shall come into force on the date that is the sooner of 10 years after the date paragraph 2 of this Article came into force or the first day of the second month following the date that the last Party has notified the others that it has completed the legal procedures necessary to implement it:

1. Article 201, paragraph 4 (management of Withdrawals in a Jurisdiction).

6. The following Chapter shall come into force 1 year after the date paragraph 5 of this Article came into force:

1. Chapter 3 (Water management programs within the Jurisdictions).

7. Except as otherwise set out in this Agreement, on the first day of the second month following the date that the last Party has notified the others that it has completed the necessary legal procedures, any remaining parts of this Agreement shall come into force.

8. The terms, agreements, and review processes contained in the Great Lakes Charter of 1985 ("Charter") shall remain in full force and effect unless and until the Parties to the Charter certify in writing that it has been replaced by the terms of this Agreement. Until the coming into force of Chapter 5 of this Agreement, the Regional Body as described in Chapter 4 shall be used for all prior notice and consultation activities as described in the Charter.

Signed this X day of 2005.

Governor of Illinois

Governor of Indiana

Governor of Michigan

Governor of Minnesota

Governor of New York

Governor of Ohio

Premier of Ontario

Governor of Pennsylvania

Premier of Quebec

Governor of Wisconsin

Draft Decision-Making Standard
Regional Review for Diversions.

I A. 120 conflicts with the charter which says 30 days
→ revert to 30 days

B. reasonable - how is it defined

C. allowance for consumptive use ← determine
→ should as close to the point of withdrawal as possible"

D. linking precedent setting (define) to cumulative impacts
→ we want to see all withdrawal and diversion data to be cumulated

E. changes (possible determination)

F. an improvement
- change to improvements

G withdrawal not in accord with other laws. However decision-making standard may require new laws or changes to existing laws.

H. what if it is more than 3 million 11.4 million litres a day ??

II Regional Review for consumptive uses
new & increased consumptive uses
5 million 120 days. (9 million litres)
→ revert to 30 days
does the consumptive use allowance come off before or after 5 million withdrawal
withdrawal 5 million less consumptive use on less consumptive use
= 5 million

III

IV Jurisdictional Review

Industrial exemption to return flow requirement

less than 250,000 gallons per day

120 day average by public water supplies

no more than 12 miles from lake. (19.3)

where no other sources of water are available

APPENDIX 1
DECISION MAKING STANDARD

DECISION MAKING STANDARD FOR REGULATING WITHDRAWALS FROM THE WATERS OF THE GREAT LAKES BASIN

I. REGIONAL REVIEW FOR DIVERSIONS

A New or Increased Diversion of 1 million gallons per day (3.8 million litres per day) or greater average in any 120 day period will be subject to Regional Review under the Agreement and declared consistent with the Standard and approved as appropriate only when:

A. There is no reasonable Water supply alternative within the basin or the watershed of the Great Lake in which the Water is proposed for use, including the efficient use and conservation of existing water supplies; and,

B. The Withdrawal of Great Lakes Basin Water will be limited to quantities that are considered reasonable for the purposes for which they are proposed; and,

C. All Water Withdrawn from the Great Lakes Basin shall be returned to the Great Lakes Basin less an allowance for Consumptive Use of the applicable water use sector. Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water 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 shall be returned to 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; and,

D. The Withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the proposal; and,

E. The Withdrawal proposal shall incorporate a conservation plan, demonstrating how Environmentally Sound and Economically Feasible Water Conservation Measures will be implemented to minimize Water Withdrawals or Consumptive Use; and,

F. The Withdrawal proposal shall incorporate a proposal for an Improvement to 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 integrity of the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and,

G. The Withdrawal will be implemented so as to ensure that it is in compliance with all applicable State, Provincial and federal laws as well as regional interstate, inter-provincial and international Agreements.

H. The Jurisdiction in which the proposal originates will be responsible for declaring whether proposals are consistent or inconsistent with the Decision Making Standard under Section I.F. for New or Increased Diversions 1 million gallons per day or greater (3.8 million litres per day) average in any 120 day period and less than 3 million gallons per day (11.4 million litres per day) average in any 120 day period.

II. REGIONAL REVIEW FOR CONSUMPTIVE USES

A New or Increased Consumptive Use of 5 million gallons per day (19 million litres per day) or greater average in any 120 day period will be subject to Regional Review under the Agreement and declared consistent with the Standard and approved as appropriate only when:

A. The need for all or part of the proposed Water Withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies; and
B. The Withdrawal of Great Lakes Basin Water will be limited to quantities that are considered reasonable for the purposes for which they are proposed; and,
C. All Water Withdrawn from the Great Lakes Basin shall be returned to the Great Lakes Basin less an allowance for Consumptive Use of the applicable water use sector. Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water 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 shall be returned to 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; and,
D. The Withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the proposal; and,
E. The Withdrawal proposal shall incorporate a conservation plan, demonstrating how Environmentally Sound and Economically Feasible Water Conservation Measures will be implemented to minimize Water Withdrawals or Consumptive Use; and,
F. The Withdrawal proposal shall incorporate a proposal for an Improvement to 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 integrity of the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and,
G. The Withdrawal will be implemented so as to ensure that it is in compliance with all applicable State, Provincial and federal laws as well as regional interstate, inter-provincial and international Agreements.

III. REGIONAL REVIEW FOR COMBINED DIVERSIONS AND CONSUMPTIVE USES

A New or Increased Diversion and a Consumptive Use where the total combined Diversion and Consumptive Use is 5 million gallons (19 million litres per day) per day or greater average in any 120 day period shall be addressed in the manner prescribed in Section I or II as appropriate even though the Diversion component is less than 1 million gallons per day (3.8 million litres per day) average in every 120 day period or the Consumptive Use component is less than 5 million gallons (19 million litres per day) per day average in every 120 day period.

IV. JURISDICTIONAL REVIEW FOR DIVERSIONS

A New or Increased Diversion less than 1 million gallons per day (3.8 million litres per day) average in any 120 day period will be managed and regulated under the authority of individual States and Provinces and declared consistent with the Decision Making Standard and approved as appropriate only when:

A. There is no reasonable Water supply alternative within the basin or the watershed of the Great Lake in which the Water is proposed for use, including the efficient use and conservation of existing water supplies; and,

B. The Withdrawal of Great Lakes Basin Water will be limited to quantities that are considered reasonable for the purposes for which they are proposed; and,

C. All Water Withdrawn from the Great Lakes Basin shall be returned to the Great Lakes Basin less an allowance for Consumptive Use of the applicable water use sector. Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water 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 shall be returned to 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. An individual Jurisdiction may grant an exemption to this Return Flow requirement only when the applicant demonstrates that the Diversion of Great Lakes Basin Water is less than 250,000 gallons (946,000 litres) per day average in every 120 day period and is exclusively for public water supply uses in areas less than 12 miles (19.3 kilometers) from the Basin boundary where adequate quantities of potable-quality water are not available; and,

D. The Withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the proposal; and,

E. Environmentally Sound and Economically Feasible Water Conservation Measures will be implemented to minimize Water Withdrawals or Consumptive Use; and,

F. The Withdrawal proposal shall incorporate a proposal for an Improvement to 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 integrity of the Waters and Water Dependent Natural Resources of the Great Lakes Basin; and,

G. The Withdrawal will be implemented so as to ensure that it is in compliance with all applicable State, Provincial and federal laws as well as regional interstate, inter-provincial and international Agreements.

V. JURISDICTIONAL REVIEW FOR WITHDRAWALS

A New or Increased Withdrawal of greater than 100,000 gallons per day (379,000 litres per day) average in any 120 day period will be managed and regulated under the authority of individual States and Provinces in accordance with the schedule set out in paragraph 5 of Article 710 of the Agreement. Proposals will be declared consistent with the Decision Making Standard and approved as appropriate only when:

A. The need for all or part of the proposed Water Withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies; and,
B. The Withdrawal of Great Lakes Basin Water will be limited to quantities that are considered reasonable for the purposes for which they are proposed; and,
C. All Water Withdrawn from the Great Lakes Basin shall be returned to the Great Lakes Basin less an allowance for Consumptive Use of the applicable water use sector. Water Withdrawn directly from a Great Lake or from the St. Lawrence River shall be returned to the watershed of that Great Lake or the watershed of the St. Lawrence River, respectively. Water 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 shall be returned to 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; and,
D. The Withdrawal will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the proposal; and,
E. Environmentally Sound and Economically Feasible Water Conservation Measures will be implemented to minimize Water Withdrawals or Consumptive Use; and,
F. The Withdrawal will be implemented so as to ensure that it is in compliance with all applicable State, Provincial and federal laws as well as regional interstate, inter-provincial and international Agreements.

JULY 19, 2004
-DRAFT-

APPENDIX 2
PROCEDURES MANUAL
Decision Making Standard Procedures Manual – Table of Contents

1) Introduction of Procedures Manual Purpose and Use

Part I: Review of a Proposal to Withdraw Water
2) Proposal Review Guidance
   A) No Reasonable Water Supply Alternative
   B) Quantities that are Considered Reasonable
   C) Return Flow
   D) No Significant Individual and Cumulative Impacts
   E) Water Conservation
   F) Improvement Measures
   G) Compliance with Applicable Laws

3) Application Information
   A) Who Applies and Who Bears the Regulatory Burden
   B) Legal Arrangements
   C) Jurisdiction Review
   D) Timing of Additional Applications
   E) Diversions
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Part 2: Review of Water Management Programs
4) Jurisdictional Management and Information
   A) Submission and Review
   B) Components of Jurisdictional Program Report
   C) Statement on Improvement Measures
   D) Water Conservation Programs
   E) Information Collection and Management

Appendices to Appendix 2
Appendix A. Elements of an Application

1) INTRODUCTION OF PROCEDURES MANUAL PURPOSE AND USE

This Manual addresses:

Part 1: Review of a Proposal to Withdraw Water

- Proposal review guidance (section 2)
  The proposal review guidance applies to proposal reviews for both proposals above the Regional Review Threshold level and proposals below the Regional Review Threshold level, reviewed by the Jurisdictions, with the following exceptions:
  - Water conservation plans covered in Section (2)(E) apply to proposals above the Regional Review Threshold level only.
  - Improvement measures covered in Section (2)(F) currently only apply to all proposals except Withdrawal under Jurisdictional Review.

- Certain of the program requirements for proposals below the Regional Review Threshold level for Consumptive Uses will be phased in by the Jurisdictions over time.
- A discussion on proposal application information (Section 3)
- Elements of an application (Appendix A)

Part 2: Review of Water Management Programs

For proposals under the Regional Review Threshold level (subject to Jurisdictional review) programs, the Manual includes descriptions of:

- The submission and review/comment process.
- The components of the Jurisdictional program report.
- Guidance to Jurisdictions on Water conservation.
- A statement on Improvement Measures.
- Information collection and management.

2) PROPOSAL REVIEW GUIDANCE

A. No Reasonable Water Supply Alternative

Description of Intent
The purpose of this requirement is to ensure that there are not reasonable alternatives available that would eliminate or diminish the need for New or Increased Diversions or Consumptive Uses of Great Lakes Basin Water.

Application Requirements
Diversion Proposals
Diversion applications shall include a narrative description of the need for the proposed New or Increased Diversion. This description should include an analysis of alternative supplies considered and reasons as to why alternatives in the Basin or watershed of the Great Lake in which the Water is proposed for use are unacceptable. The more efficient use of current Water Withdrawals, including the application of Environmentally Sound and Economically Feasible Water Conservation Measures, should be included in this analysis.

Withdrawal and Consumptive Use Proposals
Withdrawal applications shall include a narrative description of the need for the proposed New or Increased Withdrawal or Consumptive Use. This description should include an analysis of the efficiency of current water Withdrawals, including the application of Environmentally Sound and Economically Feasible Water Conservation Measures.

Criteria for Decisions
The application should include an analysis of water supply alternatives available and considered meeting the new or increased need. This analysis shall address quantity and quality (including treatability) of alternative sources. The analysis shall describe the rationale for not using the other considered water supply alternatives.

A clear demonstration of alternatives considered, the analysis undertaken and conclusions and findings of this analysis will be evaluated. There must be a showing that no reasonable water supplies are available. To determine what is reasonable, three

factors will be evaluated for alternative options, including: 1) resource protection, 2) technology and 3) cost.

Water conservation and efficient use of existing water supplies should be an alternative that is pursued first to minimize or eliminate the need for the New or Increased Diversion or Consumptive Use.

B. Quantities that are Considered Reasonable

Description on Intent
The purpose of this requirement is to ensure that the Withdrawal of Great Lakes Basin Water will be limited to quantities that are considered reasonable to meet the requirements of the intended use.

Application Requirements
The applicant must estimate the highest 120-day average use for the period for which the approval is being sought. The application must include a Water use plan. For a public water supply system, publicly or privately operated, the plan must include:

- A description and map of the service area at the time of the application and projected for up to twenty years or for the period for which the approval is being sought.
- Water use and population projections at the time of the application and projected for the next five, ten and twenty years. Population projections should be credible and the entity conducting the projections identified. Water use will be presented in terms of maximum use for any 120-day period for a given year. Water use must also be presented in terms of annual average gallons or litres per day.
- A description of the capacity of the Withdrawal, treatment and distribution portions of the system.
- An assessment of the water use savings of current and proposed water conservation programs.

Applications for other uses, such as industrial or agricultural, 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. Water use will be presented in terms of maximum 120 day average use for a given year and in terms of annual average gallons per day.

Criteria for Decisions
In determining if a proposal has successfully met the requirements of this Standard provision, the proposal will be evaluated in terms of how realistic and reasonable the quantity of the proposed Water Withdrawal is to meet the requirements of the intended purposes for the Withdrawal. The review will be conducted in concert with the review of the proposal's Environmentally Sound and Economically Feasible Water Conservation Measures to determine how effective it is in minimizing the quantity of the Withdrawal.

The proposed Water use projections will be evaluated upon the following criteria:

- The presentation of current use information – including proposed Withdrawal and/or Diversions and/or Consumptive Use;
- The existence of a Water use plan with credible multi-year use projections; and,

- The potential effectiveness of current and proposed Water conservation programs in minimizing the Withdrawal, Diversion and/or Consumptive Use of Water.

C. Return Flow

Description of Intent

The intent of the Return Flow requirement is to ensure that all of the Water Withdrawn from the Great Lakes Basin is returned to the Source Watershed, less an allowance for Consumptive Use, in order to support the ecological health of the system and for further use. It is recognized that Consumptive Uses will occur and the amount of Consumptive Use will differ depending of the use of the Water. The desire is that Consumptive Uses be reasonable and that the proposal maximizes the return of Water at a quality that meets all applicable Water quality requirements. Except under exceptional circumstances, as defined in the Decision Making Standard, Return Flow will be required for all New or Increased Diversions or Consumptive Uses triggered by the Standard, whether intended for in-basin or out-of-basin use.

Application Requirements

Applicants must submit a description of their Return Flow program. This program description should include:

- A description on how the Water will be returned. To the extent the local entity that will be discharging the Return Flow is not the applicant for the project, agreements must be presented demonstrating that the Return Flow will be guaranteed;
- An estimate of total Return Flow by volume and as a percentage of Water Withdrawn;
- Location of Return Flow and the location relationship to the Source Watershed. Justification must be provided if Return Flow will be to the Great Lakes Basin but not to the Source Watershed, including an analysis of the impacts on both the Source Watershed and the watershed receiving the Return Flow;
- An estimate of Consumptive Use, by sector, including historic use information. These estimates may be presented in the form of project engineering design plans or utilizing USGS or other Consumptive Use coefficients. To the extent use estimates are greater than "generally accepted Consumptive Use coefficients," the application must include a detailed explanation and justification for projected additional Consumptive Use by sector; and,
- A description of the anticipated Water quality of the Return Flow including a description of the proposed measurement methods (quality and quantity) and discharge location(s).

If an applicant wants an exemption to the Return Flow requirement it must be justified and the following conditions apply:

1. The total Diversion (i.e. a new Diversion or the combined volume of an existing Diversion plus a proposed increase) is less than 250,000 gallons per day (946,000 litres per day) average in every 120 day period; and,
2. The Diversion is exclusively for public water supply uses in areas less than 12 miles (19.3 kilometres) from the Basin boundary where adequate quantities of potable-quality water are not available; and,

3. The Return Flow of some or all of the Water Withdrawn from the Great Lakes Basin is not feasible.

Criteria for Decisions
In determining if a proposal has successfully met the requirements for Return Flow, the following will be evaluated:

- The clarity and completeness of the description of the Return Flow program, including the quantity, quality and location of the Return Flow in relation to the Source Watershed.
- The verification and justification of Consumptive Use estimates, by sector, using engineering estimates or Consumptive Use coefficients.
- If Return Flow is not to the Source Watershed, then impacts to both the Source Watershed and the receiving watershed will be assessed on a case-by-case basis.
- There is no replacement water from outside the Basin.
- Adequate justification is provided that a proposed Diversion meets the conditions for an exemption of the Return Flow requirement, if applicable.
- The Return Flow meets all applicable water quality Standards.
- Water that is returned to the Source Watershed via non-point sources (e.g. percolation, infiltration, septic system seepage) will be considered part of Return Flow.

In reviewing Consumptive Use estimates, commonly used coefficients will be used as a benchmark. It is understood that specific use situations vary and that in some cases higher use amounts may be justified. It is also understood that research will continue and that Consumptive Use information will improve. As of now, the Great Lakes Commission Survey, Spring 2002, entitled, "Consumptive Use Coefficients By Water Use Category Among Great Lakes Jurisdictions and USGS" is one benchmark evaluation tool for the listed water use categories, recognizing that coefficients will be updated periodically to reflect advancements in conservation practices.

D. No Significant Individual or Cumulative Impacts

Description of Intent
The intent of this Standard provision is to ensure that New or Increased Diversions or Consumptive Uses result in No Significant Adverse Individual or Cumulative Impacts to the Water and Water Dependent Resources of the Great Lakes Basin. This provision is central to the Jurisdictions' commitment to responsible resource protection and management.

Application Requirements
Applications must be submitted with detailed information related to the proposed project including the location of the New or Increased Diversion, Consumptive Use and Return Flow.

The proposal should include the following information:

- Source, location of the Withdrawal and Return Flow;
- A description of baseline conditions regarding hydrologic flow, water quality and habitat;
- A projected Withdrawal schedule including peak 30-day demand over the 120-day averaging period;
- Anticipated changes in Water and related natural resources;
- A description of all mitigation measures that will be implemented to prevent or eliminate significant impacts; and,
- A statement of how the proposal would relate to other existing Withdrawals, Diversions and Consumptive Uses for purposes of enabling the Jurisdictions to evaluate Cumulative Impacts from this proposal. The applicant shall use data and analyses on Cumulative Impacts that are available from the Great Lakes States and Provinces.

Criteria for Decisions
In determining whether a proposal has the potential for significant effects, the Great Lakes States and Provinces will consider the impacts that may be reasonably expected to occur from the proposal based on consideration of the following criteria and factors:

- The completeness of baseline information presented;
- Location, type, extent, scale and duration of impacts;
- The mitigation measures proposed;
- Potential cumulative effects of related or anticipated future projects (supply and demand analysis), including the potential for precedent-setting consequences; and,
- Individual impacts will be evaluated in the context of Cumulative Impacts. Where watershed plans exist, applicants shall discuss impacts based upon these plans. Potential impacts on other users will be evaluated.

The scope and location of a proposal will be considered when evaluating potential adverse impacts from a proposal. The geographic and temporal scale of potential impacts will be considered in the determination of when an adverse impact is significant.

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:

Physical Criteria

- Measurable change to the pre-proposal range of variability of the hydrologic regime
- Degradation of structural habitat
- Disruption of pre-proposal connections between and among habitats
- Disruption of pre-proposal temperature regime of the hydrologic system
- Significant/measurable impacts to existing Water uses

Chemical Criteria

- Disruption of natural productivity of the ecosystem
- Introduction of potentially harmful toxins, contaminants and excessive nutrients
- Disruption of the hydrologic system's ability to process toxins, contaminants, and nutrients

Biological Criteria

- Decline in population levels or health of native species
- Introduction of non-native species
- Disruption of biological interactions such as predation and competition
- Introduction of harmful microorganisms and no elevation of microorganisms to harmful level
- Impact on human health

Compliance with Jurisdictional environmental regulatory requirements (water and air) could contribute to a demonstration of the lack of significant ecological impact. In some cases, these processes require a showing of no impact. In these cases, such a finding by a Jurisdiction could meet the requirements of this section.

E. Water Conservation

Description of Intent

The purpose of this Standard provision is to minimize Water Withdrawals and associated consumptive losses through demand reduction and supply-side Environmentally Sound and Economically Feasible Water Conservation Measures and incentives. Environmentally Sound and Economically Feasible Water Conservation Measures can be grouped into two general categories: 1) "hardware" devices or equipment and 2) behavior or management practices. Examples of Water Conservation Measures for different water use sectors are provided in Table 1 from the *Handbook of Water Use and Conservation* (Vickers, 2001). Conservation incentives, on the other hand, are incentives that motivate water users to implement Environmentally Sound and Economically Feasible Water Conservation Measures. They can be classified into three categories: 1) educational, 2) financial, and 3) regulatory. Examples of conservation incentives are presented in Table 2 from the *Handbook of Water Use and Conservation* (Vickers, 2001).

The Decision Making Standard has two distinct requirements regarding Water conservation: 1) for proposals above the Regional Review Threshold level the applicant must submit a conservation plan, demonstrating how Environmentally Sound and Economically Feasible Water Conservation Measures will be implemented by the applicant, and 2) for proposals below the Regional Review Threshold level the applicant must implement Environmentally Sound and Economically Feasible Water Conservation Measures and/or incentives to minimize Water Withdrawals and/or Consumptive Use.

Table 1. Types of Water Conservation Measures (Source: *The Handbook of Water Use and Conservation (Vickers, 2001, p. 6)* and the Great Lakes Commission's Report *Water Resources Management Decision Support System for the Great Lakes-St. Lawrence River* (May, 2003)).

Water Use Sector	Hardware/Technology	Behavior/Management Practices
Residential and Domestic	• Low-volume toilets and urinals • Waterless and composting toilets and urinals • Low-flow showerheads and faucets • Water-efficient appliances such as clothes washers and dishwashers	• Shut off unnecessary flows from faucets • Restrict outdoor water use • Use water-efficient practices for clothes washers and dishwashers (full loads, no pre-rinse, wash cycles)
Landscapes	• Native and drought-tolerant turf and plants • Drip irrigation • Automatic shut-off hoses • Rain sensors	• Water less frequently (schedule during early or late hours) • Soil improvements and apply appropriate mulches • Use water-efficient landscape maintenance practices
Industrial, Commercial, and Institutional Facilities	• Cooling towers with recirculated water • Reuse process water • Leak detection and repair	• Shut off unused valves • Use water-efficient operational practices
Agriculture	• Low-energy precision application of irrigation water • Canal lining • Tailwater recovery • Laser leveling • Drip irrigation	• Use weather-controlled irrigation systems • Regular maintenance of irrigation systems • Use water-efficient cultivation practices
Water Utilities	• Distribution system leak detection and repair • Hydrant capping	• Regularly service and adjust system valves and connections • Pressure management to reduce volume of water used

Table 2. Types of Conservation Incentives (Source: *The Handbook of Water Use and Conservation (Vickers, 2001, p. 7)* and the Great Lakes Commission's Report *Water Resources Management Decision Support System for the Great Lakes-St. Lawrence River (May, 2003)).*

Type of Conservation Incentive	Examples
Educational	• Direct-mail literature, television and radio advertisements, media coverage, demonstration gardens and projects, school education programs, conservation checklists developed for specific industries, local workshops and training programs for specialized users
Financial	• Bill credits, rebates, conservation pricing/rate structures
Regulatory	• Water-efficient policies, laws and plumbing codes for water-efficient fixtures and appliances, Standards for landscape design, irrigation scheduling, penalties for outdoor water waste, pollution prevention requirements

Application Requirements

Proposals Above the Regional Review Threshold – Water Conservation Plan
Each applicant must submit a Water conservation plan for New or Increased Diversions or Consumptive Uses being submitted for Regional Review to reduce Water loss and minimize the need for a Withdrawal or increased Withdrawal to the maximum extent possible.

A generic outline of a Water conservation plan is given below. The planning steps, which are adapted from the *Handbook of Water Use and Conservation* (Vickers, 2001) and the USEPA's *Water Conservation Plan Guidelines* for Water systems (August, 1998), are meant as guidance for all water use sectors.

1. Identify Conservation Goals

- Establish Water use reduction goals (e.g. percent or volume per day)
- Determine the time frame of the Water conservation program for existing and proposed Withdrawals
- Description of community involvement in goals-development process

2. Develop a Water-Use Profile and Forecast

- Identify existing Water supply sources, Water use (average and peak use/demand), total Withdrawal and Consumptive Use.
  - ➢ For Water systems, agricultural water districts, and the industrial sector, describe production characteristics of existing facilities if any.
  - ➢ For irrigation and other agricultural uses, the plan should demonstrate that systems are properly designed for soil characteristics, topography, climatic conditions, and crop types. Information should include:

  - Soil types and percentage of each
  - Purpose of irrigation (e.g. upland crops – corn, soybeans, fruit, etc.); golf course, sod, greenhouse etc.)
  - Acreage under each crop and total acres irrigated
  - Monthly irrigation schedule
  - Irrigation method(s) to be used
- Forecast anticipated future Water use/demand and costs associated with infrastructure changes (expansion, improvements or new facilities).

3. Identify and Evaluate Environmentally Sound and Economically Feasible Water Conservation Measures and Incentives

- Review of Water conservation measures and incentives that have been implemented if any.
- Identify other Water conservation measures that save Water and identify conservation incentives that would motivate Water users to implement Water measures (see Tables 1 & 2 for examples), including consideration of generally accepted management practices and principles for the appropriate water use sector.
- Develop a matrix of measures and incentives that can be considered options.
- Evaluate measures in terms of the following:
  - Potential Water savings (i.e. reducing Water loss and minimizing the need for a Withdrawal or increased Withdrawal to the maximum extent possible)
    - Estimate the short-term, long-term, average-day, and peak-day Water savings that can be achieved by each measure as well as the total (and/or per capita) Consumptive Use reduced.
  - Benefits and costs
    - For all Water uses, consider reduced need for new or additional Water supplies, reduced operation and maintenance costs, and environmental preservation. For water systems or agricultural water districts, consider deferred, downsized or eliminated new facilities for water systems and customer benefits.
    - Estimate conservation program costs including implementation and monitoring costs.
    - Determine cost-effectiveness of measures based on benefits and costs over the life of the program.
  - Applicable laws, regulations, and standards
- Identify any short-term or long-term obstacles (e.g. socio-economic, legal etc) to implementation of the measures.

4. Select Environmentally Sound and Economically Feasible Water Conservation Measures and Incentives

- Identify quantitative (e.g. Water savings i.e. reducing Water loss and minimizing the need for a Withdrawal or increased Withdrawal to the maximum extent possible), cost-effectiveness of measures, avoidance of capital costs) and qualitative (e.g. ease of implementation, regulatory approvals) criteria for selecting measures and associated program incentives
- Evaluate and rank measures and incentives using quantitative and qualitative selection criteria
- Justify why each measure and incentive should be selected or rejected

- Refine total future Water use/demand forecasts taking into account Environmentally Sound and Economically Feasible Water Conservation Measures and incentives selected

5. Implement the Conservation Plan

- Develop a strategy and timetable for implementing and monitoring the plan's Environmentally Sound and Economically Feasible Water Conservation Measures

6. Monitor, Evaluate, and Revise Water Conservation Program as Needed

- Monitor and evaluate each measure's effectiveness by assessing actual Water savings (i.e. reducing Water loss and minimizing the need for a Withdrawal or increased Withdrawal to the maximum extent possible), and program costs and benefits
- If necessary, adjust the Water conservation program, based on findings from the monitoring and evaluation process, to ensure that Water-savings goals are met

Proposals Below the Regional Review Threshold – Environmentally Sound and Economically Feasible Water Conservation Measures

Each applicant must demonstrate that Environmentally Sound and Economically Feasible Water Conservation Measures are being implemented.
The applicant must:

- Present a list of Water conservation measures considered; and,
- Document those Environmentally Sound and Economically Feasible Water Conservation Measures that have been implemented or that are planned for implementation, including an implementation schedule.

A list of internet resources on Water conservation programs and measures for different water use sectors will be posted to a Regional website as a resource for Jurisdictions and applicants. In addition, the *Handbook of Water Use and Conservation* (Vickers, 2001) is a good starting point for applicants since it presents more than 100 "state-of-the-art" Water efficiency measures in each water use sector.

Criteria for Decisions

Proposals Above the Regional Review Threshold Level

The major criteria will be the effectiveness of the proposal in reducing the total quantity of the Withdrawal/Consumptive Use, and/or per capita Withdrawal/Consumptive Use. Three "completeness tests" will also be evaluated: 1) the contents of the Water conservation plan; 2) the Water conservation measures considered; and 3) the Environmentally Sound and Economically Feasible Water Conservation Measures to be implemented.

At a minimum, a Water conservation plan must include the following elements:

- A list of Water conservation goals to minimize Water Withdrawal, Consumptive Use and system loss;
- A description of how Water use is quantitatively measured (e.g. metering) to provide an accurate picture of Water demand, supply, loss and projected savings;
- A forecast of anticipated future Water use or demand;

- Identification and analysis of alternative Environmentally Sound and Economically Feasible Water Conservation Measures and/or incentives – including their potential effect on forecasted Water use; and,
- An implementation and evaluation strategy.

Proposals Below the Regional Review Threshold Level
Individual Jurisdictions will review the Environmentally Sound and Economically Feasible Water Conservation Measures proposed and implemented by applicants for proposals below the Regional Review Threshold level. While Water conservation plans are not specifically required for Withdrawal applications under the Regional Review Threshold level, the Standard does require that Environmentally Sound and Economically Feasible Water Conservation Measures be implemented. The specific criteria for determining acceptable Environmentally Sound and Economically Feasible Water Conservation Measures for applications below the Regional Review Threshold level will be made by each individual Jurisdiction.

Each Jurisdiction must have publicly available criteria that will be included in their overall program description. While each Jurisdiction may have their own Water conservation requirements, each New or Increased Diversion or Consumptive Use application must be evaluated for the effectiveness of the proposed Environmentally Sound and Economically Feasible Water Conservation Measures in minimizing Water loss.

F. Improvement Measures

Description of Intent
The intent of this Standard provision is to ensure an Improvement to the Waters and Water Dependent Natural Resources of the Great Lakes Basin as a result of the New or Increased Diversion or Consumptive Use. This provision is central to the Jurisdictions' commitment to responsible resource protection and management.

Application Requirements
Applicants will be required to submit an Improvement plan describing the nature of the Improvement including its spatial and temporal scope. Improvement proposals may include one or a combination of the following Improvements; hydrologic conditions, Water quality, or habitat. Improvement proposals related to hydrologic conditions are preferred. Improvement programs shall include measurement and reporting programs.

Criteria for Decisions
The following criteria will be used to evaluate Improvement proposals:

- Improvements to hydrologic conditions and functions will be given high priority. If the nature of the New or Increased Diversion or Consumptive Use itself results in an improvement to hydrologic conditions or functions, it may be considered an improvement;
- Mitigation of impacts associated with a Withdrawal cannot be considered improvement;
- Meeting other legal or regulatory requirements that the applicant may previously have been violating will not be considered improvements. However, if the project requires the applicant to meet other legal or regulatory requirements that result in an improvement, these outcomes may be considered an improvement;

- The same practices used to mitigate impacts associated with a Withdrawal can be considered Improvement to the extent that they are in addition to those needed to mitigate impacts;
- The scale, both temporal and spatial, will be a major consideration in determining the appropriate level of the Improvement. The scale of the Improvement proposal shall be commensurate with the scale of the proposed project, based on consideration of the volume of the Withdrawal, Consumptive Use and/or Diversion; the type and size of the proposed source (e.g. Great Lake or St. Lawrence River, large tributary, small tributary, deep aquifer, shallow aquifer); and the degree of uncertainty about the impacts of the project;
- All Improvement proposals should provide reasonable assurances that the Improvement would be successfully implemented at least for the period for which the approval is being sought. In this regard, management and maintenance of the Improvement need to be described;
- Improvement proposals should preferably address the Source Watershed of the proposed Withdrawal. Where this is not possible, or where the Source Watershed is at its target condition, alternatives should be evaluated and a rationale given for the proposed Improvement;
- If a watershed plan exists, the Improvement proposal should demonstrate that the proposed Improvement is consistent with the plan. Where a watershed plan does not exist, the development of a plan may be considered as part of an improvement plan, provided that the improvement also provides measurable physical improvement; and,
- Partnerships with non-governmental organizations for the implementation of the Improvement measures will be encouraged.

List of Improvement Examples

The examples listed below are from a report prepared by Tetra Tech EM Inc., entitled "Understanding Improvement Under the Great Lakes Charter Annex – Methodology and Case Studies." This work was completed with a grant from the Great Lakes Protection Fund. The examples below are taken from a long list of activities presented in Appendix A: Examples of Improvement Activities from that report. In addition, the list of examples of hydrologic conditions includes suggestions from the work of The Nature Conservancy.

Hydrologic Conditions

- Restore flow conditions to baseline conditions;
- Restore river flow by removing dams;
- Operate hydropower, flood control, recreation, and navigation dams and water retention structures to mimic natural cycles;
- Decrease amount of impervious surfaces within the catchment;
- Remove unnecessary agricultural drainage systems;
- Restore natural channel form (e.g. restore meanders, restore instream features such as large woody debris);
- Remove flow diversions;
- Manage and protect flood plains; and,
- Groundwater sustainability measures:
  - Reduce contaminants in groundwater
  - Increase groundwater recharge.

Water Quality

- Replace or upgrade the wastewater control infrastructure;
- Develop, adopt and enforce stream setback ordinance;
- Enact agricultural zoning to protect Water and soil;
- Implement watershed plan elements to address impaired Waters;
- Decrease pesticide use for conditionally approved uses (such as golf courses);
- Implement rural and urban nutrient management practices; and,
- Reduce emissions of toxic pollutants through non-regulatory methods.
- Stormwater management projects may be considered in the context of Improvement.

Habitat

- Restore and protect habitat for native threatened and endangered species;
- Restore local habitat in areas of concern; and
- Create, protect, restore, or enhance the existing coastal wetlands.

G. COMPLIANCE WITH APPLICABLE LAWS

Description of Intent
The applicant bears the responsibility that the proposed Withdrawal will be in compliance with all applicable State, Provincial and Federal laws as well as regional, inter-State, inter-Provincial and international agreements.

3) APPLICATION INFORMATION

A) Who Applies and Who Bears the Regulatory Burden

Any person, individual, partnership, corporation, body politic, municipality, State, Province or any other legal entity public or private proposing a New or Increased Diversion or Consumptive Use of Great Lakes Basin Water.

B) Legal Arrangements

In some situations, the applicant may not have complete legal authority to carry out certain requirements. Examples could include: 1) a different entity may actually discharge Return Flow, 2) the entity Withdrawing Water, if not the applicant may be responsible for ensuring there are no adverse impacts; and, 3) the operation of an Improvement project may be implemented by another entity. In these cases, legal arrangements, such as contracts, should be submitted with the application demonstrating that requirements will be met.

C) Jurisdiction Review

Applications that require Regional Review shall be submitted to the Regional Body by the Jurisdiction in which the Withdrawal is proposed. Prior to submitting the application for Regional Review, the Jurisdiction shall determine that the application is complete and meets the requirements for Regional Review.

D) Timing of Additional Applications

For the purposes of triggering Regional Review, applications for New or Increased Diversion or Consumptive Uses will be considered cumulatively within ten years of any application. In other words, when the total exceeds the Regional Review Threshold then the full amount of the Withdrawal will be reviewed regionally regardless of the increment.

For example, if an applicant has previously obtained approval for a Consumptive Use of 4.5 mgd (17 million litres per day) and five years later requests an additional 1 mgd (3.8 million litres per day), the second request would trigger Regional Review. In this case, the total amount of both actions, 5.5 mgd (20.8 million litres per day), would be subject to the requirements of the Decision Making Standard. After Regional Review, Jurisdictional denial of the proposed incremental amount shall not negate or invalidate any previously approved actions. If, however, the second request is after ten years, it would be subject to Jurisdictional review only.

E) Diversions

Diversion has been defined as a transfer of Water from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lakes into that of another, by any means. Transmission of Great Lakes Basin Water within water lines that extend outside the Basin as they convey Water from one point to another within the Basin are not considered Diversions so long as none of the Water is used outside the Basin.

F) Other Requirements

Other federal, State/Provincial or local approvals may also be required. Such approvals including permits are the responsibility of the applicant.

4) JURISDICTIONAL MANAGEMENT AND INFORMATION

It is anticipated that the majority of New or Increased Diversions or Consumptive Uses from the Great Lakes Basin will be under the Regional Review Threshold level and therefore be subject to the management or regulatory programs of the individual Jurisdictions. In order to make sure that there is consistent implementation of Water Withdrawal management or regulatory programs, the Jurisdictions have agreed that each Jurisdiction will submit their individual Water management programs for Regional Review. The Jurisdictions will also submit an annual report describing the authorities and implementation of their individual program.

This section will include: A) Submission and Review; B) Components of the Jurisdictional Program Report; C) Statement on Improvement Measures; D) Water Conservation Programs; and, E) Information Collection and Management.

A) Submission and Review

Each Jurisdiction will submit their Water management program to the other Jurisdictions for Regional Review and a Declaration of Finding. This review and Declaration of Finding process is a one-time event. The initial submission will be one year from the effective date of the Decision Making Standard. After program review, the Jurisdiction will submit an annual report for Regional Review.

The individual Jurisdiction program submissions shall include a narrative description of the components of the Jurisdictional program, including:

- The legal authority upon which the program is based, including laws, regulations, and management programs;
- A description of the public participation requirements; and,
- The reporting, inspection and enforcement program elements.

The Regional Review of Jurisdictional programs will include:

- Jurisdictional submission of program to other Jurisdictions;
- Thirty day submission review period; and,
- Regional Body meeting based upon evaluation of the submission of the Jurisdictions program for a statement of findings.

While the review of a Jurisdictional program occurs once, any other Jurisdiction, based upon review of the information in the annual reports may request the Regional Body conduct an evaluation of an existing Jurisdictional program to ensure it is still operational with necessary authority. The Regional Body may make an additional statement of findings based upon this evaluation.

B) Components of Jurisdictional Program Report
Each Jurisdiction will submit a brief program report annually. This first submission will be one year from the effective date of the Decision Making Standard. Reports will be submitted on October 1st thereafter.

The following descriptive information should be provided about the Jurisdictional program in annual report submissions:

- A statement of changes to the scope of program authority and requirements (submitted during the initial submission and updated only as necessary). If a Jurisdiction is phasing in elements of their Water management program, a status report on their program progress will be submitted; and,
- Information required in Section 4 (E) (Information Collection and Management) on Withdrawals, Diversions and Consumptive Uses and a brief narrative description of program activities.

C) Statement on Improvement Measures
While the Decision Making Standard does not require Improvement projects for New or Increased Consumptive Uses below the Regional Review Threshold level, the Jurisdictions are committed to the principle of Improvement. In this regard, the Jurisdictions will review options for the implementation of the Improvement requirement for proposals below the Regional Review Threshold level but do not believe it is universally feasible at this time. This evaluation will include the monitoring and periodic review of the implementation of Improvement measures for proposals above the Regional Review Threshold level. Individual Jurisdictions may require Improvement measures for proposals below the Regional Review Threshold.

D) Water Conservation Programs
Each Jurisdiction will implement programs to promote Environmentally Sound and Economically Feasible Water Conservation Measures to minimize existing Great Lakes Basin Withdrawals, Consumptive Uses and Diversions. These programs may include:

- Permitting and enforcement
- Technical Standards
- Reporting requirements
- Technical assistance and guidance
- Public Education

E) Information Collection and Management
In the Great Lakes Charter Annex, the Governors and Premiers committed to establish a new Decision Making Standard based upon, among other principles, "...a decision

support system that ensures the best available information." Specifically, the Governors and Premiers called for, "...the design of an information gathering system to be developed by the States and Provinces, with support from appropriate federal government agencies, to implement the Charter, this Annex, and any new agreement(s). This design will include an assessment of available information and existing systems, a complete update of data on existing uses, and identification of needs, provisions for a better understanding of the role of groundwater, and a plan to implement the ongoing support system."

Data collection requirements are intended to foster a better understanding of Water use and the impact of Withdrawals on the Great Lakes Basin Ecosystem. It is the intent that Water management decisions be based on the best available data and scientific understanding.

The applicants and users will provide annual reports estimating Withdrawals and Consumptive Uses and Diversions. Proposed users will be required to provide an estimate of the volume of the Withdrawal as well as the Consumptive use or Diversion in terms of gallons or litres per day average for the maximum volume in any 30 day period annually to the State or Province of the proposed Withdrawal.

Great Lakes States and Provinces will gather accurate and comparable information on all Great Lakes Basin Withdrawals in excess of 100,000 gallons per day (379,000 litres per day) average in any 30 day period and all Great Lakes Diversions. Information will be annually reported to a Great Lakes Regional Water Use Data Base Repository and will be made publicly accessible.

Each Jurisdiction will submit information that will serve as baseline information to identify existing Water uses. Information to be provided and the schedule for providing this information is detailed in Article 203 paragraph 2 "Determining New or Increased Diversions or Consumptive Uses."

All applications will be required to include an estimate of the volume of the proposed Withdrawal in terms of gallons or litres per day average in any 30-day period. In most cases, an estimate of the actual Withdrawal will be required of the applicant in accordance with applicable State or Provincial law. In some cases, an estimate based on approved sector models may be acceptable. Each applicant will be responsible for reporting the actual volume of the Withdrawal annually to the Jurisdiction in which the Withdrawal takes place.

Appendix A – Elements of an Application

Appendix A is a list of categories of information that will be necessary for an application to be evaluated. This list is illustrative only; each Jurisdiction will use their own application forms and information requirements.

1. **Applicant Information**
   Name:
   Mailing Address:
   Phone Number:
   Email Address:

2. **Purpose of Withdrawal**
   Provide detailed written explanation of what the Water will be used for. Uses could include for example: public water supply, commercial/industrial, irrigation or other. If the Water is to be used for multiple purposes, estimate percent usage by category of use.

3. **Source of Water**
   Applications requiring review include all Waters of the Great Lakes Basin. This means the Great Lakes and all streams, rivers, connecting channels and other bodies of Water, including tributary groundwater, within the Great Lakes Basin.

   The application must identify the source body of Water by type (lake, river, stream, or aquifer) and exact name. The exact location of the Water taking should be identified. This information should include a legal description including longitude and latitude citations.

4. **Point of Taking/Pumping Site**
   The application should indicate the legal entity that proposes to Withdraw the Water. The application should also provide a legal description of the location of the actual Withdrawal. If the Withdrawal is to be from multiple wells, all well locations should be identified.

5. **Means of Taking and Rate**
   Specify the method to be used for taking and the rate of Withdrawal (in gallons per minute or cubic feet per second or metric equivalents). If multiple wells or pump sites are to be used, attach explanation information.

6. **Method of Measurement**
   Indicate method of measurement, for example: flow meter, timing device, or other.

7. **Point of Measurement**
   The application should provide a legal description of the location of the measurement of Withdrawal and use.

8. **Schedule of Withdrawal**
   The application should include a monthly projection of Withdrawals by year.
   ____ Continuous ____ Seasonal ____ Temporary

9. **Total Amount of Use**

Expressed in millions of gallons per day or millions of litres per day/projected maximum use for any 120-day period.

10. **Return Flow**
    See section 2) C)

11. **Statement of Justification Analysis of Alternative Sources**
    See section 2) A)

12. **Attached Water Conservation Plan and Status of Implementation**
    See section 2) E)

13. **Description of Proposed Improvement(s)**
    See section 2) F)

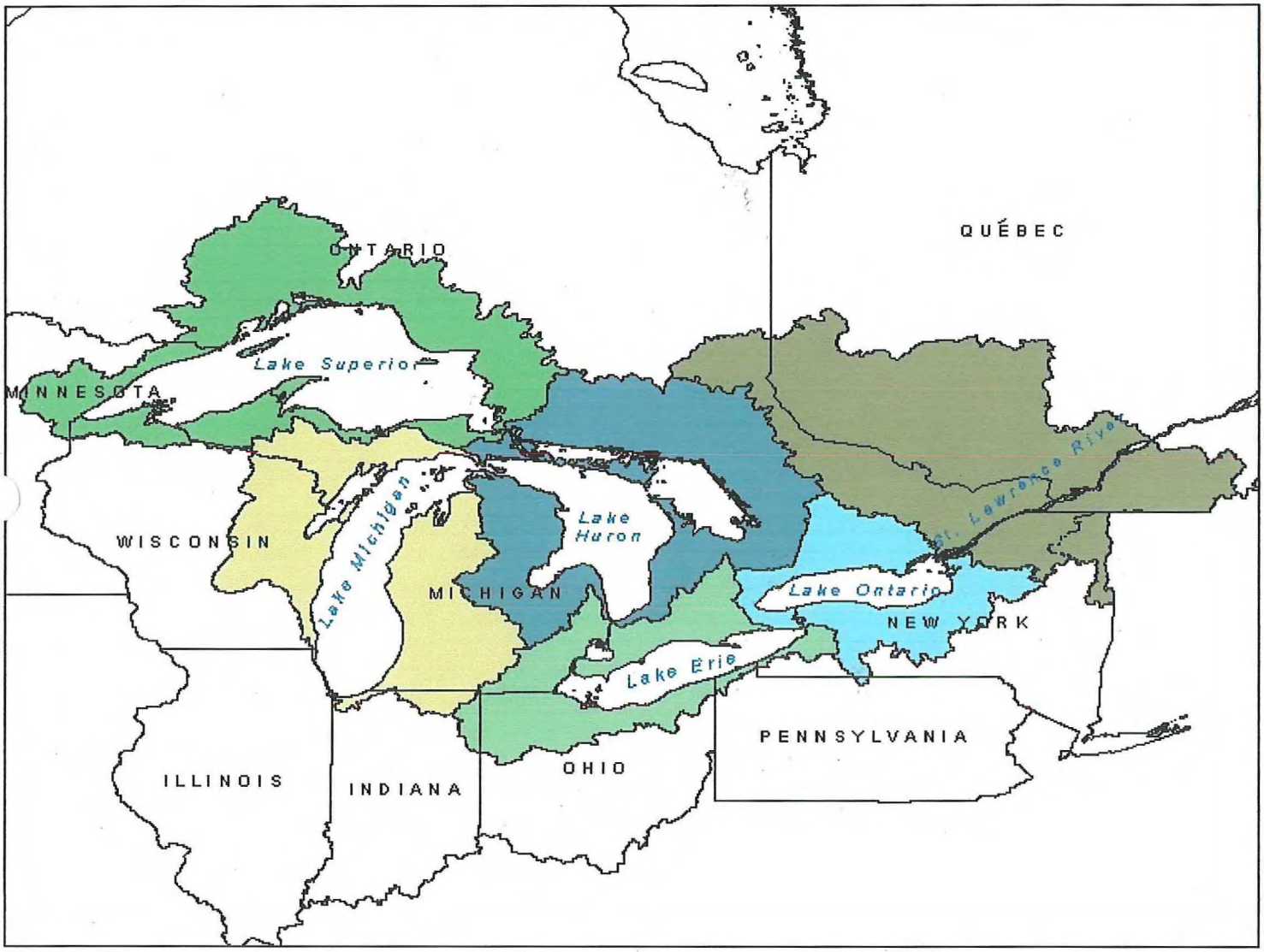
14. **Assessment of Impacts**
    See section 2) D)

15. **Map or Air Photo:** Must be provided of the area of use or the Source Watershed.

16. **Signature:** Signature of official from applying entity.

watershed

Great Lakes Basins





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

Commission mixte internationale

Recommendations

The following recommendations build upon the Boundary Waters Treaty, which provides the principles and mechanisms to help prevent and resolve disputes (primarily those concerning water quantity and water quality along the boundary between Canada and the United States), and upon the Great Lakes Charter, which brings together the Great Lakes states and provinces in a cooperative arrangement designed to protect the Great Lakes. They were developed in accordance with the ecosystem approach adopted by the governments of Canada and the United States in the Great Lakes Water Quality Agreement, the purpose of which is to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin ecosystem. The Commission's recommendations have also been prepared to support and enhance the economic and social well-being of the Great Lakes Basin community and to ensure that the beneficial uses associated with ecosystem integrity are sustained over the long term.

Recommendation I. Removals

Without prejudice to the authority of the federal governments of the United States and Canada, the governments of the Great Lakes states and Ontario and Quebec should not permit any proposal for removal of water from the Great Lakes Basin to proceed unless the proponent can demonstrate that the removal would not endanger the integrity of the ecosystem of the Great Lakes Basin and that:

a. there are no practical alternatives for obtaining the water,
b. full consideration has been given to the potential cumulative impacts of the proposed removal, taking into account the possibility of similar proposals in the foreseeable future,
c. effective conservation practices will be implemented in the place to which the water would be sent,
d. sound planning practices will be applied with respect to the proposed removal, and
e. there is no net loss to the area from which the water is taken and, in any event, there is no greater than a 5 percent loss (the average loss of all consumptive uses within the Great Lakes Basin); and the water is returned in a condition that, using the best available technology, protects the quality of and prevents the introduction of alien invasive species into the waters of the Great Lakes.

In reviewing proposals for removals of water from the Great Lakes to near-Basin communities, consideration should be given to the possible interrelationships between aquifers and ecosystems in the requesting communities and aquifers and ecosystems in the Great Lakes Basin.

In implementing this recommendation, states and provinces shall ensure that the quality of all water returned meets the objectives of the Great Lakes Water Quality Agreement.

At this time, removal from the Basin of water that is used for ballast or that is in containers of 20 liters or less should be considered, prima facie, not to endanger the integrity of the ecosystem of the Great Lakes. However, caution should be taken to properly assess the possible significant local impacts of removals in containers.

Removal of water for short-term humanitarian purposes should be exempt from the above restrictions.

The governments of Canada and the United States and the governments of the Great Lakes states and Ontario and Quebec should notify each other of any proposals for the removal of water from the Great Lakes Basin, except for removal of water that is used for ballast or that is in containers of 20 liters or less.

Consultations regarding proposed removals should continue in accordance with the procedures and processes that are evolving throughout the Great Lakes Basin and should be coupled with additional opportunities for public involvement.

Any transboundary disagreements concerning any of the above matters that the affected governments are not able to resolve may, as appropriate, be referred by the governments of Canada or the United States to the International Joint Commission pursuant to Article IX of the Boundary Waters Treaty.

Nothing in this recommendation alters rights or obligations under the Boundary Waters Treaty.

Recommendation II. Major New or Increased Consumptive Uses

To avoid endangering the integrity of the ecosystem of the Great Lakes Basin, and without prejudice to the authority of the federal governments of the United States and Canada, the governments of the Great Lakes states and Ontario and Quebec should not permit any proposal for major new or increased consumptive use of water from the Great Lakes Basin to proceed unless:

a. full consideration has been given to the potential cumulative impacts of the proposed new or increased major consumptive use, taking into account the possibility of similar proposals in the foreseeable future,
b. effective conservation practices will be implemented in the requesting area, and
c. sound planning practices will be applied with respect to the proposed consumptive use.

In implementing this recommendation, states and provinces shall ensure that the quality of all water returned meets the objectives of the Great Lakes Water Quality Agreement.

The governments of Canada and the United States and the governments of the Great Lakes states and Ontario and Quebec should notify each other of any proposals for major new or increased consumptive uses of water from the Great Lakes Basin.

Consultations regarding proposed major new or increased consumptive uses should continue in accordance with the procedures and processes that are evolving throughout the Great Lakes Basin and should be coupled with additional opportunities for public involvement.

Any transboundary disagreements concerning the above that the affected governments are not able to resolve may, as appropriate, be referred by the governments of Canada or the United States to the International Joint Commission pursuant to Article IX of the Boundary Waters Treaty.

Nothing in this recommendation alters rights or obligations under the Boundary Waters Treaty.

Recommendation III. Conservation

In order to avoid endangering the integrity of the ecosystem of the Great Lakes Basin, the governments of the Great Lakes states and Ontario and Quebec should apply conservation measures to significantly improve efficiencies in the use of water in the Great Lakes Basin and should implement the conservation measures set out in this recommendation.

The governments of the Great Lakes states and Ontario and Quebec, in collaboration with local authorities, should develop and launch a coordinated basin-wide water conservation initiative, with quantified consumption reduction targets, specific target dates, and monitoring of the achievement of targets, to protect the integrity of the Great Lakes Basin ecosystem, and to take advantage of the other economic and environmental benefits that normally flow from such measures.

In developing and implementing this initiative, the governments should, among other things, consider:

a. state-of-the-art conservation and pollution-control technologies and practices,
b. potential cumulative impacts,
c. the application of sound planning practices,
d. to the extent practicable, the setting of water prices at a level that will encourage conservation,
e. conditioning financial help from governments for water and wastewater infrastructure on the application of sound conservation practices,
f. promotion of eco-efficient practices, especially in the industrial and agricultural sectors,
g. establishment of effective leak detection and repair programs for water infrastructure in all municipalities,
h. the inclusion of strong performance and environmental standards and financial incentives for water saving in contractual arrangements for delivery of water-related services, whether public or private,
i. the application of best practicable water-saving technologies in governmental facilities,
j. sharing experiences with respect to the planning and implementation of conservation policies and programs and the use of water-saving technologies, and
k. joint preparation of promotional and educational materials and publication of success stories, including sponsoring conferences and workshops on water conservation, in partnership with others.

Recommendation IV. Great Lakes Charter Standards

Without prejudice to the authority of the federal governments of the United States and Canada, the Great Lakes States and Ontario and Quebec, in carrying out their responsibilities under the Great Lakes Charter, should develop, within 24 months, with full public involvement and in an open process, the standards and the procedures, including the standards and the procedures in Recommendations I and II, that would be used to make decisions concerning removals or major new or increased consumptive uses. Federal, state, and provincial governments should not authorize or permit any new removals and should exercise caution with respect to major new or increased consumptive use until such standards have been promulgated or until 24 months have passed, whichever comes first.

Recommendation V. Existing Institutions and Mechanisms

To help ensure the effective, cooperative, and timely implementation of programs for the sustainable use of the water resources of the Great Lakes Basin, governments should use and build on existing institutions to implement the recommendations of this report. In this regard, the governments of the states and the provinces should take action, with respect to the implementation of the Great Lakes Charter, to:

a. develop and implement, on an urgent basis, the Basin Water Resources Management Program,
b. develop a broader range of consultation procedures than is currently called for in the Charter to assure that significant effects of proposed uses of water resources in the Great Lakes Basin are assessed, and
c. ensure that the notice and consultation process under the Charter is open and transparent and that there is adequate consultation with the public.

Recommendation VI. Data and Research

Federal, state, and provincial governments should move quickly to remedy water use data deficiencies by:

a. allocating sufficient staff and financial resources to upgrade the timeliness, precision, and accuracy of water use data,
b. working much closer together to ensure consistency in water use monitoring, estimation techniques, and reporting,
c. emphasizing and supporting the development and maintenance of a common base of data and information regarding the use and management of the water resources of the Great Lakes Basin, establishing systematic arrangements for the exchange of water data and information, and undertaking coordinated research efforts to provide improved information for future water planning and management decisions.

Furthermore, governments should immediately take steps to ensure that, on a binational basis, research is coordinated on individual and cumulative impacts of water withdrawals on the integrity of the Great Lakes Basin ecosystem. In support of their decision-making, governments should implement long-term monitoring programs capable

of detecting threats (including cumulative threats) to ecosystem integrity. Such monitoring programs should be comprehensive, particularly in their approaches to detecting threats to ecosystem integrity at a spectrum of space and time scales.

As part of an anticipatory policy for identifying emerging issues, governments should, on a binational basis, undertake more active science and research and, in particular, should implement appropriate long-term monitoring programs for key indicators of ecosystem change.

Recommendation VII. Groundwater

Governments should immediately take steps to enhance groundwater research in order to better understand the role of groundwater in the Great Lakes Basin. In particular, they should conduct research related to:

a. unified, consistent mapping of boundary and transboundary hydrogeological units,
b. a comprehensive description of the role of groundwater in supporting ecological systems,
c. improved estimates that reliably reflect the true level and extent of consumptive use,
d. simplified methods of identifying large groundwater withdrawals near boundaries of hydrologic basins, effects of land-use changes and population growth on
e. groundwater availability and quality,
f. groundwater discharge to surface water streams and to the Great Lakes, and systematic estimation of natural recharge areas, and
g. systematic monitoring and tracking of the use of water-taking permits, especially for bottled water operations.

In recognition of the frequent and pervasive interaction between groundwater and surface water and the virtual impossibility of distinguishing between them in some instances, governments should apply the precautionary principle with respect to removals and consumptive use of groundwater in the Basin.

Recommendation VIII. Climate Change

Recognizing that the Intergovernmental Panel on Climate Change has concluded that human activities are having a discernible effect on global climate, and despite the uncertainties associated with the modeling of future climate, the governments of Canada and the United States should fully implement their international commitments to reduce greenhouse gas emissions.

Recommendation IX. Trade Law

The governments of the United States and Canada should direct more effort to allaying the public's concern that international trade law obligations could prevent Canada and the United States from taking measures to protect waters in the boundary region, and they also need to direct more effort to bringing greater clarity and consensus to the issue.

Recommendation X. Standing Reference

The Commission should be given a standing reference to review its recommendations for the protection of the waters of the Great Lakes in three years and thereafter at 10-year intervals unless conditions dictate a more frequent review.

Recommendation XI. Next Steps

The Commission recommends that the governments consider for adoption the proposed plan of work for Commission activities on the rest of the border, focusing on priority issues and on specific regional issues where the Commission can contribute binational experience and resources.

Recommendation XII. Implementation

The Commission recommends that the governments of the United States and Canada and the governments of the Great Lakes states and Ontario and Quebec, acting individually or collectively, as appropriate, take the necessary steps to implement the recommendations contained in this report.



PROTECTION OF THE WATERS OF THE GREAT LAKES

REVIEW OF THE RECOMMENDATIONS IN THE FEBRUARY 2000 REPORT

AUGUST 2004

International Joint Commission

Commission mixte internationale

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Ce rapport est également disponible en français

Protection of the Waters of the Great Lakes

Review of the Recommendations in the February 2000 Report

EXECUTIVE SUMMARY

The waters of the Great Lakes are essential for the health and well-being of the Great Lakes Basin ecosystem and for the nearly 40 million people who rely on the lakes for drinking water, for food, for work, and for recreation. The importance of this unique resource to the health and vitality of the entire basin ecosystem requires that governments at all levels continue to develop standards governing the use of Great Lakes water and to improve efforts to conserve water from all sources.

The Canadian and United States governments have committed themselves in the *Boundary Waters Treaty* and in the *Great Lakes Water Quality Agreement* to restore and maintain the integrity of this unique, vital, and virtually non-renewable resource. Also, the governments of the Great Lakes states and of Ontario and Quebec have made commitments in the *Great Lakes Charter* and in *Annex 2001* to protect, conserve, and manage the waters of the Great Lakes.

On February 22, 2000, the Commission issued a report at the request of the Canadian and United States governments on the protection of the waters of the Great Lakes concluding that the Great Lakes do not offer a vast reservoir for an increasingly thirsty world. That report noted that, although the Great Lakes contain about 20 percent of the fresh water on the earth's surface, only one percent of this water is renewed each year. The Commission concluded that removals of water from the basin reduce the resilience of the system and its capacity to cope with unpredictable stresses, such as climate change. The Commission therefore recommended that governments take a number of specific measures to ensure that removals of water from the basin and consumptive uses in the basin will not endanger the integrity of the Great Lakes Basin ecosystem.

The Commission has been asked by the United States and Canadian governments to review the recommendations that it made in its 2000 report in the light of developments that have taken place since that report was issued. The body of this report includes a review of each

recommendation. This report reflects the input of more than 50 non-governmental organizations, citizens, and government representatives at public hearings on water use in the Great Lakes Basin.

Key developments since the 2000 report include:

- Amendments to the *International Boundary Waters Treaty Act* (Bill C-6) and *International Boundary Waters Regulations*, which entered into force in Canada in December 2002, prohibit removals from Canadian boundary waters[1] of the Great Lakes.

- In the United States, the *Water Resources Development Act* of 1986 prohibits the diversion of Great Lakes water unless approved by all eight Great Lakes state governors. Amendments to this act in 2000 further encourage the Great Lakes states, in consultation with the provinces of Ontario and Quebec, to develop and implement a standard for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.

- In 2001, the Great Lakes states and Ontario and Quebec concluded an annex to the 1985 *Great Lakes Charter*, a good-faith arrangement called *Annex 2001* that committed them to establish a new decision-making standard, and a decision-support system to manage withdrawals of water from the Great Lakes Basin. The Commission commends the Great Lakes states and Ontario and Quebec for their achievements to date, and notes that new draft arrangements to implement *Annex 2001* were put out for public comment for 90 days on July 19, 2004, and that a final arrangement will then have to be approved by governments through legislation.

- While there are not, at present, any active proposals for diversions outside the Great Lakes Basin, except to communities on the edge of the basin, this situation could change. Moreover, the increasing demands for water to supply the needs of these near-basin communities, and potential future demands for diversions to other parts of the continent, make it urgent for governments to carry out the recommendations in the Commission's 2000 report, and for the Great Lakes states and provinces to implement *Annex 2001* in a manner that conforms with those recommendations. The Commission recommends that the outcome of the *Annex 2001* process should include a standard and management regime consistent with the recommendations in our 2000 *Report*. Until this process is complete, it is not possible to say whether and to what extent *Annex 2001* and measures taken under it will give effect to the recommendations in the Commission's 2000 Report.

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[1] The term 'boundary waters' in the Act has the same meaning as in the Boundary Waters Treaty which defines boundary water in the preliminary article to mean "For the purpose of this treaty boundary waters are defined as the waters from main shore to main shore of the lakes and rivers and connecting waterways, or the portions thereof, along which the international boundary between the United States and the Dominion of Canada passes, including all bays, arms, and inlets thereof, but not including tributary waters which in their natural channels would flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers, and waterways, or the waters of rivers flowing across the boundary."

The Commission concluded in its 2000 report that existing international trade law obligations do not prevent Canada and the United States from taking measures to protect their water resources and preserve the integrity of the Great Lakes Basin ecosystem. The governments of Canada and the United States support this view, and the Commission recommends that both governments take steps to allay public fears that Great Lakes water could be treated as a commodity. Indeed, the Commission reaffirms that trade agreements do not constrain the protection of water in its natural state, that is, before that water has become a commercial good or saleable commodity. Just as important, the Commission continues to strongly support the basic principle espoused in our 2000 report that water use standards that treat in-basin and out-of-basin users differently are reasonable.

The Commission understands that, at this time, demand for diverted water resides on the U.S. side of the boundary in communities near the basin divide such as New Berlin, Wisconsin and Lowell, Indiana.[2] Indeed, the Commission is aware of a growing number of proposals to allow communities that straddle or lie just outside the surface-water divide of the Great Lakes Basin to use Great Lakes water. Of particular concern to the Commission is unsustainable groundwater depletion in these communities that could lead to declining water quality, the dewatering of tributaries, and destruction of habitat. For instance, large groundwater withdrawals in southeastern Wisconsin have reduced groundwater flow to Lake Michigan and, in some locations, have reversed flow. [3]

States and provinces are developing a water management regime to deal with these demands in a fair and sustainable way, and the Commission continues to urge that the new regime be consistent with the Commission's recommendations in its 2000 report. In addition, the federal, state and provincial governments should work together to map and characterize groundwater aquifers.

With respect to conservation, the Commission finds that substantial work remains to be done at all levels of government to implement the water-saving measures set out in the Commission's 2000 report. Therefore, the Commission urges that those conservation recommendations be instituted as soon as possible. Governments at all levels should also encourage the development and implementation of policies such as metering and conservation pricing as well as technologies that will reduce the consumption and loss of water as long as low income families are protected.

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[2] Milwaukee Journal Sentinel, "Troubled Waters: The Great Divide," November 23, November 30 and December 7, 2003.

[3] Feinstein,D.T., Hart, D.J., Eaton, T.T., Krohelski, J.T., and Bradbury, K.R., 2004, Simulation of Regional Groundwater Flow in Southeastern Wisconsin, Wisconsin Geologic and Natural History Survey Open File Report, 2004-01 p. 132

Over the years, the Commission has been asked by governments on several occasions to offer its advice on protecting the waters of the Great Lakes Basin from unsustainable use and diversion. While knowledge of the ecosystem has advanced and policies and practices are improving, serious concerns remain and a great deal of work still needs to be done to achieve sustainable management of these resources for the benefit of present and future generations. The Commission urges all the Great Lakes states and provinces and the governments of the United States and Canada to carefully evaluate the observations in this report, to recommit themselves to implementing the recommendations in our 2000 report and to work together to manage and protect the world's most precious source of freshwater – the Great Lakes.

Review of Recommendations

The Commission has undertaken a full and careful review of the recommendations in its 2000 report. The original recommendations made by the Commission in its 2000 report are repeated below in plain text. Observations on the status of these recommendations are in **bold** following the relevant recommendation.

Recommendation I. Removals

Without prejudice to the authority of the federal governments of the United States and Canada, the governments of the Great Lakes states and Ontario and Quebec should not permit any proposal for removal of water from the Great Lakes Basin to proceed unless the proponent can demonstrate that the removal would not endanger the integrity of the ecosystem of the Great Lakes Basin and that:

a. there are no practical alternatives for obtaining the water,

b. full consideration has been given to the potential cumulative impacts of the proposed removal, taking into account the possibility of similar proposals in the foreseeable future,

c. effective conservation practices will be implemented in the place to which the water would be sent,

d. sound planning practices will be applied with respect to the proposed removal, and

e. there is no net loss to the area from which the water is taken and, in any event, there is no greater than a 5 percent loss (the average loss of all consumptive uses within the Great Lakes Basin); and the water is returned in a condition that, using the best available technology, protects the quality of and prevents the introduction of alien invasive species into the waters of the Great Lakes.

In reviewing proposals for removals of water from the Great Lakes to near-Basin communities, consideration should be given to the possible interrelationships between aquifers and ecosystems in the requesting communities, and aquifers and ecosystems in the Great Lakes Basin.

In implementing this recommendation, states and provinces shall ensure that the quality of all water returned meets the objectives of the *Great Lakes Water Quality Agreement.*

At this time, removal from the Basin of water that is used for ballast or that is in containers of 20 liters or less should be considered, prima facie, not to endanger the integrity of the ecosystem of the Great Lakes. However, caution should be taken to properly assess the possible significant local impacts of removals in containers.

Removal of water for short-term humanitarian purposes should be exempt from the above restrictions.

The governments of Canada and the United States and the governments of the Great Lakes states and Ontario and Quebec should notify each other of any proposals for the removal of water from the Great Lakes Basin, except for removal of water that is used for ballast or that is in containers of 20 liters or less.

Consultations regarding proposed removals should continue in accordance with the procedures and processes that are evolving throughout the Great Lakes Basin and should be coupled with additional opportunities for public involvement.

Any transboundary disagreements concerning any of the above matters that the affected governments are not able to resolve may, as appropriate, be referred by the governments of Canada or the United States to the International Joint Commission pursuant to Article IX of the Boundary Waters Treaty.

Nothing in this recommendation alters rights or obligations under the Boundary Waters Treaty.

Commission Observations on Recommendation I

The Commission observes that no proposals to divert water out of the Great Lakes Basin have been approved since our 2000 report.

In December 2002, the Canadian government proclaimed in force Bill C-6 which amended the Canadian *International Boundary Waters Treaty Act* and new related *International Boundary Waters Regulations.* These, among other things, prohibit new removals from the Canadian boundary waters of the Great Lakes-St Lawrence Basin by means of diversions and also prohibit removals by any other means of amounts over 50,000 liters per day. There are limited exceptions for: manufactured products that contain water, including water and other beverages in bottles or packages; water used in a conveyance, including a vessel, aircraft or train, as ballast, for the operation of the conveyance, or for people, animals or goods on or in the conveyance; or water used in a non-commercial project on a short-term basis for fire-fighting or humanitarian purposes. In the Great Lakes-St. Lawrence Basin, this prohibition against out-of-basin removals applies only to those Canadian waters that are "boundary waters" as that term is defined in the Boundary Waters Treaty of 1909.

Also, in 1999, Ontario enacted a *Water Taking and Transfer Regulation* which generally prohibits transfers out of Ontario's part of the Great Lakes-St Lawrence basin. Since 1999, Quebec has also generally prohibited transferring water outside Quebec that has been taken in Quebec.

The Commission commends the Canadian, Ontario, and Quebec governments for the added protection that they are providing to the waters of the Great Lakes-St Lawrence River Basin.

In the United States, Section 504 of the *Water Resources Development Act of 2000* (WRDA 2000) amended the *Water Resources Development Act of 1986* (WRDA 1986). Including this amendment, WRDA declares, among other things, that it is the purpose and policy of the Congress:

> **" to take immediate action to protect the limited quantity of water available from the Great Lakes system for use by the Great Lakes States and in accordance with the Boundary Waters Treaty of 1909;**
>
> **" to encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin;**
>
> **"to prohibit any [new] diversion of Great Lakes water by any State, Federal agency, or private entity for use outside the Great Lakes basin unless such diversion is approved by the Governor of each of the Great Lakes States; and**
>
> **"to prohibit any Federal agency from undertaking any studies that would involve the transfer of Great Lakes water for any purpose for use outside the Great Lakes basin."**
>
> **WRDA continues with a specific reference to the IJC:**
>
> **"No Federal agency may undertake any study, or expend any Federal funds to contract for any study, of the feasibility of diverting water from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the great Lakes, for use outside the Great Lakes basin, unless such study or expenditure is approved by the Governors of each of the Great Lakes States. The prohibition of the preceding sentence shall not apply to any study or data collection effort performed by the Corps of Engineers or other Federal agency under the direction of the International Joint Commission in accordance with the Boundary Waters Treaty of 1909."**

The Commission considers the amendment to be constructive, and commends the United States Congress for its action in this area.

On June 18, 2001, the Great Lakes states and Ontario and Quebec concluded an *Annex* to the 1985 *Great Lakes Charter*, a good-faith arrangement between the Great Lakes states and Ontario and Quebec, which established principles for the management of Great Lakes water resources.

***Annex 2001* commits the Great Lakes states and Ontario and Quebec**

> **"... to develop and implement a new common, resource-based conservation standard and apply it to new water withdrawal proposals from the Waters of the Great Lakes Basin. The standard will also address proposed increases to existing water withdrawals and existing water withdrawal capacity from the Waters of the Great Lakes Basin."**

***Annex 2001* also sets out six directives concerning the development of a new set of binding agreements: development of a broad-based public participation program; establishment of a new decision-making standard; review of projects under the *Water Resources Development Act of 1986*, as amended in 2000; development of a decision-support system that ensures the best available information; and further commitments with respect to such matters as implementing programs and legislation, monitoring, decision-making and dispute-resolution mechanisms, conservation, scientific research and the role of groundwater.**

Proposed policies to implement *Annex 2001* were released for public comment on July 19, 2004. The public comment period lasts for 90 days.

Finally, the Commission recommends that the outcome of the *Annex 2001* process should include a standard and management regime consistent with the recommendations in our 2000 report. Until this process is complete, it is not possible to say whether and to what extent *Annex 2001* and measures taken under it will give effect to the recommendations in the Commission's 2000 Report.

Recommendation II. Major New or Increased Consumptive Uses

To avoid endangering the integrity of the ecosystem of the Great Lakes Basin, and without prejudice to the authority of the federal governments of the United States and Canada, the governments of the Great Lakes states and Ontario and Quebec should not permit any proposal for major new or increased consumptive use of water from the Great Lakes Basin to proceed unless:

a. full consideration has been given to the potential cumulative impacts of the proposed new or increased major consumptive use, taking into account the possibility of similar proposals in the foreseeable future,

b. effective conservation practices will be implemented in the requesting area, and,

c. sound planning practices will be applied with respect to the proposed consumptive use.

In implementing this recommendation, states and provinces shall ensure that the quality of all water returned meets the objectives of the Great Lakes Water Quality Agreement.

The governments of Canada and the United States and the governments of the Great Lakes states and Ontario and Quebec should notify each other of any proposals for major new or increased consumptive uses of water from the Great Lakes Basin.

Consultations regarding proposed major new or increased consumptive uses should continue in accordance with the procedures and processes that are evolving throughout the Great Lakes Basin and should be coupled with additional opportunities for public involvement.

Any transboundary disagreements concerning the above that the affected governments are not able to resolve may, as appropriate, be referred by the governments of Canada or the United States to the International Joint Commission pursuant to Article IX of the Boundary Waters Treaty.

Nothing in this recommendation alters rights or obligations under the Boundary Waters Treaty.

Commission Observations on Recommendation II

The Great Lakes states and Ontario and Quebec are working to negotiate an agreement among them to implement in final form the provisions of *Annex 2001* with respect to consumptive uses. A draft agreement was put out for public comment in July, 2004.

In the meantime, on December 17, 2003, Ontario made a new regulation concerning the taking and use of water that places a one-year moratorium on new and expanded water takings in southern Ontario to allow the Ontario government time to review its groundwater supplies and draft new rules for water takings.

Recommendation III. Conservation

In order to avoid endangering the integrity of the ecosystem of the Great Lakes Basin, the governments of the Great Lakes states and Ontario and Quebec should apply conservation measures to significantly improve efficiencies in the use of water in the Great Lakes Basin and should implement the conservation measures set out in this recommendation.

The governments of the Great Lakes states and Ontario and Quebec, in collaboration with local authorities, should develop and launch a coordinated basin-wide water conservation initiative, with quantified consumption reduction targets, specific target dates, and monitoring of the achievement of targets, to protect the integrity of the Great Lakes Basin ecosystem, and to take advantage of the other economic and environmental benefits that normally flow from such measures.

In developing and implementing this initiative, the governments should, among other things, consider:

a. state-of-the-art conservation and pollution-control technologies and practices,

b. potential cumulative impacts,

c. the application of sound planning practices,

d. to the extent practicable, the setting of water prices at a level that will encourage conservation,

e. conditioning financial help from governments for water and wastewater infrastructure on the application of sound conservation practices,

f. promotion of eco-efficient practices, especially in the industrial and agricultural sectors,

g. establishment of effective leak detection and repair programs for water infrastructure in all municipalities,

h. the inclusion of strong performance and environmental standards and financial incentives for water saving in contractual arrangements for delivery of water-related services, whether public or private,

i. the application of best practicable water-saving technologies in governmental facilities,

j. sharing experiences with respect to the planning and implementation of conservation policies and programs and the use of water-saving technologies, and,

k. joint preparation of promotional and educational materials and publication of success stories, including sponsoring conferences and workshops on water conservation, in partnership with others.

Commission Observations on Recommendation III

The Commission observes that conservation is justifiable on its own merits in terms of both economic efficiencies and proper husbandry of scarce water resources, yet we remain concerned about the slow pace of implementing the recommendations in our 2000 report.

As stated in the November 8, 2002 report of the Commission's task force, the Canadian and U.S. governments continue to support research on water conservation and water use, which includes developing comprehensive databases on water valuation studies in cooperation with provincial and international partners.

The Great Lakes States and Ontario and Quebec are continuing to develop agreements for implementing those provisions of *Annex 2001* that address conservation.

The Commission's task force also noted that a paper prepared by the Great Lakes Commission[4] indicates that there is considerable room for improvement in conservation measures.[5] It appears that Indiana, Michigan, Ohio, and Wisconsin either have no conservation programs or have programs that are very limited.

Status of conservation efforts of local units of government was not assessed. However, the Commission observes that significant potential exists at the local level of government to implement conservation measures. The Commission recognizes that it will always be very difficult to collect data on conservation programs and to summarize those programs because of the very large number of local jurisdictions involved.

In the United States, the *Safe Drinking Water Act* of 1996 required the Environmental Protection Agency (EPA) to publish guidelines for geographically-tailored water conservation plans for public municipal water systems. The effectiveness of these guidelines, which are designed to encourage conservation at the municipal level, is not being measured. States have the authority to require water systems to submit a water conservation plan consistent with the EPA or other guidelines as a condition of receiving loans under the Drinking Water State Revolving Fund. However, Illinois, Indiana, Michigan, New York, Ohio, and Pennsylvania do not require conservation for projects that

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[4] Dan Blake, Great Lakes Commission, Water Conservation in the Great Lakes - St Lawrence Region, July, 2002.

[5] For the purposes of this report, "conservation measures" means actions taken to reduce withdrawal or consumptive use of water.

wish to draw on revolving funds. [6]

The Commission commends the ongoing initiative launched by Chicago Mayor Richard Daley to meter all water uses in the largest city in the Great Lakes region and notes that a majority of water withdrawals and uses in the Great Lakes basin are not metered and that such metering would dramatically enhance the ability to conserve and better manage water use. Moreover, pricing municipal water to encourage conservation would also be a step in the right direction as long as safeguards are included to protect persons with low incomes.

Finally, according to the Commission's task force, apparent water use dropped considerably between 1993 and 1998. It is not known, however, how much of that apparent reduction represents a real trend. Unfortunately, we are not able to measure how much conservation alone has contributed to the quicker than expected leveling-off of consumptive water use.

Recommendation IV. *Great Lakes Charter* Standards

Without prejudice to the authority of the federal governments of the United States and Canada, the Great Lakes States and Ontario and Quebec, in carrying out their responsibilities under the *Great Lakes Charter*, should develop, within 24 months, with full public involvement and in an open process, the standards and the procedures, including the standards and the procedures in Recommendations I and II, that would be used to make decisions concerning removals or major new or increased consumptive uses. Federal, state, and provincial governments should not authorize or permit any new removals and should exercise caution with respect to major new or increased consumptive use until such standards have been promulgated or until 24 months have passed, whichever comes first.

Commission Observations on Recommendation IV

The Great Lakes states and Ontario and Quebec are working on implementing the provisions of *Annex 2001* for the establishment of standards and procedures to manage water withdrawals and use. A proposal was put out for public comment in July 2004.

So far as we are aware, no new removals or major new or increased consumptive uses from the Great Lakes have been authorized or permitted by federal, state or provincial governments since 2000.

The Commission again urges the states and provinces to adopt a standard consistent with the principles in Recommendation I and II of our 2000 report and notes that based upon the advice of its task force, legal counsel and the governments of the

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[6] Minnesota requires cities to have a conservation plan to get on a revolving fund priority list. Wisconsin effectively requires a plan for new wells by virtue of a separate wellhead protection plan for new wells. When administering revolving funds, New York and Pennsylvania give priority to projects that have conservation features, but these states do not require conservation features in order for projects to receive these funds.

United States and Canada, a standard that treats in-basin water uses differently than out-of-basin diversions is reasonable.

Recommendation V. Existing Institutions and Mechanisms

To help ensure the effective, cooperative, and timely implementation of programs for the sustainable use of the water resources of the Great Lakes Basin, governments should use and build on existing institutions to implement the recommendations of this report. In this regard, the governments of the states and the provinces should take action, with respect to the implementation of the *Great Lakes Charter*, to:

a. develop and implement, on an urgent basis, the Basin Water Resources Management Program,

b. develop a broader range of consultation procedures than is currently called for in the *Charter* to assure that significant effects of proposed uses of water resources in the Great Lakes Basin are assessed, and,

c. ensure that the notice and consultation process under the *Charter* is open and transparent and that there is adequate consultation with the public.

Commission Observations on Recommendation V

As noted above, the Great Lakes states and Ontario and Quebec are working on implementing provisions in *Annex 2001* to the *Great Lakes Charter.*

The Commission observes that the Great Lakes states and provinces have a prior notice and consultation process for certain water withdrawals under the *Great Lakes Charter*. The Commission continues to encourage careful attention to providing the public a convenient opportunity to be heard in such consultations. The Commission also observes that the establishment of a public advisory committee to the Working Group on *Annex 2001* has been an exceptionally positive development. In addition, the Commission notes that Directive #6 of *Annex 2001* contains a commitment on the part of the governors and premiers to "identify and implement effective mechanisms for decision making and dispute resolution."

Finally, the Commission observes that the Great Lakes states and Ontario and Quebec are working on implementing provisions in *Annex 2001* that may address the issues raised in Recommendation V and that a proposed *Agreement* was put out for public comment in July 2004 .

Recommendation VI. Data and Research

Federal, state, and provincial governments should move quickly to remedy water use data deficiencies by:

a. allocating sufficient staff and financial resources to upgrade the timeliness, precision, and accuracy of water use data,

b. working much closer together to ensure consistency in water use monitoring, estimation techniques, and reporting,

c. emphasizing and supporting the development and maintenance of a common base of data and information regarding the use and management of the water resources of the Great Lakes Basin, establishing systematic arrangements for the exchange of water data and information, and undertaking coordinated research efforts to provide improved information for future water planning and management decisions.

Furthermore, governments should immediately take steps to ensure that, on a binational basis, research is coordinated on individual and cumulative impacts of water withdrawals on the integrity of the Great Lakes Basin ecosystem. In support of their decision-making, governments should implement long-term monitoring programs capable of detecting threats (including cumulative threats) to ecosystem integrity. Such monitoring programs should be comprehensive, particularly in their approaches to detecting threats to ecosystem integrity at a spectrum of space and time scales.

As part of an anticipatory policy for identifying emerging issues, governments should, on a binational basis, undertake more active science and research and, in particular, should implement appropriate long-term monitoring programs for key indicators of ecosystem change.

Commission Observations on Recommendation VI

The Commission notes that in the *Great Lake Charter*, the states and provinces made a commitment nearly two decades ago to register all water withdrawals exceeding 100,000 gallons a day and to regulate all water withdrawals for diversions or consumptive uses exceeding two million gallons per day as a condition for participation in the notice and consultation process in the *Charter*. Given that as well as other commitments in *Annex 2001*, the Commission observes that despite some progress, deficiencies in the collection of water use data continue.

In its response to the Commission's 2000 report, the Canadian government has said that plans are evolving to modernize its water-monitoring network, but these have not yet been finalized. According to the Commission's task force, Environment Canada and Ontario have initiated a joint project to gain baseline data on water supply, use and demand at a sub-basin level, identify ecological sensitivities and make projections for the future. This project is not scheduled to be completed until 2005.



The Commission's task force has found that the United States Geological Survey (USGS), which is responsible for compiling and disseminating the United States' water-use data, scaled back its 2000 five-year national water-use data report, in part because its program is under-funded, and, in part, because of concerns that certain features of the report, in particular estimates of consumption, lack a sufficient scientific basis to warrant continued publication. There is, at present, no agreement on "consumptive use coefficients," a term that is defined in this report to mean, "that portion of water withdrawn which is evaporated, transpired from plants, incorporated into products or otherwise lost, and thus is not available for further use in the basin." According to the task force, the consumptive use problem has been overstated.

The Commission also notes that, under the aegis of *Annex 2001,* the Great Lakes states and Ontario and Quebec, with support from U.S. and Canadian federal government agencies, worked with the Great Lakes Commission (GLC) to develop an assessment of available information, an update of data on existing water uses, an identification of data needs, a better understanding of groundwater, and evaluation of models that could be used to implement the support system.

Noting the steps above, the Commission continues to urge the Great Lakes states to complete and update the database for water withdrawals including agricultural withdrawals.

The state of Michigan, the only state to have failed to regulate water withdrawals over two million gallons per day, should immediately take action to keep this promise. The Commission understands that Michigan's Governor has called for action to regulate water withdrawals and that the state legislature may consider this matter in the future.

Recommendation VII. Groundwater

Governments should immediately take steps to enhance groundwater research in order to better understand the role of groundwater in the Great Lakes Basin. In particular, they should conduct research related to:

a. unified, consistent mapping of boundary and transboundary hydrogeological units,

b. a comprehensive description of the role of groundwater in supporting ecological systems,

c. improved estimates that reliably reflect the true level and extent of consumptive use,

d. simplified methods of identifying large groundwater withdrawals near boundaries of hydrologic basins,

e. effects of land-use changes and population growth on groundwater availability and quality,

f. groundwater discharge to surface water streams and to the Great Lakes, and systematic estimation of natural recharge areas, and,

g. systematic monitoring and tracking of the use of water-taking permits, especially for bottled water operations.

In recognition of the frequent and pervasive interaction between groundwater and surface water and the virtual impossibility of distinguishing between them in some instances, governments should apply the precautionary principle with respect to removals and consumptive use of groundwater in the Basin.

Commission Observations on Recommendation VII

The Commission observes that scientific understanding of groundwater and its role in supporting ecosystem functions remains incomplete and significant research needs to be conducted in order to fill existing gaps in knowledge. The Commission has provided a menu of research topics that remain relevant and urges the governments to conduct and support that research.

In its response to the Commission's 2000 report, the Canadian government stated that the Geological Survey of Canada has initiated consultations with the provinces, territories, and other federal science agencies to develop a national program that would map the nation's major aquifers, including groundwater in the Great Lakes Basin. According to the Commission's task force, groundwater is also part of the Environment Canada - Ontario water use and supply project that is referred to in the Commission's comments on the preceding recommendation. However, so far as the Commission is aware, none of these efforts has as yet come to fruition. In addition, the government of Canada has initiated discussions with the government of the United States regarding the development of a coordinated approach to raising the awareness of groundwater issues throughout the Great Lakes Basin.

The USGS and Great Lakes states are also undertaking groundwater research primarily related to specific needs, such as reports of domestic wells going dry in Monroe County and Saginaw County, Michigan, and declines in the deep aquifer in southeastern Wisconsin. A USGS official told the task force that to date there has been little done in response to the Commission's call for unified consistent mapping of boundary and transboundary hydro geological units. The task force found that there has, however, been progress in describing the role of groundwater in supporting ecological systems (although the availability of good quality water for drinking and ecosystems is still a largely unstudied area for the Great Lakes as a whole), on identifying the effects of land use changes and population growth on groundwater availability and quality, on learning more about groundwater discharge to streams and on estimating natural recharge areas.

Groundwater also forms part of the work that the Great Lakes Commission is doing with respect to *Annex 2001*. Moreover, in 2002, the Great Lakes Protection Fund issued a

grant to USGS to allow a team of hydrologists to develop a three-dimensional visualization of the Lake Michigan Basin which will illustrate how groundwater relates to the surface water system, and to develop protocols and data reporting procedures with Environment Canada that can be used in both countries in routine hydrological analyses. These efforts are underway, but, so far as the Commission is aware, have not yet been completed.

The Commission observes that the *Boundary Waters Treaty* is silent regarding groundwater. However, apart from the fact that sometimes groundwater and surface water flows may be indistinguishable, the IJC can and has considered groundwater flows under References issued pursuant to Article IX of the treaty and can consider impacts on groundwater flows when deciding whether to approve applications for projects with transboundary effects pursuant to Articles III, IV and VIII of the treaty. The *Great Lakes Charter* and *Annex 2001* both define "waters of the Great Lakes basin" as including tributary groundwater that is within the *Charter* boundary. As such, it appears that any water management regime that is developed as a result of the *Annex 2001* process will be applied to both groundwater and surface water withdrawals within the *Charter* boundaries. The Commission cautions that because of the relatively poor state of scientific knowledge concerning the quality, quantity and flow of groundwater, that any regime should be flexible enough to accommodate improvements in that knowledge.

The Commission wishes to stress the critical importance of the above recommendation that governments should commence a project to map and characterize all of the groundwater aquifers in the Great Lakes Basin. Such a project would dramatically enhance the ability to manage these vital waters and advance scientific understanding of these unseen resources.

Finally, the Commission observes that there are examples of near-basin communities that in their quest for needed water – and their inability to tap Great Lakes surface water – have resorted to withdrawing large quantities of groundwater.

Recommendation VIII. Climate Change

Recognizing that the Intergovernmental Panel on Climate Change has concluded that human activities are having a discernible effect on global climate, and despite the uncertainties associated with the modeling of future climate, the governments of Canada and the United States should fully implement their international commitments to reduce greenhouse gas emissions.

Commission Observations on Recommendation VIII

The Commission observes that climate change exacerbates uncertainty with respect to Great Lakes water supplies, with most models predicting lower lake levels, providing even more reason for the states and provinces to complete the *Annex 2001* process with standards and management guidelines consistent with our recommendations.

In addition, the Commission notes that the Canadian government has ratified the *Kyoto Protocol* to the *United Nations Framework Convention on Climate Change*, and has adopted a Climate Change Plan for Canada, which it is implementing. The Plan, which is the result of extensive consultations with provinces, territories, stakeholders and individual Canadians, is said to provide a framework for moving forward, while allowing for continuous adjustment as progress is assessed.

The United States is not a Party to the *Kyoto Protocol*, but is instead addressing the climate change issue through its own measures. In this regard, the Commission notes, with interest, the creation of the Chicago Climate Exchange, which describes itself as the "first voluntary, legally binding commitment by a cross-section of North American corporations, municipalities and other institutions to establish a rules-based market for reducing greenhouse gases." Members of the exchange buy and sell emissions reduction credits in order to reduce overall emissions in a cost-effective way.

Recommendation IX. Trade Law

The governments of the United States and Canada should direct more effort to allaying the public's concern that international trade law obligations could prevent Canada and the United States from taking measures to protect waters in the boundary region, and they also need to direct more effort to bringing greater clarity and consensus to the issue.

Commission Observations on Recommendation IX

International trade agreements do not prevent the governments of the United States and Canada from protecting water as it resides in the Great Lakes and their tributary rivers and streams, if there is no discrimination against persons from other countries and undue expectations are not created. However, some remain concerned; therefore, the governments need to make a greater effort to clarify this issue for the public, including continuing to demonstrate that future trade agreements, such as the proposed *Agreement for a Free Trade Area of the Americas* or a *General Agreement on Trade in Services*, will not affect the ability of governments to protect water resources like the Great Lakes.

Recommendation X. Standing Reference

The Commission should be given a standing reference to review its recommendations for the protection of the waters of the Great Lakes in three years and thereafter at 10-year intervals unless conditions dictate a more frequent review. This report is the response to the request from governments for a review after three years.

Commission Observations on Recommendation X

The governments have accepted this recommendation and have given the Commission the Reference that it proposed, but without committing to make funds available for the ten-year review.

Recommendation XI. Next Steps

The Commission recommends that the governments consider for adoption the proposed plan of work for Commission activities on the rest of the border, focusing on priority issues and on specific regional issues where the Commission can contribute binational experience and resources.

Recommendation XII. Implementation

The Commission recommends that the governments of the United States and Canada and the governments of the Great Lakes states and Ontario and Quebec, acting individually or collectively, as appropriate, take the necessary steps to implement the recommendations contained in this report.

Commission Observations on Recommendation XII

Progress is being made with respect to the recommendations in the Commission's 2000 report, but many of our recommendations have not been implemented. It would appear that Recommendation I has essentially been met in Canada by *Bill C-6* and by the Ontario *Water Taking and Transfer Regulation*. In the United States, the *Water Resources Development Act* prohibits diversions or exports of water from the Great Lakes or their tributaries without the approval of the Governors of all Great Lakes States. However, Recommendations I to VII, inclusive, which directly address measures needed to protect the waters of the Great Lakes Basin, have not yet been fully implemented, and a further effort is required by the governments to do so. Therefore, the governments of Canada and the United States and the governments of the Great Lakes states and Ontario and Quebec, acting individually or collectively, as appropriate, should take the necessary steps to complete implementation of all the Commission's recommendations in its 2000 report.

Herb Gray
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Chair, U.S. Section

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Irene B. Brooks, Commissioner

Jack P. Blaney, Commissioner

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

Remarks to the International Joint Commission Hearings
On Water Uses in the Great Lakes Basin
Toronto Hearing, January 20, 2003

Background

Thank you for the opportunity to speak to you tonight about the International Joint Commission three-year review of the standing reference on Protection of the Waters of the Great Lakes. My name is Sarah Miller and I am a community legal worker and water policy analyst with the Canadian Environmental Law Association (CELA). CELA has a unique mandate in Ontario. CELA is primarily funded by Legal Aid Ontario to provide legal advice and representation on environmental matters to those in need. For over 32 years CELA has also pursued a law reform mandate to improve environmental law and policy. For most of that time the organization has had a strategic focus on water quality and quantity in the Great Lakes.

CELA involvement in water sustainability issues dates back to 1984, prior to the Great Lakes Charter. At no time, since then has there been such potential for very real and tangible gains in the Great Lakes water management.

Growing water conflicts

If the International Joint Commission (IJC) is able to cast a wide enough net in this three-year evaluation, you will find many local water use conflicts exist now in the Great Lakes. Information on world water shortages has grown considerably since 2000. Numerous international agencies are investing significant resources and programs in addressing these problems. It was the need for water in Asia that fuelled the original NOVA proposal that led the governments to call for this reference. We are now seeing calls for increased allocations of the Colorado River and partitioning of water between Mexico and the United States to address growing continental water shortages. It is clear that the Great Lakes can not be complacent and dismiss these warnings and the regions role in an increasingly water short world.

The challenge of the initial IJC reference was to move the Great Lakes from its bad habit of crisis management to systemic and visionary preventative management for generations to come. This is why the progress report from the International Water Uses Review Task Force is so disturbing. It seems to imply that the Great Lakes region should revert to crisis management and insular protectionism based on the evidence of the last three years. The timing and tone of this report could not be worse.

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Annex 2001

During the past several years, CELA has participated in many components of Annex 2001 work. CELA has been on the Advisory Committee to the Great Lakes Water Management Initiative convened by the governors and premiers. CELA has also participated in the Strategic Advisory Committee to the Great Lakes Commission on a Water Resource Management Decision Support System for the Great Lakes. As well, we have worked on a Steering Committee of the Institute for Agriculture and Trade Policy project that resulted in an excellent report *Impacts of Agriculture on Water Quantity in the Great Lakes and St. Lawrence River Basin*.

Since the Annex commitment, we have worked continuously with other Great Lake environment and conservation groups in Canada and the US to provide detailed responses on the Annex process. Our latest response submitted three days ago to the Council of Great Lakes Governors was 44 pages long. Based on all of this experience, our legal research, meetings with government, discussions with our US counterparts CELA has concluded that Recommendation IV in your February 22, 2000 report is achievable. Yet, your taskforce report opines that legislation binding the States and Provinces to Annex 2001 directives is not achievable without prejudicing the federal governments of Canada or the US. However the authors offer no concrete reasons for this conclusion. From our perspective we are well on the way to achieving this. A lot of good will and tremendous effort is going into the complex challenge of binding states and provinces to common standards. Commissioner Irene Brooks will be able to attest to these efforts based on her own contributions to these efforts. The newly elected Great Lakes Governors will need time to become familiar with the efforts underway. **CELA is optimistic that the next iteration of the Water Management Working Group work will reflect this progress and recommends that your own three-year review not be completed without updating yourselves on this important work.**

The importance of the work on the Annex to the residents of the Great Lakes should not be underestimated. Right now in Ontario there is a window of opportunity to implement watershed management plans to protect the sources of our drinking water as the result of the Walkerton Inquiry. CELA is sitting on the Committee drafting this framework that includes protection of both the quantity and quality of the sources of Ontario drinking water. We have been able to cross-pollinate this effort with a lot of the good research and ideas emerging from the Annex work.

Quebec is in a similar position. They too are in the process of drafting their recent water policy framework into legislation. For the Provinces developing new legislation, and for the States that do not yet have water withdrawal licensing systems, the work underway for the annex offers tremendous tools. The Annex work on institutionalising resource improvement, tracking cumulative impacts of water withdrawals, and improving data collection on ground and surface water could greatly improve new and existing legislation. These new tools will have impacts far into the future.

Local water use problems

Because CELA is a legal clinic we get frequent requests for help from people with water use conflicts in the Province. In the past five years, these calls have escalated. People

are desperate for tools to measure and evaluate the sustainability of their water supply. They are very well informed and concerned about the impacts of climate change and water shortages. The state of the science on climate change has gone well beyond where your consultants' report puts it. Annex 2001 if implemented will result in improved groundwater mapping and knowledge in Ontario. This will lead to improved permitting and conservation of these resources.

CELA has invested a lot of time in working on the Annex 2001 because we saw that it could help resolve many problems facing communities in Ontario. For example, CELA represented the Concerned Walkerton Citizens (CWC) in both phases of the Walkerton Inquiry. Phase One investigated the failure of policy; systems and individuals to protect that community's drinking water and Phase Two the reforms needed to avoid a future tragedy. The final Inquiry recommendations included source protection measures for quantity as well as quality in the form of watershed plans. CWC and the Chippewa of Nawash, the First Nation in the area are both committed to long term solutions to water protection for the region. However they are concerned that before these protections are in place in the Walkerton area, in Bruce and Grey Counties, there are a number of pipeline proposals to move from groundwater to the Great Lakes for supplies of drinking water. Decisions on these proposals are being made on a community by community basis without knowledge of the cumulative impacts of several pipelines on near shore and aquatic ecosystems of the Great Lakes watersheds.

Many of these proposals have the potential to significantly change land use in Ontario. Pipelines are seen to be safe guards for future growth even though these areas are now low growth important agricultural areas. These pipelines are being promoted as quick solutions to water quality concerns. But what are the best long-term solutions? Often, the evaluation of the options, fail to compare the long-term costs. These include: the quality of the groundwater verses the quality of Great Lakes for drinking water, the costs of additional treatment water and maintenance of pipelines and the impacts on inland rivers and streams and fisheries receiving the additional wastewater. Arguments are made by pipeline proponents that return flows be put back into the source but once the pipeline is built, it is likely new proposals for extensions to communities outside of the watershed will emerge. This has already happened with the completed pipeline from Lake Huron to Alliston, Ontario. A new proposal has been made to extend this pipeline from the Lake Huron watershed to Bradford Ontario in the Lake Ontario - Lake Simcoe watershed. If this extension is approved, the benefits from those flows through the St. Clair, Lake Erie and Niagara River will be lost. If the Annex 2001 were implemented, these deliberations would benefit from a broader international scrutiny of ecosystem impacts.

New legislation resulting from Walkerton Inquiry, the new *Sustainable Water and Sewage Act* could result in the amalgamation of smaller drinking water systems into bigger regional systems. This could result in much larger withdrawals with much more concentrated localised impacts on the near shore and sub-watersheds of the Great Lakes. It will be critical that we have the tools being developed in the Annex to evaluate these impacts.

Non essential uses of the waters of the Great Lakes watershed are also growing rapidly. Our unscientific monitoring of the permits to take water in Ontario, during the limited time they are listed on our environmental registry, shows the largest volumes of water are being given to golf courses. The Annex will be crucial for us to be able to prioritise use in times of drought because it will result in data being cumulated. In Ontario there is inadequate oversight over all the permits given. There is also inadequate monitoring and enforcement of permits given in Ontario.

A study done several years ago by the Globe and Mail showed that the Provinces of Quebec, British Columbia and Ontario gave permits to water bottling companies for volumes far in excess of what they could actually use. Together volumes permitted were double the bottled water consumption in the US and triple the consumption in Canada. The long-term evaluative tools and sustainable policies being put forward in the Annex 2001 will help prevent these kinds of excessive and wasteful water allocations in the future.

Conclusion

Few Great Lakes residents would be surprised that your report has concluded that there is no short - term water crisis because use has dropped. The erroneous projections of the 1980's - that industry would intensify in the Great Lakes and all water demands would continue to grow exponentially for all sectors - were based on little more than surveying the sectors about their dreams. This is a lesson in just how crude our tools are to measure trends and needs. Annex 2001 will result it greatly improved data collection and ability to track changes in demands. We cannot afford to over look the per capita over use of water in our region when compared with all other countries of the world. The proof of our purpose will be in our success in reducing this use by a third to a half (per capita) by limiting demand and by conservation.

If the IJC relies on the findings of the report of the International Water Uses Review Task Force, the Annex 2001 efforts could be curtailed prematurely. Long overdue, improved Great Lakes water management would be put at risk. **The Canadian Environmental Law Association urges the IJC to cast your net further than this report. In a letter sent January 15, 2003 we joined others to recommend that you hold additional hearings to encourage more the public participation and notice.**

We urge you to recommend that there be a continuing, standing reference on Great Lakes water use. Without a standing reference the region will be without the tools to deal with the building continental and world water crises and the inevitable water conflicts within the region. As well, we could be ill prepared to assist with the humanitarian needs for water in the future while ensuring we protect our own delicate ecosystem. It is widely accepted that 40% of the countries of the world will be facing severe water shortages by 2025.

before I leave for 135 St. Clair. Theresa.

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Proposed Annex 2001 to the Great Lakes Charter

Comments from the Government of Canada on Annex 2001 to the Council of Great Lakes Governors

Canada welcomes the opportunity provided by the Council of Great Lakes Governors to comment on the proposed Annex 2001 to the Great Lakes Charter. As a Party to the 1909 *Boundary Waters Treaty*, and therefore responsible, together with the United States, for the rights and obligations contained in the Treaty, Canada considers the Treaty to be fundamentally important to protecting the shared waters of the Great Lakes. Also, through its responsibilities for the Great Lakes, Canada continues to invest millions of dollars in protecting the ecological integrity of the Great Lakes Basin.

Canada appreciates the key role played by the members of the Great Lakes Charter (the eight Great Lakes states, and Ontario and Quebec) in the management and protection of the Great Lakes. Canada does, however, have serious concerns about the proposed standard in the Annex which would allow for removals of water out of the Great Lakes Basin, and about the relationship of the Annex to the *Boundary Waters Treaty*.

Canada supports the recommendations of the International Joint Commission (IJC) February 2000 report *Protection of the Waters of the Great Lakes*.

Introduction

Canada recognizes the ongoing efforts of the members of the Great Lakes Charter to arrive at new, common standards and procedures for decisions concerning removals or major new or increased consumptive uses, as well as efforts directed at improving the information on existing and potential uses and withdrawals, and the promotion of water efficiency and conservation. There is a long history of constructive work within and between the eight Great Lakes states, and Ontario and Quebec. This work has made a critical contribution to the improvement over the past 40 years of the water quality of the Great Lakes. Indeed, in the years ahead, the environmental challenges on the Great Lakes will increase, requiring the same strong commitment and cooperation from all levels of government in Canada and the U.S.

Canada endorses actions by the Charter members which will contribute to better management and protection of the shared waters of the Great Lakes. A number of the principles and measures outlined in the Annex are consistent with this objective. However, Canada has concerns with the proposed Annex in the following areas:

- the standard proposed is too permissive, and could compromise the ecological integrity of the Great Lakes Basin by the cumulative impacts of diversions below the *de minimis*

threshold, as well as by opening the door to long-distance, large-scale removals out of the basin;

- there are a number of unanswered legal and jurisdictional questions, not the least of which is the possibility of conflict between the Annex and the *Boundary Waters Treaty*, thereby diminishing the importance of the protections the latter offers to the Great Lakes; and,

- there should be greater clarity on a number of important aspects related to implementation, as these would have a significant impact on how the Annex is applied.

The Standard

Canada considers that the standard proposed in the Annex is too permissive. The standard could open the door to long-distance, large-scale bulk removals out of the Great Lakes. In addition, the *de minimis* provisions are set too high for removals out of the basin and do not take sufficient account of the cumulative effect of many projects and other stresses on the ecosystem.

Recognizing that improved conservation measures for consumption within the Great Lakes Basin are a high priority, Canada considers that an environmental approach which treats in-basin and out-of-basin uses differently is the most effective way of protecting the Great Lakes. Prohibiting diversions between major basins is an effective means of preventing the spread of invasive species, pathogens and pollutants, and recognizes that the sustainability of ecosystems and communities within the basin is dependent on a natural supply of water.

Bulk removal outside the basin represents a permanent loss to the basin and is not a sustainable use of water. When water is withdrawn within the water basin, most of it usually returns to the boundary waters by a natural route—on average, there is essentially no or little loss to the system. Consumptive losses within the basin should not be equated to removals out of the basin.

The IJC adopted this approach in its conclusions and recommendations to the report *Protection of the Waters of the Great Lakes*. Canada notes that the IJC considers that their recommendations are consistent with international trade obligations, a position the Government of Canada fully endorses. The IJC, as well as formal submissions by the governments of Canada and the United States, reaffirmed the principle that governments retain full sovereignty over the management of water in its natural state, and in exercising this sovereignty are not constrained by international trade agreements.

Canada considers that the IJC recommendations on removals represent an excellent blueprint for addressing the multi-dimensional, multi-jurisdictional aspects of the issue. These recommendations, while not as strict as those adopted by Canada, or by Ontario and Quebec, represent a viable solution to the concerns of all jurisdictions within the Great Lakes Basin.

Canada is deeply concerned at the prospect of a regime being established which is less rigorous than that recommended by the IJC.

Legal Considerations

The *Boundary Waters Treaty* has been the bedrock of Canada-U.S. joint management of the Great Lakes for over 90 years. For the 40 million Canadians and Americans dependent on the shared waters of the Great Lakes, the Treaty represents a fundamental protection and assurance. The elements of the proposed Annex raise a number of concerns for Canada regarding the relationship with and effect on the Treaty and the IJC.

The Treaty establishes rights and obligations between Canada and the United States with respect to boundary waters. The application of provisions in the Annex that might establish a different regime with different standards and procedures could affect the ability of both countries to respect and comply with their Treaty obligations to the other and result in a weakening of the protections in the Treaty.

As presently drafted, and as described in associated material from the Council, the Annex is presented as a binding agreement between Canadian provinces and U.S. states. This is contrary to international law and the Constitution of Canada. If such a binding agreement is not in fact the intention of the Annex, there still remain a number of questions:

- what is the potential for conflict between the Annex and the Treaty, as a result of two standards or regimes on the Great Lakes? For example, a project in a connecting waterway, approved by the standard in the Annex, could result in a change to the level and flow on the other side of the boundary and thus trigger IJC jurisdiction under Article III of the Treaty. While that project might have received approval under the Annex mechanism it would still require approval by the IJC and, depending on the location, the governments of Canada and/or the United States.

- is the standard under the Annex compatible with Article IV, paragraph 2 of the Treaty (dealing with pollution) and the Great Lakes Water Quality Agreement (GLWQA)? There is considerable uncertainty.

- as the Annex does not contain the same priorities and provisions as Article VIII of the Treaty, could there not be a clash between the priority system established under Article VIII of the Treaty and the new mechanism?

- since Article V of the Annex commits to a series of obligations to improve the Great Lakes water management system, including to "identify and implement effective mechanisms for decision-making and dispute resolutions", what would be the relationship between these "mechanisms" and the existing Treaty regime, including the IJC and the GLWQA?

These questions, inter alia, raise fundamental concerns on Canada's part, concerns which Canada intends to discuss with the U.S. Department of State in greater detail.

Implementation

As the questions identified above demonstrate, many factors critical to the implementation of the Annex are not known. Given that these might well have a significant effect on the operation of the Treaty, great care is essential so as to avoid the possibility of overlap or conflict between the Treaty and the Annex.

Canada's Initiative on Bulk Water Removal

Canada announced a strategy in February 1999 to prohibit bulk water removal out of major drainage basins. All provinces have in place or are developing legislation or regulations to prohibit bulk water removal. On February 5, 2001, Canada reintroduced legislation in Parliament, Bill C-6 (*An Act to amend the International Boundary Waters Treaty Act*), which will prohibit the bulk removal of boundary waters out of their water basins, including the Great Lakes.

With regard to bulk water removals out of the Great Lakes Basin, the prohibition contained in Bill C-6 fulfills Canada's obligation to the United States under the Treaty, i.e. not to affect the level and flow of waters on the U.S. side of the boundary. The prohibition is also a non-discriminatory environmental measure of general application aimed at preserving the integrity of ecosystems within water basins.

Canada's approach of prohibiting the bulk removal of water out of water basins, which is embodied in Bill C-6, is comprehensive, environmentally sound and respects constitutional responsibilities. Moreover, it is consistent with Canada's international trade obligations as it does not target the export of water as a good, but rather protects water in its water basin, before the issue of its export arises and before it has become a good or a saleable commodity.

Conclusion

As the foregoing comments indicate, Canada continues to have serious concerns with certain aspects of Annex 2001, in particular that the proposed standard in the Annex is too permissive with regard to removals of water out of the Great Lakes Basin, and about the relationship of the Annex to the *Boundary Waters Treaty*. Canada looks forward to an ongoing dialogue with the Council on these matters.

withdrawal management systems "that are consistent in their fundamentals across the region" is the best (and even only) assurance to stave off the "trade demons" that so many fear. We do not have any such basis for decision making now, leaving every jurisdiction wide open to such challenges. More fundamentally, a common approach is required in logic and sustainability to protect the basin.

page 6 of the agreement: One worry that I did have is about clause 1.2 which requires each party to develop for their jurisdiction "a list of the capacity of existing systems" in terms of withdrawal capacity, treatment capacity, distribution capacity, or other capacity limiting factors. Can you probe this extensively in your discussions tomorrow to get at this and why / how this will work. What I worry that it means is that jurisdictions will set out a "withrawal capacity" that they are not yet at, and then be forced to start handing out permits left right and centre until they get to that "withdrawal capacity" limit. Furthermore, what is to be done with these capacity assessments? If the capacities are reached, is the answer to all further diversion or consumptive taking requests an automatic "No"?

page 7 - I think the bulk water removals provision is quite important in that it addresses containers less than 20 litres as well as those greater than 20 litres.

page 14 of the agreement - the result when there is no consensus is quite weak and similarly, the jurisdiction's obligations after the Declaration of Finding is very weak. Shouldn't they commit to implement the result in their own decision making on the application? What happens if there is consensus but the jurisdiction acts contrary to the finding of the regional body? what happens if there is not consensus in that even one jurisdiction disagrees with the result? This is also where the question arises regarding whether the dispute resolution mechanism is applicable here.

page 28 of the agreement - the criterial for "significant ecological impact" is very good - again far better than most legislative definitions we have in Canada.

page 30 - as I indicated, I like the water conservation section and it provides a really good start for the basin.

page 34 - the statement that "the improvement measures provision is central to the Jurisdictions' commitment to responsible resource protection and management is great but probably should also go in the compact and agreement themselves in preamble statements. The critieria for decisions on improvement measures and the list of improvement examples are very good and on the whole this section is highly supportable.

That's it for tonight. Good luck on your calls tomorrow if you don't have a chance to talk to me in the morning. I will be in from 9 to 12

Some additional specific comments (and I do not repeat comments where they apply equally to the compact and the sustainable waters resources agreement):

Compact page 4 - definition of Source Watershed as being the waters from which the water was taken - should be improved by linking surface water source waters and ground water source waters. In other words, will water taken from ground but returned to a surface water satisfy the agreement and its objectives?

Compact page 9 - an interesting enforcement mechanism under the Compact is to petition a court to suspend the party's right to vote if the state is in violation of its duties -- ask them whether that mechanism can't be extended to the interjurisdictional agreement that includes Ontario and Quebec - in which case the choice of law provision would have to also include the Canadian courts.

page 9 - enforcement - there is no comparable section at all regarding enforcement that I can see in the Sustainable waters agreement between all of the jurisdictions. You should ask whether they have considered trying to include many of the elements of the Compact enforcement provision in the multi-jurisdictional agreement.

page 9 - because there is no enforcement section like this in the sustainable waters agreement, there is nothing comparable to the 3.9 (4) section on citizen enforcement; we would like to see such a right in Canada as well. If so, Ontario would have to provide for that in its legislation.

page 13 of the Compact - section 8.1 - why would you say Regional Review "may include"...notice, consultation and public participation?" It shoud say "Must require" these.

page 14 - "significant" is not defined in 8.2 (4) but later in the procedures manual at appendix 2 there is a pretty fair definition - this definition should be cross referenced in both the compact and the agreement.

page 17 - I like the cumulative impacts section - it has more specific content than most such provisions in Canadian legislation and I like the triggers of each 5 years or upon reaching a specified total increase in losses. However, what is not clear is what the end result would be in terms of goals or objectives, or when cumulative impacts would be too much. Furthermore, assessment of cumulative impacts should still consider all of the takings below the thresholds under the agreements.

Agreement page 5 - the commitment to adopt measures no less restrictive than those in the standard is an extremely important new commitment and should be the foundation of your public education and outreach work about the Annex once we analyze our position. The goal of water

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Subject: Annex review - first reaction
Date: Fri, 16 Jul 2004 00:51:58 -0400

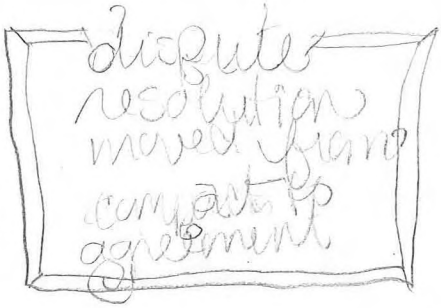
Sarah, (and Reg, Paul, John), I have read most of the document, albeit quickly and will try to read it more thoroughly soon.

On the whole, I am very encouraged. It respects many of the principles we have been advocating all along and the principles that Annex 2001 itself strove for.

As it is probably true that most reviews will be only by the individual jurisdictions, as they will be below the threshhold for regional review, I am very encouraged by the commitment that all of these jurisdictions agree to institute permitting systems for water takings based on the requirements set out for those size of takings - in other words many jurisdictions will have to institute takings regimes with criteria whereas they lack any at all today. Furthermore, the criteria set out in the agreement are fairly good and even Ontario will have to revise its system to comply, in my opinion. Even the proposed revisions to the water taking regime in Ontario don't go so far as to encompass these new Annex requirements.

There are several aspects of the proposed Agreements that I see as good precedents for much of our other work both on water and on other issues such as energy - e.g. the conservation section is excellent.

I see quite a bit in here that I recognize from discussions CELA has had with various parties over the years - e.g. "make it as binding as you can" and invoke good dispute resolution mechanisms. On the latter however, I am not clear whether the dispute resolution mechanism is meant to apply when the jurisdictions cannot reach consensus on a regional review of a particular application, or whether it's limited to administration of the agreement. Clarification of that point during your afternoon call would be helpful.



! am comfortable with the combination of the Compact and the Agreement.

We've been worrying that our fight was going to be to make the Agreement better and while there are some trickly elements that we have to consider in terms of improvement, on the whole I think the fight during the public consultation period is going to be to keep industry etc. from pushing back so hard that the agreement never proceeds or gets watered down. On the other hand, the weakest link in the whole thing is the provision that the only thing the individual jurisdiction does with a finding from a regional review is "consider it" in their own final decision making. This is very weak.

CELA Great Lakes Interest list, updated 02-September-2004

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CELA will be preparing materials for Ontarians attending these hearings over the next several days.

Who:

People with an interest in the future of the Great Lakes

What:

The governments of Ontario, Quebec and the eight Great Lakes states have negotiated draft agreements to protect and conserve the waters of the Great Lakes Basin. Several meetings will be held across Ontario to give an overview of proposed agreements, and to provide forums for questions and discussions.

When & Where:

Monday, September 13, 2004 - Thunder Bay Public meeting 7:00pm-9:00pm
Victoria Inn, 555 West Arthur Street Kensington Room
Phone: (807) 577-8481 Website: www.victoriainn.ca/ThunderBay/

Tuesday, September 14, 2004 - Sault Ste. Marie Public meeting 7:00pm-9:00pm
Water Tower Inn, 360 Great North Road Courtyard Room
Phone: (705)949-8111 Website: www.watertowerinn.com

Monday, September 20, 2004 – Toronto Public Meeting and Open House 5:00pm-9:00pm
(Presentations at 6 pm) Regional Meeting Hosted by the Council of Great Lakes Governors
Novotel Toronto Centre, 45 The Esplanade Champagne and Alsace Ballrooms
Phone: (416) 367-8900 Website: www.novotel.com

Tuesday, September 21, 2004 – Windsor Public meeting 7:00pm-9:00pm
Ramada Plaza Hotel and Suites, 430 Ouellette Ave. Guard Room
Phone: (519) 256-4656 Website: www.ramadawindsor.com

Wednesday, September 22, 2004 – London Public meeting 7:00pm-9:00pm
Best Western Lamplighter Inn, 591 Wellington Road S. Chelsea 1 Room
Phone: (519) 681-7151 Website: www.lamplighterinn.ca

Tuesday, September 28, 2004 - Kingston Public meeting 7:00pm-9:00pm
Ambassador Resort Hotel,1550 Princess St. London Room
Phone: (613) 548-3605 Website: www.ambassadorhotel.com

How to Get Involved & Resource Pointers:

Visit the Ontario Ministry of Natural Resources web site:
http://www.mnr.gov.on.ca/mnr/water/greatlakes/index.html

Read the Draft Great Lakes Basin Sustainable Water Resources Agreement, a good faith agreement between the eight Great Lake States and the provinces of Ontario and Quebec:
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/StateProvincialAgreement.pdf

Read the Draft Great Lakes Basin Water Resources Compact, a binding agreement between the 8 Great Lake States: http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/InterStateCompact.pdf

Read the International Joint Commission's Protection of the Waters of the Great Lakes – *Review of the Recommendations in the February 2000* Report a good yardstick to compare against drafts

of the Annex:
http://www.ijc.org/php/publications/pdf/ID1560.pdf

Visit the the Great Lakes basin environmental protection groups web site:
http://www.speakongreatlakes.org which has a lot of information, although most is from a US perspective.

Other Supporting Documents:
Council of Great Lakes Governors Introductory Statement
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/PublicComment.pdf

Great Lakes Basin Map
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/GreatLakesBasinMap.pdf

Great Lakes Charter, 1985
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/Charter1985.pdf

Great Lakes Charter Annex 2001
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/Annex2001.pdf

How to make Comments

1. The draft agreements are posted until October 18, 2004, on the Environmental Bill of Rights Registry for public comment at www.ene.gov.on.ca/envision/env_reg/ebr/english/index.htm (Registry Number PB04E6018).

   If you wish to comment on the draft agreements, please contact the Ontario Ministry of Natural Resources by fax at (705) 755-1267, or by mail to:

   Paula Thompson, Senior Policy Advisor
   MNR Water Resources Section, Lands and Waters Branch
   300 Water Street, P.O. Box 7000
   Peterborough, Ontario, K9J 8M5
   PHONE: (705) 755-1218 FAX: (705) 755-1267

2. You should also send comments to the Council of Great Lakes Governors directly by e-mail at Annex2001@cglg.org (electronic comments will be posted to the Council of Great Lakes Governors website at http://www.cglg.org), by fax at (312) 407-0038, or by mail to:

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

3. You can also visit and engage in discussion at the new International Joint Commission bulletin board discussion room http://www.ijc.org/rel/boards/b_board/en/index.php

   There is also a discussion room specifically for students:
   http://www.ijc.org/rel/boards/b_board_youth/en/index.php

Please contact me for any further information,

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Table 3-3
Summary Characterization of Water Use Permitting, Registration and Reporting Programs

Jurisdiction	Characteristic	Water Use Category: Public Supply	Self-Supply Domestic	Self-Supply Irrigation	Self-Supply Livestock	Self-Supply Industrial	Self-Supply Thermoelectric	Self-Supply Nuclear	Hydroelectric	Other
Illinois	Permit/Reg.	Permit	N/A			Permit	N/A			Permit
	Water Source	Surface	-			Surface	-			Surface
	Threshold	All	-			All	-			All
	Capacity/Use	All	-			All	-			All
	Req'd Reporting	Yes	-			Yes	-			Yes
	Data Source	Permit program	No existing uses			Permit program	No existing uses			Permit program
Indiana	Permit/Reg.	Registration						N/A	None	Registration
	Water Source	All						-	-	All
	Threshold	100,000 g/day						-	-	100,000 g/day
	Capacity/Use	Facility capacity						-	-	Facility capacity
	Req'd Reporting	Yes						-	-	Yes
	Data Source	Registration program						No existing uses	Volunt. reporting	Reg. program
Michigan	Permit/Reg.	Registration	None	None	None	Registration			None	
	Water Source	All	-	-	-	All			-	
	Threshold	All	-	-	-	100,000 g/day			-	
	Capacity/Use	All	-	-	-	Facility capacity			-	
	Req'd Reporting	Yes	-	-	-	Yes			-	
	Data Source	Reg. program	Not reported	Modeling	Not reported	Registration program			Not reported	
Minnesota	Permit/Reg.	Permit[1]								
	Water Source	All								
	Threshold	10,000 g/day or 1 million g/yr								
	Capacity/Use	Actual use								
	Req'd Reporting	Yes								
	Data Source	Permit program								
New York	Permit/Reg.	Permit	Registration						None	Registration
	Water Source	All	All						-	All
	Threshold	All	100,000 g/day						-	100,000 g/day
	Capacity/Use	All	Actual use						-	Actual use
	Req'd Reporting	No	Yes						-	Yes
	Data Source	Est. with permits	Registration program						Power agencies	Reg. program
Ohio	Permit/Reg.	Registration								
	Water Source	All								
	Threshold	100,000 g/day								
	Capacity/Use	Facility capacity								
	Req'd Reporting	Yes								
	Data Source	Registration program								
Ontario	Permit/Reg.	Permit	Permit[2]		None	Permit	Permit			
	Water Source	All	All		-	All	All			
	Threshold	50,000 L/day	50,000 L/day		-	50,000 L/day	50,000 L/day			
	Capacity/Use	Allowable use	Allowable use		-	Allowable use	Allowable use			
	Req'd Reporting	No	No		-	No	No			
	Data Source	Federal survey	Federal census		Federal census	Federal survey	Voluntary reporting			
Pennsylvania	Permit/Reg.	Permit	None	None	None	None	N/A			None
	Water Source	Surface	-	-	-	-	-			-
	Threshold	All	-	-	-	-	-			-
	Capacity/Use	All	-	-	-	-	-			-
	Req'd Reporting	Yes	-	-	-	-	-			-
	Data Source	Permit program	State estimated	Volunt. reporting	Not reported	Volunt. reporting	No existing uses			Not reported
Quebec	Permit/Reg.	Permit	None			None	None	N/A	None	N/A
	Water Source	All	-			-	-	-	-	-
	Threshold	All	-			-	-	-	-	-
	Capacity/Use	All	-			-	-	-	-	-
	Req'd Reporting	No	-			-	-	-	-	-
	Data Source	Prov. estimated	Province estimated			Env. Canada	Hydro-Quebec	No existing uses	Hydro-Quebec	No existing uses
Wisconsin	Permit/Reg.	Approval[3]	Approval/Reg.[3]	App/Reg	Permit	Approval/Registration[2]				
	Water Source	All	All	gwater	swater	All				
	Threshold	All	100,000 g/day	100,000	All	100,000 g/day				
	Capacity/Use	All	Facility capacity	Fac. cap	All	Facility capacity				
	Req'd Reporting	Yes	Yes	Yes	No	Yes				
	Data Source	Approval	Approval/Reg.	App/Reg	Volunt.	Approval/Registration				

NOTES

1 The hydropower category of Minnesota's water use permitting program only covers facilities that divert water out of the river channel. Currently, all Minnesota hydroelectric water uses in the Great Lakes watershed are in the river channel.
2 Permits for the self-supply domestic category do not include individual residential use.
3 Wisconsin has an approval process for many water uses that goes beyond registration but not a complete permitting process.

KEY TO TABLE 3-3 CHARACTERISTICS

Permit/Reg.: Does the jurisdiction have a water use permitting or registration program? If neither, the box for the category is marked "None" for no program or "N/A" for no existing uses and the next four categories are left blank.
Water Source: What water sources (i.e., groundwater, surface water, all) are included in the program?
Threshold: What is the use threshold for inclusion in the program?
Capacity/Use: Does the threshold apply to facility capacity, actual use, or allowable use? If the threshold applies to all uses, "All" is repeated.
Req'd Reporting: Is water use reporting required under the permit or registration program?
Data Source: What is the source of water use data for the 1998 Great Lakes Regional Water Use Data Base?

Table 3-2
Summary of Water Use Reporting Programs by Jurisdiction *

Jurisdiction	Agencies Involved (lead agency in bold)	Authorizing Laws/Regulations	Permit/ Registration (all water sources unless specified)	Public Participation in Permit Process	Total Principal Facilities	Percent Principal Facilities Reporting	Data Reporting Frequency	Data Compilation Methods	Consumptive Use Compilation Methods	Specificity of Primary Data to G.L Basin	Funding	Staffing
Illinois	**Department of Natural Resources**; State Water Survey	Level of Lake Michigan Act; Regulation Title 17 Chapter I (h), Part 3730; Voluntary Survey	Permits for Lake Michigan allocations (surface water)	Public hearings held for applications	33	N/A	Annual/ Monthly	Facility measured	N/A (all water consumed)	Yes	$80,000 (70 DNR, 10 Survey) (G.L Basin)	1.35 FTEs (1 DNR, 0.35 Survey) (G.L. Basin)
Indiana	**Department of Natural Resources**	Indiana Code 14-25-7: Water Resource Management Act	Registration for more than 100,000 g/day capacity	None	540	100	Annual	Facility/state measured or estimated	State estimated	No	$10,000 (estimate) (G.L. Basin)	0.2 FTEs (G.L. Basin)
Michigan	**Department of Environmental Quality**	Public Act 451 of 1994, Part 327 Public Act 399 of 1976, Part 15	Registration for public supply, some 100,000 g/day capacity	None	2,221	Nearly 100	Annual	Facility/state measured or estimated	Facility/state estimated	Yes	$53,000 (annual fees) (G.L. Basin)	0.9 FTEs (G.L. Basin)
Minnesota	**Department of Natural Resources**	Statute 103G.265 to 103G.315; Rules 6115.0600 to 6115.0810	Permits for use of more than 10,000 g/day or 1 million g/year	Local units given 30 days for comments	118	Nearly 100	Annual with monthly data	Facility measured	State estimated	No	From State General Fund	0.4 FTEs (G.L. Basin)
New York	**NYS Department of Environmental Conservation**; USGS; ACOE; NYSDOH	NYSECL 15-1609 and 15-1501, NYCRR Parts 675 and 601	Reg. for more than 100,000 g/day use; public supply permits	Water Supply Permit Program only	641	N/A	Annual/ Biennial	Measured or estimated	Measured or estimated	Partially	$35,367 (G.L. Basin)	0.65 FTEs (G.L Basin)
Ohio	**Department of Natural Resources, Division of Water**	Ohio Revised Code Sections 1521.15 and 1521.16	Registration for more than 100,000 g/day capacity	None	262	100	Annual	Measured and estimated	State estimated and facility measured	No	$19,410 (G.L. Basin)	0.3 FTEs (G.L. Basin)
Ontario	**Ministry of Natural Resources;** Ministry of Environment and Energy; Env't Canada	Ont. Water Res. Act: Sect. 34; Water Transfer and Taking Reg. 285/99. Other regs. may influence takings.	Permits for use of more than 50,000 L/day	Applications web posted for 30 days. Public can appeal decisions.	2,827	N/A	N/A	Measured and estimated	Province est. and facility measured (industrial)	Partially	No specific, stable funding	1 FTE (G.L. Basin)
Pennsylvania	**Department of Env'tal Protection's Bureau of Watershed Management**	Chapter 109.701 (b) Rules and Regulations; Administrative Code Section 1904-A(3)	Surface withdrawal permits for public supply	Public comment for public supply	26	N/A	Annual	Facility estimated or measured	State estimated/ fac. est. or measured	Yes	$6,700 (G.L. Basin)	0.1 FTEs (G.L. Basin)
Québec	Municipalities; Ministry of Agriculture and Fisheries; Industry; Hydro-Québec	Ministry of the Environment; Watercourses Act; Environment Quality Act; other ministries	Permit needed for public supply	Municipality gives public supply comments	171	70-100	When requested	Facility measured (industrial, electric only)	N/A (no systematic mechanism)	Only for hydro	$0	0 FTEs
Wisconsin	**Department of Natural Resources**	State Statute 281.35; Natural Resources 142, Administrative Code	Registration for more than 100,000 g/day use	None	414	100	Annual	Facility measured or estimated	Facility estimated	Yes	$14,000 (state-wide)	0.2 FTEs (state-wide)

*Based on status in 1998

Table 4-1
State/Provincial Water Conservation Programs and Drought Contingency Plans (as of January 1998)

Jurisdiction	Conservation Program	Local Conservation Efforts	Drought Contingency Plan
Illinois	For Lake Michigan water, conservation required and outdoor rules apply during growing season. System owners and end users both required to conserve. Promotion through printed materials. Permittees cannot exceed unaccounted-for-flow of 8 percent.	Municipal permittees have adopted ordinances and building codes requiring conservation.	None, but individual plans encouraged for permitted users. Governor's Drought Task Force discusses drought conditions.
Indiana	None, except during drought.	Local governments support conservation efforts during drought.	Three water shortage phases used with recommendations for action. First phases use voluntary reductions and public outreach. Phase III uses mandatory restrictions. Water Shortage Task Force can be formed to advise the governor.
Michigan	None	Individual municipalities and local governments use drought measures as necessary.	None, but ad hoc interdepartmental task forces have been formed.
Minnesota	Permits require all users to be efficient. Public water suppliers and agricultural irrigators must have conservation plans.	Local demand management measures are required to obtain approvals for new municipal wells or increases in authorized water volumes.	Current plan specific to Mississippi River, but being updated to whole state. Public suppliers and surface water users must have contingency plans. Drought plan includes mandatory restrictions. Multi-agency/stakeholder task force implements the plan.
New York	Water suppliers required to have conservation programs. Goal to maintain unaccounted-for water below 15 percent. Publicity and consumer education efforts required.	Local entities may provide additional support.	State Drought Management Task Force recommends four different drought stages. The first two stages focus on voluntary reductions. The final two stages use mandatory restrictions.
Ohio	None, except during drought.	Local entities may provide additional support.	Four phases of drought are used. The second two phases use voluntary conservation and public education; phase four uses mandatory restrictions after governor declaration. Drought Executive Committee is activated in phase three.
Ontario	Building code and planning laws require low-flow plumbing and other conservation measures. Education initiatives promote conservation. Provincial Water Use Strategy guides efforts.	Municipal levels have regulations and are involved in education during low water conditions. Communities receive federal money to reduce public use.	Three drought indicator levels used. Level 1 is voluntary, Level 2 is regulatory and Level 3 is mandatory. Ontario Low Water Response Plan guides partnerships between local and provincial agencies. Local Water Response Teams develop conservation plans.
Pennsylvania	Public water suppliers using surface water required to have conservation program. Various conservation efforts are used.	Local entities may provide additional support.	Three drought stages used. The first two stages have voluntary restrictions of various levels. The third stage may also include mandatory restrictions. Water suppliers and commercial and industrial users required to have drought plans.
Québec	None, but provincial ministries provide financial support to local efforts and NGOs. The organization RÉSEAU-Environment promotes conservation through a variety of methods.	A range of conservation occurs at local scale, including infrastructure replacement, restrictions on water use, and education programs.	None
Wisconsin	None, but conservation plans recommended as part of wellhead protection plans (required for municipal wells). System losses regulated by Public Service Commission. Plumbing flows regulated by Department of Commerce.	Local entities may provide additional support.	Declaration determines the presence of drought emergency. Formal plan, stages not used. Mandatory restrictions imposed with declaration of drought emergency.

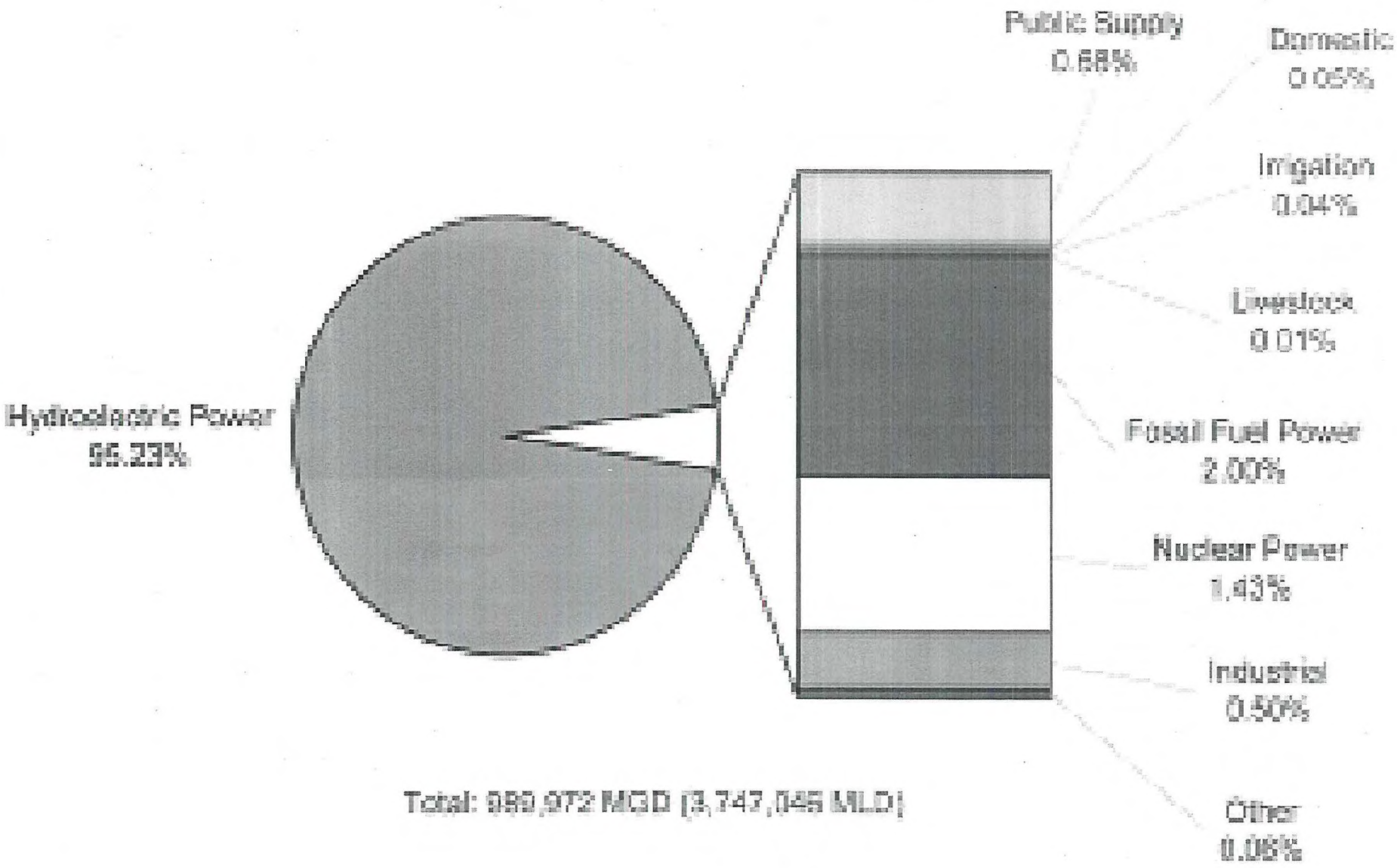


Figure 3-2
1998 water withdrawals by category

PHONE: (705) 755-1218 FAX: (705) 755-1267

2. You should also send comments to the Council of Great Lakes Governors directly by e-mail at Annex2001@cglg.org (electronic comments will be posted to the Council of Great Lakes Governors website at http://www.cglg.org), by fax at (312) 407-0038, or by mail to:

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

3. You can also visit and engage in discussion at the new International Joint Commission bulletin board discussion room
http://www.ijc.org/rel/boards/b_board/en/index.php
<http://www.ijc.org/rel/boards/b_board/en/index.php>

There is also a discussion room specifically for students:
http://www.ijc.org/rel/boards/b_board_youth/en/index.php
<http://www.ijc.org/rel/boards/b_board_youth/en/index.php>

Friends House location: link

pointers.

7. Other Documents:

Council of Great Lakes Governors Introductory Statement:
<http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/PublicComment.pdf>
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/PublicComment.pdf

Great Lakes Basin Map:
<http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/GreatLakesBasinMap.pdf>
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/GreatLakesBasinMap.pdf

Great Lakes Charter, 1985:
<http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/Charter1985.pdf>
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/Charter1985.pdf

Great Lakes Charter Annex 2001:
<http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/Annex2001.pdf>
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/Annex2001.pdf

To read what critics of the Annex say:
<http://www.powi.ca/> http://www.powi.ca/
<http://www.sierraclub.ca/national/getinvolved/item.shtml?x=729>
http://www.sierraclub.ca/national/getinvolved/item.shtml?x=729

How to make Comments

1. The draft agreements are posted until October 18, 2004, on the Environmental Bill of Rights Registry for public comment at www.ene.gov.on.ca/envision/env_reg/ebr/english/index.htm
<http://www.ene.gov.on.ca/envision/env_reg/ebr/english/index.htm>
(Registry Number PB04E6018
http://www.ene.gov.on.ca/envregistry/023323ep.htm
<http://www.ene.gov.on.ca/envregistry/023323ep.htm>).

If you wish to comment on the draft agreements, please contact the Ontario Ministry of Natural Resources by fax at (705) 755-1267, or by mail to:

Paula Thompson, Senior Policy Advisor
MNR Water Resources Section, Lands and Waters Branch
300 Water Street, P.O. Box 7000
Peterborough, Ontario, K9J 8M5

2284 ex. 213 as soon as possible to register and so that we can order lunch for you.

Admission is free.

Attached is a list of sources for further information.

For CELA background

<http://www.cela.ca/publications/cardfile.shtml?x=1980>
http://www.cela.ca/publications/cardfile.shtml?x=1980

How to Get Involved & Resource Pointers:

1. Visit the Ontario Ministry of Natural Resources web site:
http://www.mnr.gov.on.ca/mnr/water/greatlakes/index.html
<http://www.mnr.gov.on.ca/mnr/water/greatlakes/index.html>

2. Read the Draft Great Lakes Basin Sustainable Water Resources Agreement, a good faith agreement between the eight Great Lake States and the provinces of Ontario and Quebec:
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/StateProvincialAgreement.pdf
<http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/StateProvincialAgreement.pdf>

3. Read the Draft Great Lakes Basin Water Resources Compact, a binding agreement between the 8 Great Lake States:
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/InterStateCompact.pdf
<http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/InterStateCompact.pdf>

4. Read the International Joint Commission's Protection of the Waters of the Great Lakes - Review of the Recommendations in the February 2000 Report a good yardstick to compare against drafts of the Annex: http://www.ijc.org/php/publications/pdf/ID1560.pdf
<http://www.ijc.org/php/publications/pdf/ID1560.pdf>

5. Visit the Great Lakes basin environmental protection groups web site: http://www.speakongreatlakes.org which has a lot of information, although most is from a US perspective.

6. Visit the Waterhole website:
http://www.thewaterhole.ca/twp/glcannex2001.htm
<http://www.thewaterhole.ca/twp/glcannex2001.htm> for more resource

"Castrilli, Joseph" <jcastrilli@tube.com>,
"Bruce Davidson" <cwc@bmts.com>,
"Brenda Lucas" <brenda@gordonfn.org>,
"Bonnie Fox" <bfox@Conservation-Ontario.on.ca>
Cc: "Esther Vise" <visee@lao.on.ca>,
"Jessica Ginsburg" <articling.cela@lao.on.ca>,
"Nadarajah, Ramani" <nadarajr@lao.on.ca>,
"Wordsworth, Anne" <anne@cela.ca>,
"Muldoon, Paul" <muldoonp@lao.on.ca>,
"Miller, Sarah" <millers@lao.on.ca>,
"McClenaghan, Theresa (home)" <mcclenaghan@execulink.com>,
"McClenaghan, Theresa" <mcclenat@lao.on.ca>,
"Lindgren, Rick" <r.lindgren@sympatico.ca>,
"de Leon, Fe" <deleonf@lao.on.ca>,
"Cooper, Kathleen" <kcooper@cela.ca>,
"CELA Water Campaigner" <water@cela.ca>
Subject: Invitation to Annex 2001 Workshop
Date: Tue, 5 Oct 2004 11:37:00 -0400
Organization: Canadian Environmental Law Association

Invitation to Annex 2001 Workshop

Friday, October 15, 2004 (9:30 am to 1:30 pm)

Quaker Friends House
60 Lowther Avenue,
Toronto, Ontario

Two blocks north of Bloor, 1 block west of Avenue Road
(see mapquest link at end of message)

Over the past several weeks, Ontarians have expressed their concerns about the two agreements collectively known as Annex 2001. The Council of Great Lakes Governors and the Premiers of Quebec and Ontario released these agreements for public review on July 19, 2004 for a ninety-day review period ending October 18th.

It is our hope that the Ontario government will extend the comment period to allow more people to respond to these important drafts. To assist people with their responses, the Canadian Environmental Law Association is proposing to hold a workshop to further review and discuss these two agreements. CELA believes that a strong public response has the potential to improve the regimes being proposed and that it is important to spend the time now to protect the Great Lakes in the long-term.

If you will be attending our workshop, please contact Sarah Miller at millers@lao.on.ca <mailto:millers@lao.on.ca> or by phone at (416) 960

CELA Submissions on the Great Lakes Annex Agreements
October 18, 2004

1. Cover letter ~ October 18, 2004

2. General comments ~ Canadian Environmental Law Association Submissions on the Great Lakes Sustainable Water Resources Agreement, Decision-making Standard and the US Great Lakes Water Resources Compact

3. Briefing document ~ Why is the Great Lakes Basin Sustainable Water Agreement Important to Ontario?

4. Remarks from the Canadian Environmental Law Association to the September 20, 2004 Toronto Hearing

5. Environmental Group Comments on the Proposed International "Great Lakes Basin Sustainable Water Resources Agreement"

6. Environmental Group Comments on the Proposed "Great Lakes Water Basin Compact"

7. Responses to Questions posed by the Council of Great Lakes Governors

8. Principles used by CELA and Great Lakes United in Efforts to Strengthen the Great Lakes Charter Annex

9. October 15, 2004 CELA Annex Workshop Notes

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

October 18, 2004

Paula Thompson
Senior Policy Advisor
Ministry of Natural Resources
Water Resources Section,
Lands and Waters Branch
300 Water Street
P.O. Water Street P.O. Box 7000
Peterborough, Ontario
K9J 8M5

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

Dear Paula and David,

Annex Submissions from the Canadian Environmental Law Association

The Canadian Environmental Law Association (CELA) will be making several submissions to you today on the Great Lakes Annex documents. Later today you will receive our collective comments with the eleven other environmental ENGOs building on the record we have already provided you with of our concerns and suggestions. These include clause by clause comment on (a) the Great Lakes Water Resources Compact, (b) the Great Lakes Basin Sustainable Water Resources Agreement and Appendices and (c) answers to the additional questions you posed.

In addition to these three documents I am providing you with another three documents I have prepared. These include further comments from CELA addressing concerns that have arisen about the Annex in Ontario. I distributed this at a workshop we held on Friday, October 15, 2004 in Toronto to bring together divergent views to discuss perspectives. We also prepared and distributed a backgrounder for groups outside the Toronto area attending the hearings to give them our perspective on why the agreements are important for Ontarians. Finally I am including my prepared remarks to the Toronto hearing which I abandoned in favour of speaking to the mood of the room at the time.

Additionally I would like to add that at our Friday workshop groups attending agreed that the public could benefit from a ninety-day extension of the deadline. From our own experience as an Advisory Committee member we are aware of how complex and confusing these agreements are. The public could benefit from more time to answer their questions. Additional time would also offer opportunity to correct some of the erroneous assumptions that the press and public are making.

We understand that First Nations have requested ninety days for consultation with the Ontario government. CELA and others would like the opportunity to consider the outcome of that process.

I would like to thank you both for the opportunity to be part of the Advisory Committee. It is not often that we get to be part of such a huge effort to act to give primacy to ecosystem protection.

Yours truly,
Canadian Environmental Law Association

Sarah Miller

Sarah Miller
Water Researcher

Canadian Environmental Law Association Submissions on the Great Lakes Sustainable Water Resources Agreement, Decision-making Standard and US Great Lakes Water Resources Compact

The Canadian Environmental Law Association continues to support the objectives stated by the Premiers and Governors of the Great Lakes set out in the Great Lakes Charter Annex on June 18, 2001. We have endeavored to see the Annex directives strengthened throughout the negotiations by making our own and group submissions with eleven other ENGOs over the past three years. We once again will be making clause by clause collaborative comments with this group but we wanted to also make submissions at this time on many of the larger issues raised during the public consultation in Ontario.

The current Annex drafts are reflective of some of our previous input but also reflect other influences of sectors that do not share our primary concern that we need to entrench a new decision-making framework in the Great Lakes. CELA is taking this opportunity to reiterate the reasons for our support as well as making additional recommendations to improve the July 19, 2004 Draft Agreements because we wish the negotiators not to lose resolve at this crucial time.

Background of CELA involvement

The Canadian Environmental Law Association (CELA) has been involved in Great Lakes and St. Lawrence River water management issues since the early 1980s. In 1985 CELA made submissions and attended international and Ontario workshops in efforts to strengthen the Great Lakes Charter.

Our organization has worked with the Great Lakes United Sustainable Waters Taskforce to develop long term water conservation goals throughout the 1980s and 1990s and responded to most of the large withdrawal and diversion proposals that arose during this period. These included Pleasant Prairie, Akron, Mud Creek, Lowell, Indiana, the Crandon Mining proposal and the Mississippi River Army Corps of Engineers' proposal in the United States. In Canada, CELA has actively opposed the large continental engineering scheme, GRAND (Great Recycling and Northern Development) Canal Project, as well as several proposals to divert water from Georgian Bay to fast growing areas north of Toronto. In 1998, CELA was granted intervener status in the environmental appeal hearing on the Nova proposal to ship water by tanker from Lake Superior to the Orient. As our witness statements were going out the door, we received word that the Ministry of the Environment had negotiated a settlement with Nova to withdraw the permit.

In our work as a public interest legal aid clinic, CELA has represented many clients concerned with water allocation issues in the Province. Our clients have included rural residents in Grey County concerned with large water bottling operations, residents in eastern Ontario concerned with impacts on the Tay River from a large calcite

manufacturing facility and the Concerned Walkerton Residents concerned with preventing the pollution and depletion of the Province's drinking water supply. As part of our clinic's law reform mandate, CELA has made numerous submissions to the government of Ontario that have contributed to the Province's new Safe Drinking Act, regulations to improve their water-taking permitting system and a pending act to implement source protection for Ontario watersheds. These submissions can be found on our website at www.cela.ca.

CELA along with Great Lakes United and the Institute for Agriculture and Trade Policy wrote one of the first analyses of the environmental implications of trade in 1993, entitled *NAFTA and the Great Lakes A Preliminary Survey of Environmental Implications.*

CELA has made submissions to all three of the International Joint Commission (IJC) references on levels and flows and protection of the waters of the Great Lakes in the past two decades. In 1997, CELA and Great Lakes United published *The Fate of the Great Lakes ~ Sustaining or Draining the Sweetwater Seas?* an evaluation of the state of water management after the Great Lakes Charter. This report identified many of the problems that subsequently, the IJC 2000 reference and the States and Provinces are attempting to remedy today with the Annex.

In 2002, CELA was invited to participate on an Advisory Committee to the Great Lakes Water Management Initiative of the States and Provinces. CELA accepted this invitation because it was the first real effort since 1909 to entrench additional legally binding environmental protections for the ecosystem integrity of the Great Lakes. As well, it is our view that several of the Annex provisions would require Ontario to strengthen and improve their laws in ways that will:

- improve day to day water allocation practices,
- will immeasurably improve our knowledge about our groundwater and surface water interactions and renewability,
- require data to be generated on our cumulative use of water for the first time, and
- may lead to restrictions on diversions of water from one Great Lake to another.

Concurrent with the Annex 2001 negotiations, Ontario has been undertaking a complete reform of their water protection legislation as a result of recommendations made by the Walkerton Inquiry. CELA has been deeply involved in this process and has attempted to integrate and ensure that the Annex provisions are compatible and complementary to these reforms. During 2003-2004 we endeavored to inform the Ontario public of the pending Annex in water policy focused meetings we held in Parry Sound, Timmins, Owen Sound, London, King City and Belleville. We developed a mailing list of people wanting further information once it became available. As well, we held meetings with First Nations in efforts to inform them of the negotiations and concerns that the Annex could raise for them. We regularly updated an ad hoc working group advising us on source protection on Annex discussions.

CELA staff have endeavored to have the Annex discussions inform and contribute to the framework for Ontario's pending source protection legislation, which will require a shift to watershed-based planning. It is yet unclear how well the Great Lakes will be integrated into the requirements for watershed planning. The Annex could be crucial to the integration of all surface watershed planning for tributary watersheds within and outside the Great Lakes watershed by adding additional impetus and focus. Both efforts will require new data gathering and understanding of the relationship of ground to surface water. The Annex could also allow for a broader funding base to be brought to these efforts from the Federal government who share costs and responsibility for Great Lakes protection. The enhanced knowledge on groundwater that could result from Annex program implementation will address many chronic groundwater problems that have been identified by Ontario's Environmental Commissioner repeatedly in annual reports.

Why do we need a new regime now in the Great Lakes for water management?
The eight Great Lakes States and two Provinces have a shared obligation to manage and protect the Great Lakes ecosystem for future generations of residents and for the water dependent aquatic and basin wildlife, and for the economy of the region. When the Annex was announced in 2001, the Great Lakes Commission undertook a state of Great Lakes water management review entitled *Toward a Water Resources Management Decision Support System for the Great Lakes-St. Lawrence River Basin.* CELA was asked to participate in a stakeholder advisory capacity to this project.

Many of the Commission's findings corroborated the conclusions of the CELA and GLU 1997 Report. We have very little "sound science" to determine the impacts of large and cumulative water withdrawals on the ecosystem. We have inconsistent and inadequate data on current water use and future water needs in the basin and weak and inadequate water conservation practices and poor communications on water management. Perhaps the most important undertaking promised in the 1985 Great Lakes Charter, the development of a basinwide water resources management plan was completely ignored. Had that plan been put in place, we might have already created a conservation culture in the Great Lakes. Instead we find ourselves grappling with the need for such a long term enduring plan nineteen years later.

A new rigorous system that can support decisions for a water-short 21st century is needed. Critics of the Great Lakes Annex have neglected the aspects of the Annex that are attempting to address these deficits. These provisions are contained in the Decision Making Procedure Manual Appendix II of the Great Lakes Basin Sustainable Water Resources Agreement. Far more time and effort was spent on drafting these provisions which will transform our own management of the Great Lakes - St. Lawrence ecosystem than on the decision making standard for the adjudication of diversion proposals. This is testimony to the sincerity of the negotiators around the table to address their own use as well as others in a way that is nondiscriminatory and fair.

Since 1985, the Great Lakes Region has belied our bounty of one fifth of the world's freshwater by failing to implement water saving measures for all sectors. Consequently we are in the morally weak position of being the leading wasters of water in a world facing deepening water shortages. This is a leaky foundation to stand on. This is why CELA feels we have to continue our efforts to strengthen these agreements.

WRDA and diversions

The Water Resources Development Act (WRDA) has been the primary tool used to stop diversion proposals originating from the U.S. side of the Great Lakes. It allows a veto to any governor to defeat a proposal. Ontario and Quebec opposed most of the U.S. proposals. However the Provinces could only hope that there would be one State willing to use their veto power since the Provinces could not directly intervene. WRDA has no enforcement provisions. Furthermore, WRDA does not cover the entire Great Lakes ecosystem because it omits groundwater and Canadian waters. The general consensus is that WRDA would never stand up to a legal challenge and may be found to be inconsistent with the commerce clause in the US.

Water has long been an article of commerce in U.S. law. In 1982, a US Supreme Court Decision *Sporhese verses Nebraska* severely limited the States rights to regulate water sharing between States. In that case, the U.S. government stepped in and compelled water to be shared between U.S. States.

There have been at least seven diversion proposals from the U.S. side of the Great Lakes since the Charter was signed in 1985. WRDA decisions have not been made on the grounds of environmental protection. Consequently, diversions setting bad precedents that could be environmentally damaging were approved on purely political grounds. Some of these US proposals such as the Mud Creek irrigation proposal and the Crandon Mine Proposal fell outside Charter scrutiny as they were not termed diversions even though they resulted in water losses over the trigger level of the Charter. The Annex negotiators have attempted to eliminate the loopholes that allowed those proposals to proceed by including provisions on consumptive use, requirements to have no significant impacts, and requirements for return flow back to the same watershed.

The Annex Agreements once implemented will be an improvement on WRDA because they will: include the Provinces in the decision making, will use environmental criteria for decisions, include the whole ecosystem and will apply to withdrawals from Canadian as well as U.S. waters and will be legally binding and enforceable.

CELA supports that the WRDA protections remain in place until full implementation of the final Annex is completed.

The Federal Governments have jurisdiction over the boundary portions of the waters of the Great Lakes. Why do the Provinces and States need to be involved?
The Federal Government's jurisdiction over water is limited to navigation, fisheries, trade and the provision of water on government lands such as military bases and parks and to aboriginal community. The Provinces are responsible for the day to day management and allocation of most water to users including municipalities, rural wells, industry, manufacturers, mining, forestry, agriculture, food and beverage manufacturers, golf courses and parks. The water-taking permit system of Ontario is among the best in the Great Lakes Basin. Ontario requires scrutiny of all proposals for water over 50,000 liters (13,200 US gallons), an amount based on a small to average farm use. That system is now being improved with new provisions that will likely reduce exemptions, require fees for use and improve reporting.

The Federal Government shared authority over the Great Lakes was set out in the Boundary Waters Treaty (BWT) of 1909 at a time when the Great Lakes were being engineered to meet the demands of the time for hydro power, shipping and irrigation. It is interesting to note that the Long Lac and Ogoki Diversions, completed respectively in 1941 and 1943, divert water into the Canadian side of Lake Superior that would normally flow north into James Bay and from there into Hudson's Bay. The combined average daily flows of these diversions 13,468 mld (3,620mgd) are about 75% larger than all of the combined diversions out of the Basin. The Ogoki Diversion was done to support three power plants on the Nipigon River and the Long Lac to support hydropower and flows to move logs for forestry operations near Terrance Bay.

The Boundary Waters Treaty (BWT) is a binding international agreement. The BWT set up the IJC and its mandate, as well as a hierarchy of uses. These uses may have suited the times in 1909 but they are no longer reflective of the priorities of today. The Treaty is silent on the environment and on recreational uses of the Lakes. Many have speculated that the definition of Boundary waters does not include groundwater and may not include Lake Michigan because it is wholly within the boundaries of the U.S..

After the Nova proposal, both Federal Governments acted by announcing a three-part strategy. They requested that the IJC conduct a special study known as a reference to look into issues raised by the proposal. As well they attempted to strike a Federal Provincial Accord on water in an effort to get a moratorium across Canada to prevent bulk water export from Canadian watersheds. They also passed an Act Amending the Boundary Waters Treaty. In announcing these initiatives, then Secretary of State Lloyd Axeworthy stated; "The issue of water has gone beyond just some of the simple notions that applied ten years ago...it is now a much broader issue of management. It is foremost an environmental issue, not a trade issue and our approach that we are announcing today is designed to protect our waters from bulk removals from Canadian watersheds... that take place within Canada... and from without Canada...to move it into a much broader, comprehensive, co-ordinated way

of reconizing the enormous value of this resource and not simply looking at it in its economic dimension, but in terms of its basic essential utilisation for our ecology". The Federal Government was successful in two out of three of these intents. The Accord with the Provinces was a non-starter. Many Provinces preferred to strengthen their own legislation independently rather than blur sovereignty by entering into an unprecedented accord with the Federal government.

The Act amending the Boundary Waters Treaty Act gives the Minister of Foreign Affairs and Trade the sole discretion over diversion proposals in Canadian Boundary waters. Hence it does not cover all Great Lake waters. Ironically, the legislation could not further guarantee environmental assessment or scrutiny of diversions presumably because this would go beyond the hierarchy of uses designated in the Act.

The IJC final report to the governments *Protection of the Waters of the Great Lakes* was released in February 2000. It included many specific recommendations to the States and Provinces for entrenching water protection and concurred with the two Federal government's legal advice that this comprehensive route was preferable to a trade ban. The IJC requested that they be given a standing reference in order to assure that they could periodically review progress on implementation.

The Annex agreements should have come as no surprise. In June of 2001 the Great Lakes Governors and Premiers announced their intention to complete an Annex to the Great Lakes Charter within three years. This announcement was the States and Provinces attempts to act on the 2000 recommendations of the IJC reference. The IJC recommendations were reiterated as recently as August 2004 when the Commission issued their three-year progress report on implementation of protections of the waters of the Great Lakes.

CELA concurs that it is hard to determine how the Federal Government could act further using its powers to limit large withdrawals and diversions from the Great Lakes. We agree that a Federal ban on water diversions could have the unwanted consequence of evoking a trade challenge. Our job is now to determine if the two draft agreements fulfill the recommendations from the Federal government agents, the IJC and where they can be improved or strengthened.

Why two agreements for one purpose?

One of the most challenging aspects of the Annex efforts to promulgate legally binding standards for ecosystem protection are the complexities, barriers and limitations that arise from the different governance, legal and judicial systems of the States, Ontario and Quebec. It is clear that our different systems make the pioneering task of structuring and implementing an ecosystem approach across boundaries very complex. The legal and governance frameworks predate, and never anticipated, the need for cross border ecosystem actions. This creates many real barriers and limitations.

The goal of simplicity set out in the Annex 2001 Agreement was quickly overwhelmed by this task. This is why the public is having difficulty understanding how it could work. First we have to understand the diverse governance systems of two Federal, eight States, Quebec, Ontario and First Nations and Tribes.

The U.S. Compact

The U.S. Compact agreement came about in part because the U.S. Great Lakes States saw the value of strength in numbers. The use of compacts to co-ordinate action on shared waters is common in the U.S.. It is used in the in the southwest U.S. and in other areas where water management is shared such as the Chesapeake Bay.

The Compact model allows States to act together and continues to encourage consensual decision-making. For the States like Pennsylvania and Indiana that have only small portions of Great Lakes watershed within their boundaries, it means that the administrative burden of withdrawal proposals in their region can be shared by the other States. Parts of the compact spell out how the States will carry out their on-going administration through a Compact Commission. There are sensitivities about the shared administrative burden and responsibilities. These have led to discussions of penalties for failure to participate, cost sharing provisions and a majority voting for administrative matters only.

There are significant hurtles in the U.S. to Annex approval and implementation. All State Legislatures and Congress must pass the U.S. Compact. Recently, there has been another population shift out of the Great Lakes Region to the U.S. southwest. This will mean that nine seats in Congress will shift, with that population weakening votes from the Great Lakes Region. Leaders in the Great Lakes understand that they need to prepare for a time in the future when water intensive activities like farming will shift back to water rich areas. Large farming and industrial operations cannot be sustained for long in the U.S. southwest. The Annex is an important beginning to preparing for this time.

The threat of the U.S. Federal Government wading in and determining what happens to Great Lakes water is a real one that would set a terrible precedent. The Annex would make that more difficult as there would be overriding laws in eight States and parallel statutes in Ontario and Quebec. This certainly would give them serious pause.

It is the interest of the U.S. States to be assured that Ontario and Quebec can be at the table for diversion discussions to bring additional international pressures to bear on decisions that might be seen to be merely regional in the Congress. The fact is that both Ontario and Quebec have moratoriums on diversions. Ontario has had a leadership role to play in these negotiations because they currently have the most rigorous water allocation system in the Basin. As the pending improvements are made to our water-taking permitting system, the Provinces can urge the States to strive to achieve our levels of protection.

From the Province's perspective, they have the most at stake. Ontario uses more water than any other jurisdiction in the Great Lakes. Quebec is at greater risk from being at the tail end of the ecosystem. A quarter of the Canadian population depends on the Great Lakes for their drinking water. Protection of the water dependent ecology of the Great Lakes demands an ecosystem approach.

The Regional Agreement

As Canadians we are only too aware that the Provinces have no history, or cultural will to bind their governments together legally as the U.S. States are proposing to do in their compact. Ontario and Quebec have made it clear that they will be adopting the decision-making standards into their domestic legislation to bind themselves to the undertakings in the Regional Agreement signed by all jurisdictions. CELA will be working to see this occur in Ontario.

It is in the interest of Ontario and Quebec to be assured that they will be at the table for future decision-making on diversions and large withdrawals, and that those decisions will be made on environmental rather than on political grounds. With their moratoriums in place, it is unlikely there will be further proposals to divert water outside of the Basin originating from Canada. However there are already many new pipeline proposals welling up in Ontario that could result in diversions from one Great Lake Basin into the other. Many of these proposals could be subject to regional review under the Annex. This could be a huge deterrent to proponents of these schemes, as it was to York Region when they were proposing to switch to Georgian Bay for their drinking water.

The most likely location for a diversion from the Great Lakes in the future is through the Chicago Diversion. Completed in 1900, the diversion reverses the flow of the Calumet and Chicago Rivers so the sewage from Chicago will flow into the Mississippi River. The flow allocation of that diversion was limited to their current levels of 7,600 mld (6,463mgd). In the past the Canadian Government has resorted to diplomatic notes setting out their concerns on the Chicago Diversion. The Provinces now want any increases to this diversion to be subject to review under the Annex, as it will be unlikely that they would get standing in the US Federal Court to argue their concerns. The Canadian Federal Government has sent many diplomatic notes about their concerns about the Chicago Diversion requesting that the U.S. Government represent their concerns. However, recent actions on limiting the diversion resulted from State to State negotiations after Michigan threatened to sue Illinois.

Trade and the Annex

CELA has written extensively on trade and water, and has one staff lawyer who concentrates her work on trade and the environment. CELA concurs with the Canadian Federal government and other lawyers that have concluded that outright bans of diversions would evoke trade agreements. To cite the statements made by the governors and premiers when they announced the Annex:

"If you treat water like a commodity inside the basin, federal and international law would require you to treat it like a commodity outside the basin". Article XX of GATT (which was adopted in NAFTA) states that "subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party measures: ... (b) necessary to protect human, animal or plant life or health; ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption ... ".

CELA concurs that the Annex is putting in place long overdue protections to conserve the exhaustible natural resources of the Great Lakes in order to protect human, animal and plant life and health. CELA has also supported efforts to change trade agreements to insert further explicit language on the exclusion of natural waters.

Conclusion

We will have failed future generations of Great Lakes residents and may seriously compromise the sustainability and viability of the ecosystem if we fail to begin to entrench legally binding protections now. We will be guaranteeing opportunistic bids for water from the Great Lakes. We need new tools now. The Canadian Environmental Law Association urges the Parties to stay at the table until you have fulfilled all of the directives set out in the Annex.

Prepared for the Canadian Environmental Law Association
By Sarah Miller
October 14, 2004

Preliminary Guidance for the Ontario Great Lakes Community Prepared by the Canadian Environmental Law Association September 9, 2004

Why is the Great Lakes Basin Sustainable Water Agreement Important to Ontario?

This document has been prepared by the staff of the Canadian Environmental Law Association (CELA) to assist those making submissions to the governments on the Draft Great Lakes Water Management Initiative documents released by the Council of Great Lakes Governors in July 2004. We have tried to focus our comments on issues as they pertain to Ontario. **This Initiative is long overdue and has the potential to secure and sustain the waters of the Great Lakes in the future, if some crucial improvements are made. We urge you to take the time to make submissions on these changes to the Ontario government at their upcoming hearings in September or in writing to the Minister of Natural Resources and the Council of Great Lakes Governors by their October 18, 2004 deadline.** We have provided information on how to comment and the hearings locations at the end of this document.

Summary of Recommendations

1. Action needed to make the Agreement Commitments Legally Binding
Ontario and Quebec should act to legally bind themselves to the Great Lakes Basin Sustainable Water Agreement and its appendices by promulgating their provisions into new or existing laws.

2. Strengthen and bind Great Lakes States and Provinces to In-Basin Conservation Programs
To improve our stewardship of the ecosystem, strong water conservation programs with timetables and targets for all sectors in the Basin need to be established and implemented. Commitments to do this should be made binding in both the Compact and the Agreement. These programs should have the same provisions as those imposed on applicants from outside the Basin so that they cannot be deemed discriminatory.

3. Make Public Participation and Enforcement Equitable throughout the Basin
The U.S. Compact has provisions in Section 3.9 for enforcement setting out remedies, equitable relief and cost recovery that are not paralleled in the Agreement. Provisions for equitable rights and due process without penalty should be part of the Agreement and promulgated into the laws of Ontario and Quebec.

4. Shorten Implementation Timetable
The International Joint Commission has recently released their three year review of progress on the recommendations made in February 2000, *Protection of the Waters of the Great Lakes*. It recommends that
"...federal, state and provincial governments should not authorize or permit any new removals and should exercise caution with respect to any new or increased consumptive use until such standards (implementing their responsibilities under The Great Lakes Charter) have been promulgated or until 24 months have passed, whichever comes first".

We recommend that the Compact and the Agreement be promulgated within two years of final drafting. We recommend that no major diversions, withdrawals or new or increased consumptive use be permitted until laws are in place in all jurisdictions.

5. Due Process and Transparency in the Regional Review
Little is stated in the Compact and Agreement about the nature of public involvement in the Regional Review of proposals. Procedures addressing the nature of the review, evidence, transcripts, intervenor status and transparency need to be developed and included in the Agreement and Compact.

6. Improved and Consistent Cumulative Data Collection
Cumulative withdrawal data above and below the trigger level should begin to be collected now by all jurisdictions regardless of whether the Compact and Agreement have been implemented. We recommend that all data on withdrawals over 20,000 liters be submitted to a central database immediately.

7. Eliminate Discriminatory Trigger Levels
The Compact and Agreement could be seen to be discriminatory between applicants from within and outside the basin because they have a different trigger level for diversions (1 million gallons a day) and for consumptive uses (5 million gallons a day). This could provoke trade implications. In-Basin uses should have the same restrictions expected of out of Basin users.

8. Revert to 30-day Averaging
The 120-day averaging period for withdrawals could lead to unnecessary harm to the ecosystem. The Compact and the Agreement should use a 30-day averaging period for all withdrawals.

9. Return Flow Requirements
We recommend changes requiring return flows to be "as close as possible to the point of withdrawal" and be returned to the same surface or aquifer source it came from. This would prevent unnecessary harm.

10. The Chicago Diversion
Canadians want a voice in any future requests for increases in the Chicago Diversion. Future increases to the Chicago Diversion should be subject to Regional Review as set out in the Agreement.

11. Delete the Twelve-Mile Exemption for Return Flows
There should be no exceptions to return flow provisions. This provision appears to be accommodating one municipality but could set a harmful precedent. This provision should be deleted.

Other Recommendations
Other work that will need to be done for a decision support system for effective implementation of the Great Lakes Basin Sustainable Water Resources Agreement and the Great Lakes Water Resources Compact.

The Basin Water Resources Management Program promised in the Great Lakes Charter of 1985 needs to be implemented to guide and improve future water management.

Research on best efficiency and conservation practices for all sectors with public involvement is badly needed.

Studies are needed to define harmful impacts from lowered lake levels.

Further studies on the impacts of climate change on the Great Lakes and the St. Lawrence River.

Programs are needed to ensure that all waters returned to the Great Lakes, St Lawrence River basin are not introducing further invasive species.

Most importantly governments will need to allocate staff and resources to implement the transition to these water protection programs and work to make them self-sufficient without penalizing those in need.

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Background:
The Great Lakes Charter
The Great Lakes Charter was signed in 1985 in order to set out a regional strategy for protecting the Great Lakes in the event of a proposal for a major diversion or consumptive use of Great Lakes and St. Lawrence River waters. However this agreement was non-binding. In the decades that followed Great Lakes water levels were in a high cycle. This led to neglect or inadequate action on several provisions of the Charter.

Inadequate Action
Charter provisions for prior notice and consultation among the eight Great Lakes states, Ontario and Quebec, and progress on the collection of uniform data were
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inadequate. The important commitment to establish a Basin Water Resources Management Program was never fulfilled. In 1998, the Nova Group proposal to ship water from Lake Superior to the Far East caused the provincial, state and federal governments to re-examine the strength and adequacy of the legal foundations of their water management authorities. They concluded they were inadequate for the challenges expected to come from an increasingly water-short world both within and outside the basin.

International Joint Commission Reference Recommendations
These findings were reinforced in the recommendations to the governments made by the International Joint Commission (IJC) in their February 2000 report. *Protection of the Waters of the Great Lakes.* Foremost among the IJC recommendations was a call for new legally binding standards to protect the integrity of the ecosystem of the Great Lakes and govern decision-making on individual and cumulative withdrawals and consumptive uses to limit harm to the Great Lakes.

This is what the eight governors and two premiers set out to do when they signed Annex 2001 to the Great Lakes Charter, committing to have draft binding agreement(s) by 2004. A Working Group that included representatives of each jurisdiction was formed to draft these agreements and an Advisory Committee representative of Basin stakeholders was invited to periodically review and comment on their progress. The Canadian Environmental Law Association (CELA) was on this Advisory Group Committee.

Proposed Draft Agreements
Because of substantial differences between state, provincial and federal water laws and other constitutional impediments to all jurisdictions signing one agreement, these negotiations have resulted in two separate agreements.

1. The U.S. Great Lakes Basin Water Resources Compact
The Great Lakes Basin Water Resources Compact (hereafter referred to as the Compact) legally **binds** the eight Great Lakes states together in a system to review withdrawal proposals and to manage, protect, and conserve the integrity of the Great Lakes Basin. The U.S. Congress will need to approve this compact. Similar compacts are in use to manage other shared waters in the U.S. such as the Chesapeake and the Delaware and Susquehanna River watersheds. Ontario and Quebec will not be party to the compact. As well, there are no precedents or the will for the two Provinces to enter into their own binding compact.

2. Canadian Provinces and U.S. State Agreement
The Great Lakes Basin Sustainable Water Resources Agreement (hereafter referred to as the Agreement) outlines all of the regional obligations to implement the intent of the Annex. It will be signed by all the Great Lake Premiers and Governors **however, it is not legally binding** in the opinion of the Provinces. It includes the decision-making standard that will be used to evaluate withdrawal

proposals in Appendix I and the Decision-making Procedure Manual in Appendix II that contains important procedures for jurisdictions to use in evaluating withdrawals. However it also has crucial guidance for setting up long-term water management programs, information collection improvements, regular program reports and most importantly requirements for water conservation programs within the basin.

Ontario and Quebec must legally bind themselves to these arrangements by incorporating the Great Lakes Basin Sustainable Water Agreement and its appendices into law. It will be important for citizens of both Provinces to let their governments know they expect this to happen.

Ontario's Place in the Basin

When you prepare your comments there are important things to consider as Ontarians. Because the Great Lakes watershed boundaries extend far inland in Ontario many communities depend on the Lakes for their water supplies. In 1998 for all withdrawals excluding hydropower, Ontarians used more water than other jurisdictions in the Great Lakes at 35.1%. Michigan used 18.7%, Wisconsin 14.0%, New York 10.1%, Ohio 6.5%, Indiana 6.4%, Illinois 4.9%, Minnesota 1.2%, Quebec 2.9% and Pennsylvania 0.2%.

Ontario laws already prohibit water transfers out of the major water basins in the Province and new source protection legislation with a watershed management focus is expected in 2004. It will include strengthened water permitting regulations. Quebec has prohibited all water transfers out of the Province. Quebec has embarked on a package of ambitious water reforms for new programs, laws and regulations that will also shift focus to watershed management.

Ontario already has the most restrictive and advanced water-permitting program in the Basin. It requires approvals for all withdrawals over 50,000 liters per day (13,200 U.S. gallons). Reforms to the Province's water-taking permitting system now underway as a result of Walkerton will mean that Ontario will be closer than any other Basin jurisdiction to having many of the recommendations in the Agreement in place.

There is a very uneven playing field in the Basin and many different practices in water management among the ten Great Lake and St. Lawrence River jurisdictions. See the charts we have attached from the Great Lakes Commission 2003 report *Toward a Water Resources Management Decision Support System.* They show that five states merely register withdrawals rather than regulate them with permitting systems. Among jurisdictions, there are many differences in which sectors' water use are measured or permitted or exempted all together. Indiana, Michigan, Ohio and Wisconsin have no or very limited conservation programs. Although they have new improved legislation pending, the State of Michigan is the only state to have failed to regulate water withdrawals over two million

gallons a day. Ontario is already demonstrating that it is possible to regulate all withdrawals over 50,000 liters but most jurisdictions refuse to consider registration or permitting at this level. This begs the question. Why then does Ontario need to adopt the agreement into law?

Overall Advantages to the Great Lakes St. Lawrence River Region

Once implemented, the Compact and the Agreement will mean that all jurisdictions will have to be at the table to make decisions on diversions, large withdrawals and consumptive uses over the trigger level. This ecosystem approach is very important to demonstrate our stewardship of the Great Lakes to the rest of the world. This is also very important for Canadians because it is likely most proposals for diversions will come from areas near the U.S. watershed boundaries of the Basin that are now experiencing water shortages or from the U.S. southwest where aquifers are being rapidly depleted.

The Agreement and the Compact are more protective than *The Boundary Waters Treaty of 1909* and the U.S. *Water Resources Development Act* (WRDA) because they include all of the watersheds of the Great Lakes, St. Lawrence River ecosystem. The Treaty excludes ground water and tributaries flowing in and out of the basin from its provisions and WRDA excludes groundwater.

For the first time there will be a set of conditions that will require that environmental impacts and alternatives to withdrawals be considered. Since the Great Lakes Charter and WRDA, these decisions have been made largely on a political basis.

The Compact and the Agreement define diversions as being both out of Basin and between each Great Lake (intra-basin). This is an important protection for Ontario where there continues to be proposals to transfer water between Great Lake watersheds.

Where before there were no requirements of those seeking regional approval for large withdrawal proposals, for the first time Applicants will have a long list of regional requirements to fulfill. These requirements will act as a major deterrent to many. These conditions include:

- Demonstrating there is no reasonable alternative, including conservation of existing supplies,
- Requirements to return waters withdrawn back to the Great Lake watershed from which it was taken,
- Demonstrating that the withdrawal will result in no significant individual or cumulative harm to the water quantity or quality of the Great Lakes,
- Requirements that conservation planning has been carried out, and
- Demonstrating that improvement measures will be implemented to the physical, chemical or biological integrity of the waters and water dependent natural resources of the Great Lakes Basin.

A goal of consensus among all jurisdictions has been set and provisions have been made for dispute resolution and public involvement.

Advantages to Ontario

There will be a place at the table for Ontario when new Great Lakes Basin water diversion proposals are made.

Ontario will need to begin to cumulate all of their Great Lakes withdrawal data in order to establish a current use baseline and to begin to track and understand cumulative impacts of water withdrawals. Cumulative data on all the permits already granted is not currently available.

Ontario will need to consider the impacts of and measure return flow of water permitted for withdrawal. This has not yet been a condition of permits. This will make it clearer when and where there is water loss through consumptive use and where there has been over-allocation of water to applicants or water is being wasted or inefficiently used.

Ontario will need to improve its knowledge of the interaction of ground and surface water in the Great Lakes Basin. Over time the Province should acquire better tools and resources for groundwater mapping and aquifer sustainability.

There will be additional pressure to reduce exemptions now allowed from the permitting system in Ontario such as the exemption for livestock operations.

Conservation measures set out in Appendix B of the Agreement go well beyond what is in place now in Ontario and other jurisdictions in the Basin although as we address in the next section there is much more room for improvement.

All of these new programs will be very important to the new Ontario Source Protection laws now being drafted to require watershed plans.

In the opinion of the Canadian Environmental Law Association these advantages will give us a much bigger toolbox to protect the Great Lakes and St. Lawrence River ecosystem. This will ensure that we are no longer relying on crisis management and political persuasion to manage our most precious resource.

Areas where the Agreement and Compact need Strengthening

Conservation

Great Lakes Residents and other North Americans are the largest wasters of water in the world. While there has been some improvement, we still use a third to a half more water than other developed countries. In the Annex negotiations there was a reluctance to make water conservation for the region part of the legally binding part of the Agreement and Compact. However the terms of the Compact and Agreement are requiring applicants outside the Basin seeking large withdrawals and diversions to have conservation programs in place. Most

importantly we should let our governments know that strong conservation programs with timetables and targets for all sectors in the Basin need to be established and implemented. Commitments to do this should be binding aspects in both the Compact and the Agreement. Almost all water conservation over time will prove to be economically feasible. We need to keep in mind that only one percent of the waters of the Great Lakes is renewable from runoff, return flow and rainfall. The rest of the water was deposited long ago from glacial melt. The more we conserve the bigger margin of error we give ourselves for unknown impacts of future droughts and climate change impacts.

Equity and Parity between the Compact and the Agreement
It is troubling that the US compact does not contain references to the Agreement, its Appendix I, the Decision Making Standard and Appendix II, the Decision Making Procedure Manual. This limits its legally binding terms to adjudication of diversion, withdrawal and consumptive use proposals. However Part 2 of the Agreement Procedure Manual includes requirements to improve overall on-going water management below the trigger levels, conservation, information gathering and reports on progress. It is important to recommend that the Compact and the laws promulgated by Ontario and Quebec include these so that all jurisdictions are bound by law to improve their stewardship.

The Compact contains a section 3.9 on enforcement which references how the US public can require hearings, recover costs, require compliance in US courts. We need to request that the laws promulgating Ontario and Quebec's Agreement obligations contain parallel provisions so that the public on both sides of the Great Lakes have equal rights to due process without penalty.

Due Process and Transparency in the Regional Review
The negotiators have made it the responsibility of the jurisdiction where the withdrawal proposal has been made to provide the technical reports and assessment of the projects and to encourage public participation at this level. However very little is clear about how Regional Reviews will be conducted. Will they be formal hearings with parties represented by lawyers and formal submission of evidence or will they be "in camera" reviews and only include the jurisdictions? Will these deliberations be public and will transcripts be required or will there simply be a declaration of conformity with the standard issued? Imagine a withdrawal proposal in your local area that might go to regional review. Let the government know what level of involvement, access and transparency you would want during the regional review.

Areas of Controversy
The Implementation Timetable
There have been suggestions from the U.S. negotiators that implementation of new programs in eight legislatures and the approval of Congress will take up to ten years. The ENGOs on the Advisory Committee and others have asked that it take no more than five years. In August 2004 the IJC Review of progress on the

recommendations made in their February 2000 was released. This report suggests these standards and procedures could be in place in two years.

Trigger Levels and Thresholds for Regional Review and for Data Collection
The trigger levels for regional review were hotly and continuously debated over the three years. There was regrettably little sound science to support the threshold at which a withdrawal would harm the Great Lakes and St. Lawrence River. It was generally agreed that no single diversion would have demonstrable impacts on the whole ecosystem but would most certainly have local impacts. However it was also agreed that harm would come from the cumulative impacts of all small and large withdrawals over and under the trigger levels. What is perhaps most important is that we have the ability to change these trigger levels over time as we better understand the complex relationships between water levels and the well-being and integrity of the ecosystem.

Cumulative withdrawal data above and below the trigger level should begin to be collected now by all jurisdictions regardless of whether the Compact and Agreement have been implemented. We recommend that all data on withdrawals over 20,000 liters be submitted to a central database.

It is valuable for you to paint a picture of what local impacts would occur in your region from a withdrawal, diversion or consumptive use of these sizes.

One issue you may want to address is the issue of discrimination. Are we discriminating between applicants from within and outside the basin if we have a different trigger levels for diversions of 1 million gallons a day and for consumptive uses of 5 million gallons a day? Could this have trade implications?

Consumptive Use and the 120-day Average
Some uses of water are consumptive and do not return water to the Great Lakes. One of these uses is agriculture. Crops take up and retain water are harvested so this water leaves the Basin. The more effectively that water is delivered and taken up by crops, the more efficient irrigation practices are. For other sectors consumptive uses can usually be avoided or controlled. Agriculture has argued that there should be a 120-day averaging period for withdrawal, diversion and consumptive use proposals over the trigger levels. This covers the growing season in the Great Lakes. Previously the Charter and other programs called for a 30-day average.

Farming operations that exceed the trigger levels would be huge by Ontario standards. Ontario's water permitting threshold of 50,000 liters was set to reflect the use by medium to large sized farms. Would we want farms of this size to be exempt?

By increasing this average by ninety days we may be allowing other large and harmful uses to disappear under the radar. CELA recommends that the Compact and the Agreement revert to 30-day averaging periods.

Return Flow Requirements
Many jurisdictions, including Ontario, do not measure or record return flow adequately in their water management regimes. The Compact and Agreement require return flow to the Lake basin or the St. Lawrence River it was withdrawn from. If this distance is far from the point at which the water is withdrawn ecological harm could occur. We recommend changes requiring return flows to be "as close as possible to the point of withdrawal" and be returned to the same surface or aquifer source it came from. This would prevent unnecessary harm.

Increases in the Chicago Diversion
There are different degrees of sensitivity among Great Lakes jurisdictions about the Chicago Diversion (see Compact Section 3.10 and Article 203 11 of the Agreement). The Chicago diversion has been authorized by the U.S. Supreme Court to remove an average of 3,200 cfs (91 cms) from Lake Michigan to the Mississippi River. Historically, this diversion has been a matter of discussion and litigation for at least one hundred years. Canada has objected through diplomatic notes and other communications to each of the proposals to increase the Chicago Diversion. It is highly likely that further increases will be proposed. It has been argued that because Lake Michigan is wholly within the boundary of the U.S., it is not a shared boundary water.

The terms of the U.S. Compact and the Agreement apply to all other increases in diversions. There appears to be differences about whether future increases in the Chicago diversion would be exempted. The language of the U.S. compact states that no such diversion, as authorized by the U.S. Supreme Court decree is subject to the decision-making standard or regional review under the compact. Any proposed increase in the Chicago Diversion would be sought through an amendment to the Supreme Court decree and would not fall under the Compact provisions. The Compact commits the States to seek formal input from the Provinces of Ontario and Quebec and to facilitate the appropriate participation in any future proceedings to amend the decree. There is doubt that Canada or the Provinces would receive standing in the U.S. Supreme Court. Even if the Provinces received standing - would the U.S. Supreme Court consider their views?

The Agreement proposes to exclude the existing U.S. Supreme Court authorization for the Chicago Diversion from all the provisions of both the Decision Making Standard and Regional Review **as of the effective date** that the Agreement is signed by all jurisdictions. However, it is implied that any increases after that date should be subject to the Agreement.

Twelve Mile Exemption for Return Flows
There has been much discussion of areas just outside the surface water boundaries of the Great Lakes Basin seeking new water supplies from the basin. Over time these boundaries **might** be altered to include groundwater that is proven to be part of the Great Lakes Watershed as we understand more about the relationship between ground and surface water. However any relaxing of the Basin boundaries or exemptions for areas outside those boundaries at this time could set a bad precedent.

In the latest draft of the Decision Making Standard (Section 4 Jurisdictional Review for Diversions C.) we recommend deleting the following language. "An Individual jurisdiction may grant an exemption to this return flow requirement only when the applicant demonstrates that the diversion of Great Lakes Basin Water is less than 250,000 gallons (947,000 liters) per day average in every 120 day period and is exclusively for public water supply uses in areas less than 12 miles (19.3 kilometers) from the Basin boundary where adequate quantities of potable-quality water are not available..."
This seems to have been designed to resolve the problem of one particular municipality rather than subjecting their proposal to the terms others will be required to comply with.

Conclusions
Problems with water security already exist in the Great Lakes and St Lawrence River Region. Groundwater pumping in Wisconsin from areas outside the Basin is reversing flows to Lake Michigan. Areas north of Toronto, around Walkerton and in the Waterloo region in Ontario are considering pipelines to move water between watersheds. Make sure that you let the governments know about water allocation, scarcity problems and concerns about long-term sustainability in your community.

Other Needs
While this Draft Great Lakes Water Management Initiative is a giant step forward into the 21st century, it is by no means a panacea that will resolve our water supply problems. Much more will need to be done.

The Basin Water Resources Management Program promised in the Great Lakes Charter of 1985 needs to be implemented to guide future water management.

Research on best efficiency and conservation practices for all sectors with public involvement is badly needed.

Studies are needed to define harmful impacts from lowered lake levels.

Further studies on the impacts of climate change on the Great Lakes and the St. Lawrence River.

Programs are needed to ensure that all waters returned to the Great Lakes, St Lawrence River basin are not introducing further invasive species.

Most importantly governments will need to allocate staff and resources to implement the transition to these water protection programs and work to make them self-sufficient without penalizing those in need.

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For more information please contact:
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How to make Comments

1. The draft agreements are posted until October 18, 2004, on the Environmental Bill of Rights Registry for public comment at www.ene.gov.on.ca/envision/env_reg/ebr/english/index.htm (Registry Number PB04E6018).

   If you wish to comment on the draft agreements, please contact the Ontario Ministry of Natural Resources by fax at (705) 755-1267, or by mail to:

   Paula Thompson, Senior Policy Advisor
   MNR Water Resources Section, Lands and Waters Branch
   300 Water Street, P.O. Box 7000
   Peterborough, Ontario, K9J 8M5
   PHONE: (705) 755-1218 FAX: (705) 755-1267

2. You should also send comments to the Council of Great Lakes Governors directly by e-mail at Annex2001@cglg.org (electronic comments will be posted to the Council of Great Lakes Governors website at http://www.cglg.org), by fax at (312) 407-0038, or by mail to:

   David Naftzger
   Executive Director
   Council of Great Lakes Governors
   35 East Wacker Drive, Suite 1850
   Chicago, Illinois 60601 U.S.A.
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Ontario Hearing Locations

Monday, September 13, 2004 - Thunder Bay Public meeting 7:00pm-9:00pm
Victoria Inn, 555 West Arthur Street Kensington Room
Phone: (807) 577-8481 Website: www.victoriainn.ca/ThunderBay/

Tuesday, September 14, 2004 - Sault Ste. Marie Public meeting 7:00pm-9:00pm
Water Tower Inn, 360 Great North Road Courtyard Room
Phone: (705)949-8111 Website: www.watertowerinn.com

Monday, September 20, 2004 – Toronto Public Meeting and Open House 5:00pm-9:00pm (Presentations at 6 pm) Regional Meeting Hosted by the Council of Great Lakes Governors
Novotel Toronto Centre, 45 The Esplanade Champagne and Alsace Ballrooms
Phone: (416) 367-8900 Website: www.novotel.com

Tuesday, September 21, 2004 – Windsor Public meeting 7:00pm-9:00pm
Ramada Plaza Hotel and Suites, 430 Ouellette Ave. Guard Room
Phone: (519) 256-4656 Website: www.ramadawindsor.com

Wednesday, September 22, 2004 – London Public meeting 7:00pm-9:00pm
Best Western Lamplighter Inn, 591 Wellington Road S. Chelsea 1 Room
Phone: (519) 681-7151 Website: www.lamplighterinn.ca

Tuesday, September 28, 2004 - Kingston Public meeting 7:00pm-9:00pm
Ambassador Resort Hotel,1550 Princess St. London Room
Phone: (613) 548-3605 Website: www.ambassadorhotel.com

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Ohio Environmental Council
Tip of the Mitt Watershed Council
Union québécoise de la conservation de la nature
Wisconsin Wildlife Federation

Environmental Group Comments on the Proposed International "Great Lakes Basin Sustainable Water Resources Agreement"

October 18, 2004

The core recommendations in each section of comment are indicated by the symbol "=>".

ALL AGREEMENT SECTIONS

The proposed provincial-state international agreement and U.S. agreement share many passages with what appear to be the same intent, yet they are often worded substantially differently. The two documents even contain different definitions for some of the same terms. Both documents declare a desire to make water management as consistent as possible across the basin.

=>Symbolically and practically, this objective would be served by rendering in identical language all those passages in the two documents that have the same intent.

PREAMBLE

As a voluntary arrangement, the provincial-state agreement is likely to suffer from legitimate public skepticism: its predecessor: the 1985 provincial-state Great Lakes Charter was also voluntary. Nearly twenty years after being signed, major portions of the agreement remain poorly or entirely unfulfilled. The agreement promised consultation for certain withdrawals and diversions, an information database of regional water withdrawals and uses, and basinwide

watershed planning. Consultation took place, information gathering was patchy and abandoned between 1993 and 2003, and basinwide planning never took place.

=>The provinces and states should address this legacy in the agreement's preamble, recounting the successes and acknowledging the shortcomings. Coupled with a strengthening of the Article 102 promise that the provisions of the agreement will be passed into provincial and state law, this could be a basis for public faith in the possibility that the promises of the provincial-state agreement will in fact be fulfilled.

CHAPTER ONE—GENERAL PROVISIONS

Article 100—Objectives

In its subsection (g) the proposed agreement promises to "prevent or minimize significant adverse impacts of Withdrawals on the Great Lakes Basin's ecosystems and watersheds." In Annex 2001 the parties promised that withdrawals would cause *no* significant adverse impact, not minimal impacts.

=>The phrase "or minimize" should be struck from the objective.

Article 102—General Commitment

The proposed agreement promises that, "Each Party shall seek legislative, regulatory or other changes that may be required to give effect to this Agreement." Although the premiers and governors cannot assure legislative approval for implementing agreement provisions, nonetheless:

=>The agreement should simply state that the parties "shall implement" rather than merely "seek" the promised changes.

Article 103—Definitions

Praise—Conservation measures

The second line of the definition of "Environmentally Sound and Economically Feasible Water Conservation Measures" reads, "Water management practices and Water efficiency measures must be economically feasible based on a cost-benefit analysis that includes avoided environmental and economic costs." This could assure that long-term environmental benefits of water conservation are included in any determination concerning the "economically feasible" element of required water conservation. By including the value of avoided environmental damage, the definition's of cost-benefit analysis reduces the chance that its "economically feasible" language will be used to require only water conservation practices that pay for themselves in saved water.
However the terminology used could work against this intent.

Problem—Conservation measures

The second line of the definition of "Environmentally Sound and Economically Feasible Water Conservation Measures" reads, "Water management practices and Water efficiency measures must be economically feasible based on a cost-benefit analysis that includes avoided environmental and economic costs." The intent of the language seems to be to prevent the "cost-benefit" language of the provision from undermining the "economically feasible" language, that is, to make sure that provision is not interpreted to require only water conservation practices that pay for themselves in saved water and related expenses.

However, the legal nature of the phrases "cost-benefit" and "economically feasible" are contradictory. The former is legally used to measure the costs to versus the benefits for the proposal proponent. If the result of the cost-benefit analysis is net cost, the step under consideration is not required. "Economically feasible," on the other hand, legally measures the cost of the proposed step against a standard of reasonability or affordability for the implementing party. Here the outcome is often a net cost, but the step is nonetheless routinely required, depending on the amount of the net cost in the context of the scale of the project and the resources of the proponent.

The draft text attempts to split the difference by requiring the cost-benefit analysis to include benefits usually categorized as benefits only in the context of regulations, not in the context of an individual project. From an environmental protection point of view, this attempt is likely to come to grief. One main reason for this result is be the nature of the phrase—"avoided environmental costs." This is a vague phrase, for which there is no guidance even in the state-provincial international agreement's Procedures Manual.

=>We recommend striking the phrase "based on a cost-benefit analysis that includes avoided environmental and economic costs."

=>At an absolute minimum, however, the Procedures Manual should specify that "avoided environmental costs" includes long-term societal benefits of good water conservation, including assurance of water availability for non-human life and to buffer additional, increased human uses in the face of unknown elements such as impacts to hydrology from climate change over time.

Praise—Diversions

This subsection defines diversions as between Great Lakes as well as out of the Great Lakes. This improves on the voluntary 1985 Great Lakes Charter, and would subject some projects already on the drawing board to greater scrutiny.

Problem—Diversions

=>However, the definition should be extended to include diversions between major rivers that are tributary to a Great Lake or the St. Lawrence River.

Inter-river diversion projects are more common and more likely to cause ecosystem damage than inter-lake diversions at the current scale of most projects. The stronger definition would take a

longer step toward legal durability in international trade and U.S. Commerce Clause contexts by taking protective action against more "diversions" inside the basin. The stronger definition would remove the possible future argument by aggrieved parties that, despite what the agreement states, in practice, in-basin withdrawals and out-of-basin diversions are treated completely differently. With a significant number of possible in-basin withdrawals defined as the diversions that they are, such an argument would be much harder to sustain.

Problem—Water conservation as improvement

This proposed subsection unfortunately alters the definition of improvement provided in Annex 2001. The original language defined improvement as "additional beneficial, restorative effects to the physical, chemical, and biological integrity of the Waters and Water-Dependent Natural Resources of the Basin, resulting from associated conservation measures, enhancement or restoration measures which include, but are not limited to, such practices as mitigating adverse effects of existing water withdrawals, restoring environmentally sensitive areas or implementing conservation measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer." This is an appropriately broad general definition.

The language in the recently proposed agreement substitutes for "associated conservation measures" the phrase "associated Environmentally Sound and Economically Feasible Conservation Measures." It may be that this change was only an attempt at greater clarity, but the effect is possibly to permit the definition to be interpreted to allow the already required water conservation measures implemented by the applicant to also count as the project's required improvement.

=>The definition should be returned to its original language.

Problem—Preference for improving flows

Even if the intent of the change is merely to put a special emphasis on water conservation unrelated to the project, we support the thrust of the more detailed treatment of improvement found in the appendix, which says that restoring natural water flows should be the preferred focus of improvement projects.

=>Therefore, in addition to returning the definition of improvement to that found in Annex 2001, we suggest adding natural water flows to it and giving it first place in the closing list of possible improvement projects found in the Article 103 definition: ". . . such practices as restoring natural flows, mitigating adverse effects of existing water withdrawals, restoring environmentally sensitive areas, or implementing conservation measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer."

Praise—Source watershed

In this subsection "source watershed," a term intended to define the site of return flow, is defined as major tributary to a Great Lake. While too large to protect many watersheds from the effects of complete water removals, at least this definition is an improvement over the huge lake watershed originally contemplated.

Problem—Source watershed

However, the reason for defining the term in the agreement—its use in the return flow standard—is mooted by the return flow section itself, which re-defines source watershed as individual Great Lake. See our comments under sections 8 and 9.

=>"Source watershed" should be defined as "the smallest scale of watershed as defined by the U.S. Geological Survey and the Geological Survey of Canada at the point of withdrawal."

At the least, the last sentence of the current definition should be replaced with a definition of source watershed for withdrawals that are not directly from a Great Lake or the St. Lawrence River.

=>We recommend that for such withdrawals, the agreement declare at minimum that, "The source watershed shall be the watershed tributary to the Great Lake or St. Lawrence River from which the water is withdrawn."

Problem—Return flow of the same water

The proposed agreement's current definition of return flow, found in sections dealing with the conservation standard, rightly appears to require return of the actual water withdrawn. This is a critical protection against the introduction of invasive species from neighboring watersheds.

=>The agreement should explicitly define return flow in the definition section as requiring return of the same, identical water that was originally diverted.

=>The return flow standard should also specify that the return flow should further be "as close as possible to the point of withdrawal," unless such a return that would for some reason be ecologically harmful.

CHAPTER TWO—THE STANDARD

Article 200—The Role of the Standard

Praise
This section and article incorporate the "Procedures Manual," which provides needed detail on the implementation of the standards, into the body of the agreement. This will assure that the protective intent of the standards is substantially carried out.

Problem—Adoption

The proposed agreement promises that, "The Parties shall seek to adopt and implement measures, as appropriate in each Party's Jurisdiction, that are no less restrictive than those described in the Standard."

=>Although the premiers and governors cannot assure legislative approval for implementing agreement provisions, the agreement should nonetheless simply state that the parties "shall adopt and implement" the agreement rather than merely "seek" to do so.

Article 201—Standard Applicability

Problem—Trigger level

Withdrawals for using water inside the Great Lakes basin should be held to standards reasonably close to the standards for diversions outside the basin. The proposed agreement subjects diversions of 1 million gallons per day or more, averaged over 120 days, to review by all ten parties. It also requires diversion proposals of any size to provide an improvement to the Great Lakes. However, for water withdrawn for in-basin use, the agreement not only initiates regional review at a much higher level—5 million gallons per day—but also uses an entirely different form of measurement—consumptive use (water loss) rather than mere withdrawal. Also, all diversion proposals are required to carry out improvement, but for in-basin uses improvement is required only for projects above the 5 million gallon loss threshold.

While some difference in treatment between the two types of withdrawal has traditional in international water law and might withstand international trade and U.S. Constitutional scrutiny, we believe that the degree of differential treatment represented by this article is so great as to entail significant legal risk.

The proposed system could lead to very large disparities of treatment and very widely divergent end results for certain pairs of water withdrawal proposals that are in fact quite similar in their potential ecosystem impact. For example, a consumptive loss of 4.5 millions gallons per day averaged over 120 days 1) avoids Regional Review and Compact Council vote, 2) makes no improvement to the basin ecosystem, and 3) carries out mere unspecified "conservation measures." At the same time, a diversion of 1.5 million gallons per day, which entails one-third the water loss and therefore, considered generically, one-third the ecosystem impact, must by comparison 1) undergo the scrutiny of ten jurisdictions and the executive power of eight, 2) implement a much more rigorous "conservation plan," and 3) make an improvement. The generically much smaller ecological impact in this scenario generates much more rigorous treatment.

For another, much more problematic example, efficient municipal supply systems that lose just 10 percent and return 90 percent of withdrawn water would be treated exactly inversely to their likely ecological impact. An out-of-basin municipal applicant of this type would be subject to eight-state, two province Regional Review when proposing a diversion of 1 million gallons per day, but an in-basin applicant of the same type would be subject to Regional Review only at the level of 50 million gallons per day, because it would take that much withdrawal to lose 5 million gallons at a loss rate of 10 percent. Yet in the former case the ecological insult to the basin is a loss of 100,000 gallons per day, while in the latter, 5 million gallons per day.

This is to say, the agreement's currently proposed system allows the possibility of a fifty-to-one disparity in potential ecological impact before finally triggering similar treatment of like

proposals.

We approve the negotiators' determination to subject diverters to high standards. But while we may be forced to live with the political necessity of applying somewhat more lenient standards to in-basin water uses, we are alarmed that the proposed disparity of treatment can be theoretically so large, perhaps justifying an eventual legal challenge to the legitimacy of the entire system. A gap of fifty to one is far too great to fall under the internationally recognized but limited leeway granted in-basin users over out-of-basin users. Such differential treatment would be prima facie evidence of discriminatory intent and seriously undermine one of the core purposes of the annex initiative as declared by the governors and premiers during the Annex 2001 negotiations—legal durability.

=>The problem can be addressed by changing the treatment of in-basin water uses proposed in article 201 by either: 1) lowering the level of water lost for in-basin uses that triggers Regional Review from 5 million gallons per day to 1 million gallons per day, or 2) changing the trigger level from 5 million gallons per day of water lost to 5 million gallons per day of simple withdrawal.

With either change, the disparity in treatment in the above municipal use example would fall from fifty to one to a more reasonable (if perhaps still legally risky) ten to one. In many proposals the disparity would be much smaller, with the aggregate disparity perhaps being entirely within legal tradition and most judges' or tribunals' sense of the reasonable. With less disparity of treatment, the new system would be better equipped to withstand a determined, legal challenge that might arise decades hence.

Praise—Cumulative effects assessment

Section 4 of this article for the first time commits the region to assessing all the impacts of accumulated water withdrawals on the basin ecosystem. Further, the section specifies a timeline for making such assessments that is both certain and precautionary.

Problem—Cumulative effects assessment scope and followup

Nonetheless, this section is unlikely to protect the basin from cumulative impacts except in the very long term and on the largest scale because it 1) 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) 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 cumulative impact assessments be required at the level of major river watershed.

=>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.

For ideas on how to best implement Annex 2001's cumulative effects commitments, negotiators may find it useful to consult G. Hegmann et al., *Cumulative Effects Assessment Practitioners Guide*, February 1999, prepared for the Canadian Environmental Assessment Agency and accessible at http://www.ceaa.gc.ca/013/0001/0004/index_e.htm.

Article 202—Procedures Manual

Praise

This article incorporates the "Procedures Manual," an appendix that details the implementation of the standards, into the body of the agreement. This will assure that the protective intent of the standards is substantially carried out.

Problem—Implementing the standards basinwide

However, without some similar language in the compact agreement, the international agreement's incorporation of the "Procedures Manual" raises the possibility of the creation of an uneven regulatory playing field within the Great Lakes basin. All ten parties to the agreement have pledged to pass the provisions of the international agreement into law, but it is possible that the states will ultimately pass only the provisions of the compact into law, leaving the provinces with the choice of 1) passing the stronger provisions of the international agreement into law, thus creating an uneven playing field, or 2) not doing so, thereby undermining the agreement's important progress toward basinwide, ecosystem management of the Great Lakes, the signal achievement of the proposed international agreement.

=>The parties should revise the compact to at least loosely link its implementation of the standards to the detail of the provisions of the Procedures Manual. See the recommendations in our comments for revision of the proposed compact, under the "Problem—Implementing the standards" discussion of "Joint Issues" relevant to both article 8 and article 9.

=>The core recommendation in those comments reads: "We suggest that section 3.6 ('Rules and Regulations') or article 5 ('General Provisions') contain a new subsection or section saying: 'The Signatory Parties, individually and collectively, commit to using the Great Lakes Basin Water Resources Agreement's Procedures Manual as a significant source of guidance in issuing rules and regulations that give effect to the standards outlined in articles 8 and 9.' "

Article 203—Determination of Whether the Standard Applies to Proposals to Take Water

Praise

This article includes a number of important assurances that the new system will not be circumvented by cleverly configured proposals, including provisions to assure that existing uses are not exaggerated and that multiple withdrawals feeding a single distribution system and multiple withdrawals for the same purpose spread out over years are both counted as one withdrawal for the purposes of determining the application of the standards.

Problem—Applicability of standards

However, because there is a conflict between the authority of the United States Supreme Court and the proposed compact, the draft language of the compact, mirrored in Article 203.11, throws out the baby with the bathwater by simply declaring that new agreements will not apply. The region could keep the baby by acknowledging the Supreme Court as the sole authority over the diversion while explicitly pledging to do everything possible to assure that any possible future requested increases to the diversion are subject to the standards.

=>We suggest striking the current language of Article 203.11 and replacing it with, "In any process by which the *Wisconsin et al. vs. Illinois et al.* may in the future be amended, the parties to this agreement who are also present or future parties to the decree shall make every good faith effort to assure that any proposed or retroactively realized increase over the current court-ordered level of flow out of the Great Lakes basin is compelled to be subject to any processes outlined in this agreement that would otherwise apply if no court decrees were in effect."

=>We also suggest that the international agreement mirror the proposed compact's commitment to inclusion of the provinces in decision-making relative to *Wisconsin et al.*: "If an application is made by any party to the Supreme Court of the United States to amend the decree, the parties to this agreement who are also parties to the decree shall seek formal input from the Canadian Provinces of Ontario and Quebéc with respect to the proposed amendment, use best efforts to facilitate the appropriate participation of the Provinces in the proceedings to amend the decree, and shall not unreasonably impede or restrict such participation."

CHAPTER THREE—
WATER MANAGEMENT PROGRAMS WITHIN THE JURISDICTIONS

Article 301—Information

Problem—Reporting return flow

In order to enforce permit terms and a comprehensively inventory of basin water resources, the agreement's water withdrawal reporting system should include reporting on return flow.

=>In section 301.2, "Programs in each Jurisdiction shall require users to report their monthly Withdrawals, Consumptive Uses and Diversions on an annual basis," we recommend replacing "and Diversions" with ", Diversions, and Return Flows."

Problem—Reporting at the small 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 province and state.

This will give permitting officials and the public one of the 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 withdrawals have the most potential for impacting the ecosystem. The tracking of all return flow will aid and improve immeasurably the determination of consumptive use and successful conservation measures.

Article 302—Water Conservation Programs

Problem—Conservation program goals

The agreement's conservation standard will be only as effective as the sector, watershed- or basinwide-specific conservation goals it aims to reach.

On the level of the individual project, even the Procedures Manual fails to do more than list potential practices without providing any guidance on the basis of which a permit-issuer—or a panel attempting to come up with consumptive use standards or coefficients—could decide which practices would be required of a given applicant and how intensively they would have to be applied.

This is a recipe for basinwide inconsistency and overall ineffectiveness in the implementation of the standard that probably has more consensus than any other among the states, provinces, advisory stakeholders and the public.

=>We suggest that the performance of economic sectors in the best-performing developed-economy nations be used as referents for conservation goals (and their consequent consumptive use standards or coefficients), and that the parties commit to reaching these goals on specific timelines.

These goals, however arrived at, would be the background for researching the consumptive use standards or coefficients (and required return flow factors) that we suggest the parties commit to determining and implementing within three years.

Problem—Rigorous consumptive use coefficients

The conservation and return flow standards are only as effective as the consumptive use standard or coefficient used to determine the amount of water that must be returned to the lake (we recommend major tributary) basin of origin. Consumptive use standards or coefficients that do not exist or are not rigorous, that is, an approval system that allows minimal water conservation measures, will result in larger requests of all kinds, may require approval of diversion proposals that could otherwise be denied, and overall result in a system that could one day be challenged as serving only commercial rather than environmental protection purposes.

The agreement should contain a provision committing the Review Body to 1) determining scientifically justifiable consumptive use standards or coefficients for varying sectors on a guaranteed timetable, and 2) basing the consumptive use standards or coefficients on strong conservation requirements, such that requested quantities are minimized for all proposed

withdrawals and their required return flows are maximized (see our recommendations under "Problem—Conservation Program Goals" immediately above).

Without rigorous, defensible, consumptive use standards or coefficients, the return flow provision of the standards could, for certain uses, be turned into a loophole that makes diversions easy to obtain under the standards. This is obviously unacceptable.

=>We recommend a new section, perhaps inserted into Article 400—Functions of the Regional Body, perhaps between subsections 2.3 and 2.4:

=> "(a) The Regional Body will determine, no later that three years from the effective date of this agreement, 1) a scientifically defensible consumptive use coefficients for major standard categories of water use, such as public drinking water supply, and 2) a scientifically valid process for determining consumptive use standards or coefficients for non-standard water uses that is rapid, fair, and environmentally protective.

=>"(b) After three years after the effective date of this agreement, the Regional Body shall issue only negative Declarations of Finding for diversions or consumptive uses unless it has fulfilled the terms of section 10.4.1."

The international agreement must contain some form of specific commitment to determining sector-specific consumptive use coefficients for the basin environmental community to be able to support the agreement.

CHAPTER FOUR—
GREAT LAKESWATER RESOURCES REGIONAL BODY

Article 400—Functions of the Regional Body

We recommend inclusion of a new subsection in this article such that the Regional Body determines consumptive use standards or coefficients for enabling the creation of water conservation program goals and conservation and return flow requirements for water withdrawal proposals. See discussion of Article 302, "Problem—Rigorous consumptive use coefficients" above.

The Regional Body should also undertake to develop a basinwide regional conservation plan for existing as well as new uses.

Article 401—Organization and Procedures of the Regional Body

Problem—Public access to meetings and minutes

=>The meetings of Regional body should be open to the public and meeting minutes should be publicly available online, not merely in an office during business hours.

Proposed Article 402—Public Participation

Problem—Public participation in the Regional Body's non-proposal activities

Beyond participation in processes for reviewing proposed withdrawals, or which public participation processes are outlined in Chapter 5—Regional Review, under Article 503, the public should be encouraged to participate in activities by which the Regional Body carries out its other obligations.

=>We recommend the insertion of a new Article 402 that declares that,

=>"The Regional Body shall develop procedures that facilitate public comment on:

1. Development of a process for reviewing proposals that trigger Regional Review, including the development of procedures for receiving public comment
2. Development of a process for reporting whether jurisdictional water conservation programs meet the requirements of the agreement
3. Creation of reports on jurisdictional water management programs
4. Development of a process for monitoring and reporting on the jurisdictions' implementation of the agreement, including jurisdictional data collection and reporting and jurisdictional implementation of water withdrawal management programs
5. Creation of reports on jurisdictional data collection and water withdrawal management program implementation
6. Development of a process for assessment of cumulative impacts of basin water withdrawals
7. Creation of reports on cumulative impacts assessment
8. Development of a process for determining consumptive use standards or coefficients
9. Development of a process for determining the groundwater divide, and developing water withdrawal policy based on the new groundwater divide information
10. Review and, especially, proposed revision of the standard and the Procedures Manual and their application pursuant to Article 707."
11. Rules and procedures for the Regional Review process that address issues of what constitutes evidence, who may appear before the regional commission, how proceedings are recorded and disseminated and if voting is public. This should include an explicit statement that the regional review and the compact review of a proposal be concurrent.
12. Development of a process for fulfilling a central commitment of the Great Lakes Charter: establish a "Basin Water Resources Program."

CHAPTER FIVE—REGIONAL REVIEW

Article 503—Public Participation

Praise—General

This section requires public notice of all proposals for new or increased withdrawals requiring Regional Review, opportunity for public comment on all such proposals, and access to "all documents relevant" to such proposals.

Problem—Comment on draft Declarations of Finding

=>This section should allow comment not only on original proposals, but also on the Declarations of Finding that result from them.

Declarations of Finding can be heavily conditioned and in that sense dramatically different from original proposals. Since the basic facts of the proposal and its potential ecosystem impacts should have been fully explored during the period for comment on the proposal, this proposed second period for comment on a draft Declaration of Finding could be very short.

Article 504—Tribes and First Nations Consultation

Praise

This section assures that Tribes and First Nations will be separately and individually notified that a water withdrawal proposal subject to regional review has been submitted, and that the Regional Body is soliciting comment by Tribes and First Nations on the proposal.

Problems—Sovereignty

The agreement should explicitly state that nothing in the agreement is intended to intrude on the existing rights and sovereignty of any basin Tribe or First Nation.

CHAPTER SEVEN—FINAL PROVISIONS

Article 707—Amendments

Praise

In this section the ability of the Agreement Council to effectively change the agreement is appropriately limited to creating and amending the regulations needed to implement the standards. This power can be exercised only unanimously, assuring collective decisionmaking by the agreement parties.

Proposed article 711

Problem—Existing laws protecting water quantities, levels, and flows

The international agreement should assure that its provisions provide minimum, not maximum, quantity, level and flow protections for the waters and the ecosystem of the Great Lakes – St. Lawrence River basin.

=>We suggest the addition of a new "Article 711—Existing Protections" to Chapter 7: "No provision of this compact shall be interpreted to diminish existing (or hereafter enacted or issued) protections afforded water quantities, levels, or flows by provincial statutes, regulations, or

administrative procedures, policies, or guidelines or doctrines such as the U.S. public trust doctrine."

APPENDICES 1 AND 2

Problem—Boundary Waters Treaty

Those sections of the appendix that require compliance with "all applicable laws, including international agreements,"—subsections G of sections I, II, IV, and V of Appendix 1, and section 2G of Appendix 2—should be edited to replace "international agreements" with "the Boundary Waters Treaty of 1909 and all other applicable international agreements."

APPENDIX 1—DECISION-MAKING STANDARD

Problem—No reasonable alternative

There appears to be an error in the proposed text of the standard for determining that there is no reasonable alternative to a proposal to divert water. The draft texts at sections I.A. and IV.A. state that proposed diversions must demonstrate that, "There is no reasonable Water supply alternative within the basin or the watershed of the Great Lake in which the Water is proposed for use, including the efficient use and conservation of existing water supplies."

Some proposals will likely seek to divert water entirely out of the Great Lakes basin. In such cases the reasonable alternative source for water should be sought not in a Great Lake watershed, but in that place outside the basin to which the diverted water is proposed for shipment.

=>Since intra– or extra–Great Lakes basin diversions would both require a seeking of reasonable alternative supplies in the diversion destination watershed, we suggest that that the text of sections I.A and IV.A simply say, "There is no reasonable Water supply alternative within the watershed to which the diversion is proposed for shipment and use, including the efficient use and conservation of existing water supplies."

=>If for some reason the possibility of an intra–Great Lakes must be specifically noted, we suggest that that the text of sections I.A and IV.A say, "There is no reasonable Water supply alternative, for intra–Great Lakes diversions, within the basin or the watershed of the Great Lake in which the Water is proposed for use; and for extra-Great Lakes diversions, within the watershed or watersheds to which the diversion is proposed for shipment and use; in both cases including the efficient use and conservation of existing water supplies."

Problem—Permitting and reporting level

The 100,000-gallon (379,000 litre) minimum permitting and reporting level is too high.

Withdrawal amounts below this level may account for a relatively small portion of total basin withdrawals, but, when they take place from headwaters or other small water sources, they have the potential to have disproportionately significant impacts on the ecosystem.

Ontario and Minnesota permit withdrawals at the 13,800- and 10,000-gallon-per-day range (50,000 and 38,000 litre range), and the international agreement should do so as well.

Awareness of the locations and basic types of smaller withdrawals is essential to evaluating the cumulative effects of such withdrawals on sensitive ecosystems, especially in the context of larger withdrawals that may be proposed or already taking place nearby.

=>We recommend application of the standards to all new or increased withdrawals of 10,000 gallons (38,000 litres) per day or more averaged over 30 days.

Information about basin water withdrawals that is this fine-grained will give permitting officials and the public one of the most important pieces of context for evaluating a proposed water withdrawal: the current total state of water withdrawal at the smallest scale, where withdrawals have the most potential for impacting the ecosystem.

Problem—Averaging

The averaging period of 120 days for determining the trigger levels for provincial and regional review are so high as to exempt a significant percentage of basin water withdrawers.

=>As has been the practice for nearly twenty years under the Great Lakes Charter, the averaging period should be reduced to 30 days.

Problem—Improvement for jurisdictional review of consumptive uses

The standards omit improvement as a requirement for withdrawals for in-basin use under the large upper limit of 5 million gallons per day of consumptive loss. Improvement is a key commitment of the annex initiative. Annex 2001 declares in its core passage, Directive 3:

> "The new set of binding agreement(s) will establish a decision making standard that the States and Provinces will utilize to review new proposals to withdrawal water from the Great Lakes Basin as well as proposals to increase existing water withdrawals or existing water withdrawal capacity. The new standard shall be based on the following principles: . . . An Improvement to the Waters and Water-Dependant Natural Resources of the Great Lakes Basin."

As proposed in the appendix, the improvement standard will not apply to most proposed water withdrawals under the international agreement.

=>We strongly urge the parties to include the improvement standard in some form for jurisdictional review of all uses under five million gallons a day.

Problem—Improvement

The proposed agreement should require that improvement actually take place as part of any approved water withdrawal projects. Strictly interpreted, the draft agreement texts at I.F, II.F, and IV.F, require only that improvements be proposed.

APPENDIX 2—PROCEDURES MANUAL

Praise

The "Procedures Manual" provides needed detail on the implementation of the standards, into the body of the agreement. This will assure that the protective intent of the standards is substantially carried out.

Problem—Implementation in the United States

For the Great Lakes provinces to be on a level playing field with the Great Lakes states, the program regulations written to implement the provisions of the compact agreement must to at least loosely tied to the Procedures Manual. See our more detailed comment on this matter in our discussion of Article 202—Procedures Manual, and in the joint discussion of Articles 8 and 9, where we suggest inclusion of pertinent language in the proposed compact's section 3.6 or Article 5.

Canadian Environmental Law Association
Clean Wisconsin
Environmental Advocates of New York
Great Lakes United
Lake Michigan Federation
Michigan Environmental Council
Michigan United Conservation Clubs
National Wildlife Federation Great Lakes Office
Ohio Environmental Council
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"

October 18, 2004

The core recommendations in each section of comment are indicated by the symbol "=>".

ALL COMPACT ARTICLES

The proposed U.S. compact and state-provincial international agreement share many passages with what appear to be the same intent, yet they are often worded substantially differently. The two documents even contain different definitions for some of the same terms.

=>Both documents declare a desire to make water management as consistent as possible across the basin. Symbolically and practically, this objective would be served by rendering in identical language all those passages in the two documents that have the same intent.

MULTIPLE COMPACT ARTICLES

Please note that we comment on articles 8 and 9 together as well as individually, because in some cases they deal with common topics.

YET-TO-BE-DETERMINED COMPACT ARTICLES

On several occasions in the below comments we have recommended new sections to address problems we see with the draft text. In some of these cases we have made our best guess of the most appropriate home for the new section and we point them out here to draw attention to them:

=> There should be some kind of tie between the compact and the detail on the standards provided by the international agreement's Procedures Manual. We detail this recommendation in the joint discussion of Articles 8 and 9, and suggest including the pertinent language in section 3.6 or Article 5.

=> There should be a mandate and timetable for determining consumptive use coefficients. We detail this recommendation in the joint discussion of Articles 8 and 9, and suggest that the pertinent language be added to Article 10.

COMPACT ARTICLE 1

SHORT TITLE, DEFINITIONS, PURPOSES AND DURATION

Section 1.2—Definitions

Problem—Conservation measures

The second line of the definition of "Environmentally Sound and Economically Feasible Water Conservation Measures" reads, "Water management practices and Water efficiency measures must be economically feasible based on a cost-benefit analysis that includes avoided environmental and economic costs." The intent of the language seems to be to prevent the "cost-benefit" language of the provision from undermining the "economically feasible" language, that is, to make sure that provision is not interpreted to require only water conservation practices that pay for themselves in saved water and related expenses.

However, it is the legal nature of the phrases "cost-benefit" and "economically feasible" to be, in substantial measure, opposed. The former is legally used to measure costs to the implementing party—sometimes to society at large, if regulations are at issue, but in this case to individuals or companies proposing individual projects—against benefits to the implementing party. Unless otherwise specified, if the result of the cost-benefit analysis is net cost, the step under consideration is usually not required. "Economically feasible," on the other hand, legally measures the cost of the proposed step against a standard of reasonability or affordability for the implementing party, with the outcome routinely being a net cost but the step also routinely being required nonetheless, depending on the amount of the net cost in the context of the scale of the project and the resources of the proposing party.

The draft text attempts to split the difference by requiring the cost-benefit analysis to include benefits usually categorized as benefits only in the context of regulations, not in the context of an individual project. From an environmental protection point of view, this attempt is likely to come to grief. One main reason for this result is the nature of the phrase—"avoided environmental costs." This is a vague phrase, for which there is no guidance even in the state-provincial international agreement's Procedures Manual, nor, to our knowledge, anywhere in existing environmental law.

=>We recommend striking the phrase "based on a cost-benefit analysis that includes avoided environmental and economic costs."

Praise—Diversions

This subsection defines diversions as between Great Lakes. This improves on the voluntary 1985 Great Lakes Charter, and would subject one or two projects already on the drawing board to greater scrutiny.

Problem—Diversions

=>However, the definition should be extended to include diversions between major rivers that are tributary to a Great Lake or the St. Lawrence River.

Inter-river diversion projects are more common and more likely to cause ecosystem damage than inter-lake diversions at the current scale of most projects. And the stronger definition would take a longer step toward legal durability in Commerce Clause and international trade contexts. By more significantly affecting ongoing damaging practices taking place within the basin, the stronger definition would remove the possible future argument by aggrieved parties proposing rejected diversions that, although the compact is somewhat even-handed in writing, in practice in-basin withdrawals and out-of-basin diversions are treated completely differently. With a significant number of possible in-basin withdrawals legitimately defined as diversions, such an argument would be much harder to sustain.

Problem—Water conservation as improvement

This proposed subsection unfortunately alters the definition of improvement provided in Annex 2001. The original language defined improvement as "additional beneficial, restorative effects to the physical, chemical, and biological integrity of the Waters and Water-Dependent Natural Resources of the Basin, resulting from associated conservation measures, enhancement or restoration measures which include, but are not limited to, such practices as mitigating adverse effects of existing water withdrawals, restoring environmentally sensitive areas or implementing conservation measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer." This is appropriately broad in a general definition.

The language in the recently proposed compact substitutes for "associated conservation measures" the phrase "associated Environmentally Sound and Economically Feasible Conservation Measures." It may be that this change was only an attempt at greater clarity, but the effect is possibly to permit the definition to be interpreted to allow the already required water conservation measures implemented by the applicant to also count as the project's required improvement.

=>The definition should be returned to its original language.

Problem—Preference for improving flows

Even if the intent of the change is merely to put a special emphasis on water conservation unrelated to the project, we support the thrust of the international agreement's more detailed treatment of improvement, in effect a more detailed definition, which says that restoring natural water flows should be the preferred focus of improvement projects.

=>Therefore, in addition to returning the definition of improvement to that found in Annex 2001, we suggest adding natural water flows to the closing list of possible improvement projects: ". . . such practices as restoring natural flows, mitigating adverse effects of existing water withdrawals, restoring environmentally sensitive areas, or implementing conservation measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer."

Praise—Source watershed

In this subsection "source watershed," a term intended to define the site of return flow, is defined as major tributary to a Great Lake. While insufficiently small to protect many watersheds from the effects of complete water removals, at least this definition is an improvement over the huge lake watershed originally contemplated.

Problem—Source watershed

However, the reason for defining the term in the compact—its use in the return flow standard—is mooted by the return flow section itself, which re-defines source watershed as individual Great Lake. See our comments under sections 8 and 9.

=>"Source watershed" should be defined as "the smallest scale of watershed as defined by the U.S. Geological Survey at the point of withdrawal."

=>At the least, the last sentence of the current definition should be replaced with a definition of source watershed for withdrawals that are not directly from a Great Lake or the St. Lawrence River. We recommend that for such withdrawals, the compact declare, "The source watershed shall be the watershed tributary to the Great Lake or St. Lawrence River from which the water is withdrawn."

Problem—Return flow

The proposed compact's current definition of return flow, found in sections dealing with the conservation standard, rightly appears to require return of the actual water withdrawn. This is a critical protection against the introduction of invasive species from neighboring watersheds.

=>The compact should explicitly define return flow in the definition section as requiring return of the same, identical water that was originally diverted.

Problem—Withdrawal

Under the proposed definition of withdrawal, a water withdrawer could subdivide water withdrawal infrastructure or proposal timing so as to avoid regional or jurisdictional oversight.

=> The definition should include the following: "The amount of 'a withdrawal' for the purpose triggering provisions of this agreement is 1) the amount of all withdrawals from surface and groundwater resources that supply a common distribution system and 2) the cumulative amount of

water already approved and proposed for supply of a given distribution system for the previous twenty years or the effective date of this agreement, whichever is later."

Language to similar purposes is already contained in sections 203.3 and 203.6 of the international agreement.

Section 1.3—Purposes and Findings

We strongly suggest inclusion of a broader statement of purpose in this section that reflects the state trust responsibilities.

=>We suggest inserting as the first paragraph of this section the first of the document's current "whereas" statements, slightly modified to use the terminology of the definition section: "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 2

ORGANIZATION

Section 2.4—Voting Power

Praise—Amendment

In this section the ability of the Compact Council to effectively change the agreement is appropriately limited to creating and amending the regulations needed to implement the standards. This power can be exercised only unanimously, assuring collective decisionmaking by the compact parties.

COMPACT ARTICLE 3

POWERS AND DUTIES

Section 3.2—New or Increased Diversions and Consumptive Uses

Praise—Monitoring

Subsection 3 requires monitoring of permitted projects for compliance with permits.

Problem—Enforcement

Subsection 3 also 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 "shall take any enforcement actions needed to ensure" compliance.

Section 3.3—New or Increased Diversions: Proposals Subject to Regional Review and Council Review

Praise—Overall treatment of diversions

This subsection requires unanimous approval by the eight states of diversions over 1 million gallons per day averaged over 120 days, in effect the U.S. Water Resources Development Act veto authority wielded on the basis of the standards, as promised by the governors in the resolution agreed to on the same day they signed Annex 2001. Since WRDA requires no standards for vetoing diversions, by comparison the compact provision that diversions can be approved if they meet certain standards seems to limit the ability of the governors to veto diversions. However, the standards (especially the return flow standard) appear strong enough in practice to discourage most diversion proposals and to legally justify vetoing all but the smallest proposals that are ultimately submitted—so long as the states are reasonably rigorous in enforcing the standards to in-basin withdrawals.

Problem—Averaging

The proposed compact averages withdrawals over 120 days as a way to determine which proposals deserve scrutiny.

=>>The averaging period should be 30 days. See our comments under articles 8 and 9 below.

Section 3.4—New or Increased Consumptive Uses: Proposals Subject to Regional Review and Council Review

Problem—Level of "consumptive use" requiring Regional Review

See also our more extensive analysis of this problem under our discussion of Section 8.3—"Council Review for Consumptive Uses."

Section 3.4 requires a 6-2 vote to approve a withdrawal for in-basin use that results in a loss of 5 million gallons of water per day averaged over 120 days. This is a substantial amount of water with five times the identical potential for adverse impact (total loss of water to the basin) of the 1-million-gallon-per-day diversions that are the subject of section 3.3—yet it is governed by an weaker decision-making system. While the voting system is less important than the strength of the standards on which votes are supposed to be cast, nevertheless, differential voting systems should have an underlying logic, presumably differential potential impacts to the ecosystem. No such logic apparent here

=>Because they have the same potential impact to the system, withdrawals resulting in consumptive loss should be subject to the same decision-making trigger level (1 million gallons per day) and voting system (unanimity).

=>Alternatively, the trigger level for Regional Review could be triggered for consumptive uses by withdrawal rather than loss. Trigger levels of 1 million gallons for diversions (that is, 1 million

gallons of potential loss) but 5 million gallons of withdrawal for consumptive uses may be sufficiently "apples and oranges" so that, combined with the permissibility of limited differential treatment, the overall system would survive future court or arbitral panel scrutiny.

Again, please see our more extensive analysis of this problem under our discussion of section 8.3.

Problem—Averaging

=>Withdrawals should be averaged over 30 days. See our comments under articles 8 and 9 below.

Section 3.6.—Rules and Regulations

Praise—Regional public participation in developing rules

This section affords the public opportunity to comment on the development of rules for implementing compact provisions. This is an important provision since it will be these rules and regulations, as much as the general language of the standards, that will determine the fate of individual proposals.

Problem—Regional public participation in developing rules

However, it is even more important that the public be given this same opportunity for comment by the individual states when they develop rules for implementing compact obligations. After all, it is likely that many more water withdrawal decisions will be made on the state level than on the regional level, and that state-level decisions are likely to have collectively greater potential for adverse impact to the basin ecosystem, at least for the foreseeable future.

Section 3.7—Public Participation

Praise—General

This section requires public notice of all new or increased withdrawals requiring a permit, opportunity for public comment on all such withdrawal proposals, and access to "all documents relevant" to such proposals.

Problem—Comment on draft permits

This section should solicit public comment not only on original proposals, but also on permits or approval documents that states and the Compact Council propose to issue. Permits and approval declarations can be heavily conditioned and in that sense dramatically different from original proposals. Since the basic facts of a given proposal and its potential ecosystem impacts should be fully explored during original comment, this second comment period could be very short.

Problem—Procedures of facilitating regional review

=>We suggest that the compact include a provision declaring, "The Compact Council shall solicit public comment on the procedures it develops for reviewing proposals that trigger Regional Review, including the development of procedures for receiving public comment.

Problem—Criteria for scheduling public meetings

=>In particular, this section should require standards for determining which proposals require public meetings or hearings. Rather than "provide guidance on standards" for deciding to hold such meetings, the Compact Council and the individual states should simply be required to "establish" such standards.

=>In further particular, this section should offer at least a broad definition of the kind of proposals for which the public should be granted meetings or hearings. We recommend defining such proposals as those "likely to generate significant community interest, including any proposal that rises to the level of regional review."

Problem—Public participation in non-proposal activities of the Compact Council

The Compact Council may take on a number of non-proposal research and review activities.

=> We recommend that the Compact Council facilitate broad public participation in its activities by adding a clause to section 3.7 declaring that: "The Compact Council shall develop procedures to facilitate public comment on any of the following activities that it eventually carry out, or collaborate with the Regional Body to carry out:

1. Development of a process for reporting whether jurisdictional water conservation programs meet the requirements of the compact or international agreement
2. Creation of reports on jurisdictional water management programs
3. Development of a process for monitoring and reporting on the jurisdictions' implementation of the compact or international agreement, including jurisdictional data collection and reporting and jurisdictional implementation of water withdrawal management programs
4. Creation of reports on jurisdictional data collection and water withdrawal management program implementation
5. Development of a process for assessment of cumulative impacts of basin water withdrawals
6. Creation of reports on cumulative impacts assessment
7. Development of a process for determining consumptive use standards or coefficients
8. Development of a process for determining the groundwater divide, and developing water withdrawal policy based on the new groundwater divide information
9. Review and, especially, proposed revision of the standard for judging water withdrawal proposals."

Section 3.8—Consultation with Tribes

Praise—Regional consultation

This section assures that tribes will be separately and individually consulted on all water withdrawal proposals that rise to regional review.

Problems—State consultation

=>This provision should of course be extended to water withdrawal proposals that are reviewed only by the states.

=>Furthermore, the compact should explicitly state that nothing in the compact is intended to intrude on the existing rights and sovereignty of any basin tribe.

Section 3.9—Enforcement

Praise—General

This section grants citizens substantial tools to assure that the provisions of the compact are followed by both the Compact Council and the states, including the right to contest in court all final decisions, at both levels, as inconsistent with the compact, and the right of citizens to both directly sue water withdrawers who fail to secure required permits and recover legal costs if vindicated in court.

Problem—Enforcing permit conditions

=>Citizens should also be granted the right to sue not only withdrawers who fail to obtain a permit, but also those in clear violation of the permits they have received.

As exercised for decades under other U.S. environmental laws, this citizen right would in fact result in few cases, because they are so expensive. However, in those cases where citizens do sue, the results are almost invariably positive, both for the environment and as assistance to the government agency responsible for enforcing the law.

Problem—Enforcing government obligations

=>Citizens should also be granted the right to sue state governments or the Compact Council for gross derelictions of duty.

Under the compact as written, the public has no means to compel deficient states or the Compact Council as a whole to carry out even the most basic general duties required by the compact but unrelated to permitting, such as water withdrawal reporting. As noted above, this is a right that will be used rarely if ever, but is a valuable tool for protecting the environment in extreme cases.

Problem—Cost recovery

=>Citizens should also be granted the right the recover legal costs undertaken to contest any state or Compact Council decision (or any permit, if citizens gain that right) if it is shown that the citizen legal effort made a significant contribution to good faith implementation of the provisions of the compact or of resulting state water law.

Section 3.10—U.S. Supreme Court Decree: *Wisconsin et al. vs. Illinois et al.*

Praise

This section maximizes the ability of the provinces to participate in a issue of undisputed basin-wide significance.

Problem—Applicability of standards

However, because there is a conflict between the authority of the United States Supreme Court and the proposed compact, the draft language throws out the baby with the bathwater by simply declaring that the compact will not apply. The region could keep the baby by acknowledging the Supreme Court as the sole authority over the diversion while explicitly pledging to do everything possible to assure that any possible future requested increases to the diversion are subject to the standards.

=>We suggest striking the current language of section 3.10 and replacing it with "In any process by which the *Wisconsin et al. vs. Illinois et al.* may in the future be amended, the parties to this agreement who are also present or future parties to the decree shall make every good faith effort to assure that any proposed or retroactively realized increase over the current court-ordered level of flow out of the Great Lakes basin is compelled to be subject to any processes outlined in this compact that would otherwise apply if no court decrees were in effect."

Section 3.11—Program Review and Findings

Problem—Reporting is voluntary

Despite a seemingly sincere commitment by the states in the proposed international agreement's Article 300.2 to annually "submit a report to the Regional Body . . . detailing the Water management programs that implement this Agreement in their Jurisdiction," Section 3.11 declares only that the states "may" do so "periodically."

=>The compact should require the parties to live up to their international agreement obligations by declaring that they "shall" submit the needed report annually.

COMPACT ARTICLE 5

GENERAL PROVISIONS

Section 5.1—Meetings, Public Hearings and Records

Praise

The compact provides for public access to all meetings of the Compact Council and the minutes of those meetings.

Problem—Online availability

=>The minutes of Compact Council meetings should be available online, not merely in an office during business hours.

Section 5.2—Effect on Existing Rights

Praise

This section appears to be an attempt to assure that existing protections are not impacted by the compact. It could also be interpreted as part of the compact's general attempt to assure that sovereignty over water is retained in the basin.

Problem—Existing statutory law

Statutory —is not mentioned in the proposed language. The proposed compact should explicitly protect public trust rights and responsibilities.

Problem—Public trust

However, a central element of existing protection—public trust rights and responsibilities—is not mentioned in the proposed language. The proposed compact should explicitly protect public trust rights and responsibilities.

=>We suggest merging the proposed two subsections into one and adding a public trust component, by replacing all of the current language in this section with: "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."

Section 5.4—Additional Laws

Praise

This section rightly assures that compact provisions do not interfere state capacity to prevent water pollution.

Problem—Existing laws protecting water quantities, levels, and flows

The compact should assure that its provisions provide minimum, not maximum, quantity, level and flow protections for the waters and the ecosystem of the Great Lakes – St. Lawrence River basin.

=>We suggest the addition of a new subsection to Section 5.4: "No provision of this compact shall be interpreted to diminish existing (or hereafter enacted or issued) protections afforded water quantities, levels, or flows by state statutes, regulations, or administrative procedures, policies, or guidelines."

COMPACT ARTICLE 7

AUTHORITY TO COLLECT DATA

Problem—Definition of existing withdrawals

The compact agreement is intended to cover only new and increased diversions and consumptive uses of water within the Great Lakes basin. However, the agreement contains no definition of existing withdrawals by which the signatory parties could clearly define an increased withdrawal. The plain meaning of the term would seem to be limited to the amount of water physically withdrawn during the year in which the compact goes into effect. But this could unfairly understate the true amount of existing withdrawal for users whose use is intermittent and whose "existing" withdrawal is in fact a withdrawal made in the recent past. It is also likely that withdrawers will argue that an "existing withdrawal" in fact has a non-plain definition: permit limit, infrastructure capacity, or any level of past withdrawal for any purpose.

=>We recommend inclusion in the compact of a modified version of the definitions of existing withdrawal implicitly included in article 203 of the international agreement:

=>"The quantity of an existing withdrawal shall be determined to be the largest amount of water withdrawn in the last five years, where such information is reliably available, or the most-restricted element of capacity of the existing withdrawal system, presented in terms of withdrawal capacity, treatment capacity, distribution capacity, or other capacity limiting factors. The capacity of the existing systems must represent the state of the systems on the effective date of this agreement."

Some system for determining the quantity of existing uses must be included for the basin environmental community to be able to support the compact agreement.

Section 7.2—Registration and Reporting of Withdrawals

Praise—Reporting

This section requires all diversions and all withdrawals of 100,000 gallons per day averaged over 30 days to be reported, for the first time providing all the states and the basin as a whole with basic information on most significant withdrawals. The section also requires the states to report the information to a central registry and the states collectively to make that registry available to the public. This fundamental obligation of the states to the public, promised in the voluntary 1985 Great Lakes Charter, went unfulfilled for ten years after 1994.

Problem—Reporting level

The 100,000-gallon reporting level is too high. Minnesota and Ontario require reporting in the 10,000-gallon-per-day range, and the compact should do so as well.

Withdrawal amounts below the 100,000-gallon level account for a relatively small portion of total basin withdrawals, but, when they take place from headwaters or other small water sources, they have the potential to have disproportionately significant impacts on the ecosystem.

Awareness of the locations and basic types of smaller withdrawals is essential to evaluating the cumulative effects of such withdrawals on sensitive ecosystems, especially in the context of larger withdrawals that may be proposed or already taking place nearby.

=>We recommend requiring registration for all new or increased withdrawals of 10,000 gallons per day or more averaged over 30 days.

Problem—Reporting at the small 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 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—Reporting return flow

In order to enforce permit terms and a comprehensively inventory of basin water resources, the compact water withdrawal reporting system should include reporting on return flow.

=>In section 7.2.2, "Each registrant will be required to report the volume of the Withdrawal annually in accordance with applicable Signatory Party law," we recommend inserting "and Return Flow" after the word "Withdrawal."

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.

COMPACT ARTICLES 8 AND 9

REGIONAL REVIEW AND COUNCIL REVIEW OF PROPOSALS AND THE STANDARD OF REVIEW AND DECISION

AND

JURISDICTIONAL PROGRAMS AND THE STANDARD OF REVIEW AND DECISION

JOINT ISSUES

These two articles have so many common elements—the shared individual standards for judging water withdrawal proposals— that it is easier to treat them together before treating them separately.

Praise—General

The articles outline how, for the first time in basin history, a significant number of water withdrawal proposals will be subject to review on the basis of their efficiency and impact to the basin ecosystem. The articles also commit the states to a potentially ground-breaking new concept—that access to natural resources should not be conditioned only on the (usual purely theoretical) determination of little or no harm to the ecosystem, but also on a commitment to actually improving what has become a significantly impaired system.

Praise—Diversions

The treatment of diversions in articles 8 and 9 appears to be potentially as effective as the Water Resources Development Act veto in being able to prevent diversions. The requirement to return all non-consumed water to the basin is essentially an expression of the precautionary principle since any withdrawal is already required to cause no significant impact to the ecosystem. As a common-sense hedge against our uncertain ability to determine impacts—and therefore legally justified despite its arguably disparate impact on diversions and in-basin uses—the return flow standard promises a great deal of protection against harmful diversion requests while *not* being discriminatory. In most cases return flow is financially onerous, increasingly so with distance from the basin line, making the standard a powerful disincentive to diversion.

Furthermore, the combination of economic and hydrological characteristics of most uses appears to make diversion proposals under compact standards, especially the return flow standard, relatively unlikely. For example, the high consumption of many agricultural uses, which might generate relatively low return flow, is counterweighted by the inability of the agricultural sector to absorb much additional operating expense, possibly even for small, short diversions, but especially for large, long-distance diversions plus their return flows. Likewise the greater capacity of municipal supply uses to absorb additional cost is counterweighted by that sector's relatively low consumption, consequent high return flow, and correspondingly large financial burden paying for that return flow.

Finally, the definition of return flow seems to clearly require that returned water must be the same as the water withdrawn, implicitly to protect against the introduction of invasive species. This is another financially onerous burden on parties who might propose diversions. It would be very difficult for agricultural diverters to gather and return the same water, and municipal recipients of diverted water would have to construct separate distribution and treatment systems in order to avoid returning different water.

Problem—Implementing the standards

The overall system of standards in the compact agreement by which the above goals would be achieved are excellent in concept. However, they are lacking so much detail that they may be ineffective in practice.

Agreement negotiators have repeatedly declared their commitment to on-the-ground ecosystem protection from environmentally abusive withdrawal projects, and to a new system of water withdrawal rules that is consistent across a politically diverse basin.

Specifically the negotiators have said that the "Procedures Manual" appendix to the international state-provincial agreement, originally conceived as part of the compact, would be used as a basis for the specific regulations that will be written by the states and the Compact Council to implement the standards. However, nowhere in the compact do the Signatory Parties commit themselves to relying on the "Procedures Manual" in any way to write implementing rules and regulations.

The compact must commit the Signatory Parties and the Compact Council to some relationship to the international agreement's "Procedures Manual" as a basis for developing regulations implementing the standards. There are many possible ways to accept this request, expressing a wide range of degrees of commitment to reference the provisions of the international agreement.

=>We suggest that section 3.6—Rules and Regulations or article 5—General Provisions contain language declaring: "The Signatory Parties, individually and collectively, commit to using the Great Lakes Basin Water Resources Agreement's Procedures Manual as a significant source of guidance in issuing rules and regulations that give effect to the standards outlined in articles 8 and 9."

The compact agreement must contain some form of specific commitment to actually implementing the protective intent of the standards for the basin environmental community to be able to support the compact agreement.

Problem—No reasonable alternative

There appears to be an error in the proposed text of the standard for determining that there is no reasonable alternative to a proposal to divert water. The draft texts at sections 8.2 and 9.2 state that proposed diversions must demonstrate that, "There is no reasonable water supply alternative within the basin or the watershed of the Great Lake in which the Water is proposed for use, including the efficient use and conservation of existing water supplies."

Some proposals will likely seek to divert water entirely out of the Great Lakes basin. In such cases the reasonable alternative source for water should be sought not in a Great Lake watershed, but in that place outside the basin to which the diverted water is proposed for shipment.

=>Since intra– or extra–Great Lakes basin diversions would both require a seeking of reasonable alternative supplies in the diversion destination watershed, we suggest that that the text of sections 8.2 and 9.2 simply say, "There is no reasonable Water supply alternative within the watershed to which the diversion is proposed for shipment and use, including the efficient use and conservation of existing water supplies."

=>If for some reason the possibility of an intra–Great Lakes must be specifically noted, we suggest that that the text of sections I.A. and IV.A. say, "There is no reasonable Water supply alternative, for intra–Great Lakes diversions, within the basin or the watershed of the Great Lake in which the Water is proposed for use; and for extra-Great Lakes diversions, within the watershed or watersheds to which the diversion is proposed for shipment and use; in both cases including the efficient use and conservation of existing water supplies."

Problem—Rigorous consumptive use coefficients

The conservation and return flow standards are only as effective as the consumptive use standard or coefficient used to determine the amount of water that must be returned to the lake (we recommend major tributary) basin of origin. Consumptive use standards or coefficients that do not exist or are not rigorous, that is, an approval system that allows minimal water conservation measures, will result in larger requests of all kinds, may require approval of diversion proposals that could otherwise be denied, and overall result in a system that could one day be challenged as serving only commercial rather than environmental protection purposes.

The compact should contain a provision committing the Compact Council to 1) determining scientifically justifiable consumptive use standards or coefficients for varying sectors on a guaranteed timetable, and 2) basing the consumptive use standards or coefficients on strong conservation requirements, such that requested quantities are minimized for all proposed withdrawals and their required return flows are maximized (see our recommendations under "Problem—Conservation Goals" immediately below).

Without rigorous, defensible, consumptive use standards or coefficients, the return flow provision of the standards could, for certain uses, be turned into a loophole that makes diversions easy to obtain under the standards. This is obviously unacceptable.

=>We recommend a new section, perhaps included in Article 10: "Section 10.4—Consumptive use coefficients."

=> "1.The Compact Council will determine, no later that three years from the effective date of this agreement, a) a scientifically defensible consumptive use coefficients for major standard categories of water use, such as public drinking water supply, and b) a scientifically valid process for determining consumptive use standards or coefficients for non-standard water uses that is rapid, fair, and environmentally protective.

=>"2. After three years after the effective date of this agreement, the Compact Council shall issue no approvals for diversions or consumptive uses unless it has fulfilled the terms of section 10.4.1."

The compact agreement must contain some form of specific commitment to determining sector-specific consumptive use coefficients for the basin environmental community to be able to support the compact agreement.

Problem—Conservation goals

Put another way, the conservation standard will be only as effective as the sector, watershed- or basinwide-specific conservation goals it aims to reach.

On the level of the individual project, even the international agreement's "Procedures Manual" fails to do more than list potential practices without providing any guidance on the basis of which a permit-issuer—or a panel attempting to come up with consumptive use standards or coefficients—could decide which practices would be required of a given applicant and how intensively they would have to be applied.

This is a recipe for basinwide inconsistency and overall ineffectiveness in the implementation of the standard that probably has more consensus than any other among both the states and the advisory stakeholders.

=>We suggest that the performance of economic sectors in the best-performing developed-economy nations be used as referents for conservation goals (and their consequent consumptive use standards or coefficients), and that the parties commit to reaching these goals on specific timelines.

These goals, however arrived at, would be the background for researching the consumptive use standards or coefficients (and required return flow factors) that we suggest (immediately above) the parties commit to determining and implementing within three years.

Problem—Return to source watersheds

The return flow standard requires return flow only to the source Great Lakes or St. Lawrence River watershed. There is no ecosystem justification for the narrow ambit of this standard and great theoretical inconsistency in it. On the one hand, the compact requires million-gallon diversions from quadrillion-gallon lakes to be returned to the same lake—a sensible, precautionary line of initial protection. On the other hand, withdrawals from much smaller ground, stream and river sources—clearly much more vulnerable to complete losses of a given withdrawal quantity—receive no such initial protection. While this diversity of treatment may be small enough to escape a future judgment that the overall agreement is discriminatory, it is well established that ecosystem impacts of alterations in natural flows are greater as the scale of the affected ecosystem gets smaller.

=>The return flow standard should require return to the smallest scale of watershed as defined by the U.S. Geological Survey at the point of withdrawal. The return flow standard should also

specify that the return flow should further be "as close as possible to the point of withdrawal," unless such a return that would for some reason be ecologically harmful.

=>At minimum the return flow standard should use the current definition of "source watershed," so that the return flow section's current "preference" for return flow to source major tributaries becomes a requirement.

Problem—Averaging

The averaging period of 120 days for determining the trigger levels for state and regional review are so high as to exempt a significant percentage of basin water withdrawers.

=>As has been the practice for nearly twenty years under the Great Lakes Charter, the averaging period should be reduced to 30 days.

Problem—Minimum permitting and reporting levels

Problem—Permitting and reporting level

The 100,000-gallon minimum permitting and reporting level is too high.

Withdrawal amounts below the 100,000-gallon level account for a relatively small portion of total basin withdrawals, but, when they take place from headwaters or other small water sources, they have the potential to have disproportionately significant impacts on the ecosystem.

Minnesota and Ontario permit withdrawals 10,000-gallon-per-day range, and the compact should do so as well.

Awareness of the locations and basic types of smaller withdrawals is essential to evaluating the cumulative effects of such withdrawals on sensitive ecosystems, especially in the context of larger withdrawals that may be proposed or already taking place nearby.

=>We recommend application of the standards to all new or increased withdrawals of 10,000 gallons per day or more averaged over 30 days.

Problem—Compliance with international agreements

We think that the Boundary Waters Treaty, a signal precedent for the basinwide management approach embodied by the proposed compact, should be given special status and specifically enshrined in the compact's compliance provisions.

=>Those sections of the appendix that require compliance with "all applicable laws, including international agreements,"—subsections 7 of sections 8.2, 8.3, and 9.2, and subsection 6 of section 9.3—should be edited to replace "international agreements" with "the Boundary Waters Treaty of 1909 and all other applicable international agreements."

Problem—Permit terms

=>The proposed compact should specify that permits will be issued for no longer than ten years, to allow easy adjustment of permit conditions should climate change effects or cumulative impacts prove to be taking place, or in case new information about the impacts of the withdrawal come to light.

COMPACT ARTICLE 8

REGIONAL REVIEW AND COUNCIL REVIEW OF PROPOSALS AND THE STANDARD OF REVIEW AND DECISION

INDIVIDUAL ISSUES

Section 8.1—Regional Review by the Great Lakes States and Great Lakes Provinces

Praise

This section and this article as a whole commit the states to participation in true regional decisionmaking, albeit without teeth because of the difficulty of creating enforceable arrangements across the international border. Rather than the pro-forma consultation letters required by the voluntary 1985 Great Lake Charter, this article sets up a link in the binding compact agreement with the formal discussion and voting process outlined in the voluntary international state-provincial agreement for water withdrawals proposals that rise to the level of regional review.

Problem—Integrating international and compact decision-making

Nonetheless, this section requires only that the Compact Council "consider" decisions rendered by the state-provincial review body. While we concede for now that it appears legally impossible to require the Compact Council to implement decisions made by the binational review body, surely it is possible to move closer to truly binational decisionmaking, the declared intention of the states in Annex 2001 and the compact's preamble, than the ineffectual "consider."

=>We suggest replacing the last line of section 8.1with: "The Signatory Parties and the Compact Council will grant the greatest legally permissible deference to the product of Regional Review.

=>"If a Signatory Party or the Compact Council nonetheless renders a decision at odds with that of the Regional Review, the Signatory Party or Compact Council will include in the record of decision a rebuttal to claims found in the Regional Review that such a decision is inconsistent with the standards.

=>If a Signatory Party or the Compact Council decision at odds with that of the Regional Review process is contested by an aggrieved person, reviewing authorities should be directed to grant equal weight to the Signatory Parties (or Compact Council) and the Regional Body as finders of fact."

Problem—Public participation

This section declares, "Regional Review of proposals may include, but not be limited to, notice and consultation and public participation."

=>Statements about the conduct of Regional Review, as distinct from means by the states commit to participating in Regional Review, should perhaps be left to the international state-provincial agreement, under the auspices of which Regional Review will be carried out.

=>Also, the declaration that Regional Review "may" include public participation is inconsistent with the compact agreement's section 3.7. We suggest language consistent with that section, so that the agreement requires public participation rather than allowing it to be optional.

Section 8.2—Council Review for Diversions

Praise—General

This section establishes an appropriately low trigger level (1 million gallons per day averaged over 120 days), key standards (return flow of an appropriate quantity of unconsumed water and improvement), and a good decision-making system (unanimity) for regional review for diversions, which have the generic potential for permanent damage to the Great Lakes – St. Lawrence River ecosystem because they involve total loss of water to the basin.

Problem—Standards

Key elements of the decision-making standard as applied to diversions that rise to the level of Regional Review are weak or vague. Since many of these standards apply to all withdrawals, we deal with them in our critique of both articles 8 and 9 collectively above.

Section 8.3—Council Review for Consumptive Uses

Problem—Trigger level

Withdrawals for using water inside the Great Lakes basin should be held to standards reasonably close to the standards for diversions outside the basin. The proposed compact subjects diversions of 1 million gallons per day or more, averaged over 120 days, to review by all eight states. It also requires diversion proposals of any size to provide an improvement to the Great Lakes. However, for water withdrawn for in-basin use, the compact not only initiates eight-state review at a much higher level—5 million gallons per day—but also uses an entirely different form of measurement—consumptive use (water loss) rather than mere withdrawal. Also, all diversion proposals are required to carry out improvement, but for in-basin uses improvement is required only for projects above the 5 million gallon loss threshold.

While some difference in treatment between the two types of withdrawal has traditional in international water law and might withstand U.S. Constitutional and international trade scrutiny, we believe that the degree of differential treatment represented by this section is so great as to entail significant legal risk.

The proposed compact's system could lead to very large disparities of treatment and very widely divergent end results for certain pairs of water withdrawal proposals that are in fact quite similar in their potential ecosystem impact. For example, a consumptive loss of 4.5 millions gallons per day averaged over 120 days 1) avoids Regional Review and multi-jurisdictional vote, 2) makes no improvement to the basin ecosystem, and 3) carries out mere unspecified "conservation measures." At the same time, a diversion of 1.5 million gallons per day, which entails one-third the water loss and therefore, considered generically, one-third the ecosystem impact, must by comparison 1) suffer the scrutiny of ten jurisdictions and the executive power of eight, 2) implement a much more rigorous "conservation plan," and 3) make an improvement. The generically much smaller ecological impact in this scenario generates much more rigorous treatment.

For another, much more problematic example, efficient municipal supply systems that lose just 10 percent and return 90 percent of withdrawn water would be treated exactly inversely to their likely ecological impact. An out-of-basin municipal applicant of this type would be subject to eight-state Regional Review when proposing a diversion of 1 million gallons per day, but an in-basin applicant of the same type would be subject to Regional Review only at the level of 50 million gallons per day, because it would take that much withdrawal to lose 5 million gallons at a loss rate of 10 percent. Yet in the former case the ecological insult to the basin is a loss of 100,000 gallons per day, while in the latter, 5 million gallons per day.

This is to say, the compact's currently proposed system allows the possibility of a fifty-to-one disparity in potential ecological impact before finally triggering similar treatment of like proposals.

We approve the negotiators' determination to subject diverters to high standards. But while we may be forced to live with the political necessity of applying somewhat more lenient standards to in-basin water uses, we are alarmed that the proposed disparity of treatment can be theoretically so large, perhaps justifying an eventual legal challenge to the legitimacy of the entire system. A gap of fifty to one is far too great to fall under the internationally recognized but limited leeway granted in-basin users over out-of-basin users. Such differential treatment would be prima facie evidence of discriminatory intent and seriously undermine one of the core purposes of the annex initiative as declared by the governors and premiers during the Annex 2001 negotiations—legal durability.

=>The problem can be addressed by changing the treatment of in-basin water uses proposed in section 8.3 by either: 1) lowering the level of water lost for in-basin uses that triggers eight-state review from 5 million gallons per day to 1 million gallons per day, or 2) changing the trigger level from 5 million gallons per day of water lost to 5 million gallons per day of simple withdrawal.

With either change, the disparity in treatment in the above municipal use example would fall from fifty to one to a more reasonable (if perhaps still legally risky) ten to one. In many proposals the disparity would be much smaller, with the aggregate disparity perhaps being entirely within legal tradition and most judges' or tribunals' sense of the reasonable. With less disparity of treatment, the new system would be better equipped to withstand a determined, well-funded legal challenge

that might arise decades hence.

Problem—Standards

Key elements of the decision-making standard as applied to consumptive uses that rise to the level of Regional Review are weak or vague. Since many of these standards apply to all withdrawals, we deal with them in a critique of both articles 8 and 9 collectively above.

COMPACT ARTICLE 9

JURISDICTIONAL PROGRAMS AND THE STANDARD OF REVIEW AND DECISION

INDIVIDUAL ISSUES

Section 9.1—Signatory Party Water Conservation Programs

Praise

This section includes a laudable commitment to overall conservation—implicitly directed at existing water withdrawals and uses—that is not formally required under the commitments of Annex 2001.

Problem—Lack of goals

Unfortunately, this general commitment suffers from the same deficiency as the overall water conservation standard for reviewing water withdrawal proposals: it lacks specific goals and is therefore likely to be applied inconsistently and for the most part ineffectively across the basin.

=>As we suggested above in our comments addressing both articles 8 and 9, "Problem—Conservation goals," the states should commit to sectoral conservation targets on specific timelines.

Section 9.2—Jurisdictional Review for Diversions

Problem—Exemption

This section exempts certain diversions—of less than 250,000 gallons per day averaged over 120 days, used in areas less than twelve miles outside the basin line, and supplied exclusively for public water supply where "adequate quantities" of potable water are not available—from the return flow standard.

=>There is no environmental justification for this exemption, it undermines the integrity of the agreement as a whole, and it should be deleted.

Problem—Other standards

Key elements of the decision-making standard as applied to diversions approved only by the states are weak or vague. Since many of these standards apply to all withdrawals, we deal with them in a collected critique of both articles 8 and 9 above.

Section 9.3—Jurisdictional Review for Consumptive Uses

Problem—Improvement

This section omits improvement as a standard to be applied to withdrawals under the large upper limit of 5 million gallons per day of consumptive loss. Improvement is a key commitment of the annex initiative. Annex 2001 declares in its core passage, Directive 3:

> "The new set of binding agreement(s) will establish a decision making standard that the States and Provinces will utilize to review new proposals to withdrawal water from the Great Lakes Basin as well as proposals to increase existing water withdrawals or existing water withdrawal capacity. The new standard shall be based on the following principles: . . . An Improvement to the Waters and Water-Dependant Natural Resources of the Great Lakes Basin."

As proposed in this section, the improvement standard will not apply to most proposed water withdrawals under the compact.

=>We strongly urge the states to include the improvement standard in some form for jurisdictional review of consumptive uses.

Problem—Improvement

The proposed compact should require that improvement actually take place as part of any approved water withdrawal projects. Strictly interpreted, the proposed compact as currently written merely requires that improvements be proposed.

Problem—Other standards

Key elements of the decision-making standard as applied to consumptive uses approved only by the states are weak or vague. Since many of these standards apply to all withdrawals, we deal with them in a collected critique of both articles 8 and 9 above.

COMPACT ARTICLES 10

ADDITIONAL PROVISIONS

Section 10.1—Cumulative Impacts

Praise

This section for the first time commits the region to assessing all the impacts of accumulated water withdrawals on the basin ecosystem. Further, the section specifies a timeline for making such assessments that is both certain and precautionary.

Problem—Scope and followup

Nonetheless, this section is unlikely to protect the basin from cumulative impacts except in the very long term and on the largest scale because it 1) 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) 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 cumulative impact assessments be required at the level of major river watershed.

=>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.

For ideas on how to best implement Annex 2001's cumulative effects commitments, negotiators may find it useful to consult G. Hegmann et al., *Cumulative Effects Assessment Practitioners Guide*, February 1999, prepared for the Canadian Environmental Assessment Agency and accessible at http://www.ceaa.gc.ca/013/0001/0004/index_e.htm.

Problem—Consumptive use coefficients

We discussed the need for the creation of consumptive use coefficients to determine reasonable return flow percentages above, in our discussion of joint issues common to articles 8 and 9.

We repeat only the recommendation here, the suggestion of a new section, perhaps included in this article as "Section 10.4—Consumptive use coefficients":

=>"1.The Compact Council will determine, no later that three years from the effective date of this agreement, a) scientifically defensible consumptive use coefficients for major standard categories of water use, such as public drinking water supply, and b) a scientifically valid process for determining consumptive use coefficients for non-standard uses that is rapid, fair, and environmentally protective.

=>"2. After three years from the effective date of this agreement, the Compact Council shall issue no approvals for diversions or consumptive uses unless it has fulfilled the terms of section 10.4.1."

The compact agreement must contain some form of specific commitment to determining sector-specific consumptive use coefficients for the basin environmental community to be able to support the compact agreement.

Canadian Environmental Law Association
Clean Wisconsin
Environmental Advocates of New York
Great Lakes United
Lake Michigan Federation
Michigan Environmental Council
Michigan United Conservation Clubs
National Wildlife Federation Great Lakes Office
Ohio Environmental Council
Tip of the Mitt Watershed Council
Union québécoise de la conservation de la nature
Wisconsin Wildlife Federation

Responses to Council of Great Lakes Governors' Issues for Public Comment

October 18, 2004

The International Agreement

- Would you recommend changes to the Regional Review Process, including any changes that could help ensure timely, cost-effective review of water use proposals that are subject to regional review?

We recommend subjecting withdrawals to Regional Review based on the withdrawal's potential for large-scale environmental impacts. Basing the threshold on consumptive use, rather than the actual withdrawal amount, would result in very large withdrawals avoiding regional review. For most withdrawals, actual withdrawal is a better indicator than consumptive use for potential environmental impacts to the waters of the Great Lakes. Further, consumptive use is difficult to quantify. As a system it would result in significant uncertainty for both water withdrawers and the public as to whether a given withdrawal would meet the Regional Review threshold.

- Would you recommend changes to public participation?

We recommend that the agreement allow comment not only on original proposals that rise to Regional Review but also on the Declarations of Finding that result from them.

Declarations of Finding can be heavily conditioned and in that sense dramatically different from an original proposal. Since the basic facts of the proposal and its potential ecosystem impacts should have been fully explored during the original comment period, this proposed second comment period could be very short.

The Compact

- What is your recommendation for voting on New or Increased Diversions of 1 million gallons per day or greater average over any 120-day period and New or Increased Consumptive Uses of 5 million gallons per day or greater average over any 120-day period?

The different voting standards for diversions and in-basin withdrawals (consumptive uses) could be a legal weakness unless justified logically. In short, we recommend that either the consumptive use threshold be lowered to 1 million gallons per day (averaged over 30 days, not 120 days) or the 5 million gallon per day figure be converted to withdrawal rather than consumptive use. Please see our extensive discussion on this point in our full comments.

Still, both the voting scheme and even the decision venue—jurisdictional or regional—are less important than the strength of the standards, the decision-making process, and the availability of judicial review and enforcement.

- Would you recommend changes to public participation?

The provisions for public participation in Compact Council deliberations, including participation in the development of rules for implementing the compact's provisions, would give the public appropriate access to the decision-making process.

However, the compact should ensure the same opportunities for public participation in jurisdictional decisions, since that is the forum in which the vast majority of water use decisions will be made.

In both forums, we recommend requiring:

- Public notice of amendments to water withdrawal permit applications.
- Design and implementation of a special effort to notify First Nations and Tribes, beginning with the construction of contact list.
- Plain-language interpretations of the environmental, cultural, and social dimensions of projects proposed in permit application, and of amendments to permit applications.
- Response by regulators to a reasonably comprehensive list of categories of public comment

- What recommendations do you have for enforcing the terms of the Compact?

Any person should have the right to bring an enforcement action in court against any violation of the compact provisions, including:

- Failure to obtain a permit
- Violation of permit conditions
- Failure to implement adequate state programs or meet other compact responsibilities

Persons should be granted the right to recover all costs (including attorney fees and expert witness fees) in enforcement actions. This "private attorney general" right has been the best guarantee of legal enforcement of environmental laws.

Decision Making Standard (Agreement and Compact)

- Would you recommend making changes to the threshold levels for regional review?

The threshold levels for regional review should be based on the size of the withdrawal, not on the loss of the water. Withdrawal is a far better indicator of potential environmental impacts than consumptive use, and is simpler and more efficient for both water users and the public to understand and quantify.

In our analysis, the difference in threshold levels, given the identical ecosystem impacts of the category of measurement—loss—border on the discriminatory, even taking into account the region's right to limited differential treatment.

We recommend that either the 5 million gallon per day consumptive use threshold level (averaged over 30 days, not 120 days) be measured as withdrawal rather than consumptive loss, or be lowered to 1 million gallons per day consumptive use. Please see our extensive discussion on this point in our full comments.

- Would you recommend making changes to the requirements included in the Decision Making Standard for determining the adequacy of proposed improvements to the Waters and Water-Dependent Natural Resources of the Great Lakes Basin?

The improvement standard should be applied to all withdrawals, not just diversions and the largest consumptive uses subject to Regional Review. The means for determining what improvement is appropriate for a given proposal should be dealt with in the compact by means of at least a loose reference to the detailed material on that point found in the Procedures Manual appendix to the international agreement, perhaps by declaring that the Procedures Manual "should provide general guidance" for the rules that each state and the Compact Council will write to implement the standards, including the improvement standard.

- Would you recommend making changes to the averaging period used to determine the volume of a proposed water use?

The timing of a water withdrawal can be as critical as the size of the withdrawal in preventing impacts to rivers, streams, lakes, and wetlands. Any averaging period for a threshold will result in withdrawals slipping under the system without oversight and management. Using a 120-day averaging period completely undermines the threshold levels, particularly for agricultural irrigators who operate for only a month at a time and would be able to average that use over a four-month period.

We recommend that the averaging period be 30 days.

- Would you recommend making changes to the definition of "Existing Water Users"?

Because only new or increased uses will be managed, the agreement must clearly define the limits of "existing water users." Clear measures of capacity, permitted approval and time frame must be specified. Please see our recommendation on this point in our full comment.

Principles used by CELA and GLU in Efforts to Strengthen the Great Lakes Charter Annex

This document recommends a comprehensive set of reforms based on specific environmental protection and restoration objectives. These recommendations—environmental "must haves" for any reform project to succeed—can distinguish proposed approaches that lead to sustainable use of Great Lakes waters from those that push the region further down the spiral of non-sustainable water use.

In brief, these recommendations are:

1. The federal, tribal, state and provincial governments should place a moratorium on new or increased water uses, diversions, and other changes to the Great Lakes and St. Lawrence River water system, until a comprehensive conservation and ecosystem restoration strategy has been developed and implemented in legislation and permitting
2. The goal of the strategy must be to protect *and* affirmatively restore the basin water system, not just fend off additional harm
3. A central objective of the strategy must be substantial reductions in basin water consumption and use
4. The comprehensive conservation and restoration strategy must:
    - Address *all* changes to the Great Lakes and St. Lawrence River water system. Managing solely for how much water is used while neglecting, for example, how and where it moves, will not protect water for the benefit of all users, including nonhuman users
    - Provide specific, binational protection and restoration goals for the basin water system
    - Include a basin-wide standard to be applied to all decisions on proposed new water uses or alterations of the water system
    - Be conservation-based, that is, based on protecting and restoring the basin water system as opposed to accommodating and mediating the wasteful needs of use sectors
    - Set conservation targets by use sectors with timelines
    - Take a watershed approach to system protection and restoration by encouraging living within the means of individual watersheds, defined as no larger than major river watersheds
    - Prohibit new diversions of water between watersheds
    - Embody the precautionary principle: use conservative approaches in the absence of perfect information about the needs of the water system
5. The public must have full access to the process for developing and implementing both the basin-wide conservation and restoration strategy and the standard for making decisions on proposed water uses and alterations
6. All water use and alteration decisions must be subject to challenge by citizens

7. The process for developing and implementing the strategy and standard must be guided by the region's state, provincial and tribal governments, but it must also respect and accommodate the legitimate role of the federal governments: overseeing the national and international interest in protecting and restoring the basin water system

8. The federal governments must assure the availability of a constitutionally valid mechanism that enables vigorous international, tribal, provincial and state cooperation

9. Should state, local and tribal governments fail to create a strategy, the federal governments should step in to assure that a strategy is created

10. The onus must rest with those proposing new or increased water uses or alterations to the water system to show that they are consistent with the strategy and standard

11. Information on the connection between the basin water system and the life it supports should be continuously and aggressively gathered and assimilated into a publicly accessible, binational water information base that is understandable and useful to lay citizens

12. Regional climate change should be aggressively researched and climate change data evaluated with water data to routinely review the estimated impacts of climate change on basin water quantities and movement

13. The effects of all approved water uses must be monitored for periodic evaluation of the uses against the standard and strategy, and to inform future water use decisions. This monitoring information should be included in the binational water information base

14. Water use approvals must be rescindable if evidence later arises that they are no longer, or never were, consistent with the strategy and standard

15. Every individual's right to water for basic human needs—drinking, cooking, and bathing—must be guaranteed

The Great Lakes Annex Agreements
A meeting sponsored by Great Lakes United & Canadian Environmental Law Association
October 15, 2004 at Quaker Friends House, Toronto Ontario

1. History and Context

Sarah Miller (CELA) provided GLU and CELA historical involvement in the Annex process, in particular CELA and GLU's role on the Advisory Committee over the past four years.

2. Overview of the Content of Agreements

Reg Gilbert provided highlights to the agreements including:

Withdrawals Covered

- New & increased
- Ground and Surface
- Over 100,000 gallons/day (avg/120 days)

Standards for Approving the Withdrawals Covered

- No reasonable alternative
- Reasonable quantify for use
- Return flow (exact same water returned to Great Lake source)
- Conservation (measures and plans)
- "No significant adverse impact"
- Complies with laws, agreement, treaties

Additional Standards for Diversion and Large Uses

- Improvement
- Separate from "no significant adverse impact" (i.e. no mitigation)

Diversion Exemption

- Less than 250 000 gallons per day
- Public drinking water supply
- Within 12 miles of surface basin line
- Exempt from return flow standard only

Reg Gilbert was invited to review GLU's consultation process including the participation of GLU's Sustainable Waters Task Force, a GLU sponsored meeting in Detroit, Michigan, regular consultation with 11 ENGOs who indicated interest over the past several years, and the current workshop, intended to provide an opportunity for allies to ask questions and thereby benefit from GLU and CELA's participation on the Advisory Committee over the past three to four years.

3. Issues of Concern and Diverging Views

John Jackson (CELA/GLU) identified the following known issues of concern and led the group discussion.

Issues of Concern and Diverging Views

- 120 day averaging provision should be amended to 30 days
- Trigger thresholds are too high (consumptive use vrs withdrawl) (Ontario and Minnesota already more stringent)
- The 12 mile (20K) exemption should be dropped
- An action plan is needed for existing users that includes an evaluation framework, targets and timetables
- The relation between the Compact and the Int'l agreement requires clarification and the (Compact should include the implementation manual that forms part of the Int'l Agreement)
- Measures are needed to ensrue individual states/provinces follow the regional lead
- The Chicago diversion needs to be captured
- The "Return Flow AFTER Reasonable Use\Consumption" should include stricter qualitative criteria and language to ensure return flows are free from invasive species
- A 10 yr phase-in period is needlessly long and should be reduced to 5 years

Group Discussion (Questions and Issues)

- What are the odds of the proposed agreements succeeding?
- What is the relationship between the Compact and the Int'l Agreement?
- What are GLU and CELA's 'must have' amendments to secure future support?
- Some concern was raised that Canada's provincial standing vis a vis state standing is too dilate given that half the lakes are in Canada.
- Return flow seems impossible for some sectors (i.e. Agriculture)
- The timelines governing the IJC commitments to review water levels was questioned (no one from IJC was able to respond)
- The participation of First Nation, Tribal and Aboriginal Groups was unclear, though some commitments appear to be made by Ontario.
- How is the Precautionary Principle reflected in the two drafts under discussion?
- How will the proposed agreements deal with drops in water levels (i.e. Climate Change)
- What legal analysis exists (reference both Shrybman commissioned by the Council of Canadians; and the Denver court decision)
- What is the role of the Canadian federal government (DFAIT)?
- What are the supra basin trade triggers (NAFTA)?

4. Wrap-up and next steps

There was a general consensus among participants supporting an extension to the Public Comment Period by 90 days through to January 18, 2005 (currently scheduled to close October 18). It was agreed that beyond requesting an extension, groups should exercise their respective prerogative regarding the submission of substantial comments by the existing deadline (i.e. October 18). There was also discussion of a follow-up meeting in December (2004) or January (2005) (pending results in the coming weeks) that would allow for more detailed discussion of the questions and issues identified in the group discussion above.

Action Item: GLU was asked to draft a generic letter for ally use that requests an extension to the Public Comment Period citing insufficient timelines and lack of feedback from Aboriginal, Tribal and First Nation stakeholders and to include provincial government coordinates as a CC.

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

April 29, 2003

Additional Comments to the Great Lakes Water Management Working Group From the Canadian Environmental Law Association

Background

After attending the combined Advisory Committee, Great Lakes Water Management Initiative Working Group I wanted to communicate some of my concerns and input immediately upon my return. I find it a continuing challenge to shift through all the information and new revelations we receive at these meetings and be clear as to the big picture and directions the overall process is taking. At this point in the process it is still unclear where decisions have been made and what is still under review. Consequently, some of the assumptions I have made about the status of some issues may not be accurate. The Canadian Environmental Law Association (CELA) has had to focused on the International/Inter-Provincial and Compact issues, primarily because there are no other environmental ENGOs from Canada attending. We certainly have a lot of experience to contribute as well to the deliberations of the decision-making standard group, particularly since we are now undergoing a parallel exercise in Ontario. In order to protect the quantity and the quality of Ontario drinking water, a mandatory place-based watershed management planning framework has been proposed. CELA was part of the group that just finished designing this framework. Over the next month we will be advocating for this Source Protection Framework to become policy and as well we will be submitting our comments on a new reformed Water permitting regulation that is proposing to adhere to the provisions of Annex 2001. Our Provincial commitment to the Charter has already moved to into the regulatory phase, making Ontario a leader in this regard in the basin. It has always been our hope that the Annex directives would strengthen our Provinces water-taking permitting and management systems and would result in much better knowledge and understanding and management of our finite water resources. However, after the meeting this week I found myself wondering if the Annex as it is developing could instead have the potential to erode our permitting system that I believe is currently one of the best in the basin.

Underlying Principles

The thirty years that CELA has been involved in Great Lake protection were the years that the region pioneered **the ecosystem approach**. For those outside of the basin there will be an expectation that Annex 2001 will be built on this important principle that has potential to redefined water protection for the rest of the world. If instead of protecting the ecosystem we regress to protecting individual jurisdictions interests we will have lost the global leadership we pioneered in the Basin. The NOVA proposal was the first time that global imperatives knocked on the doors of the Great Lakes, but it certainly will not be the last. The world is watching what we do here. If we do not implement the Annex directives in a **non-discriminatory** and **equitable**

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way, then we can give credibility to challenges that our management regime is protectionist. This is our one chance in the Region to plan for long-term sustainability of our water resources, and to reject what might be the most expedient and affordable in the short term. It is unlikely that we will ever be able to dedicate the resources and commitment we have in place now to a parallel effort sometime in the future.

Equity Issues

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

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

Process Concerns

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

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

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

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

The Precedent Questions

Casting off the confines of these legal deliberations for a moment, the grandmother in waiting in me has to pose the question "**Aren't the Great Lakes of such importance that we can establish our own precedents?**". So much of this exercise has relied on assurances from lawyers that we can only do what has been done before. They are insisting that we use old worn out agreements that never envisioned the water short world we have today or that the water its self and the life dependent on it might need protecting, not just our uses of it. We are setting out collectively to protect one fifth of the fresh water on the globe. Is it really all that important that it crosses many political boundaries? If we are serious about protecting the ecosystem why not establish the precedent ourselves with uniform legislation in each state and province. This can be done with out compromising the constitutions of both countries.

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

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

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

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

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

November 18, 2003

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

Re: Comments from the Canadian Environmental Law Association

The Canadian Environmental Law Association (CELA) has contributed to the draft revisions and comments submitted by the environmental groups. We also wanted to submit these comments from our perspective representing the public in water disputes in a jurisdiction that has had a permitting system for some time.

While we recognise that a tremendous amount of work and good will have gone into resolving many complex issues in these draft documents, it is troubling that we have very little time left to design the regional review process if we are to keep to our timetable.

Process Concerns

The draft documents do not yet reflect the resolve stated at the meeting to have the Regional Body carryout the main adjudication of withdrawal applications and oversight of water management in the Great Lakes. From a bi-national perspective we were relieved that there seemed to be concurrence on this point at the meeting. However we are concerned that there has been little discussion between the Working Group and the Advisory Committee on the design of a Regional process.

In contrast there has been a lot of detail drafted on the Compact Council mandate and procedures. The lack of detail on procedures, dispute resolution, the scope and nature of the Regional review concerns us. It is still unclear where the public will have access to the process. It also seems unclear how the technical and scientific reviews of a proposal are carried out and how they are best applied to the decision making. Certainly the public will have an expectation that if a local water withdrawal is going to regional review that a transparent and rigorous process will ensue. The objective to have the Regional Body oversee data collection over time, manage consultations among jurisdictions and conduct reviews with a goal of consensus resulting in a "statement of findings" leaves us with a lot of details yet to resolve. The disparity between the detailed compact documents and the sketchy regional ones could lead decision makers updating themselves on our progress to misconstrue our intent that decision-making occur among all

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jurisdictions at a Regional Review. We would like some reassurance that time will be taken to focus on the details of the Regional process.

Because CELA represents people or groups involved in water disputes we can anticipate some of the needs that they will have for a new Regional process that will impact local water management and supply. The role of the public in the Regional Review will need to be clear. The public will need adequate notification of the project and a clear timetable for comments and intervention on a proposal. They may need some intervenor funding in order to attend distant meetings. To ensure transparency, the public will need access to all documentation and technical reports and comments on a proposal, including minutes of meetings on a proposed withdrawal. These public notification and involvement functions as well as information dissemination could be part of the mandate of the Secretariat to the regional review body. To avoid confusion the public will need to understand their legal rights in the courts and how these rights relate to the regional review process. As well, they will expect that their local concerns will receive consideration in a regional review. There also needs to be a mechanism to ensure that public submissions are circulated to all parties to the regional review. Will only jurisdictions be allowed to take part in the regional review? If the applicant and others are involved, many may want to be represented by lawyers or involve their own expert consultants in the process. They may want to introduce additional materials to the regional review that have not been part of the application. All of these issues still need to be considered by the working group.

This fall CELA and Great Lakes United have been holding meetings in six locations throughout the Province. The purpose of these meetings is to inform the public of recent and pending changes in Ontario water management regimes and to solicit improved ways to respond to these changes. We are introducing the public to the Annex commitment and the pending agreement at those meetings. It is our observation that the complex concepts of consumptive use, improvement standard, return flow and trigger levels and the differences between Canada and the US systems are not yet well understood by the public. A substantial education effort will be needed. Is this best achieved by each jurisdiction or by the proposed secretariat?

Additionally, it will be important to build an understanding that the intent of the regional agreement is to increase protection of the ecosystem. The public perceive that permitting systems enable withdrawals.

Implementation Timetables

CELA is concerned that there might be a flurry of large withdrawal proposals between the time the agreement is signed and the time it is fully implemented. We think that the ten-year phase-in is too long. We fear that it could cause the whole process to collapse from lack of momentum. There needs to be a clear transition plan and a way to give the agreement immediate life. We recommend that the Regional Agreement include provisions for the interim period that will commit jurisdictions to apply the agreement perimeters and principles to withdrawal proposals after the date of signing in the summer of 2003. This would act as a deterrent and would have the advantage of entrenching new approaches sooner in consideration of withdrawals (i.e. improvement). As well it could create incentive for faster implementation.

The data collection improvements should commence immediately even if everyone is not in a position to report so that the goal of tracking cumulative use can start to have utility and take shape. Reports on use by sector should reflect why some jurisdictions or sectors cannot report and when they will have the capacity to commence reporting. Annual reports should be submitted to each jurisdiction's legislature to build political accountability and understanding.

We are concerned that there is adequate time and opportunity allowed by the jurisdictions for the public to respond to and make comment on proposals. Local hearings maybe needed prior to matters proceeding to Regional review in order to solicit a range of local and scientific reports on impacts. It may be unrealistic to have the jurisdictional and regional reviews occur simultaneously.

Holding ourselves to a high standard

As we have stated before we feel that this process would be much stronger and viewed by other regions as rigorous if all jurisdictions were requiring permits for withdrawals at the same level. This should be at least at the lowest threshold currently in use in at basin (15,000 litres or 13,200 gallons). Doing so would strengthen our collective ecosystem approach and would promote understanding of the Great Lakes St. Lawrence River Basin as one body of water. This would also lay the groundwork for evaluating permits based on cumulative impacts. We feel that having one set of rules for those outside the basin and no uniform rules among Basin jurisdictions could be seen to be arbitrary and protectionist.

Thank you for all your hard work and efforts in bringing us all to this point. We have really benefited from being part of the process.

Yours truly,
Canadian Environmental Law Association

Sarah Miller
Co-ordinator

Principles used by CELA and GLU in Efforts to Strengthen the Great Lakes Charter Annex

This document recommends a comprehensive set of reforms based on specific environmental protection and restoration objectives. These recommendations—environmental "must haves" for any reform project to succeed—can distinguish proposed approaches that lead to sustainable use of Great Lakes waters from those that push the region further down the spiral of non-sustainable water use.

In brief, these recommendations are:

1. The federal, tribal, state and provincial governments should place a moratorium on new or increased water uses, diversions, and other changes to the Great Lakes and St. Lawrence River water system, until a comprehensive conservation and ecosystem restoration strategy has been developed and implemented in legislation and permitting
2. The goal of the strategy must be to protect *and* affirmatively restore the basin water system, not just fend off additional harm
3. A central objective of the strategy must be substantial reductions in basin water consumption and use
4. The comprehensive conservation and restoration strategy must:
   - Address *all* changes to the Great Lakes and St. Lawrence River water system. Managing solely for how much water is used while neglecting, for example, how and where it moves, will not protect water for the benefit of all users, including nonhuman users
   - Provide specific, binational protection and restoration goals for the basin water system
   - Include a basin-wide standard to be applied to all decisions on proposed new water uses or alterations of the water system
   - Be conservation-based, that is, based on protecting and restoring the basin water system as opposed to accommodating and mediating the wasteful needs of use sectors
   - Set conservation targets by use sectors with timelines
   - Take a watershed approach to system protection and restoration by encouraging living within the means of individual watersheds, defined as no larger than major river watersheds
   - Prohibit new diversions of water between watersheds
   - Embody the precautionary principle: use conservative approaches in the absence of perfect information about the needs of the water system
5. The public must have full access to the process for developing and implementing both the basin-wide conservation and restoration strategy and the standard for making decisions on proposed water uses and alterations
6. All water use and alteration decisions must be subject to challenge by citizens

7. The process for developing and implementing the strategy and standard must be guided by the region's state, provincial and tribal governments, but it must also respect and accommodate the legitimate role of the federal governments: overseeing the national and international interest in protecting and restoring the basin water system

8. The federal governments must assure the availability of a constitutionally valid mechanism that enables vigorous international, tribal, provincial and state cooperation

9. Should state, local and tribal governments fail to create a strategy, the federal governments should step in to assure that a strategy is created

10. The onus must rest with those proposing new or increased water uses or alterations to the water system to show that they are consistent with the strategy and standard

11. Information on the connection between the basin water system and the life it supports should be continuously and aggressively gathered and assimilated into a publicly accessible, binational water information base that is understandable and useful to lay citizens

12. Regional climate change should be aggressively researched and climate change data evaluated with water data to routinely review the estimated impacts of climate change on basin water quantities and movement

13. The effects of all approved water uses must be monitored for periodic evaluation of the uses against the standard and strategy, and to inform future water use decisions. This monitoring information should be included in the binational water information base

14. Water use approvals must be rescindable if evidence later arises that they are no longer, or never were, consistent with the strategy and standard

15. Every individual's right to water for basic human needs—drinking, cooking, and bathing—must be guaranteed

9:30-7

Subject: Re: Windsor meeting
To: Sarah Miller <millers@lao.on.ca>
From: mvalian@uwindsor.ca
Date: Wed, 22 Sep 2004 13:24:06 -0400

Hi Sarah,
There has been a lot of media attention to this issue in the last few days. Adele Hurley had an article in the Detroit paper similar to the one in the Globe and the local CBC did radio and television interviews in advance and this morning. I did one on Monday and Gail Krantzberg from the IJC office did one yesterday morning -- both of us were not totally dismissive of the agreement but said it could be improved.
At the meeting, most of the people wanted to see a no diversion policy. DeLaunay did a good job explaining the complexities but a lot of that was lost in the discussion although my sense by the end was that people understood a bit more about the politics behind the agreement but want to send a message! As often happens, there was a lot of mis-information that gets hyped up but one complaint was a lack of time to get a handle on the agreement before having to put in comments. There was a fellow who was from the Council of Canadians who read a statement sent from Ottawa about referring the issue to the feds and the IJC (didn't we do that??). Joe Comartin was there challenging the idea of a state/provincial agreement -- saying it could only be the feds who address the issue. A number of people (including me) will be putting in comments and there will be a range of views -- the more knowledgeable people (like Derek Coronado) realize that there are no standards now and there is a pressing need for environmentally based standards even though we would all prefer a no diversion policy. Some will ask for an extension of time to give comments.
I thought you piece in the Globe was very good and captured the important issues!
Hope this helps!
Cheers, Marcia

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CELA will be preparing materials for Ontarians attending these hearings over the next several days.

Who:

People with an interest in the future of the Great Lakes

What:

The governments of Ontario, Quebec and the eight Great Lakes states have negotiated draft agreements to protect and conserve the waters of the Great Lakes Basin. Several meetings will be held across Ontario to give an overview of proposed agreements, and to provide forums for questions and discussions.

When & Where:

Monday, September 13, 2004 - Thunder Bay Public meeting 7:00pm-9:00pm
Victoria Inn, 555 West Arthur Street Kensington Room
Phone: (807) 577-8481 Website: www.victoriainn.ca/ThunderBay/

Tuesday, September 14, 2004 - Sault Ste. Marie Public meeting 7:00pm-9:00pm
Water Tower Inn, 360 Great North Road Courtyard Room
Phone: (705)949-8111 Website: www.watertowerinn.com

Monday, September 20, 2004 – Toronto Public Meeting and Open House 5:00pm-9:00pm
(Presentations at 6 pm) Regional Meeting Hosted by the Council of Great Lakes Governors
Novotel Toronto Centre, 45 The Esplanade Champagne and Alsace Ballrooms
Phone: (416) 367-8900 Website: www.novotel.com

Tuesday, September 21, 2004 – Windsor Public meeting 7:00pm-9:00pm
Ramada Plaza Hotel and Suites, 430 Ouellette Ave. Guard Room
Phone: (519) 256-4656 Website: www.ramadawindsor.com

Wednesday, September 22, 2004 – London Public meeting 7:00pm-9:00pm
Best Western Lamplighter Inn, 591 Wellington Road S. Chelsea 1 Room
Phone: (519) 681-7151 Website: www.lamplighterinn.ca

Tuesday, September 28, 2004 - Kingston Public meeting 7:00pm-9:00pm
Ambassador Resort Hotel,1550 Princess St. London Room
Phone: (613) 548-3605 Website: www.ambassadorhotel.com

How to Get Involved & Resource Pointers:

Visit the Ontario Ministry of Natural Resources web site:
http://www.mnr.gov.on.ca/mnr/water/greatlakes/index.html

Read the Draft Great Lakes Basin Sustainable Water Resources Agreement, a good faith agreement between the eight Great Lake States and the provinces of Ontario and Quebec:
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/StateProvincialAgreement.pdf

Read the Draft Great Lakes Basin Water Resources Compact, a binding agreement between the 8 Great Lake States: http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/InterStateCompact.pdf

Read the International Joint Commission's Protection of the Waters of the Great Lakes – *Review of the Recommendations in the February 2000* Report a good yardstick to compare against drafts

Great Lakes Annex Public Consultation Expected in mid-July 2004

Most of us would rather be out enjoying the Great Lakes this summer. Great Lakes' residents will also be called upon to review long awaited protections for the waters of the Great Lakes and St. Lawrence River ecosystem this summer. No single issue raises the passion of Canadians more than the spectre of the water they treasure being diverted and removed in large quantities. The response of Great Lakes States and Provinces to diversions and removals is likely to be released in July 2004.

In 1999 when the Ontario government issued a water-taking permit to the NOVA Group to remove water in bulk by tanker for export to the orient, there was international outcry. The Canadian Environmental Law Association (CELA) received standing to represent Great Lakes United (GLU) in an environmental appeal hearing on the permit. Before the hearing was underway NOVA agreed to withdraw the permit. The two federal governments requested the International Joint Commission (IJC) to undertake a special reference on protection of the Great Lakes from harmful water removals. The recommendations of that IJC reference called upon regional governments to take action to entrench environmental protections of the Lakes. These recommendations can be found on their web site http://www.ijc.org/php/publications/html/finalreport.html#11.

Acting on the recommendations of the IJC, the Council of Great Lakes Governors (CGLG) has been conducting a consultation for the past three years, between the eight Great Lakes States and two Canadian Provinces on how to implement the Great Lakes Charter Annex Agreement. This agreement, signed on June 18th 2001, proposes to implement a set of binding agreements to "protect, conserve, restore, improve and manage use of the Waters and Water-Dependent Natural Resources of the Great Lakes Basin". The full text of the agreement is appended to this notice. The negotiations carried out by the Water Management Working Group made up of representatives appointed by each jurisdiction have concluded. Their recommendations are now in the hands of the governors and premiers for a month long review by individual jurisdictions. During the three years these of these negotiations, elections have changed the makeup of most of the state and provincial governments. If there is still political will to support the Annex, the document will be released for public consultation in mid-to late July 2004. Individual jurisdictions have promised to carry out consultations with the public and the Council of Great Lakes Governors hopes to hold public meetings in Toronto and in Chicago. Background documents on the Annex mandate and process, including the minutes of some of the early meetings of the three Annex Issue committees can be found on the CGLG web site; http://www.cglg.org/1projects/water/overview.asp.

The Council of Great Lakes Governors invited individuals representing stakeholders in the Great Lakes to form an Advisory Committee to the negotiators. The advice of this Committee was sought periodically during the process but members were not party to the Working Group negotiations. CELA staff member, Sarah Miller was a member of this committee as was environmentalist Mark Hudon from Quebec. Both Canadians worked with US environmental members of the Advisory Committee in efforts to make detailed submissions throughout the process on many complex issues of process, jurisdictional parity across borders, public access and protection provisions. The principles that the groups used as a basis for their submissions have been appended to this notice. Reg Gilbert of Great Lakes United did the tough job of coordinating these efforts. People wishing to get a jump on the difficult issues the group responded to can find more information from the GLU web site; http://www.glu.org/english/projects/sustainable-

waters/govs-and-premiers-plan/pdfs/annex-information-10-5-02.pdf. These groups have requested that the consultation period go until at least the end of September so that full public review of the document can occur. As well, these groups have been planning their own public meetings to share their understanding and insights with others.

During the three years that the Annex negotiations have been underway, Ontario's domestic water laws are also being strengthened to reflect Justice O'Connor's recommendations from the Walkerton Inquiry to improve water quality and quantity protections. CELA has tried to ensure that both efforts result in strengthening Ontario's water-taking permitting regime and give the public better tools to protect their water. Ontario requires that all applications over 50,000 litres (13,000 gpd) have a water permit. Most other Great Lake jurisdictions do not track withdrawals below 100,000 gpd. Others have no system in place.

At the same time, Ontario has just posted a draft of their new water-taking permit regulation (http://www.ene.gov.on.ca/envregistry/023187er.htm) and announced a sixty-day public comment period to August 17, 2004. It will be important to review this draft regulation along side the Annex proposal as complimentary pieces.

CELA and GLU have been involved in efforts to strengthen the Great Lakes Charter since its inception in 1985. In 1997 the two groups published *The Fate of the Great Lakes Sustaining or Draining the Sweetwater Seas.* This study can be downloaded from the GLU sustainable water taskforce section on their web site. It offers a critique of the shortcomings and weakness of the Charter to protect the ecosystem from diversions and future threats. The threats it identifies include water wastage in the basin, climate change, a lack of data and knowledge of current water use, an increasingly water-short continent, a lack of a conservation ethic in the region and the ambiguity of trade agreements. GLU staff was the first to survey and list the communities just outside the Basin's surface water boundaries that expected to turn to the Great Lakes for future water supplies. The Annex is intended to improve upon the failures of the Charter. Will the Great Lakes continue a crisis management approach to withdrawals or will the region rise to the challenge of creating an equitable conservation based system to evaluate use of the waters? It will be up to the caring public in the Great Lakes Basin to see that it meets this test. Both CELA and GLU will be notifying their contacts as soon as the Annex becomes public and will be providing educational materials and will schedule meetings for interested groups and individuals.

For more information, please contact:
Sarah Miller millers@lao.on.ca
(416) 960-2284 ex 213.

of the Annex:
http://www.ijc.org/php/publications/pdf/ID1560.pdf

Visit the the Great Lakes basin environmental protection groups web site:
http://www.speakongreatlakes.org which has a lot of information, although most is from a US perspective.

Other Supporting Documents:
Council of Great Lakes Governors Introductory Statement
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/PublicComment.pdf

Great Lakes Basin Map
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/GreatLakesBasinMap.pdf

Great Lakes Charter, 1985
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/Charter1985.pdf

Great Lakes Charter Annex 2001
http://www.mnr.gov.on.ca/mnr/ebr/gl_charter/Annex2001.pdf

How to make Comments

1. The draft agreements are posted until October 18, 2004, on the Environmental Bill of Rights Registry for public comment at www.ene.gov.on.ca/envision/env_reg/ebr/english/index.htm (Registry Number PB04E6018).

   If you wish to comment on the draft agreements, please contact the Ontario Ministry of Natural Resources by fax at (705) 755-1267, or by mail to:

   Paula Thompson, Senior Policy Advisor
   MNR Water Resources Section, Lands and Waters Branch
   300 Water Street, P.O. Box 7000
   Peterborough, Ontario, K9J 8M5
   PHONE: (705) 755-1218 FAX: (705) 755-1267

2. You should also send comments to the Council of Great Lakes Governors directly by e-mail at Annex2001@cglg.org (electronic comments will be posted to the Council of Great Lakes Governors website at http://www.cglg.org), by fax at (312) 407-0038, or by mail to:

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

3. You can also visit and engage in discussion at the new International Joint Commission bulletin board discussion room http://www.ijc.org/rel/boards/b_board/en/index.php

   There is also a discussion room specifically for students:
   http://www.ijc.org/rel/boards/b_board_youth/en/index.php

Please contact me for any further information,

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P R E S S R E L E A S E

For release July 19, 2004, 2:15 p.m. EDT

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Noah Hall, National Wildlife Federation Great Lakes Office—734-769-3351 x24, cell: -646-1400
Molly Flanagan, Ohio Environmental Council—614-487-7506
Jill Ryan, Tip of the Mitt Watershed Council—231-347-1181 x106
Marc Hudon, Union québécoise pour la conservation de la nature—418-543-9681

Governors and Premiers Move to Protect Basin from Unwise Water Withdrawals

July 19, 2004 – A coalition of leading Great Lakes and St. Lawrence River basin environmental groups today praised two draft agreements between the region's states and provinces as an important step toward preventing basin diversions and water abuses. But the groups said the agreements need several important changes to fully protect the region's waters.

While retaining the governors' Congressional authority to veto diversions, the governors and premiers chose to forego an outright ban on diversions because it might be legally vulnerable in the long run. Instead, the governors and premiers have proposed a system of approving diversion proposals that appears to make diversions extremely difficult. However, the range of potential diversion proposals is vast. The groups plan to work with their members and the public to closely evaluate the proposed new system for weaknesses and loopholes, and to support means for strengthening the agreements' diversion provisions.

See www.speakongreatlakes.org for more information.

The "compact" agreement between the U.S. states

On the plus side, the binding "compact" agreement between the eight Great Lakes states:

1) For the first time provides environmental standards for judging new water withdrawal proposals
2) Protects all the waters of the Great Lakes basin, including streams and groundwater
3) If approved by Congress as well as the states, would be legally binding on the states

4) Requires most water withdrawals to be registered and some larger withdrawals to be managed, assuring both a means for preventing the worst environmental damage caused by withdrawals and better knowledge of how the region is using its waters
5) Properly establishes the new environmental standards as a minimum, not a maximum system of protection
6) Provides good avenues for public participation in permitting decisions
7) Provides good means for enforcing the provisions of the compact.

On the minus side, the compact:

1) Would require conservation "plans" and "measures" for various water withdrawers, but provides no definition of those terms, making the effectiveness if this essential component questionable
2) Allows a ten-year phase in of the new rules, an unnecessarily long waiting period
3) Defines different standards for judging water withdrawals depending on their size, but defines that size according to 120-day averages that virtually exempt some withdrawers from the rules
4) Fails to properly evaluate "cumulative" impacts on the local river and local groundwater levels, where the cumulative effect of numerous small projects will do the most environmental damage
5) Fails to explicitly state that nothing in the agreement will disturb the current authority of the Great Lakes states to veto any proposal to divert water out of the Great Lakes basin.

The international agreement between the states and provinces

The "good-faith" agreement between the Canadian provinces and the U.S. states is stronger in substance than the compact agreement and sets an important precedent in binational water management. However, not being binding, the agreement is weaker in practice, and will need to be passed into law in Ontario and Québec to assure that its provisions are ultimately implemented.

Public comment

Collectively the states and provinces have agreed to hold public comment hearings on the proposed agreements in Toronto and Chicago. Individually the states and provinces have agreed to each hold at least one public comment hearing or meeting in each of their jurisdictions.

Because these agreements are potentially the most important environmental and economic protection measures taken by the jurisdictions in a generation, the groups called on each state and province to hold public meetings in all their major basin watersheds during the ninety-day comment period.

The groups also called on the governments to assure that the public meetings allow direct dialogue between the public and government officials on these complex proposals.

More information

For more information on the agreements, their background, future scheduled hearings, and the perspectives of environmental groups, connect to www.speakongreatlakes.org. The site will be updated regularly during the ninety-day comment period ending October 18.

—30—

Canada

MP wants to ban water exports

NDP legislation is designed to protect the Great Lakes
Recently proposed deal has raised loss-of-control fears

MARY GORDON
OTTAWA BUREAU

OTTAWA—An NDP MP has introduced a private member's bill to ban the export of Great Lakes water outside the Great Lakes basin.

Pat Martin (Winnipeg Centre) says piping water out of the Great Lakes would threaten Canada's water supply and damage the lakes' delicate ecosystems.

"The Americans have their eye on our water perhaps more than any other resource and they're perhaps getting fidgety and getting impatient about accessing this precious natural resource," he said.

"I think it's negligent for the Prime Minister to not stand up on his own hind legs on this issue."

The bill, introduced Monday, is timely given a proposed agreement between the Council of Great Lakes governors and the Ontario and Quebec governments that would allow large-scale water diversions outside the basin. Ontario and Quebec have not yet approved the two-part agreement, which is called the Great Lakes Annex 2001 Implementing Agreement.

Steven Shrybman, a lawyer who wrote a legal opinion of the agreement, said Canada and the provinces would be excluded from the right to approve or veto the diversion of Great Lakes waters if the second part of the agreement — the Great Lakes Water Resources Compact — were approved.

He said the deal sets no limits on the quantity, duration, purpose or geographic recipients of the diversions.

He also said the agreement would virtually nix the ability of the International Joint Commission to approve significant diversions of Great Lakes waters, as it was charged to do in the Boundary Waters Treaty. That treaty requires that Canada and the U.S. agree on anything that could hurt the health of the Great Lakes.

So far, the federal government has been largely silent on the issue, but Martin hopes his bill will help flag attention to what he says could be the most important foreign policy issue facing Canada. If the agreement is approved, Canada could lose control of its water because of trade agreements, he said.

"We may not be able to turn the tap off when we want to."

On Monday, the Sierra Club of Canada requested an extension for the 90-day public review period of the agreement, which ended Monday.

Executive director Elizabeth May said the federal government must deal with the issue, particularly once a new U.S. president is elected.

"We believe the council of Great Lakes governors and the current agreements as drafted are a very slippery slope that could lead to serious erosion of the Great Lakes."

May said she believes the governors set out to prevent diversion but wound up with an agreement that does the opposite due to "loopholes and flawed reasoning."

In his response to the Speech from the Throne, Environment Minister Stéphane Dion yesterday said the government will "intensify" work on the environmental jurisdictions it shares with the U.S., particularly with respect to the Great Lakes.

"The government will work with the United States and agencies like the International Joint Commission on issues such as air, water and invasive species," he said.

Both U.S. President George W. Bush and Democratic presidential candidate John Kerry have opposed diversion while campaigning in Great Lakes states.

In 1999, NDP MP Bill Blaikie (Elmwood-Transcona) presented an opposition motion, which was supported by the House, to ban the bulk sale and inter-basin transfer of water.

20/10/04

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TS
19/10/4

Ominous silence on Great Lakes

Prime Minister Paul Martin is allowing the unsettled currents of present-day Canada-United States relations to sweep away — quite literally — a critical aspect of this country's sovereignty.

His complete silence on a draft agreement that would give the governors of the eight states that border the Great Lakes the power to siphon off the waters of these lakes is inexcusable. It is tantamount to beaching Ottawa's responsibility for the protection of the Great Lakes and the vital ecosystems that depend on them.

That message was driven home yesterday with the release of a legal opinion of the agreement commissioned by the Council of Canadians, which said it is so bad for Canada that it should be scrapped entirely.

Since 1909, Canada and the U.S. have exercised shared sovereignty and responsibility for the Great Lakes through the Boundary Waters Treaty. That pact requires the two countries to agree on anything that could jeopardize the health of the Great Lakes. And oversight of Great Lakes management and the resolution of disputes between the two countries are handled by the International Joint Commission (IJC), an independent body that is accountable to both sides.

But that effective model for shared jurisdiction is now threatened by the Great Lakes Annex 2001 Implementing Agreement — a two-part arrangement worked out by the Council of Great Lakes Governors and the governments of Ontario and Quebec. Both parts still need final approval.

The first part, the Great Lakes Basin Sustainable Water Resources Agreement, is a non-binding "good-faith" arrangement among the states and provinces on water management that does not have the force of law.

But the second part, the Great Lakes Water Resources Compact, would be a U.S.-only binding deal that would give the eight governors together the power to decide on diversions of water from the lakes. Enabling legislation by the U.S. Congress would give this compact the force of law.

Neither Ontario nor Quebec have approved the second part. Officials say it was developed by a "working group" and was only issued for public debate. Public submissions on the proposed deals closed yesterday.

If approved, this asymmetrical arrangement would effectively rob Canada of its shared authority over the Great Lakes.

And yet Martin has not said a word about the threat of the U.S. tapping into the lakes. Just a few years ago, however, Ottawa was prepared to speak out. In 2001, when the annex was first put forward, Ottawa laid out its concerns to Great Lakes governors. In particular, it warned the standard proposed for water removals was too lax and that the cumulative impact of even the smallest diversions could cause serious harm to the lakes.

How, for example, could the lakes possibly be protected under the governors' proposal to give consumers beyond the basin the same legal right of access to the waters as the people who live on the shores of the lakes?

Since the release of the actual implementing agreement in July, those same fears have been repeated by every Canadian critic, including one expert who worked on Great Lakes issues in Ottawa for roughly 30 years.

The Council of Canadians' legal opinion, by lawyer Steven Shrybman, was right in suggesting that until appropriate safeguards can be put in place, "it would be prudent to extend the moratorium on water diversion approvals advocated by the IJC" in a 2000 report.

But that won't happen unless Martin immediately fends off the U.S. governors' grasp at our sovereignty.

Great Lakes Water

Our sovereignty at risk

Ts 18/10/4



Unilateral U.S. water diversion scheme ignores landmark 1909 agreement, *says Steven Shrybman*

The governors of the Great Lakes states have a plan for diverting water from the Great Lakes Basin. Under their scheme, neither Canada nor the provinces would have any right to approve or veto the diversion of Great Lakes waters regardless of their duration, scale, or impact on the waters of this shared ecosystem.

This is the conclusion I came to in a legal opinion commissioned by the Council of Canadians regarding the diversion of Great Lakes waters.

The governors' plan, which has implicit Congressional approval, also ignores the role of the International Joint Commission, which is supposed to approve significant diversions of Great Lakes waters.

In terms of binational relations, their scheme represents a unilateral approach for dealing with an international problem. This reflects a problematic trend by the U.S. to reject or marginalize international agreements, particularly those concerning the environment.

The governors' plan clearly presents a serious challenge to Canadian sovereignty. It would also open the door to NAFTA claims based on the come-one-come-all rights accorded to foreign investors under that trade agreement.

Moreover, despite claims to the contrary, the governors' plan would allow large-scale water diversions not just to serve consumers located in their states, but industries, farms, and communities located far from the basin.

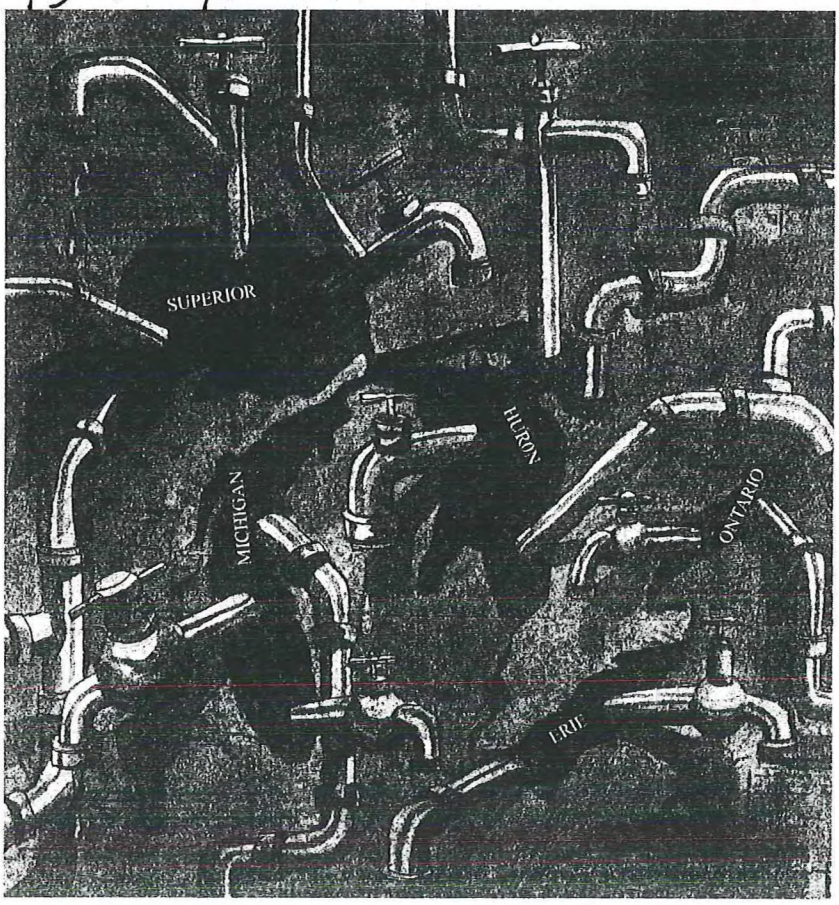


ILLUSTRATION BY PAUL LACHINE

WHAT'S ON THE TABLE

On July 19, 2004 the Council of Great Lakes Governors, along with the governments of Ontario and Quebec, published two draft agreements. Both concern the regulation of Great Lakes Basin waters including large-scale diversions for use outside the basin.

One agreement is billed as a good-faith agreement among the eight Great Lakes states and two provinces regarding management of waters in the basin.

The other is a compact among the U.S. Great Lakes states to collaborate on approvals for the use and diversion of water from the Great Lakes. Unlike the agreement with the provinces, the compact will be binding and enforceable.

While these initiatives present a bilateral face, it is clear that the push for both the agreement and the compact comes from the U.S. where pressure is mounting to approve water diversions from the Great Lakes Basin to serve nearby communities.

Although some elements of the annex may seem appealing at first glance, when considered in context, these positive features are eclipsed by the potential of the scheme to facilitate wholesale water diversions.

These would threaten the ecological integrity of the Great Lakes and seriously challenge Canadian sovereignty.

In simple terms, the U.S. compact would establish a scheme for authorizing diversions of Great Lakes waters, but impose no explicit limit on the quantity of water that may be diverted from the basin; the duration or term for such diversions; the purposes for which such waters may be used, or the geographic region that might be served by such diverted waters.

CHALLENGING CANADIAN SOVEREIGNTY

When it comes to the Great Lakes, the cornerstone of Canada-U.S. relations is the Boundary Waters Treaty of 1909, which establishes a binational regime for dealing with the lakes and other waters shared by the U.S. and Canada.

Under the treaty, which enshrines the principle of equality of access and use to Great Lakes waters, significant water diversions are approved by the IJC.

But the compact makes no reference to this critical IJC role while proposing an independent approvals scheme based on procedures and standards that are in many ways incompatible with those of the treaty. This result would reduce the IJC to playing a bystander role, if indeed it is to play any role at all.

Certainly, co-operation among the states and provinces is vital if the ecological integrity of the Great Lakes is to be protected. But that co-operation must respect the constitutional and sovereign authority of both nations.

The scheme proposed by the governors, and supported in part by two provinces, fails both tests. First, it ignores the constitutional role of Canada's federal government. In addition, it would establish an approvals scheme for out-of-basin water diversions that would be extraneous to the treaty and marginalize the role of the IJC.

TIME FOR CANADA TO TAKE A STAND

In fact, the federal government raised sovereignty concerns in early 2002 when commenting on the Great Lakes Charter Annex of 2001, which provided the template for the governors' and premiers' present plans. Ottawa complained that the standard proposed for water removals from the Great Lakes was too permissive and would open the door to long-distance, large-scale removals out of the basin.

It also worried that implementing the annex could "clash" with the Boundary Waters Treaty thereby undermining the role of the IJC and weakening the protections the treaty affords.

But the governors and premiers proceeded in spite of these concerns and similar objections voiced by the IJC.

It is now time for our federal government to speak for Canada by making it clear that the U.S. compact and the companion agreement with the provinces should be scrapped.

Instead of the essentially unilateral regime now proposed by U.S. governments, Canada and the U.S. should negotiate to strengthen the Boundary Waters Treaty by extending its application to all waters in the basin, including groundwater and tributaries to the five Great Lakes.

In addition, binational control over use and diversion of Great Lakes waters should be strengthened and the supremacy of the treaty clearly established in the event of conflicts with NAFTA or other international trade agreements.

Until such safeguards are in place, the moratorium on water diversion approvals advocated by the IJC in its 2000 report should remain in place.

Steven Shrybman is a partner in the law firm Sack Goldblatt Mitchell who prepared a legal opinion on the diversion of Great Lakes water for the Council of Canadians.

Plan for Great Lakes may kill them, critics say

S 21/914

Bilateral accord aims to preserve
Opponents claim it's a U.S. water grab

DEBRA BLACK
STAFF REPORTER

The Council of Canadians is calling on Prime Minister Paul Martin to intervene and scrap a draft agreement that allows for water to be diverted from the Great Lakes, saying it is nothing more than a "unilateral water grab" by the United States.

"We are vehemently opposed to this," said Sara Ehrhardt, a spokesperson for the Council of Canadians, which represents 100,000 members. Ottawa has abdicated its responsibility to protect the Great Lakes, she told a public meeting held last night to discuss the draft agreement.

But now it's time for the federal government to protect one of Canada's most important natural resources, she said.

"I have a message in a bottle for Paul Martin," she said as she dramatically held up an empty water bottle at the forum held at downtown Toronto's Novotel. "It reads: 'Save the Great Lakes. Say no to diversion.' "

Ehrhardt was one of about 30 people who spoke at last night's forum, one in a series of public consultations being held in Ontario, Quebec and the eight Great Lakes states to discuss the implications of a proposal known as the Implementing Agreement for Annex 2001.

The proposal is supposed to protect and restore the Great Lakes, according to the Council of Great Lake Governors, a body made up of the premiers of Quebec and Ontario and the governors of New York, Pennsylvania, Ohio, Indiana, Michigan, Illinois, Wisconsin and Minnesota.

Its authors say the agreement is designed to "protect, conserve, restore and improve the Great Lake Basins for future generations." The proposal establishes a number of protocols, including a minimum environmental standard to regulate proposed diversion and consumption of water. It also sets up a process for hearing any regional disputes and calls for enhanced information gathering and reporting on the status of the Great Lakes. Its authors maintain that the proposal will not mean any large-scale diversions from the lakes.

But many critics don't believe the agreement will protect the Great Lakes at all. Ehrhardt told the 100 or so people attending that she believes the proposal will not only allow for massive diversion of water but also potentially hurt the ecosystem.

"With only 1 per cent of the Great Lakes waters being renewed every year, the science is still out on whether we are already consuming more than can be replenished," she said. "Experts warn that, if implemented, the Annex could lead to an environmental disaster."

Ehrhardt believes the draft agreement also "undermines Canada's jurisdiction over the Great Lakes and erodes our authority over this shared resource. This is nothing more than a U.S. scheme to drain our Great Lakes dry. We're letting eight U.S. states write the policies around our water. They're setting the agenda."

Charles Fox of the Chiefs of Ontario, a body that represents 134 native bands across the province, was furious because he feels Ontario's aboriginal community was not consulted about the plan. "This is the first time I've heard of it. Supreme Court case law has said any development that affects aboriginal people, we have to be adequately consulted," he said.

Many bands are involved in "headlands" claims involving the title to land around and under the Great Lakes, he said. Outstanding cases could directly affect the future of the lakes.

Proposal called 15 danger 2001/4 to Lakes

U.S. states want to divert water

Canadian critics to appear at hearings

COLIN PERKEL
CANADIAN PRESS

An American proposal to allow diversion of water from the Great Lakes threatens both the environment and Canada's sovereignty, critics warn.

In submissions to be made at public hearings today, several groups plan to argue the proposed agreement among eight U.S. states, especially in its current form, is dangerous.

The proposal, known as the Implementing Agreement for Annex 2001, would end a virtual moratorium on new or increased water diversions south of the border.

Even though the legislation would allow only small-scale diversions, water consultant Ralph Pentland warns it would be a very large foot in the door.

Reached in Ottawa, he said, "In the business of water, once you say maybe, you say yes."

The Council of Canadians will present its "vehement" opposition to the plan at Toronto hearings by the Council of the Great Lakes Governors.

"The eight U.S. states are forming an agreement where they're going to sell Great Lakes water," said Sara Ehrhardt, water campaigner for the council. "It's going to open the door for the sale of water on a large scale."

The fear is that the combined effects of climate change, consumption and new diversions eventually could drain the lakes.

"It's not alarmist," Pentland says. "They're not going to go absolutely bone dry but there's a very good chance that, over the next 50 years, they could drop five to 10 feet easily."

A three-metre drop would likely be catastrophic, destroying or heavily damaging shipping, recreation, aquatic life, hydroelectricity generation and, ultimately, jeopardize the entire regional economy on both sides of the border.

About one-third of Canadians and 45 million people in all rely on what is the largest fresh-water eco-system in the world for their drinking water.

Thirsty American states, industry, farmers and international water sellers have long eyed the resource with increasing desire. They worry the proposed deal would strangle them in red tape.

Red tape is exactly the reason some environmental groups support the agreement, with some substantive changes.

They argue it would at least create a regulatory framework that would subject diversions to proper scrutiny and give Ontario and Quebec a voice, if not a veto, on proposed U.S. diversions.

"We have political expediency now," said Sarah Miller, of the Canadian Environmental Law Association. "Right now, there are no rules."

Experts pour cold water on bilateral plan for lakes

G+M 20/9/4

Pact to stop export of Great Lakes water doesn't go far enough, academics say

BY ALANNA MITCHELL

A Canada-U.S. pact to block exports of water from the Great Lakes, which goes before public hearings today in Toronto, needs serious revision if it is to protect the economy of Southern Ontario and the fragile health of the massive basin, according to two academic reviews of the plan obtained by The Globe and Mail.

The reviews, commissioned by the Toronto-based Walter and Duncan Gordon Foundation to encourage debate over the Great Lakes, are to be made public today.

The five lakes make up the largest body of freshwater in the world and the basin surrounding them supports about a quarter of Canadians and one in 10 Americans.

The basin is a key driver of the North American economy and its resources are responsible for about $200-billion (U.S.) in economic activity in the United States. For that reason, both Canadian and U.S. governments have had an agreement since 1972 to restore the biological health of the lakes, which had become polluted by industrial wastes.

Now, the dangers come from other sources: non-native species invading the lakes, chemical pollutants carried through the air, pathogens in runoff water and global climate change. Already, the levels of the lakes have fallen to lows not seen in decades.

At the same time, thirsty communities outside the basin — largely in the United States — are clamouring to take drinking water from the lakes. The governments of all eight states and both provinces (Ontario and Quebec) bordering the lakes unveiled the pact in July as a way of forestalling or offsetting this.

But this measure is not enough, according to James Bruce, former director of the Canada Centre for Inland Waters. The current version of the pact is "seriously flawed and would not really solve the problem," the consultant wrote in his review of the proposal.

"We've gone about as far as we can go in withdrawing water from the basin and we should find a way to put a stop to further net withdrawals from the basin," he said in an interview, adding that lowering the levels in the lakes cuts down on Canada's ability to produce hydroelectric power.

As well, as it stands now, the proposal would effectively give the power to make decisions over water withdrawals to the United States, even though the economic effects of further withdrawals would be greater on the Canadian side.

A key to avoid further degradation is to find ways to encourage citizens to use less water, he said.

"Residents of the basin are water hogs," he said, adding that they use far more water than people in Europe or Japan who have comparable standards of living.

Mark Winfield, a political scientist at the University of Toronto and program director of the Pembina Institute for Appropriate Development, said in his review that the pact needs to make it even tougher to take more water out of the lakes.

As well, he said in an interview that any decisions to take more water need to be made either with consensus of all eight states and two provinces or else with a majority from each country.

The fate of the Great Lakes has become a political football in the looming U.S. presidential election. But in Canada, interest in the lakes has declined steadily since 1995 when the federal and Ontario governments withdrew research funding, Dr. Winfield said.

As well, the population surrounding the lakes in the United States is in a long-term decline, whereas it is rising rapidly on the Canadian side, he added.

THE GLOBE AND MAIL
MONDAY, SEPTEMBER 20, 2004 G

GTM 20/9/04

The Great Lakes: death by a thousand straws

BY ADELE HURLEY, DAVID SCHINDLER AND ANDREW NIKIFORUK

This month, Americans and Canadians along the shores of the Great Lakes have a chance to participate in a series of public forums debating something called the Annex 2001 Implementing Agreement. Released two months ago, the annex is supposed to create "unprecedented protections" for the lakes. But our research indicates that the annex could undermine the security of the region's water supplies for years to come.

Annex 2001 traces its origins to an alarming 1998 Canadian scheme to export water from Lake Superior via tankers to Asia. Politicians on both sides of the border vowed to develop a "resource-based conservation standard" that would ensure the water stayed where it belongs: in the Great Lakes basin.

After three years of investigation and internal discussion, the politicians have given Great Lakes residents just 90 days to comment on their handiwork. After sifting through the rhetoric, however, the 40 million people who drink Great Lakes water will discover that Annex 2001 is little more than a licence to take water. What should have been a simple mechanism to limit diversions of water, has become a way to say "yes" to water-challenged communities all along the edge of the basin.

Thirsty towns or industries will be able to put another straw in the lakes as soon as they satisfy some pretty mild conditions set out in the technocratic document. Under current legislation, no U.S. governor can pump water out of the basin without the consensus of his peers — seven other Great Lakes governors. According to Annex 2001, a simple majority vote would suffice.

The new system would also make it possible to say yes to unlimited demands which, as any householder knows, is a great way to empty a bank account.

At the same time, the number of communities and industries eyeing Great Lakes water expands every day. Sprawling communities such as Waukesha in Wisconsin have exhausted their groundwater supplies and are now demanding Great Lakes water. Chicago, already licensed to take two billion gallons a day, is also a growing concern.

Annex 2001 also ignores the work of that demanding and persistent diverter known as climate change.

Rapid evaporation and warmer temperatures left docks and wetlands in lakes Michigan and Huron high and dry a year ago. It also removed more water from the lakes than 30 Chicago diversions in just six months.

Despite the illusion of abundance, 99 per cent of the Great Lakes represent a one-time inheritance, an aquatic capital fund that provides a host of irreplaceable services such as weather control, creature-making and nutrient-recycling. Only 1 per cent of the water is renewable, and that 1 per cent now sustains one of the world's largest economies.

No one has a good handle on how much of our water capital the region is now spending. The U.S. Geological Survey freely admits good data on evaporation, rainfall, cumulative effects and groundwater don't exist.

So, putting more straws in a glass without knowing how much is there isn't smart policy. Instead of making it easier to get water out, Annex 2001 should have focused on the state of the resource and the basic principles necessary to protect it.

It should have addressed waste and inefficiencies in the basin and considered ways to deter it. The region's 17 cities now account for approximately 32 per cent of the water withdrawn from the Great Lakes; their citizens rank among the world's most profligate water users. Each year, Detroit loses as much as 17 per cent of its treated water due to leaky plumbing alone.

The citizens of the Great Lakes have two clear choices. They can say "Yes" to Annex 2001 and witness the death of the lakes by a thousand straws.

Or, the people living along the Great Lakes can say "No" and demand from their leaders a credible management and conservation plan with a few simple rules that resolutely limit the amount of water that can ever leave the basin. Such a strategy would protect the Great Lakes for generations to come.

Adele Hurley is director of water issues at the Munk Centre for International Studies, University Toronto. David Schindler is Killam Professor of ecology at the University of Alberta. Andrew Nikiforuk is author of Political Diversions: Decision Time on Taking Water from the Great Lakes.

Public forums take place this evening in Toronto, tomorrow in Windsor and Wednesday in London. Ont.

Hands off Great Lakes

TS 11/9/14

Are the Council of Great Lakes Governors planning to sell out our water?

ELIZABETH MAY

As an environmentalist with more than 30 years of activism under my belt, I am generally not vulnerable to complacency. But if there is any area of environmental concern I tend to feel is well in hand it is the Great Lakes.

The Great Lakes have a strong governance structure. The International Joint Commission, a binational agency created by the 1909 Boundary Waters Treaty, has been a voice for conservation, for cleaner water, reducing pollution, and for the ecological integrity of the lakes.

There are serious issues of ongoing pollution of the lakes that engage Sierra Club volunteers on both sides of the border. No one could be complacent about the issue of Great Lakes pollution. But there was, I thought, no chance that anyone would suggest selling off Great Lakes water.

The IJC and the Canadian federal government have clear, unequivocal positions against any diversion of water from the Great Lakes Basin. I thought that meant no diversions would take place. I was wrong.

For the last few years, something called the Council of Great Lakes Governors and Premiers have been developing a plan for diversions.

They call it the Implementing Agreement for Annex 2001. You have probably never heard of it. It was placed for public consultation on July 19 with a deadline for comments within 90 days — Oct. 18.

It is the product of three years of negotiation, primarily among the Great Lakes governors. The 40 million residents of the basin who depend on its waters get 90 days to figure it out.

(After Oct. 18, the agreements can be approved and sent to the U.S. Congress for legislation and enacted as law by the provinces on the Canadian side.)

One of the experts who has analyzed the agreement, Ralph Pentland, calls it tantamount to a "Water for sale" sign over the Great Lakes.

Pentland is not some wild-eyed radical. He was Canadian co-chair of the IJC study board on the issue of Great Lakes' diversions and consumptive uses and before that for nearly two decades was director of Environment Canada's water policy.

Pentland has compared the impact of the decision about to be taken over the future of the Great Lakes with another potential Aral Sea disaster.

The Aral Sea in central Asia was once famous as the third largest lake in the world. It is now famous for the stark images of rusting hulks of freighters stranded in a toxic dust bowl where fish once swam. The lake is now too toxic and salty for fish and has shrunk in area by more than 60 per cent.

In Pentland's view, the agreement between the governors and premiers places the Great Lakes on a "slippery slope." The comparison to the fate of the Aral Sea is not hyperbole.

For the first time in history, this agreement would open the Lakes to water diversions based on the premise that customers for Great Lakes water from outside the Great Lakes Basin have to be treated equally to those inside the basin. Water takings would happen one permit at a time.

The language of the agreement imposes conditions and claims to be about protecting the waters of the Great Lakes.

But, in reality, the tests of when a diversion is appropriate are subjective. If a user claims that they cannot manage, even with aggressive water conservation measures that can be enough to open the taps.

The agreement claims that any water taken out of the basin must be put back in. But it is simply not possible to replace bulk water transfers within the lake system, or to engage in effective trade-offs between different lake ecosystem components. Moreover, once the waters of the Great Lakes are up for sale, the impact of trade agreements will take over.

What had been a slippery slope will be greased by trade rules.

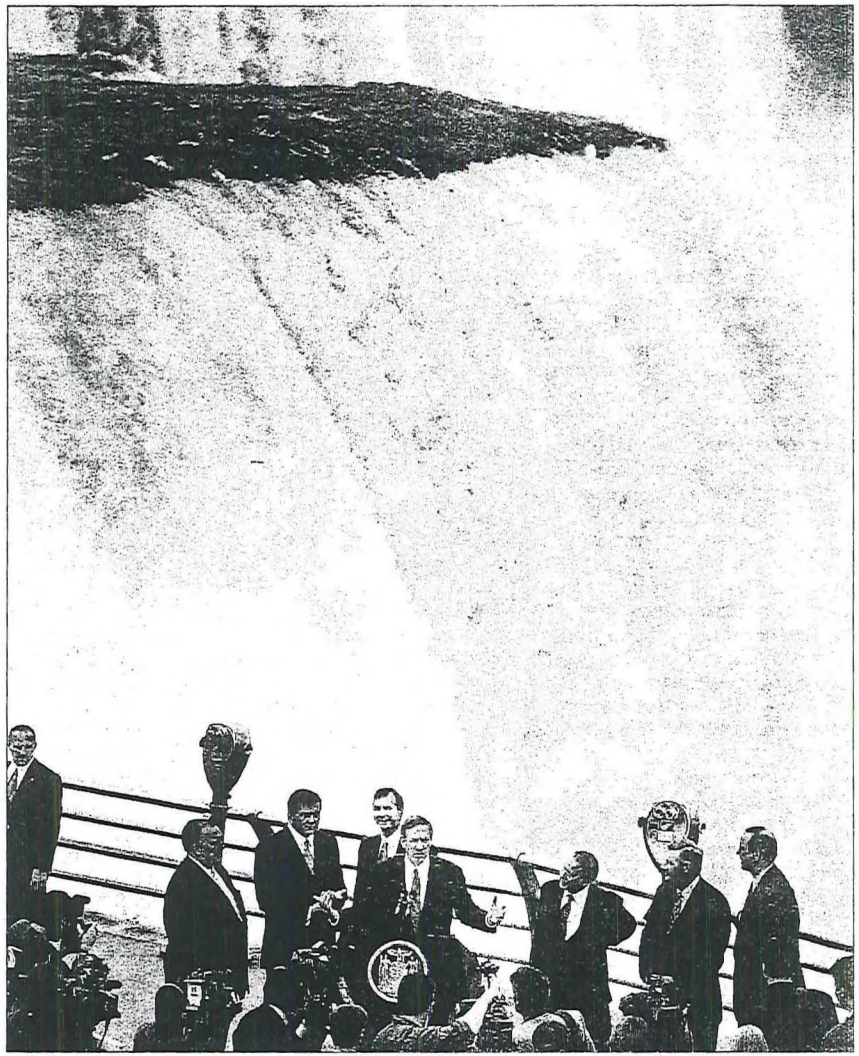
The Great Lakes already face significant threats to both quantity and quality.

A major factor will be the impacts of climate change. At this point, even with aggressive implementation of Kyoto, growing climatic instability cannot be avoided. Humanity has already changed the chemistry of the global atmosphere, increasing the absolute proportion of greenhouse gases by more than 30 per cent.

This is not reversible except over centuries. So, while we must reduce fossil fuel use at a much more accelerated rate than that to which we are committed under Kyoto, we also have to face the fact that the climate is changing.

Dropping water levels in the lakes will be part of our future. Water shortages and droughts will as well. Deciding in 2004 that it is a good business proposition to allow the transfer of tens of millions of gallons of water a day from the Great Lakes is nothing short of reckless.

It is not too late. Just say "No" to bulk water diversions from the Great Lakes.



VINO WONG/AP PHOTO

New York Governor George Pataki, at podium, speaks June 18, 2001 during the Council of Great Lakes Governors' Conference in Niagara Falls, N.Y. Then-Ontario premier Mike Harris, second from Pataki's left, attended the meeting.

Elizabeth May is the executive director of the Sierra Club of Canada.

Stakeholder Dialogue Session
Draft Great Lakes Charter Annex Implementing Agreements

October 22, 2004
Toronto, Ontario

BREAK-OUT GROUP DISCUSSION THEMES

Discussion should focus on what Ontario's position should be on each of these theme areas when we resume negotiations in January. The bullet points are offered as suggestions to assist the discussion.

<u>Lakes Superior, Huron, Michigan Groups – Discuss Themes 1,2,3</u>

1. Diversions

- What should Ontario's position be on diversions as we resume negotiations?
- If a prohibition cannot be negotiated then is there any acceptable alternative? (e.g. IJC no net loss /95% return approach, Regional Review + Unanimous Compact vote on all diversions based on strengthened standard, other)
- Is the status quo an acceptable alternative if agreement cannot be reached (i.e. Boundary Waters Treaty, Canadian/provincial prohibitions, unanimous approval of diversions under U.S. law, prior notice and consultation of major proposals under Great Lakes Charter)
- There is concern about the implications of proposed exemptions, including the Chicago Diversion. Is there an acceptable alternative to "no exemptions"? (e.g. exemption from prohibition for communities straddling the Basin divide if they meet standard and return water; Chicago diversion subject to Regional Review + U.S. Supreme Court authority with formal involvement of Canada and provinces)
- Should diversions between Great Lake watersheds (intra-basin) be prohibited or meet a lesser test than out of Basin diversions?

2. Regional Review Process, Decision-Making

- Is the proposed process for Regional Review (see handout) under the State-Provincial agreement, and voting under the Interstate Compact (i.e. unanimous agreement of voting governors for diversions, supermajority vote for consumptive uses) acceptable?
- Is the proposal for public involvement and involvement of Basin Tribes and First Nations acceptable (i.e. public notice of proposal, public meeting, opportunity for public input, prior notice of all Basin Tribes/ First Nations)? How could it be strengthened?
- The length of the decision-making process has been raised by many water users in the Basin. How can a reasonable decision-making timeline be maintained?

3. Thresholds

- Are the proposed thresholds for exchange of water use information (380,000 litres per day), regulation of water use (ALL diversions, withdrawals over 380,000 litres per day) and regional review of regionally significant proposals (3.8 million litres per day for diversions, 19 million litres per day for consumptive uses) adequate? Should they be lower? Higher?
- Should thresholds be consistent for diversions and consumptive uses?

Lakes Erie, Ontario and St. Lawrence R. Groups – Discuss Themes 4,5,6:

4. Consumptive Uses

- Should proposed consumptive water uses inside the Great Lakes Basin meet the same standard as proposed diversions?
- Should the same trigger levels (i.e. for regional review) apply to consumptive water uses inside the Basin as to diversions?
- Should any in-basin water uses be reviewed at the Regional level?
- Is a different standard and approach to in-basin consumptive use recommended? Would a different standard help to maintain the competitiveness of water users in the Basin? Would a different standard be legally defensible?
- How important is it to Ontario that all Great Lakes jurisdictions regulate proposed water uses?
- Estimating water consumption is a challenge. How should this challenge be addressed? (e.g. set consumptive use allowances defined for each water use sector, manage withdrawals instead of consumptive use, put onus on proponent to estimate consumptive loss to the Basin)

5. Jurisdictional Roles, Binding Protection

- Given that responsibility for managing Great Lakes Basin waters is shared among levels of government, with the province responsible for managing and regulating water use and the federal government responsible under the Boundary Waters Treaty for uses affecting levels or flows of boundary waters:
  - What should the role of the federal government and the IJC be? (e.g. referral of proposals for dispute resolution if consensus cannot be reached)
  - How can Ontario/Quebec/Canada's voice be strengthened in decision-making on diversions and major consumptive uses by other jurisdictions? (e.g. referral of unresolved proposals to federal governments/IJC, bi-national decision-making model, membership of federal government on Regional Body, harmonizing agreement between provinces and Canada to coordinate management, 50:50 decision-making between states and provinces under state-provincial agreement)

6. Decision-Making Standard

- How should the decision-making standard be improved? (see handout) (e.g. no reasonable alternatives, withdrawal limited to reasonable quantities, conservation, return flow, resource improvement, no significant impacts)
- The resource improvement criterion has been particularly controversial – some strongly support it others strongly oppose it as having major implications. Should resource improvement be eliminated from the standard? Should restoration be addressed through other means?
- Proposed Conservation programs for existing water uses have been criticized as too weak by some, too expensive by others. What is recommended?
- Cumulative impact evaluation is a widely recognized challenge. The proposal suggests an evaluation be performed every 5 years at the Regional level or each time an additional 50 million gallons of water is used in the Basin. Is this an adequate place to start?

July 19, 2004

Version Franç

McGUINTY GOVERNMENT TO PROTECT GREAT LAKES

Seeks Public's Input To Ensure Draft Agreements Succeed

TORONTO — The Ontario government is seeking public comment on draft agreements negotiated wi Quebec and the eight Great Lakes states to protect and conserve Great Lakes Basin waters, Natural Resources Minister David Ramsay announced today.

"Our government recognizes the need to protect Great Lakes Basin waters," said Ramsay. "With the agreements, we are ensuring that future generations will enjoy the Great Lakes."

The draft agreements would implement commitments made in the 2001 Great Lakes Charter Annex help protect, conserve and restore the Great Lakes Basin for future generations. These include establishing a minimum environmental standard for regulating water uses across the basin.

Ontario, Quebec and the eight Great Lakes states have all committed to strengthening the regulatio water uses, collaborating on reviews of major water uses and on diversions (where water is transfer from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lake into that of another) and requiring water users to practise conservation and treat and return water a its use.

"The views of our citizens are vital to ensuring the final agreements meet the needs of Ontarians," s Ramsay. "We will continue our dialogue with the other jurisdictions, while seeking public input on hc to address potential changes to historical water diversions in the Great Lakes system."

"With the public's input, we will protect our environment and strengthen our communities, providinç Ontarians with a quality of life that is second to none," said Ramsay.

Backgrounder: McGUINTY GOVERNMENT PROTECTS GREAT LAKES

For More Information:

Steve Payne
Ministry of Natural Resources
(416) 314-2103

[Program | Topic | Location | Service]

Ontario

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July 19, 2004

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McGUINTY GOVERNMENT PROTECTS GREAT LAKES
Backgrounder

Ontario's Position

Ontario is committed to strong protection for watersheds and the conservation of water. It has prohibited water transfers out of the province's three major water basins and recently proposed tou new rules for water takings in Ontario.

Through Ontario's leadership and collaborative discussions, the eight Great Lake states, Quebec anc Ontario have made important commitments. The draft agreements propose that the provinces and states strengthen the regulation of water uses by all jurisdictions, collaborate on state-provincial reviews of major water uses and diversions, and require water users to practise conservation and tr and return water to the basin after use. These combined commitments will increase the protection, conservation, restoration and improvement of Great Lakes Basin waters for future generations.

The province supports the general intent of the draft agreements and recognizes the importance of regional cooperation in conserving and protecting Great Lakes Basin waters. The province believes further dialogue with the other parties is needed to help resolve outstanding issues. These include h the agreements will deal with any future proposals to change major historical diversions like the Chicago Diversion, as well as other issues that may arise during the public consultation.

Great Lakes Charter

The Great Lakes Charter is a good-faith agreement signed in 1985 by the premiers of Ontario and Quebec and the governors of the eight Great Lakes states (Illinois, Indiana, Michigan, Minnesota, N York, Ohio, Pennsylvania and Wisconsin). The charter aims to protect and conserve the waters of th Great Lakes Basin*. It was developed in response to shared concerns about threats to Great Lakes waters from proposals to divert large quantities of water out of the basin, and is intended to help av future conflicts and shortages.

Through the charter, the provinces and Great Lakes states have consulted with each other on propo for major diversions or consumptive water uses. They have also shared information on water use.

**The Great Lakes Basin is the watershed of the Great Lakes and the St. Lawrence River upstream fr Trois-Rivières, Quebec. The basin includes the geographic areas surrounding each body of water in which water drains toward the Great Lakes or the St. Lawrence River.*

Great Lakes Charter Annex

Renewed concerns about proposals to export water in bulk led to the development of a supplementa agreement to the Great Lakes Charter known as the Great Lakes Charter Annex. Signed in 2001 by same 10 parties (two provinces and eight states), the annex reinforced the principles of the Great L Charter. The parties committed themselves to working out more binding protections within three ye including the development of an environmental standard on which to base decisions on water use.

Draft Great Lakes Charter Annex Implementing Agreements

The two **draft** agreements released today are intended to implement the Great Lakes Charter Anne: One, called the Great Lakes Basin Sustainable Water Resources Agreement, involves all 10 parties. a good-faith agreement which each province and state will seek to implement by developing or modifying appropriate laws and regulations for their jurisdiction. The other, known as the Great Lak Basin Water Resources Compact, is a binding agreement among the eight Great Lakes states.

Once they are signed, the agreements will set out the minimum environmental standard for provinc and states to manage and regulate proposed water uses. The standard will also be used to guide th review of regionally significant proposals by all 10 jurisdictions. The draft standard is based on the following proposed criteria:

- No reasonable alternative to the proposed use, such as conserving existing water supplies;
- Withdrawal limited to reasonable quantities for intended purposes;
- All water withdrawn returned to the same Great Lake watershed, less an allowance for consumptive use;
- No significant adverse individual or cumulative impacts;
- Conservation plan (for major proposals) or measures;
- Proposals for measures to improve the physical and biological integrity of the basin (for major proposals); and
- Compliance with applicable laws and agreements (for example, Ontario's Water Taking and Transfer Regulation, and the federal *International Boundary Waters Treaty Act*).

The draft agreements also propose to set up a regional body that would review major proposals for water use against the minimum environmental standard, and would monitor the implementation of agreement. The proposed process to be used by the regional body for reviewing major proposals fo water use includes guidelines for:

- public participation;
- notification of First Nations and Tribes in the Great Lakes Basin;
- technical evaluation of proposals using the environmental standard;
- consensus-building and dispute resolution among the 10 jurisdictions; and
- the issuance of public statements regarding whether proposals meet the standard.

Through the draft agreements, the parties also commit to develop programs to encourage water conservation and a system to enhance the gathering and sharing of scientific information.

Public Consultation on Draft Agreements

The two draft implementing agreements are being released on July 19 in all 10 jurisdictions for a 9C day public consultation. Comments received from the public will be considered in negotiating the fin

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7/25/2004

Bottled Water or Better Toilets?

Governors propose new way to protect Great Lakes

By Andy Guy
Great Lakes Bulletin News Service



MLUI/Pat Owen

Eight governors have proposed new rules that would require those who use water within the Great Lakes Basin to actually improve, rather than degrade, the precious resource.

CHICAGO — If crisis begets opportunity, the people of the Great Lakes ride in the catbird seat. As global demand for clean water steadily escalates, the Midwest is attracting entrepreneurs who would gladly quench humanity's thirst by selling tanker ships full of Lake Superior and truckloads of handy plastic bottles filled from natural springs. But the region also could become a worldwide center for genuine industrial innovation and new policies meant to conserve and enhance increasingly precious freshwater resources.

And so begins an epic tug-of-war over who gets to ride: The business-as-usual water wholesalers, or the true innovators who offer much more original ideas, such as selling better toilets, instead of lots of water, to all of those thirsty hordes.

Last week Great Lakes leaders introduced a pioneering plan whose fate could decide which way things will go. The proposal, called the Great Lakes Basin Sustainable Water Resources Agreement, attempts to advance more efficient water use in a region that some say is the last place on Earth that needs such a thing. Indeed, most state and provincial governments in the Great Lakes Basin do not actively promote water conservation or regulate large water takings. But the proposed agreement — also known as the Charter Annex — lays down basic principles that governments would use to evaluate water withdrawal proposals and douse the harmful ones.

It could be the most important public policy initiative to protect the Great Lakes since the 1972 Clean Water Act extinguished the pollution-fueled fires on Ohio's Cuyahoga River.

"At no time at no place in the world have we had an undertaking of this magnitude in terms of water management," said Sam Speck, director of the Ohio Department of Natural Resources, in a speech here at the annual meeting of the International Association of Great Lakes Mayors and St. Lawrence Mayors' Conference. "It's something that goes beyond past undertakings in terms of the complexity of bringing all the players together and in terms of the scale of the effort. It not only promises, if we carry through, remarkably enlightened stewardship. Maybe we'll provide a model in a world of growing water scarcity that others might learn from and follow."



Online Contributio

Take Action

For the complete text of the p
Lakes Basin Sustainable Wat
Agreement, as well as informa
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hearings in the eight Great La
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- A New Kind of Water Park
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- Lake Michigan Springs a L

Making Things Better

Perhaps the most important feature of the proposal is the so-called "improvement standard," which would guide certain water use decisions toward enhancement, not depletion, of the Great Lakes ecosystem. Coupling water project proposals to local improvement measures could lead to removing obsolete dams, restoring natural habitats, or repairing leaky sewer pipes.

"The governors and premieres were very clear that the focus should not be on economic protectionism but on the protection of the resource," Mr. Speck said. "If we take care of the water, and ensure that our use is sustainable, then we can have more development and more improvement of the economy."

Clean, fresh water provides the Great Lakes Basin with a unique, competitive edge in the 21st century because the resource is increasingly rare around the nation and globe. The region can harness its unfathomable amounts of water to retain and grow existing industries, lure corporate leaders and the talented workers they covet, and create new economic opportunities. Yet even the vast Great Lakes ecosystem has proven vulnerable to depletion and degradation. That is why a bipartisan coalition of federal lawmakers recently proposed a multi-billion dollar program to begin repairing some of the damage the Great Lakes already endure.

Civic leaders in the basin, through policy proposals such as the Great Lakes Basin Sustainable Water Resources Agreement, now are deciding how best to build an economy that simultaneously capitalizes on and celebrates such a bountiful water supply. The challenge is to find a formula for economic activity that maintains and, ideally, enhances the lakes, rivers, wetlands, and aquifers.

Meeting or Ignoring the Challenge

Innovators appear ready to meet the challenge. In 2003, for example, Falcon WaterFree Technologies located the U.S. hub of its international operation in Grand Rapids. Falcon is in the business of water conservation. The company manufactures and sells men's room urinals that require no flushing, save some 40,000 gallons of water per year, are more hygienic than the typical porcelain potty, and are cheaper to install, operate, and maintain.

But other ventures are pulling in the opposite, more traditional direction — resource extraction. For instance, Nestle Waters North America in 2001 built a water-bottling plant in Mecosta County, Mich. The company annually pumps, bottles, and sells millions of gallons of spring water from an aquifer that otherwise would replenish the Muskegon River, which feeds Lake Michigan.

Both Falcon and Nestle forecast a rapidly expanding market for their respective exports. Falcon's growing client list includes thirsty western cities like Beverly Hills, cost-conscious companies such as Daimler Chrysler, and even Nestle. Nestle Waters distributes its Michigan-produced Ice Mountain brand bottled water throughout the Midwest. Nestle hopes to expand its extractions from the Great Lakes oasis, so it is busily searching for other sources around the state even as citizens wage a highly effective lawsuit against its Mecosta County operation.

Enter the Great Lakes Basin Sustainable Water Resources Agreement. The proposed agreement attempts to better define the laws about how water is used to boost economic development. It is driven by the common belief that numerous external threats — climate change, soaring populations in the U.S. Southwest, schemes for bulk water export — threaten the integrity of the basin's economy, environment, and culture.

The proposed agreement would amend the 1985 Great Lakes Charter, a non-binding

accord that encourages collaboration among the region's state and provinces. Primarily, it would establish an official interstate compact among the eight U.S. states — Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania, and New York. The compact outlines common water management and conservation standards that each state would enact into local law and use to regulate new and increased water withdrawals for businesses, farms, municipalities, and other users.

More Efficiency, Less Extraction

The proposal, more than three years in the making, would make the diversion of large amounts of Great Lakes water to places beyond the basin nearly impossible. Effective immediately under the agreement, any proposed water withdrawal averaging one million gallons per day over any 120-day period would require unanimous agreement from the Great Lakes governors if it leaves the basin. New or increased withdrawals that stay in the basin but average a loss of five million gallons per day over 120 days would require approval of a super-majority of the governors.

Whether the proposal does more to help conservers like Falcon or extractors like Nestle remains in question. As proposed, terms in the agreement such as conservation "plans" and "measures" lack definition. And new rules to manage in-basin water projects using less than five million gallons per day averaged over a 120-day period — ventures such as Nestle's Ice Mountain plant — could take as many as 10 years to go into effect.

"The governors and premiers continue our work to achieve our first priority — the sustainable use of water resources," said Wisconsin Governor Jim Doyle, a Democrat who co-chairs the Council of Great Lakes Governors with Ohio Governor Bob Taft, a Republican. "Once implemented, these agreements will ensure that when other regions look toward the Great Lakes to solve their problems, we will have the legal authority to protect ourselves. In part, this means that we must take it on ourselves to improve our own stewardship over the use of Great Lakes water."

The proposed water use agreement comes as economists predict that environmental quality will play an increasingly crucial role in the Great Lakes community as it competes in the global marketplace. The region's past economic history is one of extraction, export, and exploitation of natural resources — from fur to timber to oil and gas. But the modern economy uses information — not natural resources — as its chief raw material. And it measures competitive advantage by an area's ability to attract talented workers, generate innovative ideas, and turn them into goods or services.

"Jobs are not so much tied to ports and minerals and transportation systems, but rather intellectual work that can take place anywhere," said Bill Testa, vice president of the Federal Reserve Bank of Chicago. "More than ever, people want to live and work near the water. Work location has increasingly become more footloose and fancy-free. Jobs follow people. And people go where life is good."

Selling Quality

The proposed agreement ultimately aims to make life better around the Great Lakes . The current regulatory system meant to protect that ecosystem is a patchwork of hundreds of public programs and regulations designed merely to *slow* economic activities that, by their nature, degrade the environment and poison the people who depend on it. In contrast, the agreement employs a unique improvement standard to actually enhance freshwater resources.

As drafted, the agreement would encourage resource managers and large water users to ensure that their projects actually add value to the economy, environment, and society. For local leaders attending the Mayors Conference, many of whom are busy upgrading sewer

infrastructure and transforming industrialized shorelines into parks to lure people and business, such a standard could create a new mechanism to fund local restorations.

"Critics have said this [Agreement] has the possibility of commodifying water," said Henry Henderson, a partner at Policy Solutions Limited, a Chicago-based consulting firm. "What has begun here is a way to commodify ecological services and ecological benefits as the basis for creating a natural marketplace that starts to energize private investments in ecological improvements in local communities."

The public review period for the proposed water management agreement runs through October 18, 2004. The Council of Great Lakes Governors will sponsor two meetings, one on September 8, 2004 in Chicago and another on September 20, 2004 in Toronto. A complete schedule of meetings and hearings in all eight basin states regarding Annex 2004 is available on the organization's Web site, www.cglg.org.

Andy Guy, a journalist, directs the Great Lakes Water Project and manages the Michigan Land Use Institute's regional office in Grand Rapids. Reach him at aguy@mlui.org

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Stemming the flow from the Great Lakes

GTM 20/7/14

Ontario, Quebec and eight U.S. states develop pact to restrict water exports

BY MARTIN MITTELSTAEDT
ENVIRONMENT REPORTER

A pact to block large-scale water exports from the Great Lakes to parched parts of the U.S. South has been developed by eight U.S. states that border the lakes, along with the governments of Ontario and Quebec.

The proposal, which has been under negotiation for the past three years and was announced yesterday, would place severe hurdles on large-scale water diversions and establish a new body that would have the power to vet water-export proposals.

Under the proposal, any request to divert from the basin more than 3.8 million litres of water a day — about the amount in two Olympic-sized pools — averaged over a 120-day period, would have to be approved unanimously by all eight U.S. states and reviewed by the Canadian provinces.

'People look at all that water [in the lakes] and I think they get a bit deluded.'

There are also tough conditions requiring most of the water to be returned, in non-polluted condition, to the lakes and that the amount requested be reasonable. With these types of severe restrictions, it will be virtually impossible for arid regions of the U.S. that don't lie very close to the Great Lakes to gain access to the water body.

"It sends out a very strong message to people outside the basin that they should be solving their problems close to home," said Sarah Miller, a water-policy expert at the Canadian Environmental Law Association.

The agreement was lauded by politicians, who say that in an increasingly thirsty world, the five Great Lakes, the planet's largest body of fresh water, are a resource that must be protected from those who covet it.

The pact "will protect us against demands from outside the region that threaten the ecology, the environment and the beneficial use of waters of the Great Lakes," Ohio Governor Bob Taft told the news conference in Seattle announcing the pact yesterday.

Besides Ontario and Quebec, the pact involves the U.S. states sharing Great Lakes shorelines — New York, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Wisconsin and Minnesota. The St. Lawrence River in Quebec is considered part of the Great Lakes drainage system.

The proposal is open for 90 days of public comments, as well as public meetings that will be held in Chicago on Sept. 8 and in Toronto on Sept. 20.

The 10 governments hope to have a final version of their proposal ready for approval by next spring, but it may take a decade for the agreement to be fully implemented because it must be approved by the U.S. Congress, each state and the two provinces.

Although the Great Lakes are immense, and contain about 20 per cent of the world's fresh water, they are a finite resource. Only about 1 per cent of the water in the lakes is renewed each year from precipitation or other inflows, such as rivers, meaning that withdrawals above this amount would cause water levels to plunge.

"People look at all that water [in the lakes] and I think they get a bit deluded," said David Schindler, an ecology professor at the University of Alberta. "The actual water that is replaced in each year in the Great Lakes is minuscule."

But under the new proposal, water-short areas in the U.S. that lie just outside the Great Lakes basin may have better chances of putting straws into the lakes. There are many water-short communities such as this in the U.S., including parts of suburban Milwaukee and areas of Ohio near Akron.

There is a "high risk" that these near-lake communities will try to gain access to the water and place demands on the lakes, said Adele Hurley, director of the water-issues program at the University of Toronto's Munk Centre for International Studies.

The announcement of the deal was made in Seattle, where U.S. governors are holding an unrelated meeting. The proposal also contains new rules that would govern large-scale consumption of lake water for local use, such as for water bottling, industrial processes and lawn watering.

Those wanting to consume 19 million litres or more a day, averaged over 120 days, would have to show how they can avoid this extra water use through conservation. They would also have to show that their withdrawals aren't harming the lakes, among other conditions.

Diversions of Great Lakes water outside the basin have always been contentious, and there are currently only three of any consequence.

In the 1990s, a plan by an Ontario company to scoop up tanker loads of water from Lake Superior caused an international uproar and was eventually blocked by the province.

The largest current diverter is Chicago. It's taking water from Lake Michigan and diverting it through a shipping canal into the Mississippi River system.

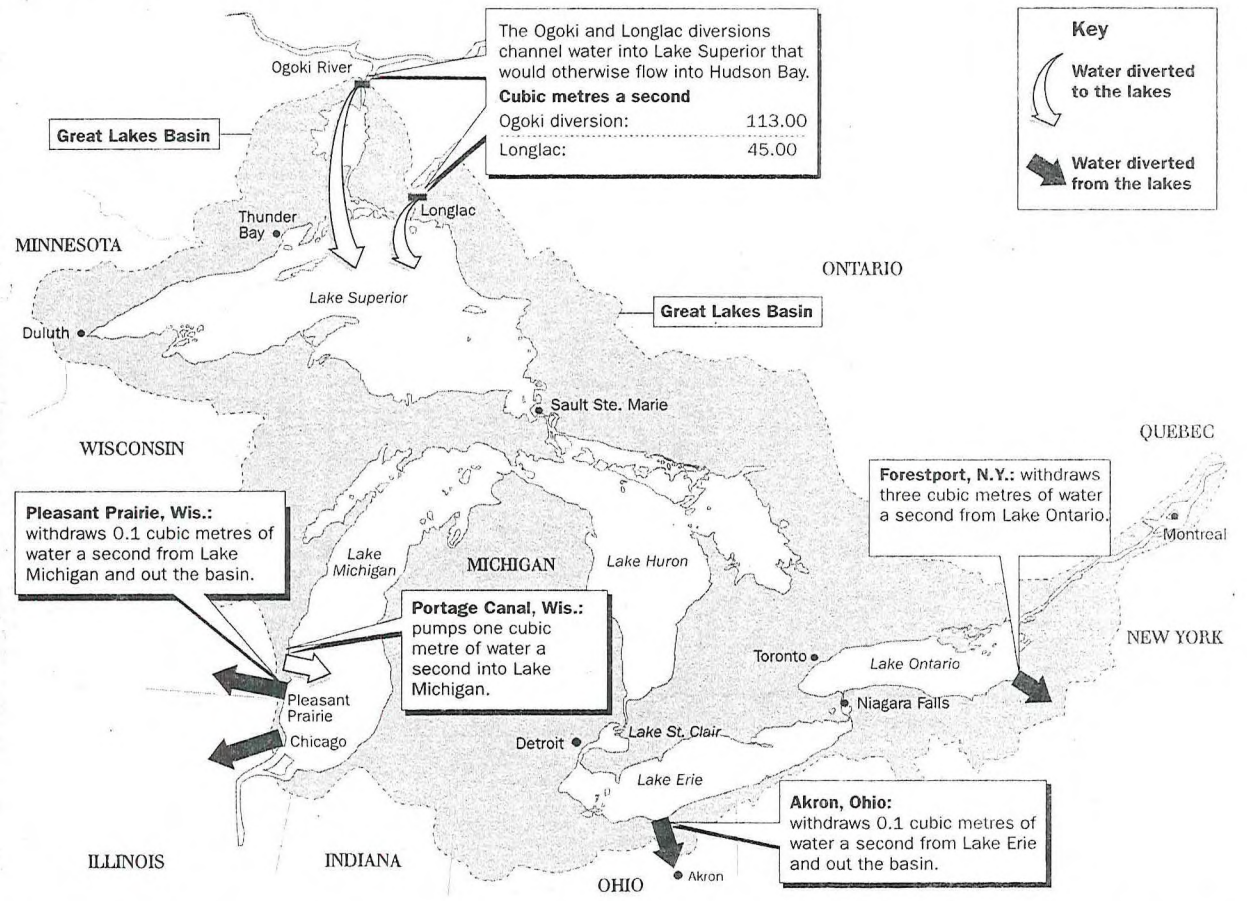
In Ontario, the province is diverting water in two places that would normally flow into the Arctic and into Lake Superior.

These three projects are all more than 50 years old, and the amounts involved largely balance each other. Most recent diversion proposals in the U.S. have been blocked because each of the eight states has a veto power over transfers outside the basin.

There are concerns this veto rule would not survive a court challenge, a worry that has led to the development of the new pact.

Tapping into the Great Lakes

Great Lakes provinces and states unveiled a sweeping plan that would place tight controls over any efforts to divert water from the lakes.



THE GLOBE AND MAIL

User-Agent: Microsoft-Entourage/10.0.0.1309
Date: Tue, 20 Jul 2004 08:45:19 -0400
Subject: FW: Toledo Blade article-see quote by John Jackson
From: John Jackson <jjackson@web.ca>
To: Reg Gilbert <reg@glu.org>, Sarah Miller <millers@lao.on.ca>

--
John Jackson
17 Major Street, Kitchener, Ontario N2H 4R1
519-744-7503
Fax: 519-744-1546

------ Forwarded Message
From: KirschnerB@windsor.ijc.org
Date: Tue, 20 Jul 2004 08:15:51 -0400
To: jjackson@web.net
Subject: Toledo Blade article-see quote by John Jackson

Article published July 20, 2004

Plan to curb diversion of water from Great Lakes
Governors would need to approve withdrawals

HIGHLIGHTS
* New or increased withdrawals from the Great Lakes would be allowed only if they improve the condition of the lakes.

* Projects that would involve diverting more than 1 million gallons of water per day out of the region must be unanimously approved by the eight Great Lakes states.

* Projects that would involve pulling more than 5 million gallons of water per day within the basin must be approved by six of the eight states.

* Each state has up to 10 years to enact policies to regulate projects that withdraw more than 100,000 gallons of water per day.

* Area municipalities that fall outside the basin could begin or increase diverting water from the lakes if they return

cleaned wastewater.

* A uniform decision-making standard based on science will be used in evaluating
[illegible]e proposals for new or
increased water uses.

By ERICA BLAKE <mailto:eblake@theblade.com>
BLADE STAFF WRITER

Taking water from the Great Lakes basin for use elsewhere in the United States or for new multimillion-gallon users within the basin would require approval from all or nearly all of the eight Great Lakes governors under a plan released yesterday.

Though the proposed Great Lakes Charter Annex leaves the door open for [illegible] from the world's largest source of fresh water to be diverted outside the basin, permission would be granted only if treated wastewater is immediately returned and lake conditions are improved.

"One of the purposes of what we are trying to accomplish is to create a uniform standard that governs water diversion," said Ohio Gov. Bob. Taft, a co-chairman of the Council of Great Lakes Governors who announced the proposal yesterday with Wisconsin Gov. Jim Doyle.

"This is to protect us from the demands of outside the region that threaten the ecology."

To become law in the United States, the agreement signed by the eight governors must be approved by the legislatures in each state and by Congress - a process expected to take a few years.

As The Blade reported in an award-winning series in 2000 called "The Future of the Great Lakes: Who Controls The Water," massive pipeline systems have been discussed that would divert water from the Great Lakes to supply areas of the United States such as the Southwest, where b[illegible]ning population growth has

overwhelmed available water.

These population shifts have given those areas more clout in Congress that could be used to force water diversion outside the Great Lakes,

government and environmental leaders in the basin fear.

"There have already been attempts to divert Great Lakes water out of the region. ... We expect those types of efforts could well increase," Governor Taft said.

The proposed charter annex would require municipalities with new or increased water diversions to return cleaned wastewater to the lakes to reduce the effect on water levels.

Conservation efforts would be required of those who live and work within the basin.

Any proposal to divert more than 1 million gallons of water a day out of the region must receive the unanimous approval of the governors of each of the Great Lakes states - Ohio, Michigan, Illinois, Indiana, Minnesota, New York, Pennsylvania, and Wisconsin - in consultation with the premiers of the Canadian provinces of Ontario and Quebec.

A supermajority of at least six governors must approve any plan within the Great Lakes basin to withdraw an average of 5 million gallons a day over 120 days.

Smaller proposed diversions would be reviewed by the jurisdictions where they were recommended.

States would have 10 years to implement rules covering those diversions.

The proposed agreement is the result of three years of work by the Great Lakes governors and an advisory group of environmentalists and representatives of local government, business, and agriculture.

Environmental groups applauded the restrictions, although they noted that the standards were well above the amount of water needed by an average agricultural or factory operation.

"This is a laudable step forward in our journey to protect the Great Lakes," said Michele DePhilip, aquatic ecologist for The Nature Conservancy. "Currently our states and provinces are managing the Great Lakes under a patchwork of rules and policies."

The agreement is an update of the 1985 Great Lakes Charter signed by all the Great Lakes governors that seeks to curb water diversion and bulk water exports. In 2001, the governors agreed to create a binding agreement by 2004 that would protect, preserve, restore, and improve the Great Lakes.

Noah Hall, senior manager of the Great Lakes Water Resource Program of the National Wildlife Federation, said his only concern of the proposed agreement is that individual states have 10 years to create a review

process for withdrawals from the lakes that fall below what requires regional review.

"We're obviously disappointed that states would have a full 10 years to p in place those standards," he said.

John Jackson of the Canadian-based Great Lakes United applauded the interstate compact but expressed concerns about the lack of teeth given to the international agreement.

Because the international aspect of the agreement is not a binding accord, Mr. Jackson said it was essential that Ontario and Quebec each pass legislation that implement similar laws.

Sam Speck, director of the Ohio Department of Natural Resources and chairman of the working group responsible for the proposal, said the key is cooperation among all parties involved.

"We're all in this together and treating this as an effort to make sure that no matter what water is withdrawn, we will not only sustain the Great Lakes but improve them as well," he said.

The proposed agreement is expected to face some opposition from farm and business officials during the 90-day public comment period.

t Piggott, manager of the Michigan Farm Bureau's Agricultural Ecology Department, said he is worried the new regulations will impinge on farmers' ability to use water.

"We're not in short supply of water," Mr. Piggott said. "It's hard to tell farmers they need to be cautious of something when it's so plentiful."

The Council of Great Lakes Governors will hold public hearings on the proposal on Sept. 8 in Chicago and on Sept. 20 in Toronto.

Each of the Great Lakes states also is expected to hold public hearings on the proposal.

In addition, public comments can be submitted to the governors' council at www.cglg.org. Officials said that the comments will be considered so that a final draft of the agreement will be before the states early next year.

Information from the Associated Press was used in this report.

------ End of Forwarded Message

Stemming the flow fr

Ontario, Quebec and eight U.S. states develop pact to restrict water exports

BY MARTIN MITTELSTAEDT
ENVIRONMENT REPORTER

A pact to block large-scale water exports from the Great Lakes to parched parts of the U.S. South has been developed by eight U.S. states that border the lakes, along with the governments of Ontario and Quebec.

The proposal, which has been under negotiation for the past three years and was announced yesterday, would place severe hurdles on large-scale water diversions and establish a new body that would have the power to vet water-export proposals.

Under the proposal, any request to divert from the basin more than 3.8 million litres of water a day — about the amount in two Olympic-sized pools — averaged over a 120-day period, would have to be approved unanimously by all eight U.S. states and reviewed by the Canadian provinces.

'People look at all that water [in the lakes] and I think they get a bit deluded.'

There are also tough conditions requiring most of the water to be returned, in non-polluted condition, to the lakes and that the amount requested be reasonable. With these types of severe restrictions, it will be virtually impossible for arid regions of the U.S. that don't lie very close to the Great Lakes to gain access to the water body.

"It sends out a very strong message to people outside the basin that they should be solving their problems close to home," said Sarah Miller, a water-policy expert at the Canadian Environmental Law Association.

The agreement was lauded by politicians, who say that in an increasingly thirsty world, the five Great Lakes, the planet's largest body of fresh water, are a resource that must be protected from those who covet it.

The pact "will protect us against demands from outside the region that threaten the ecology, the environment and the beneficial use of waters of the Great Lakes," Ohio Governor Bob Taft told the news conference in Seattle announcing the pact yesterday.

Besides Ontario and Quebec, the pact involves the U.S. states sharing Great Lakes shorelines — New York, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Wisconsin and Minnesota. The St. Lawrence River in Quebec is considered part of the Great Lakes drainage system.

The proposal is open for 90 days of public comments, as well as public meetings that will be held in Chicago on Sept. 8 and in Toronto on Sept. 20.

The 10 governments hope to have a final version of their proposal ready for approval by next spring, but it may take a decade for the agreement to be fully implemented because it must be approved by the U.S. Congress, each state and the two provinces.

Although the Great Lakes are immense, and contain about 20 per cent of the world's fresh water, they are a finite resource. Only about 1 per cent of the water in the lakes is renewed each year from precipitation or other inflows, such as rivers, meaning that withdrawals above this amount would cause water levels to plunge.

"People look at all that water [in the lakes] and I think they get a bit deluded," said David Schindler, an ecology professor at the University of Alberta. "The actual water that is replaced in each year in the Great Lakes is minuscule."

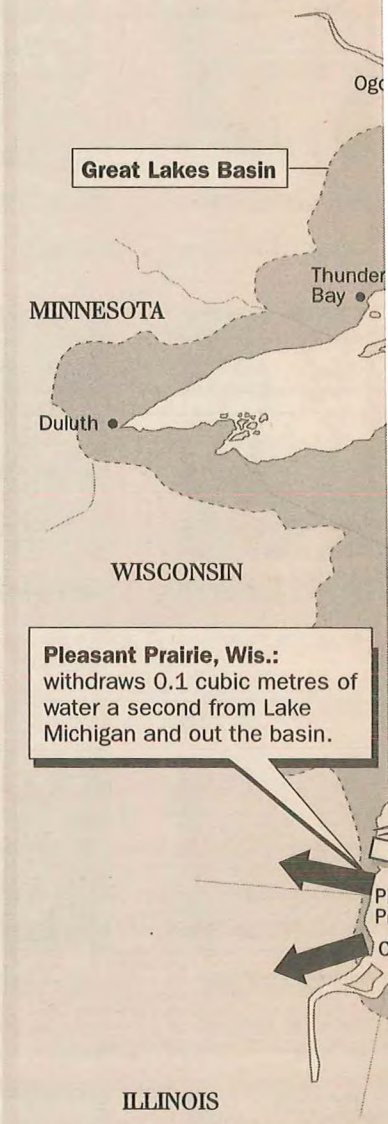
But under the new proposal, water-short areas in the U.S. that lie just outside the Great Lakes basin may have better chances of putting straws into the lakes. There are many water-short communities such as this in the U.S., including parts of suburban Milwaukee and areas of Ohio near Akron.

There is a "high risk" that these near-lake communities will try to gain access to the water and place demands on the lakes, said Adele Hurley, director of the water-issues program at the University of Toronto's Munk Centre for International Studies.

The announcement of the deal was made in Seattle, where U.S. governors are holding an unrelated meeting. The proposal also contains new rules that would govern large-scale consumption of lake water for local use, such as for water bottling, industrial processes and lawn watering.

Tapping into the Grea

Great Lakes provinces and states u
place tight controls over any efforts

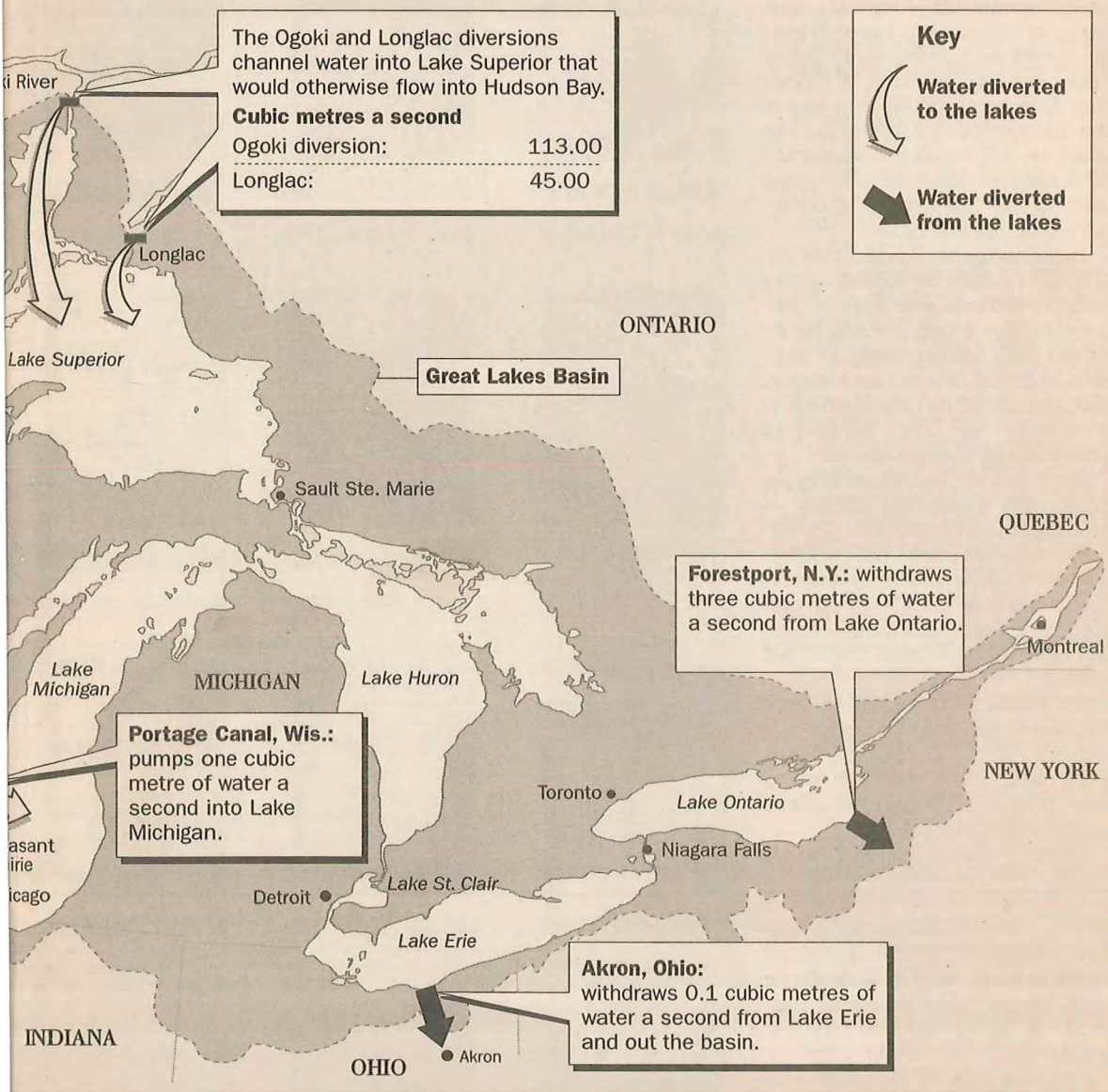


ister Joe Volpe, Trade Minister [illegible]

om the Great Lakes

Lakes

veiled a sweeping plan that would
o divert water from the lakes.



THE GLOBE AND MAIL

Those wanting to consume 19 million litres or more a day, averaged over 120 days, would have to show how they can avoid this extra water use through conservation. They would also have to show that their withdrawals aren't harming the lakes, among other conditions.

Diversions of Great Lakes water outside the basin have always been contentious, and there are currently only three of any consequence.

In the 1990s, a plan by an Ontario company to scoop up tanker loads of water from Lake Superior caused an international uproar and was eventually blocked by the province.

The largest current diverter is Chicago. It's taking water from Lake Michigan and diverting it through a shipping canal into the Mississippi River system.

In Ontario, the province is diverting water in two places that would normally flow into the Arctic and into Lake Superior.

These three projects are all more than 50 years old, and the amounts involved largely balance each other. Most recent diversion proposals in the U.S. have been blocked because each of the eight states has a veto power over transfers outside the basin.

There are concerns this veto rule would not survive a court challenge, a worry that has led to the development of the new pact.

Detroit Free Press
www.freep.com

LAKES PROTECTION: Speak out for a plan to prevent water exports

August 10, 2004

The job of saving the Great Lakes from diversions needs the active involvement of Michiganders. The first public opportunity comes at 6 p.m. on Aug. 30 at the St. Clair Shores City Hall.

The outcry was huge in 1998 when a small Canadian company wanted to take Lake Superior water by the boatful to Asia. Equally disturbing to many people is the bottling of spring water for sale, which continues in Mecosta County in the face of legal challenge.

Such activities wouldn't be likely to suck the lakes dry, but they act as important warning flags in a thirsty world. The tanker plan, in particular, set off alarm bells that pushed the Council of Great Lakes Governors, in conjunction with their Ontario and Quebec counterparts, to negotiate a new framework for water oversight. The current U.S. law -- in which one governor can veto a diversion based on any standard he or she chooses -- was deemed too shaky to hold up under international trade pacts.

The new agreement, known as Annex 2001 (it will become an "annex" to the Great Lakes Charter), calls for approval of all eight governors for major diversions and of six of the eight for big new uses within the basin. The thresholds seem high, but water use will be monitored at much lower levels. Most important, at every level, the annex calls for users to return the same quantity of treated water. For all practical purposes, this eliminates export except to cities close enough to pipe treated wastewater back to the lakes.

This is the beginning of a process that will seem long and arcane, but it is essential that Michiganders make a strong show of support. (For more meeting times, and ways to comment online, go to www.cglg.org)

Michigan -- the state shaped by the lakes -- must bring fervor to this effort, or risk having everyone else wonder why they should care.

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limits on water takings based on sound science, does not leave the door open for large-scale water diversions and promotes water conservation for all users.

Sara Ehrhardt
National Water Campaigner
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REPORTER Heather Cohen

The latest municipality to sign-on to take water from Lake Huron is Strathroy Caradoc. The municipality will spend $18 million over the next few years to connect to a pipeline which draws water from the lake. Reporter Heather Cohen talks about the project and says that the municipality will not draw much water from the lake. She also talks about the problems associated with well and ground water.

(Toronto; 9:30 minutes)

Clips: Jim Fairlie, Chief Administrator, Stratroy-Caradoc; Thomas Schmidt, Director of Water, Waterloo Region

Letter: Bulk water exports would be a negative

The Windsor Star
Wed 08 Sep 2004
Page: A7
Section: Editorial/Opinion
Byline: Sara Ehrhardt
Source: Windsor Star

Re: Bulk Water Ban Praised. Although the International Joint Commission claims that Canada has made good progress concerning bulk water removals, an analysis of the recently released Draft Annex 2001 tells a different story.

The IJC review concluded that no removals from the Great Lakes should be authorized unless it can be shown that they will not adversely affect the integrity of the Great Lakes Basin ecosystem.

However as we speak, the U.S. Great Lakes governors, Ontario and Quebec are hastily pushing through an agreement that will do just that.

The proposed Annex 2001 will set up a system whereby our lakes could be gradually sucked dry. Citizens have only 90 days to comment on an agreement that could jeopardize the largest freshwater ecosystem in the world.

We must demand that our governments live up to the praise of the IJC and ensure that this pact safeguards the Great Lakes as a public trust, does not undermine

Canada's share of control and responsibility over the lakes, establishes

SCHMIDT: Well water and when I say well water I truly mean water that is ground water not water that's directly connected to the surface. So, if you have water that can get into your well, without first being filtered to the ground, that's dangerous. But if you have ground water that's been filtered, it's essentially being naturally treated and bacteria had been removed and the water is generally safe. Most of our wells, when we test them, they show no bacteria in the ground water that we're using. But, we still have to disinfect. You still have to have that additional barrier.

REPORTER: So, as he explained, the ground, with its layers of gravel and earth, access a huge natural filter for water.

CBC: Okay. Well finally Heather, if you take me back up the pipeline to the town of Strathroy where we began this conversation, they're getting off ground water, they're tapping into the lake. When does that actually happen?

REPORTER: The province has given Strathroy-Caradoc the necessary approvals to hook up to the Lake Huron pipeline and a contract for construction should be awarded next month. The province is also allowing the municipality to put off work to its existing ground water system and Lake Huron should be flowing into Strathroy taps via this pipeline, by 2006.

CBC: Okay, something to look forward to perhaps. Heather, we also had a number of calls and emails about the Ministry of the Environment, Leona Dombrowsky's comments about changes to water. We're going to feature through the week on the show as well, but interesting to see what listeners make of the ground water versus lake water debate as well. I'm sure we'll be hearing from them. Thanks very much.

REPORTER: Alright then, you're welcome.

CBC: Heather Cohen is our Southwestern correspondent.

things.

CBC: Okay, so you got all these municipalities taking their water from Lake Huron, nibbling away, is there some concern that the levels dropped then?

REPORTER: There is some concern. The International Joint Commission has a report out and it's called, Protection of the Waters of the Great Lakes. The report says that water from municipal supplies accounts for 28 per cent of the draw from the lakes for what is called consumptive use and a report also says, I'm quoting here, "for the 21st century there is a great deal of uncertainly regarding factors such as future consumptive use, small scale removals of water and climate change, present indications are that all three factors are likely to place downward pressure on water levels and the impacts could be significant." But we should point that climate, I'm told, has a much greater impact on all of these lakes than human activity, even when you put it altogether, industrial, municipal and everything.

CBC: And a little bit harder to control.

REPORTER: Yes, significantly.

CBC: Although some would argue that we have a bigger role to play there, but we won't get into that at this time.

REPORTER: That's right, yes.

CBC: Okay, with this interest from municipalities and taking water from Lake Huron, is there a sense that it's safer or better than ground water?

REPORTER: There may be a perception among the public, post Walkerton, that wells are suspect. Thomas Schmidt says that is a misconception and he says ground water is actually the cleanest water you can find.

looking at an alternate water supply and when we reviewed the alternatives that we had, we decided that the best alternative was going to one of the Great Lakes, either Lake Huron or Lake Erie. I think from a public perspective during our process the preference was clearly for Lake Huron and I think that's primarily a perception that people feel the water from Lake Huron would be cleaner than that from Lake Erie.

CBC: So they're going to be going for it too?

REPORTER: Yes. Well, they might. Now this region, if it ever does go to Lake Huron water, would keep well water available on standby.

CBC: Now just paint a picture for me here. How far is Kitchener-Waterloo from Lake Huron?

REPORTER: One hundred kilometres.

CBC: So they're not able to just tap into Lake Huron?

REPORTER: No, they would not be able to just tap into Lake Huron and 100 kilometres is a long way to push water. They would certainly need approvals from both the province and the federal government to do this and there is also a new level of by-national approval, which is pending. Work is proceeding on a proposed change or annex, to a Canada-US agreement, which is called the Great Lakes Charter. Now the Annex would prohibit water transfers from one water shed to another. That is in fact what London is doing now. They draw water from Lake Huron, they discharge it back into the Thames River so they have changed water sheds.

CBC: Got ya.

REPORTER: The annex would also require communities which draw water from any of the Great Lakes to contribute to the lake's well being, through a number of things, habitat, restoration or agricultural work, or other

municipalities still do rely on wells?

REPORTER: I was wondering that as well, especially for large municipalities and for that we go to the region of Waterloo, which is made up of the cities of Kitchener, Waterloo and Cambridge, plus assorted smaller municipalities, with a combined population of almost half a million. The region relies on wells for most of its water, four/fifths of its water, in fact has the largest well system of any municipality in Canada. In an interesting twist, the Region of Waterloo, actually takes some water from the surface, in this case it's the Grand River, and it's about one/fifth of their water, and they send it underground, this Alan is called injection. Thomas Schmidt is the Director of Water for the Waterloo Region.

THOMAS SCHMIDT (Director Water, Waterloo Region): So what it is, we take water from the Grand River, we treat it and then we inject that water, underground, and store it in an aquifer and then in the summer when we need more water, we're able to pump that water back out again. What we're really doing is we're using the space in the aquifer. The aquifer is made up of gravel and sand and there are voids, air around the gravel and sand and we're essentially filling that up water. So we're really using the ground as a storage for water..

REPORTER: So in a sense you can almost argue, they're turning surface water into ground water. They can keep it underground in this storage for up to a year and after that it is deemed to have traveled too far. It has become part of the aquifer. The Waterloo region is the only municipality in Canada using this system. But it is done elsewhere, notably in Florida and in California.

CBC: So is it safe to assume that that the half million people in the Waterloo region will be one group, no, maybe be the only group, not drawing on Lake Huron?

REPORTER: Actually that is not a safe assumption. Listen to what Thomas Schmidt says when he talks about the long term.

SCHMIDT: We have at least enough capacity for the next 30 years, but we feel that at some point in the future, after 30 years, we need to start

PAT MCNALLY (Director of Water, City of London): For quite some time London was basically fed by a series of well systems. Over the years we've slowly decommissioned most of the wells, not all of them. I think we're down to about seven or eight wells, as in a stand-by mode right now, but as the regulations on ground water supply continue to become more and more stringent, we're regularly reviewing the cost benefit of keep those wells in stand-by mode or abandoning them altogether. From the plant at Grand Bend, down to London, there are seven municipalities taking water off that pipeline with the source at Lake Huron. The municipalities are Blue Water, Lambton Shores, South Huron, North Middlesex, Lucan (inaudible), Middlesex-Centre and London.

CBC: Okay, each taking either the nibble or the bite, whatever the case may be.

REPORTER: That's right.

CBC: So now both people that we heard from there, Pat McNally in London and Jim Fairlie in Strathroy-Caradoc, referred to this increased regulation for ground water, right?

REPORTER: Yes.

CBC: So don't the rules apply to surface water as well?

REPORTER: They do. It's all drinking water that is under increased scrutiny from the province. The problem is, with well water, the heightened standards and testing have to be done at all well sites. Strathroy for instance, just a small place, it has 13 wells, where with a single large intake there are fewer areas to keep track of, so the expense is multiplied many times over for ground water and there are also new rules having to do with making sure that well water gets no exposure to surface contamination because, as you will recall, with Walkerton that was indeed an issue.

CBC: For sure. Okay, now you told me about the drawn water from Lake Huron, the move away from the wells, what about the opposite? Like which

said, which brings lake water down through Southwestern Ontario, from an intake near Grand Bend. Jim Fairlie is the chief administrative officer for Strathroy-Caradoc.

JIM FAIRLIE (Chief administrative officer, Strathroy-Caradoc): We looked at an engineer's evaluation with respect to the existing 13 well sites within Strathroy-Caradoc. The assessment was that we were going to spend somewhere in the neighbourhood of four to six million dollars simply to satisfy those MOE requirements. We further have higher iron and maganese content in the larger producing wells. That's very expensive to treat under the new standards. Having said all of that, it was still difficult to make that decision to go to spending $18 million for the connection to Lake Huron pipe.

CBC: Okay, but have there been problems with the community's current water system?

REPORTER: Jim Fairlie says there have not been problems from a health point of view, but he says the municipality does have some reservations about how much is left in the ground, so that that makes them consider alternatives and they don't really want to expand their well system because of all the regulatory requirements he was describing.

CBC: Okay. Well, let's talk then a little bit about who all is in on the pipeline. If Strathroy-Caradoc is taking a small amount, compared to other Southwestern Ontario users, how many are we talking about?

REPORTER: There are many municipalities. I don't know exactly how many. If you take all the ones that are around the lake itself actually on the peripheries, but there are seven municipalities taking water from the pipeline right now as it comes down from Grand Bend. The big user Alan, the City of London. They use, I think, 160 million litres a day, of Lake Huron water. So London takes about 80 per cent of its water from Lake Huron now. Lake Huron is 50 kilometres distant from London. In fact, the city draws from two of the Great Lakes, Lake Huron and Lake Erie, but most of its water comes from Huron. Now in the past, if you look past several years, London did rely on well water. Pat McNally is the Director of Water for the City of London.

Strathroy Caradoc signs onto lake water pipeline project

20040907R-0261

CBC: Well post Walkerton doubts about well water and increased regulation of course, are making the broad expanse of Lake Huron look pretty attractive. The latest to sign on the dotted line to take water from Lake Huron is the municipality of Strathroy-Caradoc, west of London. Strathroy-Caradoc will spend about $18 million over the next few years to connect up with a pipeline which draws water from the lake. When the connection is complete, the existing ground water system is going to be shut down. Heather Cohen has been looking to the thirst for Lake Huron water and she joins me now. Hi Heather.

REPORTER (Heather Cohen): Hi Alan.

CBC: Okay, so let's talk a little bit about Strathroy-Caradoc. They're a representative of the municipalities were hungering or thirsting, as you put it, for Lake Huron. What's inspiring their decision to go with lake water there?

REPORTER: Well you know, first of all, as you say I mean I think they're part of kind of a continuing drain from the lake. They're part of a trend, if you will. Strathroy-Caradoc, with its population of only about 20,000 will take very little from Lake Huron compared to some other municipalities, but it is the most recent to sign up.

CBC: Right, they're not going to be the biggest bite, but there are enough little bites to make a difference.

REPORTER: More of a nibble.

CBC: Yeah, yeah.

REPORTER: The municipality will hook up to an existing pipeline, as you

From: paula.thompson@mnr.gov.on.ca
To: danielle.dumoulin@mnr.gov.on.ca, david.delaunay@mnr.gov.on.ca, rob.messervey@mnr.gov.on.ca, Bill.Carr@mia.gov.on.ca, leith.hunter@mnr.gov.on.ca, millers@lao.on.ca, carolyn.dodds@mnr.gov.on.ca
Subject: FW: I: Transcript - Strathroy Caradoc signs onto lake water pipel ine project
Date: Thu, 9 Sep 2004 09:41:38 -0400

FYI -CBC Radio transcript - Lake Huron pipeline - includes discussion of Charter/Annex in context of potential Waterloo pipeline.

Paula Thompson

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-----Original Message-----
From: Meil, Laura (MNR)
Sent: September 9, 2004 8:13 AM
To: Thompson, Paula (MNR)
Subject: I: Transcript - Strathroy Caradoc signs onto lake water pipeline project

CBC Radio 1 (Toronto)

Tue 07 Sep 2004

Ontario Today

12:32 PM

Heather Cohen

From: paula.thompson@mnr.gov.on.ca
To: danielle.dumoulin@mnr.gov.on.ca, rob.messervey@mnr.gov.on.ca,
Bill.Carr@mia.gov.on.ca, leith.hunter@mnr.gov.on.ca, millers@lao.on.ca,
carolyn.dodds@mnr.gov.on.ca
Subject: FW: water-taking
Date: Wed, 8 Sep 2004 08:57:36 -0400

It looks like the CBC story I mentioned to some of you yesterday was about a Lake Huron pipeline

Also - a less than positive editorial in the Windsor Star by the Council of Canadians.

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-----Original Message-----
From: Cornale, Regis (MNR)
Sent: September 8, 2004 8:47 AM
To: Thompson, Paula (MNR)
Subject: water-taking

CSB is getting transcript. They'll send directly to you. Abstract is below...

Strathroy Caradoc signs onto lake water pipeline project

BROADCAST SUMMARY - 20040907R-0261

CBC Radio 1 (Toronto)

Tue 07 Sep 2004

Ontario Today 12:32 PM

The last time Canadians got really upset about water diversions from the Great Lakes was in 1998. An Ontario company was given a permit to export water by tanker ship to the Orient. After a public outcry and diplomatic objections the permit was cancelled.

That incident focussed attention on the neglected, leaky, and antiquated water laws and policies on both sides of the Great Lakes. Without firm rules how can we hope to protect these vital lakes? They're home to one-fifth of the world's freshwater and the source of drinking water for 25% of Canadians.

Fortunately, six years after that crisis we have before us two draft agreements. Some environmentalists in Canada are nervous about these agreements. They think they'll set up a regulatory framework that will amount to a license to export water.

I disagree. I've been privy to some of the complex negotiations among Ontario and Quebec and the eight American states that border the Great Lakes. To me having rules on water use is far better than the empty reservoir we have now.

There's no doubt pressure is growing on the Great Lakes. The millions of people who live around them are thirsty. Near neighbours and others further away, that have already depleted their groundwater stocks, are eyeing these seemingly limitless reserves.

It's true that Ontario and Quebec have already strengthened their laws to prevent future diversions

from the Canadian side of the Lakes. But will this be enough? No similar laws have yet been passed in the eight Great Lake states.

We risk more crisis management and purely political decisions if we walk away from the table as some are suggesting. And there's little guarantee that Ontario and Quebec will be at the table or even consulted when the inevitable proposals to increase the flows from the Chicago Diversion into the Mississippi River are made.

To be sure, with these agreements the devil is in the details and Canadians must examine them. But rather than ideologically rejecting the notion of formal rules we can make recommendations to strengthen these drafts. They could give us the first legally binding regime to protect the water of the Great Lakes. They will establish a rigorous set of ecological conditions to prevent further harm from large water withdrawals. Not only that...they will give the public a role in water-use decisions and they will mandate day-to-day water management improvements in the Great Lakes. It all adds up to a strong deterrent to those who want to turn on more taps.

The outcome of these efforts could act as a model for other provinces that share boundary waters with the U.S. and for other countries sharing water. Binding water agreements could resolve conflicts before they escalate into strife, crisis and scarcity. Which legacy will we leave in a water short world?

For Commentary, I'm Sarah Miller in Toronto.

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Original URL: http://www.jsonline.com/news/state/sep04/257483.asp

Diversion rules face rough waters to gain approval

Great Lakes hearing draws 100 in Chicago

By DAN EGAN
degan@journalsentinel.com

Posted: Sept. 8, 2004

Chicago high school teacher Andy Pearsons pedaled down to Navy Pier Wednesday afternoon after hearing on the radio earlier in the day news of a public hearing concerning Great Lakes water diversions.

He was the only one of about 100 people who attended the hearing, sponsored by the Council of Great Lakes Governors, to show up in shorts and T-shirt. Standing with his bike helmet under his arm, and amid a forest of blue blazers and a sea of black loafers, he confessed to feeling a bit out of place. But just a bit.

The meeting, after all, was held on a pier jutting into his favorite place, Lake Michigan.

"The idea of selling (the lake) off to a bottled water company or to an arid nation doesn't sit well with me," said the 32-year-old, whose first job was on a charter fishing boat operating out of his former hometown of Muskegon, Mich. "There are better ways to make money."

Most everybody agrees the Great Lakes should never be drained to fuel subdivisions and flood golf courses in faraway places such as Phoenix or Denver.

But deciding who is entitled to Great Lakes water and who is not could prove to be tricky business.

As chairman of the group appointed by the council to develop new rules for Great Lakes water diversions, Sam Speck has to figure out how to protect the country's most treasured reservoir of freshwater from overexploitation.

At the same time, the group of governor appointees must figure out how to satisfy a growing number of increasingly thirsty communities and industries in the region that believe they have a right to tap Great Lakes water.

"I don't know if we can do this, to be honest," Speck, director of the Ohio Department of Natural Resources, said minutes before a public hearing started.

Speck noted that the new rules his group has proposed must be unanimously approved by all eight Great Lakes governors and all eight legislatures. Any governor, any legislature, could hold the whole thing up.

"Nobody," Speck said, "is going to get everything they want."

New rules considered

As the law currently works, communities inside the massive watershed known as the Great Lakes Basin are entitled to a virtually unlimited supply of Great Lakes water.

Great Lakes

DIVIDED OVER WATER

Special Series: Divided Over Water (11/23/03)

Archived Coverage

8/17/04: Great Lakes advocate says aid flows elsewhere

7/19/04: Nearby regions could tap Great Lakes under plan

7/17/04: Toronto cools off using Lake Ontario waters

7/16/04: New Great Lakes rules expected on Monday

7/15/04: Clean water main ingredient in mayors' recipes for success

6/26/04: We're not alone in dumping sewage

eliminate all carcinogenic dyes and a wide range of heavy metals from their clothing and other product lines.

The European Union in their management of chemicals is also moving away from risk management towards a goal of a non-toxic environment.

Under their proposed chemicals regulation, known as REACH, carcinogens are identified as chemicals of very high concern and will be placed on such a list. A manufacturer or importer of any of these listed chemicals will only be permitted to use them with a time-limited authorisation from the European Commission.

In other directives that are already in effect, the substitution of safer chemicals for carcinogens is a legislated requirement. Substitution is an effective way to apply precautionary principle. It requires that hazardous chemicals be systematically substituted by less hazardous alternatives or preferably alternatives that are non-hazardous.

For example, Directive 98/8/EC (the Biocidal Products Directive) governs pesticide products and their placement on the market. It promotes safer products by providing for the possibility that active ingredients in pesticides may be refused entry onto the European market if another substance is available that poses less risk to health or the environment. It also creates a list of "low risk" products that are not allowed to contain any carcinogenic, mutagenic substances or chemicals toxic to reproduction. Products containing known or probable carcinogens are generally not authorized for use by the general public.

In Europe there is a complete prohibition on carcinogens in cosmetic products. This was put in place in February 2003 under an amendment to Directive 76/768/EEC (the Cosmetic Products Directive). It states that "given the special risks that substances classified as carcinogenic, mutagenic or toxic for reproduction...may entail to human health, their use in cosmetic products should be prohibited". This prohibition applies to known and probable carcinogens and, for the first time, places restrictions on *possible* carcinogens in products. The amendment also includes requirements for labeling hazardous substances in cosmetics. Several toxic chemicals have been restricted in cosmetics as a result of this Directive. In comparison, relatively little has been done in Canada or the United States to address potentially hazardous substances in personal care products.

The Directive 90/394/EEC (the Occupational Carcinogens Directive), discussed in Section 5, also calls for the substitution of carcinogens in order to protect workers.

7.5 Principles of extended producer responsibility, including clean production and take back of end of life products

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Sep. 20, 2004. 01:00 AM

Proposal called danger to Lakes

U.S. states want to divert water

Canadian critics to appear at hearings

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An American proposal to allow diversion of water from the Great Lakes threatens both the environment and Canada's sovereignty, critics warn.

In submissions to be made at public hearings today, several groups plan to argue the proposed agreement among eight U.S. states, especially in its current form, is dangerous.

The proposal, known as the Implementing Agreement for Annex 2001, would end a virtual moratorium on new or increased water diversions south of the border.

Even though the legislation would allow only small-scale diversions, water consultant Ralph Pentland warns it would be a very large foot in the door.

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Reached in Ottawa, he said, "In the business of water, once you say maybe, you say yes."

The Council of Canadians will present its "vehement" opposition to the plan at Toronto hearings by the Council of the Great Lakes Governors.

"The eight U.S. states are forming an agreement where they're going to sell Great Lakes water," said Sara Ehrhardt, water campaigner for the council. "It's going to open the door for the sale of water on a large scale."

The fear is that the combined effects of climate change, consumption and new diversions eventually could drain the lakes.

"It's not alarmist," Pentland says. "They're not going to go absolutely bone dry but there's a very good chance that, over the next 50 years, they could drop five to 10 feet easily."

A three-metre drop would likely be catastrophic, destroying or heavily damaging shipping, recreation, aquatic life, hydroelectricity generation and, ultimately, jeopardize the entire regional economy on both sides of the border.

About one-third of Canadians and 45 million people in all rely on what is the largest fresh-water eco-system in the world for their drinking water.

Thirsty American states, industry, farmers and international water sellers have long eyed the resource with increasing desire. They worry the proposed deal would strangle them in red tape.

Red tape is exactly the reason some environmental groups support the agreement, with some substantive changes.

They argue it would at least create a regulatory framework that would subject diversions to proper scrutiny and give Ontario and Quebec a voice, if not a veto, on proposed U.S. diversions.

"We have political expediency now," said Sarah Miller, of the Canadian Environmental Law Association. "Right now, there are no rules."

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Sarah Miller

Proposals to protect Great Lakes waters aren't perfect, but we can't walk away from the table, says water policy analyst and negotiator



Photo: NASA

This MODIS (Moderate Resolution Imaging Spectroradiometer) image from NASA shows all the North American Great Lakes Superior, Michigan, Huron, Erie, and Ontario.

By SARAH MILLER
Globe and Mail Update

Tuesday, Sep 21, 2004

UPDATED AT 1:14 AM EDT

This month, in public meetings across Ontario and Quebec, Canadians have been invited to come and defend our greatest national treasure - our water - from diversions and harmful withdrawals. These meetings may well be our last chance for decades to create binding laws to protect the Great Lakes.

Pierre Trudeau's parable of Canada-U.S. relations is apt: For years, Ontario and Quebec have been two mice in bed (a waterbed) with eight elephants, the Great Lakes states. Any jostling and their fragile mattress could spring a leak. Meantime, climate change, trade agreements and growing water shortages within and outside the Great Lakes Basin make all 10 strange bedfellows fearful of the future.

I was one of the few Canadians invited to participate on a stakeholders' advisory committee during the protracted negotiations for new legal protections. Frankly, I am terrified about the consequences of failure in this round.

It's worth noting that these negotiations have survived elections and changing governments in all 10 jurisdictions. Despite this, the negotiators have persisted in their efforts to create the first legally binding agreement since the antiquated 1909 Boundary Waters Treaty. Yes, there are potential flaws with the agreement they have come up with. But we cannot quit now.

Concern about potential drains on our fresh water resurfaced in 1998 when Ontario granted a permit to the Nova Group to export water from Lake Superior to the Orient. Diplomatic notes flew between Washington and Ottawa; the International Joint Commission (IJC) was summoned to study the protection of Great Lakes

waters.

Although Ontario withdrew Nova's permit, the lakes' vulnerabilities had been revealed. The IJC and the best legal advice that could be bought concurred that the Great Lakes had inadequate protections to manage and sustain the waters now and for future generations.

In June of 2001, the Great Lakes-area state governors and provincial premiers announced their intent to negotiate a legally binding annex to the Great Lakes Charter.

Since then, Ontario has tightened up its laws and now has the strongest water allocation system of all the 10 jurisdictions. It scrutinizes all withdrawal requests of more than 50,000 litres and has put a moratorium on withdrawals between watersheds. And Quebec has placed a moratorium on out-of-province diversions until it has implemented its new water policies.

But no similar new protections are yet in place in the United States.

This should be of great concern to Canadians, a quarter of whom depend on the Great Lakes for their drinking water. Since 1985, when the Great Lakes Charter (a sort of gentlemen's agreement) was signed, we have had little power to protect Great Lakes waters when U.S. claims arise. Our only (slim) hope to stop diversion proposals south of the border has been that one Great Lakes state would veto a water diversion proposal by another one under the U.S. Water Resources Development Act.

In the current talks about preserving the Great Lakes, U.S. negotiators acknowledge that they're very concerned about weaknesses in the Water Resources Development Act. Many believe it may not endure a court challenge. For one thing, they say the act covers only surface waters. That is, as it now stands, the act may not stop a groundwater diversion proposal such as the claim by Waukesha, Wisc., that it has a right to divert some of Lake Michigan's waters to feed its growing thirst, by right of the fact that some of its groundwater flows into Lake Michigan. No wonder U.S. conservationists are so eager to tighten up the act's terms.

Despite prior notice and consultation provisions in the 1985 agreement, Ontario and Quebec have not always been invited to discuss diversion proposals. Indeed, decisions on diversion proposals have been purely political. There have been no ecological protection standards in place that would give those seeking to protect the Great Lakes rational reasons to just say no.

And as North American water shortages increase, the elephant herds will search for new resources to quench their thirst.

A strong public response at the public meetings being held in Quebec and Ontario this month (today's is in Windsor, tomorrow's is in London and the last will be in Kingston on Sept. 28) can have a major impact on the outcome, as will public input before the negotiators' Oct. 18 comment deadline.

Negotiators have tried to put together a series of legally binding protections and rules that are at least as rigorous as trade regimes. Critics of these draft agreements charge that, despite the negotiators' best efforts, the new rules could lead to more diversions. But if we walk away from the table now, having no rules in place will almost certainly allow new drains on the Great Lakes. Deep-sixing this attempt to protect the lakes can only make many industrial farming operations and

other water-intensive users very happy.

From my glimpses into the negotiating room, I think it's a miracle we have got this far. Constitutional and other differences have almost been insurmountable, which is why we have ended up with two distinct agreements. One is a U.S. compact that legally binds the eight state "elephants" to act together as a herd; the other is a regional agreement signed by all 10 jurisdictions that allows Ontario and Quebec to participate as two solitudes on common interests and to bind themselves by incorporating the decision-making standard into their domestic laws.

If signed by all 10 jurisdictions, the agreement sets high hurdles for diversions, with strong burden-of-proof demands. Parties seeking Great Lakes water must prove they have no reasonable alternatives. Parties who take out water are required to return water - what's known as "return-flow requirements." Such parties must prove their activities have no significant or cumulative impacts on the water system. They must show proof of water conservation, and they must seek consensus among all jurisdictions.

The agreement also requires all jurisdictions to improve their day-to-day water management, data collection and water conservation practices. And it will finally give us a way to force ourselves to relinquish the title of the world's No..1 waster of water.

If we act like mice and run away from these negotiations, everyone - every creature - who depends on the Great Lakes ecosystem will suffer and so will future generations.

The Canadian Environmental Law Association urges concerned Canadians to keep working on these agreements. Let's strengthen them - and strengthen the protection of our shared treasure.

Sarah Miller is a water policy researcher with the Canadian Environmental Law Association.

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Questions to consider when evaluating the Great Lakes Charter Annex

SIGNIFICANT IMPROVEMENTS

Has the Annex enshrined and advanced conservation in the Great Lakes Basin?
Is it sustainable as a long-term strategy to protect the ecosystem from harmful withdrawals?
Is the decision-making standard legally binding and enforceable?
Will the return flow requirements of the standard protect the ecosystem?
Will the improvement standard protect the ecosystem?
Is the Annex weighted properly. Are there enough requirements in place to ensure a harmful proposal will be rejected?

EQUITY

Will the proposal protect the Great Lakes Ecosystem (or just parts of it)?
Will all ten Great Lakes jurisdictions have the same level of protection in place?
Will all jurisdictions participate equally in decisions made on withdrawals?
Will communities in the Great Lakes have the same ability to participate in Annex deliberations and outcomes?
Will all jurisdictions have the ability and capacity to generate water use data for all major sectors using the waters of the Great Lakes?
Will applicants within and from outside the Great Lakes be treated the same?

TRANSPARENCY

Is the Charter Annex understandable?
Is it clear how regional and compact decisions will be made?
Is it clear how reasonable alternatives will be evaluated?

ACCESSIBILITY

Is it clear how the public will be involved in annex

DURABILITY

How long will it take to fully implement the Great Lakes Charter Annex?
Can protections be put in place sooner?
What happens if some jurisdictions lag behind others in implementing the Annex?

THE DO NOTHING OPTION

Can we afford to go into the water short 21st century without new protections for the Great Lakes Ecosystem?
Can the Provinces count on being involved in international discussions of all large withdrawal proposals on the US side of the Lakes if the Annex is not implemented?

sending their comments in writing to the Ontario Environmental Bill of Rights Registry and the Council of Great Lakes Governors.

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Date: Tue, 14 Sep 2004 06:37:54 -0400
Subject: FW: [SuperiorAllianceSC] Great Lakes water withdrawal issue LSA Waterkeeper discussion in Thunder Bay
From: John Jackson <jjackson@web.ca>
To: Reg Gilbert <reg@glu.org>, Sarah Miller <millers@lao.on.ca>

--
John Jackson
17 Major Street, Kitchener, Ontario N2H 4R1
519-744-7503
Fax: 519-744-1546

------ Forwarded Message
From: Gbdaleview@aol.com
Reply-To: SuperiorAllianceSC@yahoogroups.com
Date: Sun, 12 Sep 2004 20:12:21 EDT
To: superior-eco@great-lakes.net
Subject: [SuperiorAllianceSC] Great Lakes water withdrawal issue LSA Waterkeeper discussion in Thunder Bay

This would also be the TV overvoice (Thurs. Evening) in a Thunder Bay interview when Bob Olsgard presented a session at in Thunder Bay; there was a 'clip' of Bob's actual comment with it as well.

A CBC radio interview was also on at 5:50 pm Wed evening the 8th.

****
Local News
Water Withdrawl Agreement...Bob Olsgard
Tb News Source
Web Posted: 9/10/2004 8:48:27 PM
Two international agreements affecting future withdrawls of water from the Great Lakes are getting some support from an area environmental group. The Lake Superior Alliance says both agreements have the potential to make a positive difference in the lakes.

Governments on both sides of the border are now gathering public comment. A public meeting will be held in Thunder Bay on Monday into an agreement being developed jointly by Ontario and Quebec. The other is being drafted by eight States bordering the lakes. Alliance coordinator, Bob Olsgard says while the agreements don't prohibit the withdrawal of water, there are provisions that will make it extremely difficult. He's now encouraging the public to get involved, especially with the American agreement. He says Canadians CAN make a difference in how that plan is developed. The public has until October 18th to comment. Olsgard says the public can provide input by attending the upcoming meetings or by



Great Lakes Article:

Great Lakes water siphoning at risk
By Diane Kubiak
Post-Tribune (NW Indiana)
Published August 23rd, 2004

Michigan City — If what's in that ubiquitous plastic water bottle is a commodity, the Great Lakes may need more protection than current international trade agreements provide.

That's one impetus for "Annex 2001," a legislative guideline being developed by the Council of Great Lakes Governors and others for protecting the Great Lakes and its watershed from depletion, exploitation and further damage. The council is seeing public comment on its current draft document through Oct. 18.

The threats are many, immediate and not all local, explained Cheryl Mendoza of the Lake Michigan Federation, who met with a roundtable of area environmentalists at the Save the Dunes Council headquarters here on Barker Road last week.

Imagine the outrage and concern, she said, when an Asian tanker began mining water out of Lake Superior in full view of Canadians. Imagine the shock and fear that followed, she added, when the tankers argued that free-trade agreements allowed them to treat water as any other commodity. If you can sell it, you can't interfere with its free trade.

While the eight Great Lakes governors and two Canadian premiers have agreed the lakes need to be protected, their vehicle for protecting it, the Great Lakes Charter Annex Agreement in 2001, "Annex 2001" for short, might need more teeth, maintains Mendoza. The lakes, she said, hold 20 percent of the world's available fresh surface water and 95 percent of the fresh water in the United States.

The agreement, on line at www.speakongreatlakes.org, is designed to meet the goals of the Canadian-American agreement: To prevent or minimize water loss through the implementation of conservation measures which are environmentally sound and economically feasible; to prevent adverse individual or cumulative actions which impact the quantity or quality of the water or natural resources dependent on the Great Lakes Basin and to require

users to improve the waters or the water dependent resources in the basin.

The waters in the Great Lakes are glacial deposits from the last ice age. Only 1 percent of what is taken is now returned, said Mendoza.

"It's a world-class resource," she said. "It deserves world-class protection."

She said the draft, although a major step, is weak on several points and may not, if implemented as is, achieve the goals of Annex 2001. The best time to change it is now, she said, before it goes to state assemblies and the U.S. Congress.

"Our fight now is to try and get improvement back in," she said, saying the draft needs to be more clear on who has to do how much and why. Right now the line is at 5 million gallons a day.

Environmentalist Herb Read said that was too lenient and does not deal with the cumulative effects of smaller operations. He said Asia should look at cleaning up its own water systems before it mines water from the Great Lakes.

Lee Botts, a local environmentalist, said the mere anticipation of the agreement has already had an impact. "It has forced the states, including Indiana, to do a much better job of accounting for water use." She said Illinois had the best data at a recent conference she attended in Toronto.

"Don't forget Indianapolis doesn't think we border the Great Lakes," said Jack Harris of Valparaiso, a member of the Northwest Indiana Steelheaders. He noted that President Bush, campaigning in Traverse City, Mich., indicated his support by telling people there the Great Lakes were not for sale.

Botts said the initial statements from Sen. John Kerry's presidential campaign, seen by some as negative, were quickly modified with a next-morning news release.

"There's been a lot more communication with his campaign since then," she said.

Mendez said the draft currently discriminates between "in-basin" and "out-of-basin" users and that such discriminatory language may put the whole document at odds with free trade agreements.

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Great Lakes Article:

Great Lakes management proposal to be reviewed
Port Clinton News Herald
Published August 19th, 2004

The first in a series of public meetings to discuss proposed agreements to manage and protect waters of the Great Lakes basin will be Thursday, Aug. 26 in Toledo.

The Ohio Department of Natural Resources, in cooperation with the University of Toledo College of Law, will host two sessions, at 2 and 6 p.m. in the College of Law auditorium, 2801 Bancroft St., Toledo. ODNR officials will explain the draft agreements, take questions and offer opportunities for public comment.

On July 19, the eight Great Lakes governors and the premiers of Ontario and Quebec announced a 90-day public review period for agreements created to update the way the Great Lakes and the waters of the Great Lakes basin are managed and protected. The agreements will implement Annex 2001, a supplementary agreement to the Great Lakes charter that was adopted by the governors and premiers in June 2001.

The draft Annex implementing agreements are the result of three years of effort by a state/provincial working group to address Great Lakes Basin protection issues ranging from water consumption to diversion. During the review period that extends until Oct. 18, the draft agreements are available for the public and all interested groups to read and make comments. The draft documents are available at www.ohiodnr.com

Specific protective measures in the draft implementing agreements include:

A commitment that conservation and information programs will be put in place and maintained in all the Great Lakes states, Ontario and Quebec;

A commitment to use a uniform, resource-based decision making standard in evaluating future proposals for new or increased water uses;

A commitment to a collective decision making process for future proposals for regionally significant new or increased water uses; and

A requirement that all future new or increased diversions and regionally significant water uses in the Great Lakes Basin result in an improvement to the basin's ecosystem.
During the 90-day comment period, public meetings will be held throughout the Great Lakes region to explain the agreements and elicit public comment. Meetings scheduled for Ohio include:

Thursday, Aug. 26 -- Toledo

University of Toledo College of Law auditorium 2801 Bancroft St.

2 to 4 p.m. and 6 to 8 p.m.

Tuesday, Sept. 14 -- Ashtabula/Geneva Area

Ballroom - Geneva State Park Lodge and Conference Center

4888 Ohio 534, Geneva-on-the-Lake

6:30 to 8:30 p.m.

Tuesday, Sept. 21 - Akron/Cleveland Area

Brecksville Community Center One Community Drive, Brecksville

2 to 4 p.m. and 6:30 to 8:30 p.m.

Wednesday, Sept. 22 - Norwalk/Sandusky Area

Huron County Department of Job & Family Services

185 Shady Lane Drive, Norwalk

6:30 to 8:30 p.m.

Thursday, Sept. 23 - Findlay

ODNR Division of Wildlife District 2 Office

952 Lima Ave., Findlay

2 to 4 p.m.

Columbus - September date and location to be announced.

The public may also comment before Oct. 18 by writing to Annex Comments, ODNR Division of water, 1939 Fountain Square Court, Building E, Columbus, Ohio 43224 or by e-mail to annexcomments@dnr.state.oh.us
Once the 90-day period is complete and public comments have been taken into account, the agreements will be refined and presented to the governors

From: "M Reilly" <maureen.reilly@sympatico.ca>
To: <wateract-l@list.web.net>
Subject: [Wateract-l] Cornell Report - US Farmers : drain on world water supply
Errors-To: wateract-l-admin@list.web.net
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List-Help: <mailto:wateract-l-request@list.web.net?subject=help>
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Environmentally conscious agricultural practices by U.S. farmers would ease drain on world water supply, Cornell ecologists report
October 19, 2004
Cornell News

http://www.news.cornell.edu/releases/Oct04/water_resources.hrs.html
<http://www.news.cornell.edu/releases/Oct04/water_resources.hrs.html>

ITHACA, N.Y. -- In a world plagued by shortages of water, three facts stand out in an analysis by Cornell University ecologists: Less than 1 percent of water on the planet is fresh water; agriculture in the United States consumes 80 percent of the available fresh water each year; and 60 percent of U.S. water intended for crop irrigation never reaches the crops.

Their report in the October 2004 journal BioScience (Vol. 54, No. 10, "Water Resources: Agricultural and Environmental Issues") names farmers as "the prime target for incentives to conserve water." The report is particularly critical of irrigation practices in the United States, where subsidized "cheap water" offers scant incentive for conservation.

Thirsty Agriculture

Estimated liters of water required to produce 1 kilogram of food:

Crop	Liters/kg
Rice	1,600
Wheat	900
Potatoes (dry weight)	630
Broiler chicken	3,500
Beef	43,000

(Source: "Water Resources: Agricultural and Environmental Issues," BioScience, October 2004)

"Part of the problem is the decision by farmers on

what to grow where," says David Pimentel, a Cornell professor who led nine student ecologists through an exhaustive analysis of research conducted at other institutions and government agencies. "We learned, for example, that to produce wheat using irrigation requires three times more fossil energy than producing the same quantity of rain-fed wheat. The next time you make a sandwich, think about this: One pound of bread requires 250 gallons of water to produce the grains that go into the bread."

At particular risk, the ecologists discovered, are aquifers, the once-vast but now diminishing underground repositories of water that are tapped by wells for agricultural irrigation and drinking water. "Given that many aquifers are being over-drafted, government efforts are needed to limit the pumping to sustainable withdrawal levels . . . Integrated water resource management programs offer many opportunities to conserve water resources for everyone, farmers and the public," they write in their report in BioScience, a publication of the American Institute of Biological Sciences.

Their report concludes with a six-point priority list for using water wisely:

Farmers should be the prime target for incentives to conserve water.

Water-conserving irrigation practices, like drip irrigation, should be implemented to reduce water waste.

Water- and soil-conservation practices, like cover crops and crop rotations, should be implemented to minimize rapid water runoff related to soil erosion.

Water subsidies that encourage the wasteful use of water by farmers and others should be eliminated.

Forests, wetlands and natural resources should be protected to enhance the conservation of water.

Water pollution needs to be controlled to protect public health, agriculture and the environment.

Other authors of theBioScience< report were students in Pimentel's graduate-level class, Environmental Policy: Bonnie Berger, David Filiberto, Michelle Newton, Benjamin Wolfe, Elizabeth Karabinakis, Steven Clark, Elaine Poon, Elizabeth Abbett and Sudha Nandagopal.

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Clean Wisconsin
Environmental Advocates of New York
Great Lakes United
Lake Michigan Federation
Michigan Environmental Council
National Wildlife Federation Great Lakes Office
Ohio Environmental Council
Union québécoise de la conservation de la nature

Environmental Group Comments on the Proposed State-Provincial "Great Lakes Basin Sustainable Water Resources Agreement"

DRAFT – Sept. 7, 2004

Summary comments

The proposed international agreement among the two provinces and eight states of the Great Lakes – St. Lawrence River ecosystem is an important step forward in protecting Great Lakes basin waters from bulk water exports, diversions, and abuse. However, the proposed agreement needs a significant number of improvements to achieve its aims of fully protecting the basin ecosystem from damage caused by water withdrawals. In particular, the agreement needs changes to assure that 1) future vetoes of harmful diversion proposals are able to withstand possible court challenges, and 2) greater consideration is given ten-party decisions on diversions and other withdrawals of basinwide concern when those decisions are ultimately implemented by the provinces, the states, or the eight states acting collectively in the form of the proposed Agreement Council.

It should be noted that, while the proposed agreement makes important advances, the provinces and states regrettably decided in 2001 that both the provincial-state international agreement and accompanying eight-state agreement would not address a number of important issues related to Great Lakes – St. Lawrence River basin water withdrawals.

Most importantly, the agreements deal only with "new or increased" water withdrawals, mostly ignoring the ecosystem damage caused by existing withdrawals. And as primarily systems for reviewing individual water withdrawal projects, the agreements also provide no overall basin water planning—or even significant incentives for individual communities to undertake such planning—that would reduce overall human water consumption in the basin and therefore also reduce the number and size of new water withdrawal proposals.

Summary of benefits of the proposed agreement

1. **Environmental standards.** The proposed international agreement provides, for the first time, environmental standards for judging new water withdrawal proposals.
2. **Covering all basin waters.** The proposed agreement protects all the waters of the Great Lakes surface water basin, including streams and groundwater.
3. **Improved diversion protection.** Taken as a whole, the proposed agreement appears to increase the region's ability to prevent harmful diversions.
4. **Fairly extensive application.** The proposed agreement requires most water withdrawals to be registered and many larger withdrawals to be 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.
5. **Substantial detail on implementing standards.** The proposed agreement's appendix is stated to have the full force of the rest of the agreement, and provides substantial guidance on how the standards should be implemented to assure that they are truly protective.
6. **Consistency across the basin.** The agreement's detail provides a reasonable assurance that implementation of the standards would be relatively consistent across the basin.
7. **Greater protection allowed.** The proposed agreement properly establishes the new environmental standards as a minimum, not a maximum system of protection, so individual states are free to expand their protections.
8. **Public participation.** The agreement provides public notice of water withdrawal proposals and significant avenues for public participation in permitting decisions.

Summary of problems with the proposed agreement

1. **Lack of enforceability.** The proposed international agreement is voluntary. Recognizing the difficulty of creating a truly enforceable agreement across the international border—this would require a binational federal treaty, the seeking of which would carry its own risks—the agreement could nonetheless provide greater assurance that it will be carried out. The preamble should acknowledge that, nearly twenty years after the fact, the ten parties have failed to carry out significant sections of the 1985 Great Lakes Charter. The body of the agreement should contain strong promise to pass the agreement into provincial and state law.
2. **"Transparency" of "regional review."** The agreement says very little about how diversions and withdrawals large enough to require a vote by the ten jurisdictions will be judged. Will the applicants and their lawyers be allowed to make a case in person? Will the public be able to the same? Will deliberations be transcribed and released publicly, or only a final "yes" or "no" decision issued? The agreement should assure openness in regional decisionmaking.
3. **Insufficient conservation provisions.** The agreement provides good water conservation requirements for individual proposals, but no system for reducing basin water use, currently twice the average for developed-world countries, overall. The agreement's conservation provisions should establish a goal of significantly reducing water loss due to basin water uses.

In the long run the region cannot persuade the world to forego access to Great Lakes waters if we are obviously wasting it.

4. **Some uses are treated more leniently.** The proposed agreement effectively exempts many proposed intermittent and seasonal uses from oversight by averaging the size of the daily withdrawal at which they are subject to standards over 120 days—four long months. For smaller source watersheds, this is a license to cause ecosystem damage. The averaging period should be 30 days.

5. **Dangerously unequal treatment of diversions and in-basin uses.** The proposed agreement appropriately subjects even the smaller out-of-basin diversions to extra requirements and tougher eight-state review, but for in-basin water uses the agreement reserves those extra hoops only for the very largest proposals. In some scenarios, this disparity of treatment could require a fifty-times higher amount of in-basin use to trigger the tougher review than it would for diversions intended for the same purpose, such as drinking water supply. This difference in treatment would be excellent evidence for a lawsuit challenging some future state diversion veto as discriminatory.

   The solution is simple: toughen the standards for in-basin uses by 1) lowering the level at which they are subject to regional review and 2) requiring that they include an improvement. Political realities may make it impossible for in-basin uses to be treated as toughly as diversions, but the gap must be significantly reduced.

6. **Limited "improvement."** The proposed agreement's "improvement" standard should apply to all withdrawals, not just to diversions and the largest withdrawals. Subjecting new and increased withdrawals to the standards of conservation, no harm, and improvement was the core commitment of Annex 2001.

7. **The ten-year phase-in of in-basin standards is too long.** The phase-in of standards for in-basin water withdrawals reviewed by the individual provinces and states should be five years rather than ten. The longer phase-in, by permitting such a wide gap between the jurisdictions' commitment to reform and their implementation of that commitment, invites discord among the jurisdictions and risks the failure of the agreement in the medium term.

8. **Protect the public trust.** The proposed agreement 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 agreement, and must not be accidentally harmed or limited by it.

9. **Return the exact same water.** The current definition of return flow in the agreement rightly appears to require return of the actual water withdrawn. This is a critical protection against the introduction of invasive species from neighboring watersheds. The agreement should explicitly define return flow as requiring return of the same water.

10. **Return water to its local source.** Rather than requiring return flow only to the watershed of the same lake from which it was taken, the agreement should require return as near as possible to point where the water was withdrawn. 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.

11. **Delete the diversion exemption.** There is no justification for exempting near-basin diversions under 250,000 gallons per day from the requirement to return the diverted water. The provision should be deleted.

12. **Permit time limits are needed.** Permits should be explicitly granted for no more than ten years, to allow alteration of permit terms if climate change impacts and the cumulative effects to the ecosystem of increased water withdrawals become apparent.

13. **Assess cumulative effect locally.** The proposed agreement 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 agreement should also require, rather than merely allow, amending the rules for judging water withdrawals based on assessments of cumulative effects.

Canadian Environmental Law Association
Clean Wisconsin
Environmental Advocates of New York
Great Lakes United
Lake Michigan Federation
Michigan Environmental Council
National Wildlife Federation Great Lakes Office
The Nature Conservancy Great Lakes Program
Ohio Environmental Council
Union québécoise de la conservation de la nature

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

DRAFT—August 20, 2004

General summary

The proposed compact is an important step forward in protecting the Great Lakes basin from bulk water exports, diversions, and abuse. However, the document needs a significant number of improvements to achieve its aims of fully protecting the basin ecosystem from damage caused by water withdrawals of all kinds, in particular to assure that future decisions to reject harmful diversion proposals are able to endure court challenges.

It should be noted that the compact does not attempt to address a number of important issues related to basin water withdrawals. Most importantly, the compact deals only with "new or increased" withdrawals, completely ignoring the extensive ecosystem damage caused by the vast range of existing withdrawals. And as primarily a system for overseeing individual proposals for withdrawing water, it also generally fails to propose effective solutions for basinwide water-quantity problems, such as the total amount of water lost to the basin by human use, which is twice the average of other economically developed countries.

Summary of proposed compact benefits

1. The proposed compact provides, for the first time, environmental standards for judging new water withdrawal proposals.
2. The proposed compact protects all the waters of the Great Lakes surface water basin, including streams and groundwater.
3. Taken as a whole, the proposed compact appears to increase the region's ability to prevent harmful diversions.

4. The proposed compact requires most water withdrawals to be registered and some larger withdrawals to be 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.
5. 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.
6. The proposed compact properly establishes the new environmental standards as a minimum, not a maximum system of protection.
7. The compact provides significant avenues for public participation in permitting decisions.
8. 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 proposed compact problems

1. The proposed compact does not assure that the standards for judging water withdrawal proposals will be applied consistently across the basin. The standards need to be better defined to assure that they will truly protect the environment and be implemented in a reasonably consistent manner by all eight states. To do this, the compact should reference the proposed international agreement's detailed "Procedures Manual," perhaps by declaring that the manual "should provide general guidance" for the rules that each state will write to implement the standards.
2. The proposed compact's "improvement" standard should apply to all withdrawals, not just to diversions and the largest withdrawals. Subjecting new and increased withdrawals to the standards of conservation, no harm, and improvement was the core commitment of Annex 2001.
3. The compact's proposed system of conservation, an very general requirement that water withdrawal proposals contain "environmentally sound" and "economically feasible" conservation, will likely have little impact on overall levels of basin water consumption, which is twice the average for developed-world countries. The compact's conservation provisions should establish a goal of significantly reducing water loss due to basin water uses. In the long run the region cannot persuade the world to forego access to Great Lakes waters if we are obviously wasting it.
4. The levels at which withdrawals should be subject to standards should be based on withdrawal quantities averaged over 30 days, not over 120 days. At the withdrawal levels in question and depending on the size of the source watershed, averaging withdrawals over periods longer than 30 days will exempt from oversight many projects certain to cause ecosystem damage.
5. The proposed compact declares that diversions of 1 million gallons per day or more must be reviewed by all eight states. But for water withdrawals intended for in-basin use, the proposed compact sets a level of 5 million gallons per day of "consumptive use" (water loss) for a proposal to reviewed by all eight states. The amount of complete water loss to the basin is clearly a reasonable basis for deciding whether a proposal should get extra scrutiny. Given the potential harm caused by diversions, the 1-million-gallon figure is appropriate. However, a lost gallon of water is a lost gallon, whether in the basin or by diversion. The higher figure for in-

basin losses is too high and, even worse, clearly discriminatory. As a result the higher in-basin loss number is both insufficiently protective and seriously undermines the compact's potential to withstand legal challenge in the long run.

Either the level of water loss for in-basin withdrawals to receive multi-state review should be set at 1 million gallons per day, or the level should be set at 5 million gallons per day of simple withdrawal, rather than loss.

6. The phase-in of standards for in-basin 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.
7. The compact must specifically protect public trust rights and obligations.
8. The current definition of return flow in the compact rightly appears to require return of the actual water withdrawn. This is a critical protection against the introduction of invasive species from neighboring watersheds. The compact should explicitly define return flow as requiring return of the same water.
9. 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 point where the water was withdrawn. The most extensive ecological damage from withdrawals occurs near the point of removal, especially on smaller rivers or smaller-scale surface waters supported by groundwater, not on a lakewide basis.
10. There is no justification for exempting near-basin diversions under 250,000 gallons per day from the requirement to return the diverted water. The provision should be deleted.
11. Permits should be explicitly granted for no more than ten years, to allow alteration of permit terms if climate change impacts and the cumulative effects of increased water withdrawals become apparent.
12. The cumulative effects of multiple withdrawals approved over time, proposed in the compact for assessment only on a basinwide basis, must be assessed on the scale at which they are most likely to first occur—that of the local watershed. The compact should also then require, rather than merely allow, alteration of the rules for judging water withdrawals based on cumulative impacts assessment.

Canadian Environmental Law Association
Clean Wisconsin
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Lake Michigan Federation
Michigan Environmental Council
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The Nature Conservancy Great Lakes Program
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Union québécoise de la conservation de la nature

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

DRAFT—August 20, 2004

These comments do not address, or do not address in much depth, many dimensions of basin water withdrawal reform needed to achieve comprehensive protection of Great Lakes basin waters.

Some needed reforms, such as addressing existing water withdrawals, were not part of the original Annex 2001 agreement-in-principle and therefore not part of the subsequent negotiations on how to implement those principles. Other needed reforms, such as creating an overall plan for reducing the amount of water wasted in the basin to developed-world norms, have been already proposed to the state and provincial negotiators and clearly, sometimes unanimously, ruled out of consideration.

In these comments we focus on elements of the proposed compact that fail to live up to, or are likely not to fulfill, the promises made by the basin governors and premiers when they signed Annex 2001. Revisions to the compact that, while advisable, have already been discussed and are unlikely to gain any further hearing by the negotiators, are mentioned only in passing. Those suggestions can be found in much more detail in past submissions to the negotiators by basin environmental groups, available at www.speakongreatlakes.org.

ALL ARTICLES

The proposed U.S. compact and state-provincial international agreement share many passages with what appear to be the same intent, yet they are often worded substantially differently. The two documents even contain different definitions for some of the same terms.

Both documents declare a desire to make water management as consistent as possible across the basin. Symbolically and practically, this objective would be served by rendering in identical language all those passages in the two documents that have the same intent.

ARTICLE 1
SHORT TITLE, DEFINITIONS, PURPOSES AND DURATION

Section 1.2—Definitions

Praise—Conservation measures
The second line of the definition of "Environmentally Sound and Economically Feasible Water Conservation Measures" reads, "Water management practices and water efficiency measures must be economically feasible based on a cost-benefit analysis that includes avoided environmental and economic costs." This could assure that environmental benefits of water conservation are included in any determination concerning the "economically feasible" element of required water conservation. The definition's detail on cost-benefit analysis language out this clarification, the "economically feasible" requirement could be used to prevent a permit requirement for any water conservation practice that does not simply pay for itself over the life of the permit with reduced water-use costs.

Problem—Conservation measures
However, "avoided environmental costs" is a highly flexible term, for which there is no guidance even in the state-provincial international agreement. That agreement should specify that "avoided environmental costs" includes long-term benefits of good water conservation, including assurance of water availability for non-human life and to buffer additional, increased human uses in the face of unknown elements such as impacts to hydrology from climate change over time.

Praise—Diversions
This subsection defines diversions as between Great Lakes. This improves on the voluntary 1985 Great Lakes Charter, and would subject one or two projects already on the drawing board to greater scrutiny.

Problem—Diversions
However, the definition should be extended to include diversions between major rivers that are tributary to a Great Lake or the St. Lawrence River. Inter-river diversion projects are more common and more likely to cause ecosystem damage than inter-lake diversions at the current scale of most projects. And the stronger definition would take a longer step toward legal durability in Commerce Clause and international trade contexts. By more significantly affecting ongoing damaging practices taking place within the basin, the stronger definition would remove the possible future argument by aggrieved parties proposing rejected diversions that, although the compact is somewhat even-handed in writing, in practice in-basin withdrawals and out-of-basin diversions are treated completely differently. With a significant number of possible in-basin withdrawals legitimately defined as diversions, such an argument would be much harder to sustain.

Problem—Water conservation as improvement
This proposed subsection unfortunately alters the definition of improvement provided in Annex 2001. The original language defined improvement as "additional beneficial, restorative effects to the physical, chemical, and biological integrity of the Waters and Water-Dependent Natural Resources of the Basin, resulting from associated conservation measures, enhancement or restoration measures which include, but are not limited to, such practices as mitigating adverse

effects of existing water withdrawals, restoring environmentally sensitive areas or implementing conservation measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer." This is appropriately broad in a general definition.

The language in the recently proposed compact substitutes for "associated conservation measures" the phrase "associated Environmentally Sound and Economically Feasible Conservation Measures." It may be that this change was only an attempt at greater clarity, but the effect is possibly to permit the definition to be interpreted to allow the already required water conservation measures implemented by the applicant to also count as the project's required improvement.

Problem—Preference for improving flows

Even if the intent of the change is merely to put a special emphasis on water conservation unrelated to the project, we support the thrust of the international agreement's more detailed treatment of improvement, in effect a more detailed definition, which says that restoring natural water flows should be the preferred focus of improvement projects.

Therefore, we suggest returning the definition of improvement to that found in Annex 2001, with the addition of natural water flows to the closing list of possible improvement projects: ". . . such practices as restoring natural flows, mitigating adverse effects of existing water withdrawals, restoring environmentally sensitive areas, or implementing conservation measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer."

Praise—Source watershed

In this subsection "source watershed," a term intended to define the site of return flow, is defined as major tributary to a Great Lake. While insufficiently small to protect many watersheds from the effects of complete water removals, at least this definition is an improvement over the huge lake watershed originally contemplated.

Problem—Source watershed

However, the reason for defining the term in the compact—its use in the return flow standard—is mooted by the return flow section itself, which re-defines source watershed as individual Great Lake. See our comments under sections 8 and 9.

"Source watershed" should be defined as "the smallest scale of watershed as defined by the U.S. Geological Survey at the point of withdrawal."

At the least, the last sentence of the current definition should be replaced with a definition of source watershed for withdrawals that are not directly from a Great Lake or the St. Lawrence River. We recommend that for such withdrawals, the compact declare, "The source watershed shall be the watershed tributary to the Great Lake or St. Lawrence River from which the water is withdrawn."

Problem—Return flow

The proposed compact's current definition of return flow, found in sections dealing with the conservation standard, rightly appears to require return of the actual water withdrawn. This is a critical protection against the introduction of invasive species from neighboring watersheds. The compact should explicitly define return flow, here in the definition section, as requiring return of the same, identical water that was originally diverted.

Section 1.3—Purposes and Findings

We strongly suggest inclusion of a broader statement of purpose in this section that reflects the state trust responsibilities. We suggest inserting as the first paragraph of this section the first of the document's current "whereas" statements, slightly modified to use the terminology of the definition section: "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."

ARTICLE 2
ORGANIZATION

Section 2.4—Voting Power

Praise--Amendment
In this section the ability of the Compact Council to effectively change the agreement is appropriately limited to creating and amending the regulations needed to implement the standards. This power can be exercised only unanimously, assuring collective decisionmaking by the compact parties.

ARTICLE 3
POWERS AND DUTIES

Section 3.2—New or Increased Diversions and Consumptive Uses

Praise—Monitoring
Subsection 3 requires monitoring of permitted projects for compliance with permits.

Problem—Enforcement
Subsection 3 also 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 "shall take any enforcement actions needed to ensure" compliance.

Section 3.3—New or Increased Diversions: Proposals Subject to Regional Review and Council Review

Praise—Overall treatment of diversions
This subsection requires unanimous approval by the eight states of diversions over 1 million gallons per day averaged over 120 days, in effect the U.S. Water Resources Development authority veto authority wielded on the basis of the standards, as promised by the governors in the resolution agreed to on the same day they signed Annex 2001. Since WRDA requires no standards for vetoing diversions, by comparison the compact provision that diversions can be approved if they meet certain standards seems to limit the ability of the governors to veto diversions. However, the standards (especially the return flow standard) appear strong enough in practice to discourage most diversion proposals and to legally justify vetoing all but the smallest proposals that are ultimately submitted—so long as the states are reasonably rigorous in enforcing the standards to in-basin withdrawals.

Problem—Averaging
The proposed compact averages withdrawals over 120 days as a way to determine which proposals deserve scrutiny. The averaging period should be 30 days. See our comments under articles 8 and 9 below.

Section 3.4—New or Increased Consumptive Uses: Proposals Subject to Regional Review and Council Review

Problem—Level of "consumptive use" requiring regional review
This section requires a 6-2 vote to approve a withdrawal for in-basin use that results in a loss of 5 million gallons of water per day averaged over 120 days. This is a substantial amount of water with five times the identical potential for adverse impact (total loss of water to the basin) of the 1-million-gallon-per-day diversions that are the subject of section 3.3—yet it is governed by an weaker decision-making system. While the voting system is less important than the strength of the standards on which votes are supposed to be cast, nevertheless, differential voting systems should have an underlying logic, presumably differential potential impacts to the ecosystem. No such logic apparent here

Because they have the same potential impact to the system, withdrawals resulting in consumptive loss should be subject to the same decision-making trigger level (1 million gallons per day) and voting system (unanimity).

The compact's glaring discrepancy in treatment between two types of withdrawals with identical potential impacts will likely be a significant legal weakness in the new system should it ever be legally challenged.

Problem—Averaging
Withdrawals should be averaged over 30 days. See our comments under articles 8 and 9 below.

Section 3.6.—Rules and Regulations

Praise—Regional public participation in rules
This section affords the public opportunity to comment on the development of rules for implementing compact provisions. This is an important provision since it will be these rules and regulations, as much as the general language of the standards, that will determine the fate of individual proposals.

Problem—Regional public participation in rules
However, it is even more important that the public be given this same opportunity for comment by the individual states when they develop rules for implementing compact obligations. After all, it is likely that many more water withdrawal decisions will be made on the state level than on the regional level, and that state-level decisions are likely to have collectively greater potential for adverse impact to the basin ecosystem, at least for the foreseeable future.

Section 3.7—Public Participation

Praise—General
This section requires public notice of all new or increased withdrawals requiring a permit, opportunity for public comment on all such withdrawal proposals, and access to "all documents relevant" to such proposals.

Problem—Comment on draft permits
This section should allow comment not only on original proposals, but also on permits that states and Compact Council propose to issue. Permits can be heavily conditioned and in that sense dramatically different from an original proposal. Since the basic facts of the proposal and its potential ecosystem impacts should have been fully explored during the original comment period, the second comment period could be very short.

Problem—Standards for holding public meetings
This section should more clearly require standards for determining which proposals require public meetings or hearings. Rather than "provide guidance on standards" for deciding to hold such meetings, the Compact Council and the individual states should simply be required to "establish" such standards. The section should also offer at least a very broad definition of the kind of proposals for which the public should be granted meetings or hearings, for example, "all proposals likely to generate significant community interest, including any proposal that rises to the level of regional review."

Section 3.8—Consultation with Tribes

Praise—Regional consultation
This section assures that tribes will be separately and individually consulted on all water withdrawal proposals that rise to regional review.

Problems—State consultation
This provision should of course be extended to water withdrawal proposals that are reviewed only by the states.

Furthermore, the compact should explicitly state that nothing in the compact is intended to intrude on the existing rights and sovereignty of any basin
tribe.

Section 3.9—Enforcement

Praise—General
This section grants citizens substantial tools to assure that the provisions of the compact are followed by both the Compact Council and the states, including the right to contest in court all final decisions, at both levels, as inconsistent with the compact, and the right of citizens to both directly sue water withdrawers who fail to secure required permits and recover legal costs if vindicated in court.

Problem—Enforcing permit conditions
Citizens should also be granted the right to sue not only withdrawers who fail to obtain a permit, but also those in clear violation of the permits they have received. As exercised for decades under other U.S. environmental laws, this citizen right would in fact result in few cases, because they are so expensive. However, in those cases where citizens do sue, the results are almost invariably positive, both for the environment and as assistance to the government agency responsible for enforcing the law.

Problem—Enforcing government obligations
Citizens should also be granted the right to sue state governments or the Compact Council for gross derelictions of duty. Under the compact as written, the public has no means to compel deficient states or the Compact Council as a whole to carry out even the most basic duties required by the compact, such as water withdrawal reporting. As noted above, this is a right that will be used rarely if ever, but is a valuable tool for protecting the environment in extreme cases.

Problem—Cost recovery
Citizens should also be granted the right the recover legal costs undertaken to contest any state or Compact Council decision (or any permit, if citizens gain that right) if it is shown that the citizen legal effort made a significant contribution to good faith implementation of the provisions of the compact or of resulting state water law.

Section 3.10—U.S. Supreme Court Decree: *Wisconsin et al. vs. Illinois et al.*

Praise
This section maximizes the ability of the provinces to participate in a issue of undisputed basin-wide significance.

Problem—Applicability of standards
This section fails to assure that the Chicago diversion is subject to the greatest possible degree of oversight, given the potential problems posed by the fact that the diversion is currently governed by U.S. Supreme Court orders. While it is not feasible to restrict the latitude of the Supreme Court in future jurisprudence involving *Wisconsin et al. vs. Illinois et al.*, it remains possible to require the states to do their best to assure that any future changes to *Wisconsin*-related court orders are consistent with the compact.

Therefore, we suggest striking the last clause of section 3.10's subsection (2), which ineffectively addresses this issue, and adding stronger language as a new subsection (3): "In any process by which the decree is amended, the parties to this agreement who are also parties to the decree shall make every good faith effort to assure that any proposed or retroactively realized increase over the current court-ordered level of flow out of the Great Lakes basin is compelled to be subject to any processes outlined in this compact that would otherwise apply if no court decrees were in effect."

ARTICLE 5
GENERAL PROVISIONS

Section 5.1—Meetings, Public Hearings and Records

Praise
The compact provides for public access to all meetings of the Compact Council and the minutes of those meetings.

Problem—Online availability
The minutes of Compact Council meetings should be available online, not merely in an office during business hours.

Section 5.2—Effect on Existing Rights

Praise
This section appears to be an attempt to assure that existing common law protections are not impacted by the compact. It could also be interpreted as part of the compact's general attempt to assure that sovereignty over water is retained in the basin.

Problem—Public trust
However, a central element of existing protection—public trust rights and responsibilities—is not mentioned in the proposed language. The proposed compact should explicitly protect public trust rights and responsibilities. We suggest merging the proposed two subsections into one and adding a public trust component, by replacing all of the current language in this section with: "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."

Section 5.4—Additional Laws

Praise
This section assures that compact provisions become minimum, not maximum, protections for the waters and the ecosystem of the Great Lakes – St. Lawrence River basin. Individual states remain free to pass stronger protections as the need arises.

ARTICLE 7
AUTHORITY TO COLLECT DATA

Section 7.2—Registration and Reporting of Withdrawals

Praise—Reporting
This section requires all diversions and all withdrawals of 100,000 gallons per day averaged over 30 days to be reported, for the first time providing all the states and the basin as a whole with basic information on most significant withdrawals. The section also requires the states to report the information to a central registry and the states collectively to make that registry available to the

public. This fundamental obligation of the states to the public, promised in the voluntary 1985 Great Lakes Charter, went unfulfilled for ten years after 1994.

Problem—Reporting level
The 100,000-gallon reporting level is too high. Minnesota and Ontario require reporting in the 10,000-gallon-per-day range, and the compact should too.

Withdrawal amounts below the 100,000-gallon level account for a relatively small portion of total basin withdrawals, but, when they take place from headwaters or other small water sources, they have the potential to have disproportionately significant impacts on the ecosystem.

While it may be impractical to require most smaller withdrawals to obtain permits, awareness of the locations and basic types of smaller withdrawals is essential to evaluating the cumulative effects of such withdrawals on sensitive ecosystems, especially in the context of larger withdrawals that may be proposed or already taking place nearby.

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.

ARTICLE 8
REGIONAL REVIEW AND COUNCIL REVIEW OF PROPOSALS AND THE STANDARD OF REVIEW AND DECISION

ARTICLE 9
JURISDICTIONAL PROGRAMS AND THE STANDARD OF REVIEW AND DECISION

These two articles have so many common elements—the shared individual standards for judging water withdrawal proposals— that it is easier to treat them together before treating them separately.

Praise—General
The articles outline how, for the first time in basin history, a significant number of water withdrawal proposals will be subject to review on the basis of their efficiency and impact to the basin ecosystem. The articles also commit the states to a potentially ground-breaking new concept—that access to natural resources should not be conditioned only on the (usual purely theoretical) determination of little or no harm to the ecosystem, but also on a commitment to actually improving what has become a significantly impaired system.

Praise—Diversions

The treatment of diversions in articles 8 and 9 appears to be potentially nearly as effective as the WRDA veto in being able to prevent diversions. The requirement to return all non-consumed water to the basin is essentially an expression of the cautionary principle since any withdrawal is already required to cause no significant impact to the ecosystem. As a common-sense hedge against our uncertain ability to determine impacts, the return flow standard promises a great deal of protection against harmful diversion requests. In most cases return flow is financially onerous, increasingly so with distance from the basin line, making the standard a powerful disincentive to diversion.

Furthermore, the typical combination of economic and hydrological characteristics of most uses appears to make diversion proposals under compact standards, especially the return flow standard, relatively unlikely. For example, the high consumption of many agricultural uses, which might generate relatively low return flow, is counterweighted by the inability of the agricultural sector to absorb much additional operating expense, possibly even for small, short diversions, but especially for large, long-distance diversions plus their return flows. Likewise the greater capacity of municipal supply uses to absorb additional cost is counterweighted by that sector's relatively low consumption, consequent high return flow, and correspondingly large financial burden paying for that return flow.

Finally, the definition of return flow seems to clearly require that returned water must be the same as the water withdrawn, implicitly to protect against the introduction of invasive species. This is another financially onerous burden on parties who might propose diversions. It would be very difficult for agricultural diverters to gather and return the same water, and municipal recipients of diverted water would have to construct separate distribution and treatment systems in order to avoid returning different water.

Problem—Implementing the standards

The overall system of standards in the compact agreement by which the above goals would be achieved are in many respects excellent in concept. However, they are sufficiently lacking in detail to be potentially ineffective in practice.

Agreement negotiators have repeatedly declared their commitment to on-the-ground ecosystem protection from environmentally abusive withdrawal projects, and to a new system of water withdrawal rules that is relatively consistent across a politically diverse basin.

Specifically the negotiators have said that the "Procedures Manual" appendix to the international state-provincial agreement, originally conceived as part of the compact, would be used as a basis for the specific regulations that will be written by the states and the Compact Council to implement the standards. However, nowhere in the compact do the Signatory Parties commit themselves to relying on the "Procedures Manual" in any way to write implementing rules and regulations.

The compact must commit the Signatory Parties and the Compact Council to some relationship to the international agreement's "Procedures Manual" as a basis for developing regulations implementing the standards. There are many possible ways to accept this request, expressing a wide range of degrees of commitment to reference the provisions of the international agreement. We suggest that section 3.6 ("Rules and Regulations") or article 5 ("General Provisions") contain a new subsection or section saying: "The Signatory Parties, individually and collectively, commit to using the Great Lakes Basin Water Resources Agreement's "Procedures Manual" as a

significant source of guidance in issuing rules and regulations that will give effect to the standards outlined in articles 8 and 9."

The compact agreement must contain some form of specific commitment to actually implementing the protective intent of the standards for the basin environmental community to be able to support the compact agreement.

Problem—Rigorous consumptive use coefficients

The return flow standard is only as effective as the consumptive use standard or coefficient that determines the amount of water that must be returned. Consumptive use standards or coefficients that are too low, that is, presume a large amount of acceptable water loss, will result in larger requests of all kinds and, for any diversions that might be approved, smaller return flows.

The compact must contain a provision committing the Compact Council to 1) determining scientifically justifiable consumptive use standards or coefficients for varying sectors within a reasonable timeframe, and 2) basing the consumptive use standards or coefficients on strong conservation requirements, such that request quantities are minimized for all proposed withdrawals and, for diversions, return flow is maximized.

Problem—Return to source watersheds

The return flow standard requires return flow only to the source Great Lakes or St. Lawrence River watershed. There is no ecosystem justification for the narrow ambit of this standard and great theoretical inconsistency in it. On the one hand, the compact requires million-gallon diversions from quadrillion-gallon lakes to be returned to the same lake—a sensible, no-questions-asked line of initial protection. On the other hand, withdrawals from much smaller ground, stream and river sources—clearly much more vulnerable to complete losses of a given withdrawal quantity—receive no such initial layer protection. While this diversity of treatment may be small enough to escape a judgment as rendering the overall agreement discriminatory, it is well established that ecosystem impacts of alterations in natural flows are greater as the scale of the affected ecosystem gets smaller.

The return flow standard should require return to the smallest scale of watershed as defined by the U.S. Geological Survey at the point of withdrawal. The return flow standard should also specify that the return flow should further be "as close as possible to the point of withdrawal," unless such a return that would for some reason be ecologically harmful.

At an absolute minimum the return flow standard should use the current definition of "source watershed," so that the return flow section's current "preference" for return flow to source major tributaries becomes instead a requirement.

Problem—Conservation goals

Likewise the conservation standard will be only as effective as the conservation goals it aims to reach. Even the international agreement's "Procedures Manual" fails to do more than list potential practices without providing any guidance on the basis of which a permit-issuer could use for deciding which practices would be required of a given applicant and how intensively they would have to be applied.

This is a recipe for inconsistency and ineffectiveness in the implementation of a standard that probably has more consensus than any other among both the states and the advisory stakeholders.

In the past we have suggested that the performance of economic sectors in the best-performing developed-economy nations be used as referents for conservation goals to be reached on specific

timelines. An alternative benchmark could be the performance of middle-of-the-pack developed-economy nations.

Problem—Averaging
The averaging period of 120 days for determining the trigger levels for state and regional review are so high as to exempt a significant percentage of basin water withdrawers. As has been the practice for nearly twenty years under the Great Lakes Charter, the averaging period should be reduced to 30 days.

Problem—Permit terms
The proposed compact should specify that permits will be issued for no longer than ten years, to allow easy adjustment of permit conditions should climate change effects or cumulative impacts prove to be taking place, or in case new information about the impacts of the withdrawal come to light.

Section 8.1—Regional Review by the Great Lakes States and Great Lakes Provinces

Praise
This section and this article as a whole commit the states to participation in true regional decisionmaking, albeit without teeth because of the difficulty of creating enforceable arrangements across the international border. Rather than the pro-forma consultation letters required by the voluntary 1985 Great Lake Charter, this article sets up a link in the binding compact agreement with the formal discussion and voting process outlined in the voluntary international state-provincial agreement for water withdrawals proposals that rise to the level of regional review.

Problem—International decision-making
Nonetheless, this section requires only that the Compact Council "consider" decisions rendered by the state-provincial review body. While we concede for now that it appears legally impossible to require the Compact Council to implement decision made by the binational review body, surely it is possible to move closer to truly binational decisionmaking, the declared intention of the states in Annex 2001 and the compact's preamble, than the ineffectual "consider."

We suggest replacing the last line of the section with: "The Signatory Parties and the Compact Council will grant the greatest legally permissible deference to the product of Regional Review. If a Signatory Party or the Compact Council nonetheless renders a decision at odds with that of the Regional Review, the Signatory Party or Compact Council will include in the record of decision a rebuttal to claims found in the Regional Review that such a decision is inconsistent with the standards. If a Signatory Party or the Compact Council decision at odds with that of the Regional Review process is contested by an aggrieved person, reviewing authorities should be directed to grant equal weight to the Signatory Parties (or Compact Council) and the Regional Review body as finders of fact."

Problem—Public participation
This section declares, "Regional Review of proposals may include, but not be limited to, notice and consultation and public participation." Statements about the conduct of Regional Review, as distinct from means by the states commit to participating in Regional Review, should perhaps be left to the international state-provincial agreement, under the auspices of which Regional Review

will be carried out. Also, the declaration that Regional Review "may" include public participation is inconsistent with the compact agreement's section 3.7, which appropriately requires public participation rather than allowing it to be optional.

Section 8.2—Council Review for Diversions

Praise—General
This section establishes an appropriately low trigger level (1 million gallons per day averaged over 120 days), key standards (return flow of an appropriate quantity of unconsumed water and improvement), and a good decision-making system (unanimity) for regional review for diversions, which have the generic potential for permanent damage to the Great Lakes – St. Lawrence River ecosystem because they involve total loss of water to the basin.

Problem—Standards
Key elements of the decision-making standard as applied to diversions that rise to the level of Regional Review are weak or vague. Since many of these standards apply to all withdrawals, we deal with them in a collected critique of both articles 8 and 9 above.

Sections 8.3—Council Review for Consumptive Uses

Problem—Trigger level
This section establishes a form of trigger level (consumptive use or loss), level of loss (5 million gallons per day averaged over 120 days), and decision-making system (a minimum 6-2 vote for approval) for water withdrawal proposals that together point to an intent by the Signatory Parties to treat withdrawals for in-basin use much less strictly than withdrawals for out-of-basin use. While some difference in treatment between the two types of withdrawal has a tradition in international water law and might withstand U.S. Constitutional and international trade scrutiny, the degree of differential treatment represented by this section is so great as to entail significant legal risk.

The avowed purpose of the Annex 2001 initiative and the proposed compact agreement is to protect the Waters and Water Dependent Natural Resources of the Great Lakes – St. Lawrence River basin. It is difficult to see how this ecosystem protection is achieved by allowing one form of total loss of water to the basin ecosystem, say, a consumptive loss of 4.5 millions gallons per day averaged over 120 days, to avoid Regional Review and multi-jurisdictional vote, make no improvement to the basin ecosystem, and carry out mere unenumerated "conservation measures" rather than a much more detailed "conservation plan"—while requiring a diversion of 1.5 million gallons per day, which entails one-third the water loss and therefore on average one-third the ecosystem impact but must implement a rigorous conservation plan, make an improvement, and suffer the scrutiny of ten jurisdictions and the enforceable power of eight.

This differential treatment is prima facie evidence of discriminatory intent and seriously undermines one of the core purposes of the annex initiative declared by the governors during the negotiations leading up to the signing of the original Annex 2001—legal durability.

We suggest either of two possible revisions to the system proposed in section 8.3: 1) reduction of the consumptive use trigger level to 1 million gallons per day averaged over 120 days, the same trigger applied to diversions in section 8.2, because consumptive uses and diversions involve the same kind of ecosystem-impact: total water loss, or 2) changing the type of proposal being addressed by section 8.3 from consumptive use to simple withdrawal; in most cases the

consumptive loss entailed by withdrawals above 5 million gallons per day will be far less than total, and differential treatment (compared to diversions) of proposals under 5 million gallons per day could potentially be justified as generically less likely (compared to diversions of the same size) to cause ecosystem damage.

Problem—Standards
Key elements of the decision-making standard as applied to consumptive uses that rise to the level of Regional Review are weak or vague. Since many of these standards apply to all withdrawals, we deal with them in a collected critique of both articles 8 and 9 above.

Section 9.1—Signatory Party Water Conservation Programs

Praise
This section includes a laudable commitment to overall conservation—implicitly directed at existing water withdrawals and uses—that is not formally required under the commitments of Annex 2001.

Problem—Lack of goals
Unfortunately, this general commitment suffers from the same deficiency as the overall water conservation standard for reviewing water withdrawal proposals: it lacks specific goals and is accordingly likely to be applied inconsistently and for the most part ineffectively across the basin. As we suggested above in our comments addressing both articles 8 and 9, the states should commit to sectoral conservation targets on specific timelines.

Section 9.2—Jurisdictional Review for Diversions

Problem—Abuse of exemption
This section exempts certain diversions—of less than 250,000 gallons per day averaged over 120 days, used in areas less than twelve miles outside the basin line, and supplied exclusively for public water supply where "adequate quantities" of potable water are not available—from the return flow standard. There is no environmental justification for this exemption, and it should be deleted.

Problem—Other standards
Key elements of the decision-making standard as applied to diversions approved only by the states are weak or vague. Since many of these standards apply to all withdrawals, we deal with them in a collected critique of both articles 8 and 9 above.

Section 9.3—Jurisdictional Review for Consumptive Uses

Problem—Improvement
This section omits improvement as a standard to be applied to withdrawals under the huge upper limit of 5 million gallons per day of consumptive loss. Improvement is a key commitment of the annex initiative. Annex 2001 declares in its core passage, Directive 3:

> "The new set of binding agreement(s) will establish a decision making standard that the States and Provinces will utilize to review new proposals to withdrawal water from the Great Lakes

> Basin as well as proposals to increase existing water withdrawals or existing water withdrawal capacity. The new standard shall be based on the following principles: . . . An Improvement to the Waters and Water-Dependant Natural Resources of the Great Lakes Basin."

As proposed in this section, the improvement standard will not apply to most proposed water withdrawals under the compact. We strongly urge the states to include the improvement standard in some form for jurisdictional review of consumptive uses.

Problem—Improvement
The proposed compact should require that improvement actually take place as part of any approved water withdrawal projects. As strictly written, the compact merely requires that improvements be proposed.

Problem—Other standards
Key elements of the decision-making standard as applied to consumptive uses approved only by the states are weak or vague. Since many of these standards apply to all withdrawals, we deal with them in a collected critique of both articles 8 and 9 above.

Section 10.1—Cumulative Impacts

Praise
This section for the first time commits the region to assessing all the impacts of accumulated water withdrawals on the basin ecosystem, not just water quantity impacts and not just on the basin's Great Lakes. as a whole. Further, the section specifies a timeline for making such assessments that is both certain and precautionary.

Problem—Scope and followup
Nonetheless, this section is unlikely to protect the basin from cumulative impacts except in the very long term and on the largest scale because it 1) 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) 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 cumulative impact assessments be required at the level of major river watershed. 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.

Canadian Environmental Law Association
Clean Wisconsin
Environmental Advocates of New York
Great Lakes United
Lake Michigan Federation
Michigan Environmental Council
National Wildlife Federation Great Lakes Office
The Nature Conservancy Great Lakes Program
Ohio Environmental Council
Union québécoise de la conservation de la nature

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

DRAFT—August 20, 2004

These comments do not address, or do not address in much depth, many dimensions of basin water withdrawal reform needed to achieve comprehensive protection of Great Lakes basin waters.

Some needed reforms, such as addressing existing water withdrawals, were not part of the original Annex 2001 agreement-in-principle and therefore not part of the subsequent negotiations on how to implement those principles. Other needed reforms, such as creating an overall plan for reducing the amount of water wasted in the basin to developed-world norms, have been already proposed to the state and provincial negotiators and clearly, sometimes unanimously, ruled out of consideration.

In these comments we focus on elements of the proposed compact that fail to live up to, or are likely not to fulfill, the promises made by the basin governors and premiers when they signed Annex 2001. Revisions to the compact that, while advisable, have already been discussed and are unlikely to gain any further hearing by the negotiators, are mentioned only in passing. Those suggestions can be found in much more detail in past submissions to the negotiators by basin environmental groups, available at www.speakongreatlakes.org.

ALL ARTICLES

The proposed U.S. compact and state-provincial international agreement share many passages with what appear to be the same intent, yet they are often worded substantially differently. The two documents even contain different definitions for some of the same terms.

Both documents declare a desire to make water management as consistent as possible across the basin. Symbolically and practically, this objective would be served by rendering in identical language all those passages in the two documents that have the same intent.

basin losses is too high and, even worse, clearly discriminatory. As a result the higher in-basin loss number is both insufficiently protective and seriously undermines the compact's potential to withstand legal challenge in the long run.

Either the level of water loss for in-basin withdrawals to receive multi-state review should be set at 1 million gallons per day, or the level should be set at 5 million gallons per day of simple withdrawal, rather than loss.

6. The phase-in of standards for in-basin 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.
7. The compact must specifically protect public trust rights and obligations.
8. The current definition of return flow in the compact rightly appears to require return of the actual water withdrawn. This is a critical protection against the introduction of invasive species from neighboring watersheds. The compact should explicitly define return flow as requiring return of the same water.
9. 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 point where the water was withdrawn. The most extensive ecological damage from withdrawals occurs near the point of removal, especially on smaller rivers or smaller-scale surface waters supported by groundwater, not on a lakewide basis.
10. There is no justification for exempting near-basin diversions under 250,000 gallons per day from the requirement to return the diverted water. The provision should be deleted.
11. Permits should be explicitly granted for no more than ten years, to allow alteration of permit terms if climate change impacts and the cumulative effects of increased water withdrawals become apparent.
12. The cumulative effects of multiple withdrawals approved over time, proposed in the compact for assessment only on a basinwide basis, must be assessed on the scale at which they are most likely to first occur—that of the local watershed. The compact should also then require, rather than merely allow, alteration of the rules for judging water withdrawals based on cumulative impacts assessment.

Section 3.6.—Rules and Regulations

Praise
This section affords the public opportunity to comment on the development of rules for implementing compact provisions. This is an important provision since it will be these rules and regulations, as much as the general language of the standards, that will determine the fate of individual proposals.

Problem
However, it is even more important that the public be given this same opportunity for comment by the individual states when they develop rules for implementing compact obligations. After all, it is likely that many more water withdrawal decisions will be made on the state level than on the regional level, and that state-level decisions are likely to have collectively greater potential for adverse impact to the basin ecosystem, at least for the foreseeable future.

Section 3.7—Public Participation

Praise
This section requires public notice of all new or increased withdrawals requiring a permit, opportunity for public comment on all such withdrawal proposals, and access to "all documents relevant" to such proposals.

Problem
This section should allow comment not only on original proposals, but also on proposed permits that result from them. Permits can be heavily conditioned and in that sense dramatically different from an original proposal. Since the basic facts of the proposal and its potential ecosystem impacts should have been fully explored during the original comment period, the second comment period could be very short.

Problem
This section should more clearly require standards for determining which proposals require public meetings or hearings. Rather than "provide guidance on standards" for deciding to hold such meetings, the Compact Council and the individual states should simply be required to "establish" such standards. The section should also offer at least a very broad definition of the kind of proposals for which the public should be granted meetings or hearings, for example, "all proposals likely to generate significant community interest, including any proposal that rises to the level of regional review."

Section 3.8—Consultation with Tribes

Praise
This section assures that tribes will be separately and individually consulted on all water withdrawal proposals that rise to regional review.

Draft, August 5, 2004

Great Lakes Basin Water Resources Compact

(Agreement Among the U.S. Great Lakes States)

Key Proposed Comments

1. Some tie to the international agreement "Procedures Manual" for writing state and Compact Council rules implementing the standards

2. Inclusion of a commitment to establishing rigorous consumptive use standards or coefficients as the only means for assuring the effectiveness of the return flow standard

3. Reduction in 120 averaging period to 30 days

4. Include improvement standard for withdrawals subject to state review

5. Alteration of the treatment of consumptive uses in regional review: either 1) lowering the trigger level to 1 million gallons per day, or 2) converting the type of 5-mgd withdrawal that rises to Regional Review to simple withdrawal rather than consumptive use

6. Reduction in ten-year phase-in of jurisdiction in-basin standards to five years

7. Caps and other restrictions on diversion exemption

1. Sarah Miller
2. John Jackson
3. Katherine Smithermann
4. Cheryl Mendoza Lake Ontario
5. Pat Lupo
6. Mike Kepkay Chippewa/Ottawa
7. Nicks Hall NWF
8. Jill Ryan TIP
9. Stephanie Weiss
10. Lana Grimm
11. Terry Swier
12. Mary Mutter
13. Arlene
14. Reg Gilbert
15. Patty Olson

Problems
This provision should of course be extended to water withdrawal proposals that are reviewed only by the states.

Furthermore, the compact should explicitly state that nothing in the compact is intended to intrude on the existing rights and sovereignty of any basin tribe.

Section 3.9—Consultation with Tribes

Praise
This section grants citizens substantial tools to assure that the provisions of the compact are followed by both the Compact Council and the states, including the right to contest in court all final decisions, at both levels, as inconsistent with the compact, and the right of citizens to both directly sue water withdrawers who fail to secure required permits and recover legal costs if vindicated in court.

Problems
Citizens should also be granted the right the recover legal costs undertaken to contest a state or Compact Council decision if it is shown that the decision was not a good faith effort to implement the provisions of the compact.

Citizens should also be granted the right to sue state governments or the Compact Council for gross derelictions of duty. Under the compact as written, the public has no means to compel deficient states or the Compact Council to carry out even the most basic duties required by the compact, such as water withdrawal reporting.

Section 3.10—U.S. Supreme Court Decree: *Wisconsin et al. vs. Illinois et al.*

Praise
This section maximizes the ability of the provinces to participate in a issue of undisputed basin-wide significance.

Problem
This section fails to assure that the Chicago diversion is subject to the greatest possible degree of oversight, given the potential problems posed by the fact that the diversion is currently governed by U.S. Supreme Court orders. While it is not feasible to restrict the latitude of the Supreme Court in future jurisprudence involving the case, *Wisconsin et al. vs. Illinois et al.*, it remains possible to require the states to do their best to assure that any future changes to *Wisconsin*-related court orders are consistent with the compact.

Therefore, we suggest striking the last clause of section 3.10's subsection (2), which implicitly but ineffectively addresses this issue, and adding stronger language as a new subsection (3) that says: "In any process by which the decree is amended, the parties to this agreement who are also parties to the decree shall make every good faith effort to assure that any proposed or retroactively realized increase over the current court-ordered level of flow out of the Great Lakes basin is compelled to be subject to any processes outlined in this compact that would otherwise apply if no court decrees were in effect."

ARTICLE 5
GENERAL PROVISIONS

Section 5.1—Meetings, Public Hearings and Records

Praise
The compact provides for public access to all meetings of the Compact Council and the minutes of those meetings.

Problem
The minutes of Compact Council meetings should be available online, not merely in an office during business hours.

Section 5.2—Effect on Existing Rights

Problem?
[Question to the group: should we be concerned that "Nothing 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 Signatory Parties relating to common law water rights." Common law water rights were asserted by Michigan Citizens for Water Conservation as a defense against unreasonable use (the ecosystem damage) by Perrier/Nestle, so not "affecting" would seem to be in the public interest. But common law water rights are, after all, a form of property right (although in a community context). Should we propose an alteration such as: ". . . or in any way to interfere with the common law right to reasonable use of water, provided that such use does not cause significant adverse impact to the ecosystem"?]

Problem
While affirming private water rights of various kinds, this section fails to address public water rights. We suggest adding a subsection (3) that says: "Nothing in this Compact shall be construed in intent or practice to affect, limit, diminish, or impair any use of the public trust doctrine to protect the state and regional public interest in the waters, the ecosystem services provided by the waters, and the Water-Dependent Natural Resources of the Great Lakes – St. Lawrence River basin."

Section 5.4—Additional Laws

Praise
This section assures that compact provisions become minimum, not maximum, protections for the waters and the ecosystem of the Great Lakes – St. Lawrence River basin. Individual states remain free to pass stronger protections as the need arises.

ARTICLE 7
AUTHORITY TO COLLECT DATA

Section 7.2—Registration and Reporting of Withdrawals

Praise
This section requires all diversions and all withdrawals of 100,000 gallons per day averaged over 30 days to be reported, for the first time providing all the states and the basin as a whole with basic information on most significant withdrawals. The section also requires the states to report the information to a central registry and the states collectively to make that registry available to the public. This fundamental obligation of the states to the public, promised in the voluntary 1985 Great Lakes Charter, went unfulfilled for ten years after 1994.

Problem
The 100,000-gallon reporting level is too high. Withdrawal amounts below that level account for a relatively small portion of total basin withdrawals, but they have the potential to have disproportionately significant impacts on the ecosystem. While it may be impractical to permit most smaller withdrawals, and awareness of their locations and basic types is essential to evaluating the cumulative effects of the withdrawals on sensitive ecosystems, especially in the context of larger withdrawals that may be proposed nearby. Minnesota and Ontario require reporting in the 10,000-gallon-per-day range, and the compact should too.

Problem
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.

ARTICLE 8
REGIONAL REVIEW AND COUNCIL REVIEW OF PROPOSALS AND THE STANDARD OF REVIEW AND DECISION

ARTICLE 9
JURISDICTIONAL PROGRAMS AND THE STANDARD OF REVIEW AND DECISION

These two articles have so many common elements in the form of shared individual standards for judging water withdrawal proposals that it makes sense to treat them together before treating them separately.

Praise
The articles outline how, for the first time in basin history, a significant number of water withdrawal proposals will be subject to review on the basin of their efficiency and impact to the

basin ecosystem. The articles also commit the states to a potentially ground-breaking new concept—that access to natural resources should not be conditioned only on the (usual purely theoretical) determination of little or no harm to the ecosystem, but also on a commitment to actually improving what has become a significantly impaired system.

Praise

The treatment of diversions in articles 8 and 9 appears to be potentially nearly as effective as the WRDA veto in being able to prevent diversions. The requirement to return all non-consumed water to the basin is in most cases financially onerous, increasingly so with distance from the basin line. The combined economic and hydrological characteristics of most uses appears to make diversion proposals under agreement standards relatively unlikely. For example, the high consumption of many agricultural uses, but the inability of that sector to absorb much additional operating expense, versus the greater ability of public supply uses to absorb additional cost, but that sector's relatively low consumption and accordingly high cost of return flow.

Problem

The overall system of standards in the compact agreement by which the above goals would be achieved are in many respects excellent in concept. However, they are sufficiently lacking in detail to be potentially ineffective in practice.

Agreement negotiators have repeatedly declared their commitment to on-the-ground ecosystem protection from environmentally abusive withdrawal projects, and to a new system of water withdrawal rules that is relatively consistent across a politically diverse basin.

Specifically the negotiators have said that the "Procedures Manual" appendix to the international state-provincial agreement, originally conceived as part of the compact, would be used as a basis for the specific regulations that will be written by the states and the Compact Council to implement the standards. However, nowhere in the compact do the Signatory Parties commit themselves to relying on the "Procedures Manual" in any way to write implementing rules and regulations.

The compact must commit the Signatory Parties and the Compact Council to some relationship to the international agreement's "Procedures Manual" as a basis for developing regulations implementing the standards. There are many possible ways to accept this request, expressing a wide range of degrees of commitment to reference the provisions of the international agreement. We suggest that section 3.6 ("Rules and Regulations") or article 5 ("General Provisions") contain a new subsection or section saying: "The Signatory Parties, individually and collectively, commit to using the Great Lakes Basin Water Resources Agreement's "Procedures Manual" as a significant source of guidance in issuing rules and regulations that will give effect to the standards outlined in articles 8 and 9."

The compact agreement must contain some form of specific commitment to actually implementing the protective intent of the standards for the basin environmental community to be able to support the compact agreement.

Problem

The return flow standard is only as effective as the consumptive use standard or coefficient that determines the amount of water that must be returned. The agreement must contain a provision committing the Compact Council to 1) determining scientifically justifiable consumptive use standards or coefficients within a reasonable timeframe, and 2) basing the consumptive use

standards or coefficients on strong conservation requirements, such that return flow is truly maximized.

Problem
The return flow standard requires return flow only to the source Great Lakes or St. Lawrence River watershed. There is no ecosystem justification for the narrow ambit of this standard and great inconsistency in closely monitoring million-gallon diversions from quadrillion-gallon lakes while theoretically permitting percentage reductions in ground, stream and river ecosystems that could very possibly reach double digits without triggering the prohibition on adverse ecosystem impacts simply because the science cannot yet pin it down in advance. It is well established that ecosystem impacts of alterations in natural flows are greatest at the smallest scale of ecosystem.

At an absolute minimum the return flow standard's "preference" for return flow to source major Great Lakes tributaries should be changed to a requirement.

Problem
Likewise the conservation standard will be only as effective as the conservation goals it aims to reach. Even the international agreement's "Procedures Manual" fails to do more than list potential practices without providing any guidance on the basis of which a permit-issuer could use for deciding which practices would be required of a given applicant and how intensively they would have to be applied.

This is a recipe for inconsistency and ineffectiveness in the implementation of a standard that probably has more consensus than any other among both the states and the advisory stakeholders.

In the past we have suggested that the performance of economic sectors in the best-performing developed-economy nations be used as referents for conservation goals to be reached on specific timelines. An alternative benchmark could be the performance of middle-of-the-pack developed-economy nations.

Problem
The averaging period of 120 days for determining the trigger levels for state and regional review are so high as to exempt a significant percentage of basin water withdrawers. The averaging period should be reduced to the standard 30 days.

Section 8.1—Regional Review by the Great Lakes States and Great Lakes Provinces

Praise
This section and this article as a whole commit the states to participation in true regional decisionmaking, albeit without teeth because of the difficulty of creating enforceable arrangements across the international border. Rather than the pro-forma consultation letters required by the voluntary 1985 Great Lake Charter, this article sets up a link in the binding compact agreement with the formal discussion and voting process outlined in the voluntary international state-provincial agreement for water withdrawals proposals that rise to the level of regional review.

Problem
Nonetheless, this section requires only that the Compact Council "consider" decisions rendered by the state-provincial review body. While we concede for now that it appears legally impossible to require the Compact Council to implement decision made by the binational review body, surely it is possible to move closer to truly binational decisionmaking, the declared intention of the states in Annex 2001 and the compact's preamble, than the ineffectual "consider."

We suggest replacing the last line of the section with: "The Signatory Parties and the Compact Council will grant the greatest legally permissible deference to the product of Regional Review. If a Signatory Party or the Compact Council nonetheless renders a decision at odds with that of the Regional Review, the Signatory Party or Compact Council will include in the record of decision a rebuttal to claims found in the Regional Review that such a decision is inconsistent with the standards. If a Signatory Party or the Compact Council decision at odds with that of the Regional Review process is contested by an aggrieved person, reviewing authorities should be directed to grant equal weight to the Signatory Parties (or Compact Council) and the Regional Review body as finders of fact."

Problem
This section declares, "Regional Review of proposals may include, but not be limited to, notice and consultation and public participation." Statements about the conduct of Regional Review, as distinct from means by the states commit to participating in Regional Review, should perhaps be left to the international state-provincial agreement, under the auspices of which Regional Review will be carried out. Also, the declaration that Regional Review "may" include public participation is inconsistent with the compact agreement's section 3.7, which appropriately requires public participation rather than allowing it to be optional.

Section 8.2—Council Review for Diversions

Praise
This section establishes an appropriately low trigger level (1 million gallons per day averaged over 120 days), key standards (return flow of an appropriate quantity of unconsumed water and improvement), and decision-making system (unanimity) for regional review of a class of water withdrawal—diversions—that has the generic potential for permanent damage to the Great Lakes – St. Lawrence River ecosystem because it involves total loss of water to the system.

Problems
Key elements of the decision-making standard as applied to diversions that rise to the level of Regional Review are weak or vague. Since many of these standards apply to consumptive uses that rise to the level of Regional Review and both diversions and consumptive uses subject only to jurisdictional review, we deal with most of the standards collectively in a critiques of both articles 8 and 9 below.

Sections 8.3—Council Review for Consumptive Uses

Problem
This section establishes a form of trigger level (consumptive use or loss), level of loss (5 million gallons per day averaged over 120 days), and decision-making system (a minimum 6-2 vote for

approval) for water withdrawal proposals that together point to an intent by the Signatory Parties to treat withdrawals for in-basin use much less strictly than withdrawals for out-of-basin use. While some difference in treatment between the two types of withdrawal has a tradition in international water law and might withstand U.S. Constitutional and international trade scrutiny, the degree of differential treatment represented by this section is so great as to entail significant legal risk.

The avowed purpose of the Annex 2001 initiative and the proposed compact agreement is to protect the Waters and Water Dependent Natural Resources of the Great Lakes – St. Lawrence River basin. It is difficult to see how this ecosystem protection is achieved by allowing one form of total loss of water to the basin ecosystem, say, a consumptive loss of 4.5 millions gallons per day averaged over 120 days, to avoid Regional Review and multi-jurisdictional vote, make no improvement to the basin ecosystem, and carry out mere unenumerated "conservation measures" rather than a much more detailed "conservation plan"—while requiring a diversion of 1.5 million gallons per day, which entails one-third the water loss and therefore on average one-third the ecosystem impact but must implement a rigorous conservation plan, make an improvement, and suffer the scrutiny of ten jurisdictions and the enforceable power of eight.

This differential treatment is prima facie evidence of discriminatory intent and seriously undermines one of the core purposes of the annex initiative declared by the governors during the negotiations leading up to the signing of the original Annex 2001—legal durability.

We suggest either of two possible revisions to the system proposed in section 8.3:
1) reduction of the consumptive use trigger level to 1 million gallons per day averaged over 120 days, the same trigger applied to diversions in section 8.2, because consumptive uses and diversions involve the same kind of ecosystem-impact: total water loss, or 2) changing the type of proposal being addressed by section 8.3 from consumptive use to simple withdrawal; in most cases the consumptive loss entailed by withdrawals above 5 million gallons per day will be far less than total, and differential treatment (compared to diversions) of proposals under 5 million gallons per day could potentially be justified as generically less likely (compared to diversions of the same size) to cause ecosystem damage.

Section 9.1—Signatory Party Water Conservation Programs

Praise

This section includes a laudable commitment to overall conservation—implicitly directed at existing water withdrawals and uses—that is not formally required under the commitments of Annex 2001.

Problem

Unfortunately, this general commitment suffers from the same deficiency as the water conservation standard for reviewing water withdrawal proposals: it lacks specific goals and is accordingly likely to be applied inconsistently across the basin and for the most part ineffectively. As we suggested above in our comments on articles 8 and 9 as a pair, the states should commit to sectoral conservation targets on specific timelines.

not just to conservation above trigger levels.

Section 9.2—Jurisdictional Review for Diversions

This section exempts certain diversions—of less than 250,000 gallons per day averaged over 120

days, used in areas less than twelve miles outside the basin line, and supplied exclusively for public water supply where "adequate quantities" of potable water are not available—from the return flow standard. This exemption could be interpreted as having a primarily humanitarian character, and its relatively low maximum size (in the context of most public water supply projects) may provide a significant financial disincentive for communities more than one or two miles from the basin line. The exemption is also relatively narrow in procedural scope, in that all the other standards continue to apply.

However, we are concerned that the exemption could be abused by being used to support new development or by division of a much larger diversion scheme into several small proposals. Therefore we suggest a cap of one or two such exemptions per state and a requirement that recipients be primarily houses of facilities in existence at the time of the signing of the compact agreement.

Section 9.3—Jurisdictional Review for Consumptive Uses

Problem

This section omits improvement as a standard to be applied to withdrawals under the huge upper limit of 5 million gallons per day of consumptive loss.

Improvement is a key commitment of the annex initiative. Annex 2001 promised that all basin water withdrawals would be subject to the basic standards of conservation, no significant adverse impact, and improvement.

We strongly urge the states to include the improvement standard, even if in a somewhat attenuated form, in the process for jurisdictional review of consumptive uses.

Section 10.1—Cumulative Impacts

Praise

Precedent setting, sufficiently frequent assessments

Problem

Failure to assess at anything other than basin level; failure to mandate changes in permitting rules based on findings.

Canadian Environmental Law Association
Clean Wisconsin
Environmental Advocates of New York
Great Lakes United
Lake Michigan Federation
Michigan Environmental Council
National Wildlife Federation Great Lakes Office
Ohio Environmental Council
Union québécoise de la conservation de la nature

Environmental Group Comments on the Proposed State-Provincial "Great Lakes Basin Sustainable Water Resources Agreement"

DRAFT – Sept. 7, 2004

Summary comments

The proposed international agreement among the two provinces and eight states of the Great Lakes – St. Lawrence River ecosystem is an important step forward in protecting Great Lakes basin waters from bulk water exports, diversions, and abuse. However, the proposed agreement needs a significant number of improvements to achieve its aims of fully protecting the basin ecosystem from damage caused by water withdrawals. In particular, the agreement needs changes to assure that 1) future vetoes of harmful diversion proposals are able to withstand possible court challenges, and 2) greater consideration is given ten-party decisions on diversions and other withdrawals of basinwide concern when those decisions are ultimately implemented by the provinces, the states, or the eight states acting collectively in the form of the proposed Agreement Council.

It should be noted that, while the proposed agreement makes important advances, the provinces and states regrettably decided in 2001 that both the provincial-state international agreement and accompanying eight-state agreement would not address a number of important issues related to Great Lakes – St. Lawrence River basin water withdrawals.

Most importantly, the agreements deal only with "new or increased" water withdrawals, mostly ignoring the ecosystem damage caused by existing withdrawals. And as primarily systems for reviewing individual water withdrawal projects, the agreements also provide no overall basin water planning—or even significant incentives for individual communities to undertake such planning—that would reduce overall human water consumption in the basin and therefore also reduce the number and size of new water withdrawal proposals.

Summary of benefits of the proposed agreement

1. **Environmental standards.** The proposed international agreement provides, for the first time, environmental standards for judging new water withdrawal proposals.
2. **Covering all basin waters.** The proposed agreement protects all the waters of the Great Lakes surface water basin, including streams and groundwater.
3. **Improved diversion protection.** Taken as a whole, the proposed agreement appears to increase the region's ability to prevent harmful diversions.
4. **Fairly extensive application.** The proposed agreement requires most water withdrawals to be registered and many larger withdrawals to be 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.
5. **Substantial detail on implementing standards.** The proposed agreement's appendix is stated to have the full force of the rest of the agreement, and provides substantial guidance on how the standards should be implemented to assure that they are truly protective.
6. **Consistency across the basin.** The agreement's detail provides a reasonable assurance that implementation of the standards would be relatively consistent across the basin.
7. **Greater protection allowed.** The proposed agreement properly establishes the new environmental standards as a minimum, not a maximum system of protection, so individual states are free to expand their protections.
8. **Public participation.** The agreement provides public notice of water withdrawal proposals and significant avenues for public participation in permitting decisions.

Summary of problems with the proposed agreement

1. **Lack of enforceability.** The proposed international agreement is voluntary. Recognizing the difficulty of creating a truly enforceable agreement across the international border—this would require a binational federal treaty, the seeking of which would carry its own risks—the agreement could nonetheless provide greater assurance that it will be carried out. The preamble should acknowledge that, nearly twenty years after the fact, the ten parties have failed to carry out significant sections of the 1985 Great Lakes Charter. The body of the agreement should contain strong promise to pass the agreement into provincial and state law.
2. **"Transparency" of "regional review."** The agreement says very little about how diversions and withdrawals large enough to require a vote by the ten jurisdictions will be judged. Will the applicants and their lawyers be allowed to make a case in person? Will the public be able to the same? Will deliberations be transcribed and released publicly, or only a final "yes" or "no" decision issued? The agreement should assure openness in regional decisionmaking.
3. **Insufficient conservation provisions.** The agreement provides good water conservation requirements for individual proposals, but no system for reducing basin water use, currently twice the average for developed-world countries, overall. The agreement's conservation provisions should establish a goal of significantly reducing water loss due to basin water uses.

In the long run the region cannot persuade the world to forego access to Great Lakes waters if we are obviously wasting it.

4. **Some uses are treated more leniently.** The proposed agreement effectively exempts many proposed intermittent and seasonal uses from oversight by averaging the size of the daily withdrawal at which they are subject to standards over 120 days—four long months. For smaller source watersheds, this is a license to cause ecosystem damage. The averaging period should be 30 days.

5. **Dangerously unequal treatment of diversions and in-basin uses.** The proposed agreement appropriately subjects even the smaller out-of-basin diversions to extra requirements and tougher eight-state review, but for in-basin water uses the agreement reserves those extra hoops only for the very largest proposals. In some scenarios, this disparity of treatment could require a fifty-times higher amount of in-basin use to trigger the tougher review than it would for diversions intended for the same purpose, such as drinking water supply. This difference in treatment would be excellent evidence for a lawsuit challenging some future state diversion veto as discriminatory.

   The solution is simple: toughen the standards for in-basin uses by 1) lowering the level at which they are subject to regional review and 2) requiring that they include an improvement. Political realities may make it impossible for in-basin uses to be treated as toughly as diversions, but the gap must be significantly reduced.

6. **Limited "improvement."** The proposed agreement's "improvement" standard should apply to all withdrawals, not just to diversions and the largest withdrawals. Subjecting new and increased withdrawals to the standards of conservation, no harm, and improvement was the core commitment of Annex 2001.

7. **The ten-year phase-in of in-basin standards is too long.** The phase-in of standards for in-basin water withdrawals reviewed by the individual provinces and states should be five years rather than ten. The longer phase-in, by permitting such a wide gap between the jurisdictions' commitment to reform and their implementation of that commitment, invites discord among the jurisdictions and risks the failure of the agreement in the medium term.

8. **Protect the public trust.** The proposed agreement 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 agreement, and must not be accidentally harmed or limited by it.

9. **Return the exact same water.** The current definition of return flow in the agreement rightly appears to require return of the actual water withdrawn. This is a critical protection against the introduction of invasive species from neighboring watersheds. The agreement should explicitly define return flow as requiring return of the same water.

10. **Return water to its local source.** Rather than requiring return flow only to the watershed of the same lake from which it was taken, the agreement should require return as near as possible to point where the water was withdrawn. 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.

11. **Delete the diversion exemption.** There is no justification for exempting near-basin diversions under 250,000 gallons per day from the requirement to return the diverted water. The provision should be deleted.

12. **Permit time limits are needed.** Permits should be explicitly granted for no more than ten years, to allow alteration of permit terms if climate change impacts and the cumulative effects to the ecosystem of increased water withdrawals become apparent.
13. **Assess cumulative effect locally.** The proposed agreement 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 agreement should also require, rather than merely allow, amending the rules for judging water withdrawals based on assessments of cumulative effects.

Can you supply any clarification ?

Many thanks in advance for your consideration.

Jeff Laidlaw (905) 833 2249

Incoming mail is certified Virus Free.
Checked by AVG anti-virus system (http://www.grisoft.com).
Version: 6.0.760 / Virus Database: 509 - Release Date: 10/09/2004

Reply-To: <water@cela.ca>
From: "CELA Water Campaigner" <water@cela.ca>
To: <millers@lao.on.ca>
Subject: FW: Annex 2001 / 4 Draft
Date: Fri, 10 Sep 2004 19:02:17 -0400
Organization: Canadian Environmental Law Association
Importance: Normal

Hi Sarah, I received this which I can't respond to at the moment but I will on Monday or Tuesay unless you would like to reposnd.

Darryl

-----Original Message-----
From: Ribbit [mailto:ribbit@allstream.net]
Sent: Friday, September 10, 2004 1:07 PM
To: water@cela.ca
Cc: nancy@hopkinson.ca; fredwjessop@aol.com; janeunderhill@sympatico.ca
Subject: Annex 2001 / 4 Draft

Good day:

My name is Jeff Laidlaw and I am the Chairman of King Environmental Groups.

I have a relatively simple question with respect to the draft Annex 2001/4 Agreements, which perhaps your more in-depth knowledge and understanding can allow you to answer.

As you may be aware York Region is planning to implement the Big Pipe for King City.

Without getting in to all the detail, King City which currently draws about 2 million litres per day from the aquifers servicing King City; and through the use of septics it's estimated that 600,00 litres goes back to the aquifer and 1.4 million litres goes in to the Humber River... will see a very dramatic shift in water consumption and flow.

Assuming that the Official Plan holds, the total water consumption on buildout will increase to an estimated 9.4 million litres per day, with no return to the aquifer or the Humber River watershed. All of that water will be siphoned off to the Duffins Creek treatment plant in the Rouge River Watershed.

The wording of the draft Annex 2001/4 agreement is unclear as to how this might be viewed. While it is true that this is unquestionably, from our viewpoint a significant and somewhat scary source water diversion, the other aspect to take in to consideration is that ultimately in both cases the waters will end up in Lake Ontario.

> full text of the agreement can be reviewed at
> www.cglg.org/1projects/water/overview.asp. The Great Lakes Governors and
> the Council of Great Lakes Governors will accept comments through
> October 18, 2004. The Council will hold two public hearings this fall,
> and Wisconsin hearings are scheduled for:"
>
>
> Derek Scheer
> Water Policy Director
> Clean Wisconsin
> (Formerly Wisconsin's Environmental Decade)
> 122 State Street, Suite 200
> Madison, WI 53703-2500
> P: 608.251.7020 F: 608.251.1655
> W: www.cleanwisconsin.org
> }><{{{{'> }><{{{{'> }><{{{{'>
> Water Above Water Below: The connection between Wisconsin's Waters, is
> now available. Email or call me to receive a copy.
>
>

> to confer a right to water.
>
> I also think that we should be discussing the definition of
> permitted/existing diversion or consumptive use. There are many
> withdrawal permits out there that allow for increased use. Put another
> way, many water users are permitted well beyond their current use
> levels. We should be calling for language that fixes existing uses at
> current levels.
>
>
> "At the National Governors Association annual meeting July 19, 2004, in
> Seattle, the Great Lakes Governors released for public comment a draft
> construct for managing Great Lakes water withdrawals. The states have
> been negotiating this long-awaited document for more than seven years.
> Despite the release of a draft document there is not yet agreement
> amongst the states on some of the most significant issues. Therefore,
> public comments will likely play a significant role in determining the
> final agreement.
> The basic construct of the agreement (amongst state and Canadian
> Provinces) and the compact (U.S. States only) includes regional review
> of new or increased diversions greater than 1 million gal/day and new or
> increased consumptive use greater than 5 million gal/day averaged over
> 120 day period. The draft requires unanimous support of states for
> approval of any such withdrawals. States would use the following
> approval criteria:
> . Need for all/part of withdrawal cannot be reasonably avoided
> . Withdrawal limited to quantity that is reasonable for the intended
> purpose
> . Water returned to basin, less consumptive use allowance
> . Withdrawal will result in no significant individual or cumulative
> adverse impacts to quantity or quality (more than just water)
> . Conservation plan required
> . Proposal for improvement to water and dependent resources (physical,
> chemical, or biological)
> . Withdrawal must comply with all applicable laws
>
> Some of the important issues for which there is no agreement include:
> . What will the regional review process look like? Does a withdrawal
> project require a unanimous vote of states or will a majority (or
> super-majority) suffice?
> . What public participation process will diversion projects require?
> . Are grandfathered projects protected?
> . Do states or a regional commission determine whether the Annex's
> "improvement" standard are met?
> . How do projects meet the improvement standard?
>
> WMC is still in the process of evaluating the agreement. Of particular
> concern is protection of grandfathered projects, the ability of other
> states to stop an economic development project in Wisconsin, and the
> poorly defined improvement standard. WMC will work with Governor Doyle
> and the Legislature to secure revisions that address these concerns. The

Date: Sat, 11 Sep 2004 21:45:23 -0400
From: Marc Hudon <hudo@videotron.ca>
Subject: Re: WMC on Annex
To: Derek Scheer <dscheer@cleanwisconsin.org>,
'John Jackson' <jjackson@web.ca>, 'Cameron Davis' <cdavis@lakemichigan.org>,
'Reg Gilbert' <reg@glu.org>, 'Andrew Guy' <aguy@mlui.org>,
'Anne Wordsworth' <anne@cela.ca>,
'Cheryl Mendoza' <cmendoza@lakemichigan.org>, 'David Higby' <dhigby@eany.org>,
dhigby@sover.net, 'Donna Stine' <dstine@mucc.org>,
'Erin McDonough' <mcdonough@nwf.org>, 'James Clift' <jamesmec@voyager.net>,
'Jill Ryan' <jill@watershedcouncil.org>, 'Jim Kleinschmit' <jim@iatp.org>,
'John Andersen' <jandersen@tnc.org>, 'Karen Vigmostad' <kvigmostad@nemw.org>,
'Lois Morrison' <lmorrison@tnc.org>, 'Mark Muller' <mmuller@iatp.org>,
'Melissa Sutton' <muccintern@mucc.org>,
'Michele DePhilip' <mdephilip@tnc.org>, 'Molly Flanagan' <molly@theoec.org>,
'Noah Hall' <hall@nwf.org>, 'Patty O'Donnell' <pattyglu@earthlink.net>,
'Sarah Miller' <millers@lao.on.ca>,
'Sarah Miller' <sarah.miller@sympatico.ca>,
'Wil Cwikiel' <wil@watershedcouncil.org>
User-Agent: Microsoft-Entourage/11.0.0.040405

Bonsoir Derek,

Thanks for the heads-up, You are right on these points.

Regards,

Marc

> From: Derek Scheer <dscheer@cleanwisconsin.org>
> Date: Fri, 10 Sep 2004 17:12:26 -0500
> To: 'John Jackson' <jjackson@web.ca>, 'Cameron Davis'
> <cdavis@lakemichigan.org>, 'Reg Gilbert' <reg@glu.org>, 'Andrew Guy'
> <aguy@mlui.org>, 'Anne Wordsworth' <anne@cela.ca>, 'Cheryl Mendoza'
> <cmendoza@lakemichigan.org>, 'David Higby' <dhigby@eany.org>,
> <dhigby@sover.net>, 'Donna Stine' <dstine@mucc.org>, 'Erin McDonough'
> <mcdonough@nwf.org>, 'James Clift' <jamesmec@voyager.net>, 'Jill Ryan'
> <jill@watershedcouncil.org>, 'Jim Kleinschmit' <jim@iatp.org>, 'John Andersen'
> <jandersen@tnc.org>, 'Karen Vigmostad' <kvigmostad@nemw.org>, 'Lois Morrison'
> <lmorrison@tnc.org>, 'Marc Hudon' <hudo@videotron.ca>, 'Mark Muller'
> <mmuller@iatp.org>, 'Melissa Sutton' <muccintern@mucc.org>, 'Michele DePhilip'
> <mdephilip@tnc.org>, 'Molly Flanagan' <molly@theoec.org>, 'Noah Hall'
> <hall@nwf.org>, 'Patty O'Donnell' <pattyglu@earthlink.net>, 'Sarah Miller'
> <millers@lao.on.ca>, 'Sarah Miller' <sarah.miller@sympatico.ca>, 'Wil Cwikiel'
> <wil@watershedcouncil.org>
> Subject: WMC on Annex
>
> Wisconsin Manufacturing and Commerce's take on the Annex is copied
> below. Notice that they are using the term grandfathered. I think that
> we need to hit that issue hard. Nothing in this document should be read

and could use some improvement in dealing with takings intended for in-basin uses. I think it is fair to say that recent criticism of the agreements posted and referenced on this list did contain some misunderstandings of the agreements. This is not surprising given their length and complexity.

I think all basin environmentalists have a critical (and potentially very time-consuming) job at this point: to decide if the proposed agreements can be made useful for solving the basin's water quantity problems, to participate in a constructive way during the remaining weeks of the comment period (which ends October 18), and organize our fellow citizens to do the same. Government does not provide us with many opportunities of this scale and with these long-term implications. We should make the best of it.

Reg Gilbert
Senior Coordinator
Great Lakes United

Buffalo State College, Cassety Hall
1300 Elmwood Ave.
Buffalo, New York, 14222

716-886-0142, fax: -0303

www.glu.org

Great Lakes United staff represented by UAW

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world, would be one more means to convince Congress and any trade tribunal that the new rules were not intended as simple regional protectionism of "our" water, but as a genuine effort to protect the region's ecosystem.

The rhetoric may have been a little overheated. As proposed in the agreements, the improvement standard will apply only to the fewer large proposals, so it is more of a pilot program than an integral part of the new system. But since the improvement standard is separated from the agreements' "reasonable water quantity," conservation, return flow, and environmental harm provisions, it does appear to be a good faith effort by the governments to do something innovative, not exactly the most common attribute of government proposals.

While the agreements do some things right, they also have some serious problems.

1) The conservation provisions of the nonbinding international agreement seem to be excellent; the compact agreement simply requires conservation "plans" and "measures" of all withdrawal projects. Supposedly the international agreement will be used as guidance for implementing the conservation elements the U.S. compact agreement, but if that is the case, obviously the compact should say so.

2) The provinces have not explicitly promised that they will pass the applicable provisions of the international agreement into law.

3) The U.S. compact allows an absurd ten years to enact the standards into state law (although the standards would apply immediately to the larger proposals the must be considered by the states and provinces together)

4) The agreements' promised regular assessment of cumulative impacts of basin water withdrawals applies only to the lakes as a whole, completely omitting the local watersheds where cumulative impacts will be first, and most strongly, felt, and in any case there is no link between findings of cumulative impacts and changes to permitting rules.

5) The compact agreement fails to explicitly state that the governors' current diversion veto authority will remain untouched. No state official has said they desired repeal of the veto authority, but the compact standards system could be read to imply its repeal. While the new system requires unanimous support for larger diversion proposals, without a veto it would still be possible for irresponsible individual jurisdictions to permit harmful diversions of less than 1 million gallons per day or less, requiring an annoying federal lawsuit by another state to prevent it, something the other states might be reluctant to do over a comparatively small amount of water.

In conclusion, Great Lakes United and ten other groups represented on the www.speakongreatlakes.org site think that the proposed agreements are a good first step overall, make substantial advances on diversion protection

Expensive separate distribution and treatment facilities would have to be built by this kind of applicant.

This is potentially a devilishly simple way to have an apparently evenhanded policy (since both in- and out-of-basin withdrawers would be required to return the water, and water return is a reasonable requirement) that could successfully address trade challenges while effectively preventing water export.

One little-noticed implication of the return flow standard is that its definition of source watershed is lake basin, not the Great Lakes basin as a whole. This means that proposed diversions between lakes, such as the Lake Huron – Lake Ontario diversions being contemplated for supply to the regions north of Toronto and east of Hamilton, would be banned under the proposed agreements because they would not be returning water to the source lake basin.

2) The agreements seem to deliver on the promise of the original Annex 2001 agreement-in-principle: for the first time water withdrawal proposals would be managed on a environmental-protection basis. This would be a significant advance for the region, bringing under rule of law the last great area of almost completely unregulated abuse of the region's ecosystem.

3) The enforcement powers granted in the compact agreement to the states (against each other) and to citizens (against inadequate state programs, bad permit decisions, and withdrawers who fail to get a permit) make it possible that the apparently strong standards will make more of a difference on the ground than similar protections in other areas of environmental law, which look good on paper but are poorly enforced.

4) The language of the "improvement" standard, criticized in some quarters as simply selling water by trading half-hearted mitigation for water losses, does not seem on first inspection of the specific language to be problematic in that way. The agreements clearly define "improvement" as something different from and additional to any measures that might be taken to prevent or make up for damage caused by the proposal. The latter actions are required by the separate "no significant adverse impact" standard. One source of confusion may be a clause in the original Annex 2001 definition of improvement that said improvement projects could be used to "mitigate" damage caused by the *existing* water withdrawals. Those of us who were working on strong language for the original Annex 2001 agreement lost the battle to include existing withdrawers under the new rules, which may have been politically impossible anyway. But since they are excluded, finding a non-governmental, off-budget way to reduce the damage they do should be a very good thing for the ecosystem.

The theory of including the improvement standard was to introduce a precedent-setting practice to environmental protection: improving the ecosystem rather than attempting (and usually failing) to simply prevent damage when accessing ecosystem resources. According to the theory, having such a high additional standard, supposedly the only one of its kind in the

The nonbinding international agreement is much more complex than outlined here, but a central fact is that it is nonbinding. The states and provinces are basically promising to pass it into law, but there is no consequence if they do not. One reasonably possible scenario if both the compact and international agreements are signed as currently written, is that the provinces would pass the international agreement into provincial law in order to retain moral leverage over their U.S. state colleagues, and the U.S. states would use the highly detailed environmental protection provisions of the international agreement as guidance for the regulations they must write to implement the compact agreement.

On the other hand, another possibility is that the provinces forget about the international agreement and the U.S. states ignore its guidance and use weak rules to enforce the compact standards.

The proposed agreements and much additional information is available at a joint environmental Web site, <http://www.speakongreatlakes.org/>www.speakongreatlakes.org. Although the above is just an outline, I know it is already a great deal to digest. Even those of us who have watched the negotiations closely for the last three years have had to spend many hours of analysis to fully understand the implications of the proposed agreements' provisions. The agreements seem promising, but on closer inspection they may not live up to that promise.

Nonetheless, a few things can be speculated as possible after first inspection:

1) The return flow standard may make some diversions theoretically easier, but it may also make them practically impossible. Moving water is expensive, and moving it both out of and back into the basin is twice as expensive. Furthermore, the cost of moving water increases right along with amount of water and distance traveled, making the feared large-scale diversions to the Mississippi River, the U.S. South, and the U.S. Southwest, already very expensive, doubly so under the return standard.

The return flow standard could also act as a substantial disincentive for near-basin diversions. The proposed diversion to Lowell, Indiana, vetoed by Michigan in 1992, would not have met the return flow standard (and probably would never have been proposed), because that community, despite being just a few miles outside the basin, was unwilling to pay to return the water.

Furthermore, the return flow provision seems to clearly specify that the exact same water that was diverted must be returned. This would have ruled out the last approved diversion, at Akron, Ohio, in 1998, because it employs a "no net loss" idea of returning an equal quantity of different water (and its possible invasive species) by a luckily placed existing canal.

Returning the same water might also add a substantial barrier to recipients who already have a distribution and treatment system (that is, most existing residential settlements), because the returned water would not be able to be simply dumped into the existing infrastructure. That would mix in- and out-of-basin water and make return of the same water impossible.

more than 100,000 gallons of water per day, no matter its destination:
--the proposed quantity of water is reasonable for the proposed use
--the proposal incorporates "environmentally sound" and "economically feasible" water conservation
--the water is returned to its originating lake basin, less an "allowable" loss unavoidably caused by the use
--the withdrawal causes "no significant adverse individual or cumulative impact" on the basin environment

4) To require consideration by a regional body of all ten jurisdictions of diversions over 1 million gallons per day and withdrawals for in-basin use that result in a loss of 5 million gallons per day or more to evaporation, incorporation into products, or by other means, and to add an additional standard that these larger proposals must meet:
--the proposal incorporates an additional "improvement" to the Great Lakes ecosystem that is not mitigation for damage caused by the proposal

5) To add an additional standard for diversions:
--there is no reasonable alternative water supply that would avoid the diversion

6) To provide a) public notice of all withdrawal proposals, b) the opportunity to comment before decisions are made, and c) timely access to all relevant documents throughout and after the permitting process

The U.S. compact additionally proposes:

7) To be binding on the U.S. states, with enforcement possible in U.S. federal court

8) Requiring a unanimous vote of all eight states to approve diversions of 1 million gallons or more, and support of at least six states to approve withdrawals that result in a loss of 5 million gallons per day or more to evaporation, incorporation into products, or by other means. Proposals under those amounts would be decided by the states individually, but must also meet the standards or be subject to legal challenge

9) Exempting diversions from the water return standard if they are a) under 250,000 gallons per day (enough to supply an average of 200-300 homes), b) intended for public drinking water supply, and c) used within 12 miles of the basin line

10) To "consider" the judgment on water withdrawal of a ten-person decision-making body that includes both the states and Ontario and Quebec

11) To permit citizens, supposedly including the provincial governments, to dispute permitting decisions in administrative, state, and ultimately federal court, and to allow citizens to sue individuals or companies that fail to obtain permits, with provision for reimbursement of legal costs if successful

law that suggest that there is in fact a serious problem in the trade agreements' treatment of water. Other lawyers have disagreed, but any concerned observer should be looking for explicit protections in the next rounds of trade agreement negotiations.

That is unlikely. Trade agreements have become broader and more intrusive without letup for fifty years. This trend is accelerating and possibly unstoppable, barring a worldwide depression. The planned Free Trade Area of the Americas and the current round of negotiations on the new GATT, and its enforcement arm, the World Trade Organization, will cover more goods, define things as goods that were previously never thought to be goods, significantly extend to services, and become significantly more administratively intrusive. Water services, as most people on this list probably know, are specifically in the sights of the GATT negotiators. France, the country that thankfully torpedoed the Multilateral Agreement on Investment horror show several years, will play no similar role on this issue. France is home to the world's leading water services corporations and will be looking for extensive privatization options, both of water services around the world, and, no doubt, of the water *sources* that are the main basis (along with monopoly) of water services wealth. The problem of trade agreements and water is sure to get worse, not better in future rounds of trade negotiations.

I think the above facts effectively argue for the need for some additional protection for Great Lakes waters. As a region, we can hope that traditions of regional autonomy and states rights will offer some measure of protection from a dangerous Congress. In the world, we can and must continue to work for clauses that exempt water from trade rules. But neither of these are promising options. We must take a look and see what we can do for ourselves.

The question is whether the proposed agreements released in July by the U.S. states (the proposed binding "compact") and by the states and provinces (the proposed nonbinding international agreement) help, hurt, or are irrelevant to the cause of protecting Great Lakes waters.

Great Lakes United has taken a position on this question, which we formulated in consultation with our member groups. An outline of several important features of the agreements will help readers of this list make up their minds on this critical question before the official comment period ends on October 18.

Both agreements propose:

1) To cover all withdrawals, both for out-of-basin use (diversion) and for in-basin use

2) To cover all water in the basin -- ground, spring, stream, and river as well as Great Lakes

3) To create several standards for judging nearly all proposals to withdraw

This leaves the governors' veto. The authority granted to the governors by the U.S. Congress to veto diversions is thought to be unconstitutional by some lawyers and perfectly constitutional by others. As a group, the states' official lawyers, both those who are part of the executive branch and the independently elected attorneys general, seem to think there is a problem with the veto's constitutionality, because they are advising their states to pursue the second level of protection embodied in the proposed agreements. Whatever the case, no one disagrees that Congress can remove the veto authority at any time by a simple majority vote.

This is where political reality becomes a serious concern. The Great Lakes states are losing representation in the U.S. House of Representatives and do not have a very large representation (just 16 percent) in the U.S. Senate. Also, many of the Great Lakes states representatives live in areas of the states outside of the basin, sometimes a great distance from the basin. Some of the Great Lakes senators, such as those from Illinois, Indiana, and Pennsylvania, come from states with only tiny portions of the basin within their boundaries. In short, if there is a "water grab" in coming decades, the votes in Congress could very well be there to enable it.

Unlike Canada, in which the number of seats in Parliament grows with the population, in the United States the number of seats in the U.S. House is fixed. As population ratios change, states gain and lose representation. After the 2000 census, twelve seats changed states. Of these, the Great Lakes states lost nine seats, with seven of them going to water-poor states. This double shift, out of the Great Lakes region and also into thirsty regions, is likely to continue for at least the next two decadal censuses. Great Lakes state representation will remain unchanged in the U.S. Senate, where representation is undemocratically allocated two per state rather than by population, but one should also keep in mind that this representation amounts to only 16 of a total 100 seats, proportionally less than the region's shrunken representation in the House. In neither House nor Senate will the region have enough power to stop a determined water grab attempted twenty years hence by a combination of powerful corporations, their lackeys in Congress, and a southern- and western-dominated administration (headed no doubt by one of the Bush daughters).

That's the domestic U.S. politics side of the problem. There remains the trade agreement dimension to the problem. Both the Canadian and U.S. governments argue that "water in its natural state" is not covered by the trade agreements. While the legal case for this position is not absurd, the fact remains that the two countries were unwilling to put that statement into the body of NAFTA, relegating it to an unsigned attachment to a 1993 press release that has no value in a trade tribunal. As for the worldwide General Agreement on Tariffs and Trade, in 1999 the U.S. trade representative refused the official request of four senior U.S. senators to explain how the current GATT agreement would apply to a Great Lakes water export scenario, and did not even respond to a citizen request to assure that water in its natural state is exempted in the new version of the GATT. The Council of Canadians have commissioned credible legal analyses of trade

Date: Mon, 27 Sep 2004 09:03:35 -0400
To: wateract-l@list.web.net
From: Reg Gilbert <reg@glu.org>
Subject: proposed "annex" water agreements

Dear list,

I would like to address recent critiques of the proposed "Annex 2001" agreements as merely diversion-permitting schemes.

Great Lakes United and almost all of the rest of the Great Lakes basin environmental community have for two decades advocated a policy of diversions bans as the simplest and clearest method of preventing bulk removals of water from the region. As long as such bans can be legally upheld, we continue to hold that view. However, several important political and trade agreement realities suggest that a second layer of protection may soon be needed.

In our analysis, available in greater detail at a joint environmental group Web site found at www.speakongreatlakes.org, the proposed new state- and state-provincial agreements leave in place all existing protections against diverions while significantly improving long-run protection against them. At the same time, the agreements need to do better to achieve their other main aim: preventing damage to the ecosystem caused by water takings intended for in-basin use.

Two general realities suggest the need for an additional layer of protection against diversions: 1) the U.S. governors' current veto authority will not necessarily always be able to save the lakes from bulk water export and diversion, and 2) trade agreements become wider-reaching and more powerful with every new version.

The region could choose to defend itself against diversions by simply continuing to say no to them -- that is, to rely solely on the status quo of the bans enacted in Canada, Ontario, Quebec, the United States, and Michigan in their various forms. But can the bans withstand a well-funded legal challenge by corporations, other U.S. states, or other countries? The question is whether relying on existing laws alone to defend against such challenges is wise.

Let us set aside the issue of Canadian bans, because trade agreements appy equally to both the United States and Canada and Canada's constitution makes the nation's various bans likely to withstand any domestic legal challenge. The proposed agreements explicitly set minimum standards, so they do not affect Canada's various bans.

The Michigan ban (and by extension any ban by a state) is considered unconstitutional by every lawyer who has commented on it. States simply can't restrict so-called interstate "trade" that way. The U.S. Constitution is one of the original free trade agreements.

> From: John Jackson <jjackson@web.ca>
> Date: Thu, 23 Sep 2004 13:38:03 -0400
> To: Jim Mahon <jimahon@ody.ca>
> Subject: Annex
>
> Jim
>
> I see from the story in the London paper that you had a huge turnout at the
> meeting last night. Where you there? What was your sense of the meeting?
>
> John
>
> --
> John Jackson
> 17 Major Street, Kitchener, Ontario N2H 4R1
> 519-744-7503
> Fax: 519-744-1546
>
>
>
>
>

------ End of Forwarded Message

given. I also raised the issue the water quality goes hand in hand with quantity. And used water begets lower quality plus projection of up to a 4 foot drop of the Lakes in 10 years from climate change promising concentrated toxics. Again no answer here either other than they recognized climate change as a major problem.

The meeting was scheduled to go from 7 - 9pm. At 11 pm. They finally told the diehards about 50 remaining that they were calling the meeting. There were people from as far away as Walkerton. One from Sarnia asked why they weren't coming to the Lake communities to hear from the people that lived beside the Lakes. I never heard one person say one favorable remark about the agreement and most were outraged. The meeting was awful and designed to discourage people from commenting. I suggested that it was offensive to have a meeting and expect average people to comment by copying down an address on a PowerPoint presentation to send in comments that at the very least they could print out the page with the addresses which they did but the majority will not.

I was appalled by what I saw of the agreement and said so, I was appalled that the perception was that GLU was the promoter of it. The MNR official said after the meeting the GLU knew all about the agreement and GLU had setup a website to inform the general public. I informed him if MNR wanted us to inform people and get people out to their meeting they should provide money to GLU for that purpose. They asked me to send in comments and I assured them that I would. I would be interested in seeing your comments.

If Reg Gilbert had been there I would have shot him. It was not MNR or Glue's finest hour.

Yours Truly--

Jim Mahon
CAW Local 1520
London and District Labour Council, Environment Committee
Ontario Environment Network, Labour Caucus
Great Lakes United, Vice-President

When a man throws an empty cigarette package from an automobile, he is liable to a fine of $50. When a man throws a billboard across a view, he is richly rewarded. ~Pat Brown, quoted in David Ogilvy, Ogilvy on Advertising, 1985

User-Agent: Microsoft-Entourage/10.0.0.1309
Date: Fri, 24 Sep 2004 05:20:31 -0400
Subject: FW: Annex
From: John Jackson <jjackson@web.ca>
To: Sarah Miller <millers@lao.on.ca>

--
John Jackson
17 Major Street, Kitchener, Ontario N2H 4R1
519-744-7503
Fax: 519-744-1546

------ Forwarded Message
From: Jim Mahon <jimahon@ody.ca>
Date: Thu, 23 Sep 2004 18:28:34 -0400
To: John Jackson <jjackson@web.ca>
Subject: Re: Annex

The paper underestimated the count I counted 200 and there were people that left in frustration because they could not get in. I waited at least 15 minutes outside the door while they arranged to remove a wall and setup more chairs. At that point there was no more handouts.

I admit that I was very angry and frustrated by the time I got a seat that was not calmed in any way by being approached by several people before I got seated to be asked "Why was GLU promoted Annex 2001?"

I tried to keep an open mind but was really pissed by the presentation delivered that appeared very much to focus on ignoring concerns, belittling them and suggesting that this was a good agreement and people should be happy that it had been negotiated on their behalf. That any concerns like NAFTA and 8 US states and two Provinces entering into an agreement with Ontario and Quebec (Canada) having 2 votes and 8 US states having 8 votes instead of a 50/50 split was voiced as being ludicrous. A number of people made reference to the softwood lumber agreement and why did Canada think this agreement would be any different?

Numerous people pointed out that they had only found out about the meeting at the last minute through Thames Region Ecological Associations efforts or the stories in the paper last Monday. Why didn't MNR try to get hold of people with known interest in water to help get the word out? No answer as far as notice they said their budget was only so much and that notice had been given to reporters and it was up to them whether they wrote an article.

They made the point that all the water taken under the agreement would require the water to be returned to the Lakes. I raised the point that bottled water how would they control it being returned, no real answer

> 130 Spadina Avenue
> Suite 301
> Toronto, ON M5V 2L4
> tel: 416-960-2284 x 213
> fax: 416-960-9392
> e-mail: millers@lao.on.ca
> CELA web site: www.cela.ca
> CELA library web site: www.ecolawinfo.org
>
> **********
>
>

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User-Agent: Microsoft-Entourage/11.0.0.040405
Date: Fri, 24 Sep 2004 09:34:51 -0400
Subject: Re: The Annex
From: Jim Mahon <jimahon@ody.ca>
To: Sarah Miller <millers@lao.on.ca>

Let's do it the first of the week as today is a wipeout.

Yours Truly--

Jim Mahon
CAW Local 1520
London and District Labour Council, Environment Committee
Ontario Environment Network, Labour Caucus
Great Lakes United, Vice-President

When a man throws an empty cigarette package from an automobile, he is liable to a fine of $50. When a man throws a billboard across a view, he is richly rewarded. ~Pat Brown, quoted in David Ogilvy, Ogilvy on Advertising, 1985

> From: Sarah Miller <millers@lao.on.ca>
> Date: Fri, 24 Sep 2004 09:26:18 -0400
> To: <jimahon@ody.ca>
> Subject: The Annex
>
> Dear Jim,
> John shared your e-mail on the Annex with me. I would be happy to spend
> sometime with you discussing it as I was also involved. CELA plans to
> hold an afternoon information session on it soon we are just finalizing
> the details. Please let me know when you'd like to talk. I can call you
> to spare you the expense.
> Sarah
>
> **********
>
> Sarah Miller
> Canadian Environmental Law Association

Canada and the "Annex" Water Agreements

On first glance, the basin's U.S. citizens stand to gain the most from the proposed "Annex" water reform agreements released in July by the Great Lakes – St. Lawrence River premiers and governors. After all, the eight states gain a binding, enforceable "compact" agreement for managing basin water, while the two provinces receive only a voluntary provincial-state handshake agreement.

In fact, Canadians should benefit substantially from both agreements.

Arguably the biggest concern for Canadians when it comes to basinwide water management is preventing diversions, something much more likely to be proposed in the United States than in Canada. **The eight-state "compact" agreement appears to strengthen the ability of the region to prevent diversions** (see separate fact sheet on diversions). Furthermore, the compact grants "any Person aggrieved" the right to challenge decisions made under the compact. This grants the provinces standing in state administrative and judicial proceedings. Finally, the compact will significantly strengthen state laws governing water withdrawals, which will better protect the basin ecosystem and Canada's stake in that ecosystem.

While voluntary, the provincial-state international agreement remains potentially very useful for Canadian and basin ecosystem protection. The agreement both improves Canadian participation in basinwide decisions and promises improvement in provincial water takings laws. For the first time, the agreement sets up a formal approval procedure involving all ten jurisdictions for most diversion proposals and certain large takings proposals anywhere in the basin. This procedure is a great advance over its predecessor—a written "consultation" system between the states and provinces set up in 1985—which involved no extensive exchange of views and required no public involvement.

In short, the provincial-state agreement sets up a precedent-setting basinwide water management system. Under the new system the premiers and governors or their representatives would actually meet and cast votes on most diversions and the largest takings. The agreement describes this voting process as striving for consensus, an opportunity for Ontario and Québec to fully make any case they may have for better protecting the basin environment. While not mandatory, the resulting decision would carry considerably more weight than the current exchange of letters. For proposals originating in the states, the provincial-state vote is supposed to be accorded special consideration by the states when they deliberate separately under the enforceable arrangements set up in the eight-state compact agreement.

The two agreements—the eight state compact and the provincial-state international agreement—differ in their theoretical enforceability. However, if the voluntary 1985 provincial-state Great Lakes Charter is any guide, the provinces are better at keeping promises than the states. There is a good chance that the provincial-state agreement will end up, as promised, in Ontario and Québec law.

Both the eight-state compact agreement and the provincial-state international agreement promise new, ecosystem-based standards for judging new or increased water takings proposals. But the provincial-state agreement provides much more detail on how the standards would be implemented, making any resulting provincial laws likely to better protect the environment than their U.S. state counterparts.

Even so, the provinces will likely have less difficulty meeting their obligations under the new system. The provinces, particularly Ontario, have better water management systems than most of those found in the United States portion of the basin. Many states lack even basic water takings permitting and almost all lack significant watershed planning.

The bottom line for Canadians: The provincial-state international agreement would likely strengthen provincial water takings law and deepen joint provincial-state decision-making on diversions and the largest water takings. The eight-state compact agreement, despite having no formal Canadian involvement, would likely provide the basin, and therefore Canada, with better protection against U.S. diversions proposals and stronger U.S. laws for all water takings.

For more information on the proposed agreements, connect to www.speakongreatlakes.org.

The www.speakongreatlakes.org Web site is sponsored by Canadian Environmental Law Association (Sarah Miller, 416-960-2284 x213), Clean Wisconsin (Derek Scheer, 608-251-7020), Environmental Advocates of New York (David Higby, 518-462-5526 x239), Great Lakes United (Reg Gilbert, 716-886-0142), Lake Michigan Federation (Cheryl Mendoza, 616-850-0745 x13#), Michigan Citizens for Water Conservation (Terry Swier, 231-972-8856), Michigan Environmental Council (James Clift, 517-487-9539, x17), National Wildlife Federation Great Lakes Program (Noah Hall, 734-769-3351 x23), Ohio Environmental Council (Molly Flanagan, 614-487-7506), and Union québécoise pour la conservation de la nature (Marc Hudon, 418-543-9681).

Diversions and "Annex" Water Agreements

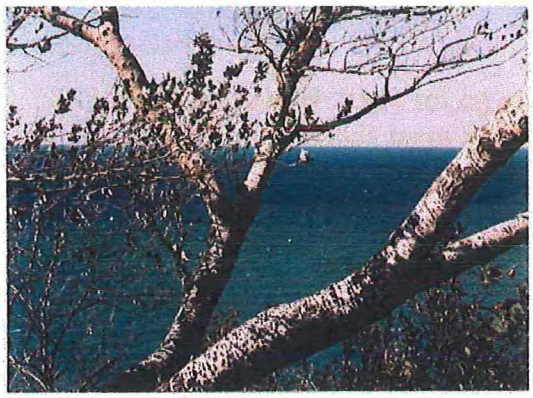
The eight Great Lakes governors and two premiers have recently completed two proposals for changing how the ten jurisdictions manage withdrawals of water from anywhere in the Great Lakes basin. Although water shortages and conflicts between water users have begun to appear in the basin in recent years, the governors and premiers are *not* proposing the agreements primarily to improve regional water management.

The governors and premiers spent four years negotiating these wide-ranging agreements—a voluntary state-provincial international agreement, and a binding eight-state "compact" agreement—primarily because they wish to improve protections against large-scale diversions of water from the Great Lakes basin.

Perhaps the most important question citizens should ask while evaluating the proposed documents is: Do the agreements better protect the Great Lakes basin from diversions?

Of the two agreements, the eight-state compact deserves the most scrutiny on this question. Canada's federal and Ontario and Québec's provincial governments have legislated diversion bans that appear fully constitutional under Canadian law. The same cannot be said in the United States.

Although Congress in 1986 granted any single Great Lakes state a no-questions-asked veto over all proposed basin diversions, there is still a substantial question as to whether this authority would hold up in court under a determined, well-funded legal challenge from large corporations or other states. The proposed compact is an attempt to make rejection of diversion proposals legally durable in the long run.



The methods for doing this in the proposed agreements are somewhat roundabout, but **basin environmental groups monitoring the state-provincial negotiations over the years have decided that, on balance, the compact significantly improves regional protections against diversions.**

The problem with the current gubernatorial veto authority is that it is arbitrary. A governor need give no reason for wielding it and a diversion applicant has no recourse after an adverse decision. Generally speaking, U.S. law frowns upon such systems. A less legally vulnerable system would have standards by which diversion requests were evaluated. If a request failed to meet the standards, it could be denied.

The trick is to write standards that have a "rational" (legally justifiable) basis while at the same time preventing most diversions and all large ones. In the compact, the governors chose ecosystem harm as this rational basis for judging water withdrawal proposals. Under the new system, whether water is intended for use in or out of basin, proposals would be required to 1) conserve water and return it after use to the originating lake basin, 2) cause no significant ecosystem impact, and 3) improve the ecosystem.

Without overtly banning diversions, these rules make them quite difficult, mainly due to the requirement to return the water.

(over)

First, moving water is expensive, and gets proportionally more so the further it is moved. Moving water back into the basin could be doubly expensive. This is a major disincentive for every sector of water use. Sectors such as agriculture, which use up a great deal of water and would have to return relatively less, have difficulty absorbing any additional cost at all, because they operate in a bitterly competitive world market. On the other hand, sectors such as public drinking water systems, which have some leeway to absorb extra cost, use relatively less water and would therefore have to pay enormous sums to return the large remainder.

Second, the compact appears to require return of the *same* water, a critical protection against introducing invasive species. This could require recipients to build expensive separate distribution and treatment facilities for the diverted water, making use of the water much less attractive.

Finally, the burden of returning water comes on top of the other water withdrawal requirements—conserving water, causing no damage while removing and returning it, and improving the ecosystem.

While providing significant improvement in the handling of diversions in most respects, the draft agreements do have one serious shortcoming: a limited exemption for small diversions (250,000 gallons per day or less) for destinations within twelve miles of the basin line intended for public drinking water supply. For these proposals, the return flow requirement (but not the other standards) would be suspended.

The purpose of this exemption is apparently to supply some small, needy communities near the basin line who have had long-standing requests to divert water because their existing supplies are tainted with sulphur, fluoride, or other contaminants. However, the needs of these communities could be met in other ways. Meanwhile, the exemption sets a bad precedent in principle and in practice opens the door to abusive requests intended not for existing communities but to promote new development and sprawl. The exemption should be deleted from the draft agreements.

Conclusion

The new agreements could allow some diversion proposals to go forward. However, taken as a whole, the agreements seem to empower the states to turn down most significant diversion requests in a way that will hold up in court over the long run.

For more information on the proposed agreements, connect to www.speakongreatlakes.org.

The www.speakongreatlakes.org Web site is sponsored by Canadian Environmental Law Association (Sarah Miller, 416-960-2284 x213), Clean Wisconsin (Derek Scheer, 608-251-7020), Environmental Advocates of New York (David Higby, 518-462-5526 x239), Great Lakes United (Reg Gilbert, 716-886-0142), Lake Michigan Federation (Cheryl Mendoza, 616-850-0745 x13#), Michigan Citizens for Water Conservation (Terry Swier, 231-972-8856), Michigan Environmental Council (James Clift, 517-487-9539, x17), National Wildlife Federation Great Lakes Program (Noah Hall, 734-769-3351 x23), Ohio Environmental Council (Molly Flanagan, 614-487-7506), and Union québécoise pour la conservation de la nature (Marc Hudon, 418-543-9681).

An opinion on the governors and premiers' proposed "Annex Implementing Agreements"

by John Jackson, Reg Gilbert, and Noah Hall

Despite needing some improvement, agreements proposed by the ten Great Lakes governors and premiers provide much better defenses against U.S. diversion proposals while leaving in place strong diversion bans recently passed by Canada, Ontario, and Québec.

A widespread myth on both sides of the international border is that the Great Lakes are already well protected from U.S. water diversions. After all, a U.S. federal law allows any one of the eight Great Lakes governors to veto diversion proposals for any reason.

The facts don't support the myth. Of the three U.S. diversions proposed since the states got their veto, two have been approved. Other diversions take place without approval because existing laws don't cover them. From Wisconsin alone, the Great Lakes basin loses 38 million litres of water every day via groundwater pumping.

Worst of all, an independent legal study by the Great Lakes states came to the disturbing conclusion that a well-financed legal challenge by water companies or other states could overturn the U.S. diversion veto as unconstitutionally discriminatory.

To their credit, the governors have responded with action rather than denial. Working with the premiers, they've proposed a new system that judges all water takings—whether intended for diversion or for use inside the basin—according to clear standards that protect the lakes.

The result is two proposed agreements that provide increased protection without being "protectionist." That is, the agreements shield basin laws from claims of discrimination because they use similar rules to address both diversions and unwise water use here in the basin. International trade rules make this approach useful for both Canada and the United States, but it is especially valuable south of the border. The U.S. Constitution, arguably the world's original free trade agreement, makes simple diversion bans or veto powers very legally questionable.

The proposed agreements are available for public comment through October 18.

We have concerns with how well the proposed agreements protect the lakes from abusive water takings, detailed at www.speakongreatlakes.org. But we think they *do* meet the most important test: preventing U.S. diversions.

We came to this conclusion in part by looking at how the agreements would have affected diversions already approved by the governors. Take the last one, a diversion of 18 million litres per day at Akron, Ohio, approved in the late 1990s. That diversion removes water from the state's Cuyahoga River, diverts it to suburban communities across the basin line, and returns an equal amount of water via canal.

This "no net loss of water" concept has two terrible flaws at Akron. First, the return water comes from an out-of-basin source, opening yet another door to the devastating threat of invasive plants and animals. Second, the water is returned twelve miles downstream from where it is diverted, seriously damaging the long stretch of river in between.

Under the new agreements, the Akron diversion would certainly have been rejected. The agreements require new projects to cause "no significant adverse impact" to the environment, to include significant water conservation, and to provide an "improvement" to the environment on

top of any steps taken to prevent the forbidden adverse impacts. None of these expensive requirements was a consideration for the Akron proposal.

But most significantly, the agreements mandate return of the *exact same* water. This break-the-bank requirement, which would require most potential out-of-basin water recipients to construct separate water distribution and treatment facilities, was not part of the original Akron proposal and would have made it completely unprofitable.

In fact, it is hard to think of any major diversion proposal that could feasibly return the exact same water, much less go on to meet the other requirements.

Under the new agreements, every Great Lakes diversion proposal ever made, whether vetoed, abandoned, or approved, either would not have been proposed, because it would have cost too much, or would have been rejected, because it couldn't meet the new standards.

The potential large-scale diversions worrying every citizen of the Great Lakes basin—to the Mississippi River, to the Midwest grain belt, to the U.S. South and Southwest—all become impractical or impossible under the new standards, even factoring in substantial federal or state subsidies.

And most importantly, the new rules seem likely to stand up in U.S. and international trade courts.

The agreements' diversion provisions are strong, but the documents still need improvement to fully protect the lakes. A proposed exemption from returning water for certain small diversions must be deleted. The water conservation standards must be stronger and much more specific. And water must be returned to the source, not anywhere in the same Great Lake watershed.

But the governors and premiers got the main thing right—preventing diversions. Now they need to work on improving the rest of the agreements.

John Jackson is a board member and Reg Gilbert is senior coordinator of Great Lakes United, a coalition of Canadian and U.S. environmental groups. Noah Hall is a lawyer with the U.S. National Wildlife Federation.

Submission to the Council of Great Lakes Governors

On the subject of the Draft Implementing Agreements for Annex 1

of the Great Lakes Charter

from

The Sierra Club (U.S. and Canada)

October 18, 2004

With a combined membership of more than 750,000 in the United States and Canada and with chapters in the all the Great Lakes states and provinces, the Sierra Club of the U.S. and Canada is deeply concerned with the long-term protection of the Great Lakes basin. We are equally concerned that, with the complexity of the proposed agreements and their far-reaching natural resource and environmental policy implications, the public comment period has been far from adequate and the timing of the comment period made it difficult for many people to evaluate the issues and provide substantive comments. The Sierra Club staff and volunteer leaders have devoted considerable time to the review of the proposed agreements and have concluded that the review period is not sufficient to allow our cross-border organizations to understand adequately the possible repercussions of the draft agreements in order for us to submit detailed comments at this time.

The Sierra Club looks forward to remaining fully engaged in this process which will have significant ramifications for the long-term health of the Great Lakes and for all the life which they support.

For additional information, please contact Emily Green, Sierra Club
Great Lakes Program Director at (608) 257-4994

RECEIVED SEP 23 2004



A PLACE OF VISIONS AND DREAMS

September 20, 2004

FAXED Sept 20/04

Annexation of Great Lakes

WITHOUT PREJUDICE

Dear Sir/Madam:

RE: Consultation in Respect of Great Lakes Charter Annex

This is a response to your letter of August 30, 2004, wherein you requested our input or consultation in respect of the above-noted matter.

The Crown is proposing to undertake the Great Lakes Charter Annex related to (the Great Lakes Basin), in our area this is (Lake Huron). As you know, the Whitefish River First Nation has Aboriginal and Treaty rights in the territory which will be affected by the project; therefore, we have a substantial interest in the project and are willing to be meaningfully consulted. Our Aboriginal and treaty rights are recognized and affirmed under s. 35 of the *Constitution Act, 1982*. Placing Aboriginal and treaty rights in the Constitution makes them part of the supreme law of the land: they are superior to all other laws. The Supreme Court of Canada has declared that the actions and laws of both federal and provincial levels of government cannot infringe upon Aboriginal and treaty rights unless it can be established by the Crown that such laws or actions are justified.

In the cases of *Sparrow, Van der Peet, Gladstone, Badger, Delgamuukw* and *Sundown*, the Supreme Court put forward a test which must be met by the Crown in seeking to justify its actions which infringe upon Aboriginal and treaty rights. It is a very stringent test, as you know, and has two branches:

WHITEFISH RIVER FIRST NATION
BIRCH ISLAND, ONTARIO P0P 1A0 TELEPHONE (705) 285-4335 (705) 285-4334 FAX (705) 285-4532

1. The government must establish that the activity (law or action) in question is pursuant to a valid legislative objective that is compelling and substantial; and
2. The law or action must be assessed against the Crown's fiduciary responsibility, that is, "the honour of the Crown". In other words, has there been an effort to accommodate the Aboriginal group? This branch of the test then has several subcomponents, depending somewhat on the nature of the right in question: (a) is the infringement the least impairment as possible, (b) has the Aboriginal group been consulted, (c) is there any economic participation or benefits to the Aboriginal group from the development, and (d) has the group been compensated for any infringement?

While the invitation to consult is an acknowledgement of Aboriginal and treaty rights and the duty to consult, governments have tended to focus only on the consultation aspect of the overall burden on the Crown to justify its infringements. For this reason, I want to remind you of the Crown's further duties in respect of other aspects of the justification framework, as outline above. In this regard, we would like you to please identify, in specific terms, the way in which you have addressed or intend to address the other above-noted aspects of the test, other than consultation. Our decision to participate in this consultation may be contingent upon your answering this question to our satisfaction.

To be absolutely clear, we are prepared to engage in consultations with you, but must insist that, first of all, the Crown abide by its other duties which fall upon it as a result of s. 35 of the *Constitution Act, 1982*, and second that we jointly define the terms of the consultation. In this regard, we want to make it clear to you that "consultation" to us means full and informed consent. Any variation from this position must be in writing and signed by the Chief pursuant to authority granted to him by the Council by Resolution. Furthermore, our participation in the consultations you propose is not to be considered as a waiver of our Aboriginal and treaty rights or of any other entitlements flowing from the infringement, including compensation and or other economic benefits or accommodations.

As you know, the ability of our First Nation to participate meaningfully in your consultations will depend upon our financial and human resource capacity. We will only agree to participate in consultations if we can do so on a full and informed basis. Our First Nation receives funding from the federal department of Indian Affairs and Northern Development, but most of the money is earmarked for programs and service, including education, health, social services, etc. We do not receive any specific funds to respond to letters like yours or to participate in consultations like that you propose. Therefore, please advise if you are prepared to cover the costs for our First Nation to retain and assign the necessary technical expertise to properly evaluate the impact of this project on our Aboriginal and treaty rights.

On the issue of this Annex to the Charter on the Great Lakes, I am deeply concerned about the long term impacts to these social-ecological systems. How will our communities be affected by the activities that will be guided by this framework? How will the Whitefish River, fish habitat, migratory birds, animals, natural drainage systems, wetlands, groundwater, hydrological and hydrogeological systems be affected by this proposal? These systems are very much a part of the great lakes basin and they are not fully understood by any single authority. While I understand the need for a **"set of rules"** that will govern the use of the Great Lakes and the basin, I do need to remind this audience that there is a far more subtle rule that governs all things including the Great Lakes. It's a rather simple rule, and it goes something like this;

" for every action, there is an equal and opposite reaction"

Your proposed activities, no matter how well intended will ultimately be governed by this simple rule.

We are ***not*** in agreement with the level of consultation put forth by the Crown on this very serious matter for our community. We will have many questions on how our area will be affected by this proposal. How will Whitefish River, McGregor Bay, Bay of Islands, Baie Finn, Frazer Bay, our shorelines, our lake bottoms be affected by this development? What will be the impact on Lake Huron? Has the proper scientific research been completed that supports this work?

We ***can not*** begin to support such a large and significant undertaking by government without the meaningful consultation of the First Nations people. We need an opportunity to consider putting forth concrete recommendations and options on this matter.

Thank you for your consideration and we look forward to your response.

Sincerely,
Whitefish River First Nation

Shining Turtle

Chief Shining Turtle (Franklin Paibomsai)
Sturgeon Clan

Cc UCCM Chiefs
Lake Huron Regional Chief Angus Toulouse
Chiefs of Ontario. Regional Chief Charles Fox
Canadian Environmental Law Association
Nancy Kleer, OKT

October 18, 2004

Paula Thompson, Senior Policy Advisor
MNR Water Resources Section
Lands and Waters Branch
300 Water Street
P.O. Box 7000
Peterborough, Ontario
K9J 8M5
Fax: (705) 755-1267

Re: EBR Registry Number PB04E6018
The Great Lakes Basin Sustainable Water Resources Agreement and the Great Lakes Basin Water Resources Compact

Dear Ms. Thompson,

Pollution Probe supports the governments of Ontario, Quebec and the eight Great Lakes states initiative to establish a common set of decision-making standards to manage and regulate proposed water uses in the Great Lakes Basin. We support the general intent of the Great Lakes Basin Sustainable Water Resources Agreement (Agreement) and the Great Lakes Basin Water Resources Compact (Compact) and their objective to "protect, conserve, restore, improve and efficiently and effectively manage the Waters and Water Dependent Natural Resources of the Great Lakes Basin..."(Chapter 1, Article 100). **However, Pollution Probe believes that the current draft versions of the Agreement and the Compact need to be strengthened significantly.** Attached please find Pollution Probe's comments, concerns and questions on the proposed Agreement and Compact.

We strongly encourage the Great Lakes states and provinces in their commitment to take the public's comments into account and to make adjustments to improve the draft Agreement and Compact. We look forward to reviewing any subsequent drafts and encourage the governments to hold additional public consultation on them, prior to making any final decisions.

We feel that in spite of many days spent reviewing and researching our comments on these critically important proposals, we may emerge at this point having as many questions as comments. The discussion has been healthy, however and will surely result in better

understanding by stakeholders as well as signatories and a stronger set of agreements. We suspect we are not alone. If it takes more time and additional drafts, it will be a wise investment.

Sincerely,

Rick Findlay
Director, Water Programme
Pollution Probe

attachment

Re: EBR Registry Number PB04E6018
The Great Lakes Basin Sustainable Water Resources Agreement (Agreement) and
The Great Lakes Basin Water Resources Compact (Compact)

BACKGROUND ON POLLUTION PROBE

Pollution Probe is a non-profit charitable organization that works with all sectors of society to protect health by promoting clean air and clean water. Established in 1969, Pollution Probe is supported by a donor base of approximately 6,000 donors. Working in partnership with industry, governments and communities, Pollution Probe offers innovative and practical policy-oriented solutions to air and water pollution issues and we seek to support measures that will assist in providing a clean, safe and healthy environment.

GENERAL COMMENTS

Definitions

Pollution Probe recommends that the Great Lakes States and Provinces expand on and clarify some ambiguous terms and definitions used in the Agreement and the Compact. Pollution Probe believes that these terms (some, but not all of which have been highlighted below) should be defined by ecologists and other experts that have knowledge and expertise on how water withdrawals can adversely affect ecosystems.

- The term **significant** is used often in both the Agreement and the Compact; one example includes "to prevent or minimize significant adverse impacts of Withdrawals" (the Agreement, Article 100, 1g). The Agreement and Compact should explicitly outline when, for example, an adverse impact to the quantity and/or quality of the waters and water dependent natural resources of the Basin would be deemed significant.

- Although the manual for the Agreement (Appendix 2, Section 2D) states that a Water Withdrawal Proposal will be considered to have a **significant** ecological impact if there is a significant change to physical, chemical and biological parameters, the terms introduced in these sections result in more ambiguity. For example, what is considered a **measurable change** to the pre-proposal range of variability of the hydrologic regime; how much habitat **degradation** is acceptable before it is considered to be significant; what level of change in potentially harmful toxins, contaminants and excessive nutrients, is considered to have a **significant** ecological impact?

Preamble

Pollution Probe believes that the final paragraph of the opening remarks of the Compact should be the central commitment of the Great Lakes States and Provinces and the following should be made clear in both the Compact and the Agreement:

"WHEREAS, the Great Lakes States and Provinces have established a set of principles to guide them in developing, maintaining and strengthening the regional management regime for the Great Lakes Basin Ecosystem. Protecting, conserving, restoring and improving the Great Lakes is the foundation upon which decisions concerning water resource management are based."

Pollution Probe urges the Great Lakes States and Provinces to take an ecosystem approach when making decisions on water withdrawal proposals. After all, we rely on a healthy and sustainable environment to support a healthy economy and a thriving society.

Public Trust

Pollution Probe is strongly supportive of the statement contained in the Preamble to the Agreement that the Great Lakes are a "shared public treasure" and in the Compact that the Great Lakes are "precious public natural resources, shared and held in trust by the Great Lakes States". In both documents however we feel that it is important to demonstrate a stronger and more specific adherence and reliance on the notion of Public Trust in order to more directly offset the ever-present pressures of potential private gain.

REQUIRE CLARITY BETWEEN STATE/PROVINCIAL, FEDERAL AND INTERNATIONAL AGREEMENTS AND GOVERNMENTS' ROLES

After reviewing assurances on all sides Pollution Probe is still uncertain how the Agreement and the Compact affect and will be affected by the Boundary Waters Treaty and other international treaties and trade agreements. Given the fact that the States and Provinces cannot bind themselves across international boundaries, we seek clarification and assurance regarding the roles of the federal, provincial and state governments and their various laws and treaties. Will the Compact and the Agreement undermine the Boundary Waters Treaty Act, the responsibilities of Canada and/or the role of the International Joint Commission? How does the Compact, which would become a binding agreement among Great Lakes States, affect Canada and the provinces? Does the Compact take primacy over the U.S. Water Resources Development Act? We are concerned that the Compact may not be viewed as a truly binational initiative, even when viewed together with the Agreement.

Pollution Probe believes that the Parties to the Agreement and the Compact should explicitly explain and address these concerns.

THE AGREEMENT – UNDERSTANDING CONSENSUS-BUILDING PROCESSES

According to the Agreement, the intent of a regional review for a water withdrawal proposal, whether it be for a diversion or consumptive use, is to use a consensus-building approach among members to produce a Public Declaration of Finding. The Declaration of Finding will outline whether or not the proposal meets the requirements of the decision-making standards contained in the Agreement and it will provide recommendations to the jurisdiction in which the water withdrawal proposal originates (the originating jurisdiction) on whether or not to proceed with the proposal. The originating jurisdiction considers the recommendations made by the Regional Body, and ultimately makes the final decision on whether to proceed with the proposal; but they also have the authority to dismiss the Declaration of Finding (Articles 501 and 506). Pollution Probe is concerned that the Agreement grants the originating (potentially biased) jurisdiction with such large decision-making powers. We believe that all members of the Regional Body should have a clear understanding on how consensus-building stakeholder engagement models operate, the merits behind engaging in such a process and the "consequences" of dismissing the recommendations developed by consensus.

Pollution Probe recommends that a base level of training on consensus-building should be provided to all members of the Regional Body; they should have a clear understanding of their roles and responsibilities and the "rules of engagement" that are used in consensus-building decision making processes. Special care should be given to ensure that the dispute resolution process is designed effectively. In addition, the Regional Body should ensure that all decisions made are transparent to the public.

THE COMPACT – MANDATE UNANIMITY IN THE DECISION-MAKING PROCESS

According to the Compact, new or increased diversion proposals that are subject to regional and council review can only proceed if all council members approve of the proposal (Section 3.3); however, new or increased consumptive use proposals only require the approval of five out of the eight Great Lakes jurisdictions (Section 3.4). Pollution Probe urges the Great Lakes States and Provinces to strengthen this provision and require unanimity among the council members before approving a new or increased consumptive use. We suggest the final line of Section 3.4 be changed to state "Council approval shall be given unless one or more Council Members disapproves".

REDUCE THRESHOLD LEVELS WHICH TRIGGER REGIONAL REVIEWS

Pollution Probe is not willing to accept proposed threshold levels, unless we understand and can accept the rationale behind their selection. We recommend that the Great Lakes States and Provinces provide explanations for selecting these levels and consider lowering them to ensure that regional reviews will be conducted for water withdrawal proposals that "significantly" threaten the Great Lakes Basin ecosystem. Reasonable threshold levels should be established based on sound science and with the advice of ecologists and other experts that are knowledgeable about hydrologic-ecological relationships and in particular how the magnitude of water withdrawals impact ecosystems.

The rationale behind selecting the threshold levels on which Regional Reviews would be conducted needs acknowledgement and justification. What is the basis for selecting a value of 3.8 million litres per day or greater for a new or increased diversion and 19 million litres per day or greater for a new or increased consumptive use? Transferring less than 3.8 million litres per day from one watershed to another or losing less than 19 million litres per day could result in "significant" adverse impacts to the water dependent natural resources of the whole Great Lakes Basin. As a result, it is insufficient to give these decision-making powers solely to the jurisdiction in which the water withdrawal proposal originates; the Regional Body should be called on to require diversion and consumptive use proposals at lower threshold levels, when there is justification.

The threshold levels in which a regional review would be called on for combined diversions and consumptive uses should also be lowered.

SHORTEN THE AVERAGING PERIOD FOR WITHDRAWALS TO 30 DAYS

We are unclear on the rationale behind selecting a 120 day averaging period for withdrawals as a 120-day average may exempt large water users such as agriculture and other uses which could

cumulatively affect the ecosystem adversely may be overlooked, thereby contravening the objectives of the Agreement (Article 100) .

Pollution Probe recommends that the Great Lakes States and Provinces provide explanations for selecting the 120-day averaging period. We are not willing to accept the 120 day period unless we understand and agree with the rationale behind it. Furthermore we recommend that the Great Lakes States consider using a 30-day averaging period; this would be consistent with the Agreement's data gathering requirement which stipulates that the Great Lakes States and Provinces should gather and share data on all diversions and withdrawals over a 30-day averaging period (the Agreement, Article 301).

SHORTEN TIME PERIODS FOR IMPLEMENTATION

Pollution Probe believes that the time periods for enforcing various aspects of the Agreement as outlined in Article 710 (Entry into Force) are too long. For example, according to Article 710, Paragraph 6, Water Management Programs (Chapter three) within Jurisdictions would not be required until more than ten years after the Agreement comes into force; this includes the gathering and management of water withdrawal data (Article 301). Pollution Probe does not understand how sound decisions can be made on new or increased water withdrawal proposals without understanding current usage and the consequential impacts that these water-takings have on the Great Lakes Basin ecosystem. Furthermore, it is not clear how can the cumulative impacts of the withdrawals, diversions and consumptive uses be assessed as outlined in Article 201, Paragraph 5, approximately five years after the Agreement comes into force (Article 710, Paragraph 4), without an understanding of how much water is being used, diverted and consumed in the Basin. This data is essential to make informed decisions.

Pollution Probe strongly recommends that the time periods outlined in Article 710 of the Agreement be reviewed and reassessed. At a minimum we urge the Great Lakes States and Provinces to make data information gathering and sharing on all water withdrawals a priority by shortening the time period that Chapter three comes into force; we support the Great Lakes States and Provinces initiative to share the information gathered on all diversions and withdrawals with the public and for developing a Great Lakes Water Use Data Base Repository, but we recommend that all data on withdrawals be submitted to a central database immediately. Furthermore, we urge the governments to suspend all new or increased water diversion proposals until data on water usage and the effects of water-taking on the ecosystem has been gathered, shared, assessed and is publicly available.

THE CHICAGO DIVERSION

Pollution Probe believes that the inconsistencies in the ways in which potential proposals to increase the Chicago Diversion would be handled between the Agreement and the Compact should be resolved; both the Agreement and the Compact should explicitly state how increases to the Chicago Diversion would be handled by the Great Lakes States and Provinces and it is imperative that the Provinces of Ontario and Quebec are involved in the decision-making processes.

CHANGE REQUIREMENTS TO THE RETURN FLOW STANDARD

Pollution Probe urges the Great Lakes States and Provinces to change the provisions of the Return Flow Standard outlined in Appendix 2, 2C, of the Agreement to stipulate that the water withdrawn from the Great Lakes Basin SHALL be returned to the Source Watershed and that impacts to the Watershed should be assessed on a case-by-case basis. The governments should explain the rationale behind granting exemptions to the Return Flow requirements. Until Pollution Probe understands and accepts the rationale, we believe that the exemptions to the Return flow requirement should be removed, from both the Agreement and the Compact (Application Requirements for the Return Flow provision, Paragraph 2). For example:

Delete the Twelve-Mile Exemption for Return Flows
Pollution Probe believes that the provisions that exempt individual jurisdictions requesting a diversion of less than 946,000 litres per day (averaged in a 120-day period) for public water supply uses in areas less than 12 miles from the Great Lakes Boundary where adequate quantities of potable-quality water are not available should be removed. The rationale for this exemption provision is unclear and the reasons for establishing it should be explained to the public. Without scientific justification, the provision could establish a "bad" precedent, enabling decision-makers to increase the geographic limits imposed for the exemption to apply.

Delete the Exemption for Return Flows where it is "not feasible"
(The Agreement, Appendix 2, 2C, Application Requirements, Paragraph 2, Number 3)
Pollution Probe believes that this exemption is ambiguous, arbitrary and could pose unnecessary harm to the ecosystems of the Great Lakes Basin. It is important to set out what types of criteria would determine whether or not a return flow is feasible. Would the criteria include economic and/or ecological impacts? As highlighted above, Pollution Probe believes that this exemption should be removed from the Agreement and the Compact.

INCLUDE THE PRECAUTIONARY PRINCIPLE

Pollution Probe is concerned that the Agreement and the Compact do not make any reference to the precautionary principle. We believe that the precautionary principle should guide the decision-making process, especially when there is a lack of scientific data and information. Pollution Probe supports including "duty to act" as an essential requirement of the precautionary principle - action should be taken despite possible gaps in science and information; the absence of scientific certainty about a risk should not bar the taking of precautionary measures in the face of possible irreversible harm.

WORKING TOWARDS IMPROVEMENT - REQUIRE WATERSHED MANAGEMENT PLANS FOR ALL WATERSHEDS IN THE GREAT LAKES BASIN

Pollution Probe is strongly in support of the Improvement Standard concept that lies at the heart of the proposed Agreement and Compact. We believe that one of the surest ways of being assured that you have ecosystem improvement (or impairment) is to require watershed management plans for all watersheds in the Great Lakes Basin.

Integrated watershed management plans are developed based on an understanding of the needs of ecosystems, society and the activities that pose a risk to water quality and quantity. Such plans

identify existing and potential problems that exist in the watershed and provide decision-makers with valuable information on the "health" and sustainability of their local watershed. Pollution Probe believes that before any decisions that may impact water quality and quantity can be made, it is important that decision-makers understand the ecological health of the watershed, and integrate ecosystem considerations into their decision-making process. Water conservation plans should be a component of the Watershed Management Plans, for example (see below).

Pollution Probe urges the Great Lakes States and Provinces to require jurisdictions to develop watershed management plans. Commitments to do this should be made binding in both the Agreement and the Compact. The plans would help jurisdictions make informed decisions about whether or not the ecosystem has more than enough "capacity" to handle a new or increased water withdrawal proposal; it would also help them decide on the relative merits of one withdrawal proposal over another, or an impairment or an improvement opportunity.

The application of the improvement standard should be applied on a local watershed basis and should ensure that watershed management plans lead to a net improvement in the overall ecosystem integrity of the watershed.

DEVELOPING THE RESOURCE IMPROVEMENT STANDARD

As stated above, Pollution Probe supports the idea of implementing an improvement standard if it is designed to achieve environmental and ecological improvements to the Waters and Water Dependent Natural Resources of the Great Lakes Basin. We believe that it is only through standards and principles designed to restore existing environmental damages that we can stop depleting natural capital, such as forests, wildlife, agricultural land, and water, upon which life depends. Furthermore, we believe that decision-makers need to go beyond the no net loss goal and move towards a net gain or improvement goal.

New tools and approaches will be needed in order to achieve these new goals. We believe that an ecological currency approach could identify and quantify improvements (or impairments) across a watershed. In addition, we have researched and consulted with stakeholders on what is called the net gain principle, a concept quite similar to resource improvement. Net gain means that when for example, a change in land or water use is proposed in a watershed, there would be widespread recognition that this change should only occur if it results in a net environmental benefit. (For more information, see: "Exploring Applications of the Net Gain Principle" and "Air Quality, Water and Soil: Issue Paper No. 2"; http://www.pollutionprobe.org/Reports/netgain.pdf).

The Agreement and the Compact state that an improvement means improving the physical, chemical or biological integrity of the Waters and Water Dependent Natural Resources of the Great Lakes Basin. Pollution Probe supports this concept and believes that it is imperative that improvements and losses to the impacted ecosystems be measured in ecological terms. Ecological services (or functions) can be valued in terms of the services that an ecosystem provides, using an approach such as an ecological currency. Ecological services should not be valued in monetary terms.

Pollution Probe believes that the **improvement standard would be best applied on a local watershed scale**, to help watershed managers make informed decisions about the relative values in ecosystem terms, of one improvement action over another; Some room for trade-offs among environmental indicators should be considered, however, it is imperative to stipulate that overall there must be a no net loss on any indicator at the watershed level.

In our work we found that it is important to satisfy the following criteria before a resource improvement or net gain "project" could be deemed acceptable:

- Ensure that a clear ecosystem improvement would occur;
- Ensure that a hydrologic-ecological linkage exists, so that the ecological attributes that are improved are directly affected by the withdrawal (and return flow) scenario;
- Measure changes using quantifiable spatial, temporal and ecological metrics;
- Take into account the cumulative effects of multiple water withdrawal applications, to ensure that there are ecological improvements achieved locally, regionally and Basin-wide;
- Establish clear procedures and regulations that manage and minimize uncertainty;
- Make a number of policy decisions before the standard can be put into force; for example how much of an improvement is required for a water withdrawal proposal to be accepted? What are unacceptable tradeoffs? Acceptable ones?
- Monitoring and enforcement are imperative, as is transparency and openness.

Developing this standard is a considerable, time-intensive initiative, which requires the input and expertise of knowledgeable stakeholders such as ecologists, academia, governmental agencies, business and non-governmental agencies. Discussions on the required science-based ecosystem measurement steps and the policy development steps are required.

In reviewing the current draft of the Agreement, Section F, Improvement Measures - Criteria for Decisions, Pollution Probe believes that the following criteria should NOT be considered an improvement to the Waters and Water Dependent Natural Resources of the Great Lakes Basin:

- ...However, if the project requires the applicant to meet other legal or regulatory requirements that result in an improvement, these outcomes may be considered an improvement;
- ...Where a watershed plan does not exist, the development of a plan may be considered as part of an improvement plan, provided that the improvement also provides measurable physical improvement;
- Partnerships with non-governmental organizations for the implementation of the Improvement measures will be encouraged.

We also recommend that the Great Lakes States and Provinces continue to review existing and other potential criteria that could be used to implement the improvement standard. We strongly urge the governments to continue to explore the improvement standard and bring together experts in relevant fields of science, policy and management to build further understanding of the principle, discuss its implications and to seek consensus on what is needed to make it workable and practical.

Furthermore, Pollution Probe believes that if the improvement standard is a provision of the Agreement and the Compact then it should be applied equally for all new or increased water withdrawal proposals; the reasons for exempting water withdrawals greater than 379,000 litres per day that are subject to jurisdictional review are unclear to us and should be reviewed and reassessed.

STRENGTHEN CONSERVATION MEASURES

According to the Agreement and the Compact, a new or increased diversion or consumptive use proposal that is subject to a regional review must include a conservation plan. Water withdrawal proposals that are subject to a jurisdictional review do not require a conservation plan, but rather conservation measures must be implemented. Pollution Probe believes that the Great Lakes States and Provinces should highlight the differences between conservation plans and conservation measures and require all water withdrawal proposals to adopt the more stringent of the two, if they are different.

Pollution Probe believes that the Governments should require water withdrawal applicants to establish strong water conservation plans (or measures) with explicit targets and timelines. These plans should be incorporated into the local watershed management plans. Commitments to develop and implement strong conservation practices should be made binding in both the Agreement and the Compact. Applicants should be required to assess and implement mechanisms for water conservation in accordance with sectoral best water conservation practices and standards. The Great Lakes States and Provinces should research best practices in water conservation for all sectors demonstrating ways to conserve and reduce water use, and make the findings public. Further research and stakeholder consultation are required to determine reasonable target values.

It is also unclear in the Agreement and the Compact by whom and how the conservation plans will be monitored and enforced. If for example, a new consumptive use proposal, which included a conservation plan that appeared to have achievable conservation targets within a 'reasonable' timeframe was accepted by the Regional Body, but not implemented, what, if any penalties would the applicant face? Does the withdrawal project come to a halt until the conservation plan is implemented? Is the applicant fined and is that a sufficient 'penalty' to encourage applicants to implement the plan? Pollution Probe believes that these concerns should be addressed and that the Great Lakes States and Provinces should develop effective monitoring and enforcement practices to ensure that water conservation plans are developed and implemented.

PUBLIC EDUCATION

In Pollution Probe's opinion the Canadian public is confused with the reasons for developing and implementing a common decision-making standard among the Great Lakes States and Provinces to evaluate water withdrawal, diversions and consumptive use proposals in the Great Lakes Basin. The public may not understand the Province's role and reasons for developing the Great Lakes Basin Sustainable Water Resources Agreement and the Great Lakes Basin Water Resources Compact. After all, Ontario and Quebec have already prohibited all water transfers out of the Provinces, Ontario claims to have the most restrictive water-permitting program in the Basin and the amendments to the International Boundary Waters Treaty Act (Bill C-6) and International

Boundary Waters Regulations prohibit removals from Canadian boundary waters of the Great Lakes[1].

Pollution Probe urges the Great Lakes States and in particular, Ontario and Quebec, to educate the public on the reasons for the development of the Agreement and the Compact. For example, highlight: the concerns with the US Water Resources Development Act and the US Commerce Clause; how the Provinces will have a greater role in participating in water-use withdrawal proposals on the U.S. side of the border; how it will affect and be affected by the Boundary Waters Treaty Act, other international treaties and trade agreements such as NAFTA and GATT/WHO; the roles of the federal, provincial and state governments in the Agreement and Compact; etc...The Governments should also explain the reasons for selecting the threshold levels and time periods for implementation.

During the public consultation process, we have heard from many members of the public that are concerned that the Agreement and the Compact may result in more water withdrawal and diversion proposals being accepted in the Great Lakes Basin, thereby harming the ecosystem and diminishing the quality and quantity of our water sources. The Great Lakes States and Provinces are obligated to educate the public on the intent and consequences of the Agreement and the Compact. As public citizens they are entitled to understand their governments' actions on such an important issue, and also from the government's point of view, it is only with their understanding and acceptance that the Agreement (and the Compact on the US side) can be effectively developed and implemented.

PUBLIC PARTICIPATION

Pollution Probe supports the decision to conduct public participation and Regional Review processes concurrently and for recognizing the importance and necessity of public participation in the Agreement (Article 401) and the Compact. However, the Agreement and the Compact should explicitly state how the public can participate and how transparent the process will be. In addition, in the Agreement it states that the "Parties shall seek to provide notice to the public and an opportunity for public input and comment on proposals that are subject to the Requirements of the Standard but that are not subject to review by the Regional Body". (Article 503, Paragraph 9). Pollution Probe recommends that the word "seek" be removed to that the Parties are required to provide notice.

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[1] International Joint Commission. August 2004. Protection of the Waters of the Great Lakes – Review of the Recommendations in the February 2000 Report, p. 2.

15 October 2004

Paula Thompson
Senior Policy Advisor
MNR Water Resources Section, Lands and Waters Branch
300 Water Street, P.O. Box 7000
Peterborough, ON
K9J 8M5

Dear Ms. Thompson,

Re: Great Lakes Water Management Initiative
EBR Registry Number PB04E6018

Attached please find my comments on the draft Annex 2001 Implementation Agreements.

Yours very truly,

Marcia Valiante
Professor of Law

Cc: David Naftzger, Council of Great Lakes Governors

COMMENTS ON
COUNCIL OF GREAT LAKES GOVERNORS
GREAT LAKES WATER MANAGEMENT INITIATIVE
ANNEX 2001 IMPLEMENTATION AGREEMENTS

Marcia Valiante
Professor of Law
University of Windsor
October 15, 2004

Thank you for the opportunity to comment on the July 19, 2004 draft agreements intended to implement Annex 2001. This is a complex and important initiative that will have significant impacts, far into the future. As such, it deserves careful scrutiny and open debate.

General comments. The draft agreements represent a significant achievement in regional cooperation. Because the door is already open to large-scale diversions, the key question for me is the extent to which the agreements close that door, or limit potentially detrimental actions.

While I do not support some aspects of the agreements and believe that improvements are necessary, I do believe that they represent an improvement over the status quo. At the moment, there is a great deal of disparity between the water management programs of the Great Lakes states and provinces; this disparity is not in the best interests of the Great Lakes ecosystem and communities within it. By promoting comprehensive water management in all jurisdictions and establishing a minimum standard for diversions and consumptive uses, the agreements will help improve water management decisions across the Basin. The existing regional regime addressing diversions of water out of the Basin (comprised of *WRDA* and the Great Lakes Charter) suffers from many problems. Diversions were never banned and decisions allowing them have been ad hoc due to the absence of any formal decision-making criteria, let alone any environmentally-based criteria. Such a system carries the risk of political decisions that include trade-offs unrelated to environmental concerns. In addition, *WRDA* applies only to diversions from the U.S. side of Great Lakes themselves, and not to groundwater, and the provinces are not included; the Charter does not impose standards but only requires notice and consultation.

The draft agreements are an important step forward because they are more comprehensive: they are concerned with the water resources of the ecosystem as a whole, including tributary waters and groundwater as well as the Great Lakes themselves. They also expand the definition of diversion to include transfers of water from the watershed of one Great Lake into that of another, an important concern for many local communities in Ontario.

The Standard. For reasons of both national and international law, it is essential that water management decisions be based on environmental grounds and not be seen as either arbitrary, discriminatory or protectionist of local economic interests. It is risky to predict how a trade panel or court would view a regulatory measure of this kind, but the best guidance suggests that governments should design their measures to focus on achieving environmental protection and human health benefits, be minimally trade restrictive, and be even-handed in treatment of users and investors. That does not mean that no distinction can be made between in-basin and out of basin users, but that any distinction must be justifiable on environmental grounds and supportable with scientific evidence. The standard must on its face be supportive of environmental protection, must be easily implementable to minimize the risk of arbitrary interpretations and must be applied in a non-discriminatory manner. There is no guarantee that the measure will not be challenged or if challenged that it will be upheld, but designing such a system now will minimize the risk. The proposed standard is positive to the extent that it is rooted in environmental concerns (e.g., the requirement that there be no significant individual or cumulative adverse impacts). However, it has some aspects that need improvement.

The concept of "return flow" is a key ingredient in the standard and should be maintained. It is easy to implement and based on maintenance of the ecological integrity of the system. However, it should be a requirement that water returned to the Basin be of good quality, ensuring protection against the introduction of contaminants or alien invasive species, consistent with obligations under the *Boundary Waters Treaty* and the *Great Lakes Water Quality Agreement*. In addition, the location of the return flow should be required to be as close as possible to the location of the initial withdrawal in order to minimize adverse ecological impacts. There would appear to be no ecological justification for the proposed exemptions from the return flow requirement (Appendix 2, Part 1(2)(C)); they should be deleted. Some have concluded that the return flow requirement could be interpreted as de facto discrimination against users at great distances from the Great Lakes. Certainly this is more likely if some adjacent users are exempted from the requirement on the basis of what appear to be arbitrary criteria.

The "resource improvement" requirement seems the most problematic and should be reconsidered. While in principle it is admirable, there are serious concerns with its potential implementation. Resource improvements should be part of ongoing practice, unrelated to applications to take water out of the system. The proposal creates the unfortunate impression that applicants can buy their approvals by contributing to unrelated improvements in areas remote and unconnected with the local water body subject to the application.

The conservation requirements are crucial and, if anything, should be strengthened. Few existing users within the Basin are required to adopt conservation measures and, as a result, much water is wasted. There are already water shortages and conflicts in many Ontario communities and, as population grows and climate impacts are felt, these problems will only get worse without significant conservation efforts. Focusing primarily on those proposing new or expanded diversions and consumptive uses is discriminatory and will do little to reduce per capita demand for water in the Basin.

Conservation programs should be imposed on existing water users throughout the Basin. Article 302, imposing an obligation only to "seek to implement programs to promote" conservation, does not go far enough. In Ontario, conservation requirements should be imposed at the PTTW renewal stage, not only for new or expanded water takings, and other programs developed for existing users. For all jurisdictions, specific conservation targets and deadlines should be established in law.

Applicability of the Standard – Threshold triggers. It is not clear from the material what justifies the thresholds for applicability of the standard, that is, whether they are meant to represent the level at which significant harm might result. There are a couple of difficulties with such high triggers: first, localized (as opposed to Basin-wide) adverse impacts could occur at much lower levels and, second, the cumulative impacts of even a few large diversions could add up to significant harm. This is of particular concern with groundwater withdrawals. Ontario regulates all withdrawals above 50,000 litres per day, far below the lowest trigger of 19 million litres per day. Having different thresholds for diversions and consumptive uses is not necessarily problematic, as long as the levels can be justified on ecological grounds. Related to this is the 120 day averaging period. The Great Lakes Charter used a 30-day average. Even within this agreement, the 30-day average is used for the obligations regarding compiling and sharing information (Article 301) and it is not clear from the materials what the justification is for moving to a longer period. It raises the concern that certain large withdrawals (such as irrigation) that could have important local impacts could be excluded from review. Consideration should also be given to whether it is appropriate to have a much lower threshold for withdrawals of groundwater and possibly tributary water than for withdrawals from the Great Lakes themselves.

The Regional Body. The proposed structure of the Regional Body implies a political body (the governor/premier or delegate). Given that its work will largely consist of making "findings" with respect to water management programs and applications, the body should be independent of political considerations and be made up of people with expertise on the range of issues addressed in the criteria. Proceedings should be open to the public, public participation should be included, and reasons for decisions provided.

Approvals. The agreement should reinforce that the onus is on the applicant to demonstrate by clear and convincing evidence that a diversion is justified according to the criteria. The precautionary principle should be referenced and it should be made explicit that if there is uncertainty about whether or not an application will result in harm to the ecosystem, it will not be approved. The agreement should go further and impose a cap on the amount of water allowed to leave the system through diversions, as suggested by the IJC.

In addition, because of the significant data gaps and future uncertainties about availability of water, all approvals should have time limits on them. This ensures there are no permanent entitlements to Great Lakes water, allowing jurisdictions the flexibility to periodically assess the impacts prior to authorizing renewals. Ontario does this now when issuing its PTTWs.

Potential conflicts. The proposals do state that they have no effect on the jurisdiction and authority of the IJC and the federal governments and, as a legal matter, they cannot. However, consideration should be given to the potential for conflicting approvals and how conflicts will be resolved.

Appeals and judicial review. Decisions at the jurisdictional level (whether or not they go to regional review) should be subject to broad appeal provisions that are consistent across the region. Ontario must commit to amending the present, inadequate provisions in the *Environmental Bill of Rights* to allow more open access.

October 15, 2004

Re: Environmental Bill of Rights Registry Number PB04E6018

Paula Thompson, Senior Policy Adviser
MNR Water Resources Section, Lands and Waters Branch
300 Water Street, P.O. Box 7000
Peterborough, ONK9J 8M5 Via Fax: 705-755-1267

Dear Ms. Thompson:

Great Lakes Water Management Initiative

Background:

On behalf of the Blue Mountain Watershed Trust Foundation we respectfully submit our response to the Great Lakes Water Management Initiative. The BMWTF was incorporated in 1995, the first *watershed-based* land trust in Ontario. We are a not-for-profit registered charitable organization with nearly 200 members. We are a member of the Ontario Land Trust Alliance and the Ontario Greenbelt Alliance.

Our area of interest totals about 50,000 hectares and includes independent watersheds that originate in the Niagara Escarpment and drain directly into Georgian Bay. The BMWTF is committed to ensuring the continued environmental health and integrity of our watersheds. Our Mission Statement is: *"The restoration, rehabilitation, conservation and sustainable use of the Blue Mountain Watershed ecosystem through broad community stewardship."*

We have participated public information sessions and commented on the Province of Ontario's Greenbelt Task Force, Planning Reform Initiatives and the Growth Plan for the Greater Golden Horseshoe. We have been involved in Ontario Municipal Board hearings in the Town of Collingwood and The Town of The Blue Mountains, prepared a Natural Heritage Systems Plan (1995) and organized a one-day seminar "Saving Our Water Resources" in 1999 which was one of the catalysts for the $300,000. AEMOT Groundwater Management Study funded by the Ontario Ministry of the Environment. We have also just completed the three-year Beaver River Water Quality Improvement Project which resulted in over 40 works to improve the water quality and fish habitat in the Beaver River.

Why is the Great Lakes Basin Sustainable Water Agreement Important?

The Town of Collingwood and The Town of The Blue Mountains both draw their municipal drinking water from Georgian Bay. Therefore Great Lakes water quality is important to us. This

area is a major tourist destination and retirement haven. The Cryptosporidium contamination of Collingwood's drinking water in the late 1990's made headlines in the Toronto press. The Town moved quickly to upgrade their water treatment plant to remedy the problem, thus avoiding any long-term economic impacts. They implemented an expensive reverse-osmosis water treatment system.

Water quantity in the Great Lakes is also important. The recreational uses of our harbors and beaches has been adversely affected by the recent lower water levels in the Great Lakes. For example, the beach in Collingwood's Sunset Point Park has been closed for two years due to low water levels.

The work of the International Joint Commission and the signing of the 1985 Great Lakes Charter are important stages in the efforts to protect the Great Lakes waters. In today's atmosphere of potential water shortages and increasing demands (especially from areas where groundwater resources are becoming depleted), the logic for fortifying the measures to protect the Great Lakes is compelling. More than a non-binding agreement is needed. The approach of having a binational agreement strongly anchored by water conservation and protection of ecosystem values is an appropriate one. A target of **no net loss** of water from the Great Lakes through a cap on diversions and stronger requirements for water efficiency and conservation should be our goal.

Recommendations:

Stronger Conservation Measures:

We recommend that the conservation measures in the Agreement be strengthened. For example, a pipeline constructed in 2000 takes treated water from Collingwood south to Alliston. The Town concluded that selling surplus water would offset the cost of their new treatment facilities and Alliston required more water to service growth. Collingwood and Alliston are both in the Nottawasaga River watershed. However, in 2003, municipalities south of Alliston, in the Lake Simcoe watershed, were looking for water to service their needs - they are part of the "Greater Golden Horseshoe". They approached the Town of Collingwood asking to tap into the pipeline. The BMWTF objected, as did many citizens, to the transfer of water out of the watershed and Collingwood's council rejected the proposal. However, the Town is now "marketing" its water to municipalities within the watershed adjacent to the pipeline between here and Alliston. We are concerned that this is not sustainable in the long term. How long can we deny Georgian Bay water to the GGH? Conservation measures and movements to improve the quality and quantity of the groundwater is an alternative that is recommended for Collingwood's citizens as well as these potential "customers".

Ontario & Quebec Need to Pass Laws to Legally Bind The Provinces to the Agreement:
Ontarians uses more water than any other Great Lakes jurisdiction. Therefore, we must be committed to the Agreement and thus need to "walk the walk". Provisions for equitable rights and due process without penalty should be part of the Agreement and promulgated into the laws of Ontario and Quebec.

Shorten Implementation Timetable:
We strongly recommend that the Compact and the Agreement be promulgated within two years of final drafting. We further recommend that no major diversions, withdrawals or new or increased consumptive use be permitted until laws are in place.

Due Process and Transparency in the Regional Review:
The BMWTF is a firm believer in public involvement and transparency as are our watershed municipalities. This approach works for us. Thus, we recommend that procedures for public involvement, such as intervener funding and opportunity for public participation, need to be developed and included in the Agreement and Compact.

Data Collection Improvement:
A few years ago, we asked the Ontario Ministry of the Environment for data on water taking permits in our watersheds. Information was difficult to obtain and a long time in coming. As an accountant, I cannot see how we can balance our "water budget" if we do not know our "expenses". Establishment of a centralized Great Lakes data base on withdrawals is a matter of urgency, as is a better understanding of the ecological impacts.

Trigger Levels:
Regional reviews should be mandatory at lower usage levels. Due to the current definition of "consumptive use", massive water withdrawals may not trigger a regional review. Also, we need to establish a "level playing field" by applying the same restrictions to both in-basin and out-of-basin uses.

Revert to 30-day Averaging:
The Compact and the Agreement should return to 30-day averaging for all withdrawals.

Return Flow Requirements:
Recent studies indicate that changes in water temperatures and flows can have adverse effects on the ecology of a stream. We recommend changes to the Compact and the Agreement requiring return flows to be "as close as possible to the point of withdrawal" and be returned to the same surface or aquifer source it came from.

The Chicago Diversion:
Taking water from the Great Lakes and sending it down the Mississippi is of concern to all Great Lakes basin citizens. Canadians must have a voice in any future increases to the Chicago Diversion, thus it ought be subject to Regional Review as set out in the Agreement.
Delete the Twelve-Mile Exemption for Return Flows:
No exceptions - this could set a harmful precedent. Everyone should "play by the same rules".

Sincerely,

BLUE MOUNTAIN WATERSHED TRUST FOUNDATION

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Pembina Institute for Appropriate Development

Holistic and practical solutions for a sustainable world.

August 27, 2004

Paula Thompson
Senior Policy Advisor
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Lands and Waters Branch
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And

David Naftzger
Executive Director,
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Re: Draft Great Lakes Basin Sustainable Water Resources Agreement and Great Lakes Basin Water Resources Compact - July 19, 20004 Draft/Ontario EBR Registry Posting PB04E6018

Dear Ms.Thompson and Mr.Naftzinger,

I am writing to you on behalf of the Pembina Institute for Appropriate Development regarding the proposed Great Lakes Sustainable Water Resources Agreement.

The Institute has taken an ongoing interest in water resource management issues in the province of Ontario over the past few years. The Director of the Institute's Environmental Governance Program, testified as an expert witness before the Walkerton Inquiry on Ontario environmental law and policy affecting drinking water protection. The Institute has continued to follow the Province of Ontario's initiatives related to source water protection, and more general initiatives on both sides of the border affecting the Great Lakes.

The proposed water resources agreement and compact represent a significant effort to address the question of diversions and consumptive uses of the shared waters of the Great Lakes basin. The Pembina Institute believes that these issues should be addressed in a precautionary manner for a number of reasons. These considerations include:

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There is also evidence that reducing carcinogens in the environment will bring down the detectable levels in our bodies. For example, Health Canada studies reported a 50 per cent decrease in the levels of dioxins and furans in women's breast milk. This occurred after the use of pesticides with high levels of dioxin were banned, and pulp mills were required to eliminate dioxin and furan releases from their effluents.

It is, of course, extremely difficult to know how many cancers might be prevented or delayed if we eliminated our exposures. However, these successes are hopeful signs that with a concerted effort to reduce carcinogens, the number of people likely to get cancer could be brought down.

There are many question marks about cancer. We are not certain about the links between carcinogens and the development of cancer. We are only starting to learn about windows of vulnerability – how exposures can be more hazardous when they occur at a particular time, during pregnancy, for example. We do not know if there are any safe or acceptable doses since we have found with the most studied carcinogen, tobacco, that exposures to low doses over long periods can cause serious harm.

In addition, evidence is growing that known carcinogens may also be responsible for other health impacts like neurological problems and compromised immune systems. Limiting exposures to carcinogens may have a ripple effect in improving the prognosis for other diseases.

Because of the uncertainty surrounding cancer issues, there is a growing recognition that the "precautionary principle" is a better policy choice than the current policy of studying single chemicals to prove there is harm. This is particularly true in Europe where increasingly, legislation is being designed to incorporate this principle.

This report assumes that overall the best practice is a precautionary one – that "when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically". Any known, probable or even possible carcinogen constitutes the possibility of harm.

Rather than wait for definitive answers to all the questions about cancer, the knowledge that we have now demands that we act to remove these substances from our workplaces and our environment.

- The extremely low recharge rate of the basin ecosystem. The International Joint Commission (IJC) has concluded that only one percent of the waters of the Great Lakes is renewed annually by precipitation, surface water runoff, and inflow from groundwater sources. [1]
- The uncertainties regarding the long-term impacts of global climate change on the basin ecosystem, and water resources within it, again as highlighted by the IJC. [2]
- The generally poor state of understanding and management of the extent and impact of existing water takings in the basin. The existing information and knowledge gaps regarding the state of water resources, and the current levels of authorized water takings have been highlighted in recent years on the Canadian side by the Ontario Environmental Commissioner,[3] federal Commissioner for Environment and Sustainable Development,[4] and the Walkerton Inquiry.[5] The Great Lakes Commission identified similar, and in some cases, even more extensive, knowledge and information gaps on the US side.[6]

The institutional and legal framework around the management of the basin's waters has been evolving since the adoption of the *Boundary Waters Treaty* in 1909. The overall approach of the agreement and compact need to reflect both the fragile nature of the resource, and its shared, binational character.

The proposed agreement and compact have been the subject of controversy. On one hand it has been argued that the proposed accords represent significant progress in efforts to establish environmental standards for water withdrawals from the basin and to improve the overall management of water resources in the basin.[7] Others argue, however, the proposed accords are a means of "getting to yes" regarding major water withdrawals from the basin.[8]

The Pembina Institute's comments are focussed on the proposed agreement, rather than the compact, as it is the agreement to which the Canadian jurisdictions would be signatories. However, the Institute's comments consider the compact as an important contextual element for discussion of the agreement.

Agreement Structure and Provisions

The overall structure of the proposed Great Lakes Basin Sustainable Water Resources Agreement is as follows:

- Approvals for new or expanded diversions or consumptive uses above specified amounts would trigger a 'regional review' by a regional body established through the agreement,

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[1] See *Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States* (Washington and Ottawa: International Joint Commission, March 2000), s.2.
[2] IJC, *Protection of the Waters of the Great Lakes*, s.5.
[3] See Gordon Miller, *Ontario's Permit to Take Water Program and the Protection of Water Resources* (Toronto: Environmental Commissioner of Ontario, 2001).
[4] *Report of the Commissioner for Environment and Sustainable Development* (Ottawa: Office of the Auditor General, May 2001) Chapter 1.
[5] See the Hon.D.O'Connor, *Report of The Walkerton Inquiry: Part II* (Toronto: Queen's Printer 2002).
[6] *Toward a Water Resources Management Decision Support System for the Great Lakes – St. Lawrence River Basin* (Great Lakes Commission, May 2003), chapter 3.
[7] See for example, Great Lakes United, "Governors and Premiers Move to Protect Basin from Unwise Water Withdrawals," *Press Release*, July 19, 2004.
[8] See, for example, A.Nikiforuk, *Political Diversions: Annex 2001 and the Future of the Great Lakes* (Toronto: Munk Centre for International Studies, June 2004).

2. Surveillance

Cancer surveillance refers to the ongoing or systematic collection, evaluation and dissemination of data related to cancer. The purpose of collecting this data is to reduce the risk of developing and dying from cancer.

Although cancer surveillance is considered one of the more developed areas of health surveillance in Canada, there is very little precise information that links the incidence of cancer in Canada to its causes. This makes it difficult to know how many cancers in Canada are caused by environmental and occupational exposures, and, consequently, how to prevent them.

In May 2000, a Health Canada report, "Strengthening Environmental and Occupational Health Surveillance in Canada", found environmental and occupational health surveillance lagged behind that of other health and safety domains and that there were "many significant gaps and shortcomings that call for substantial investment".

From the cancer statistics collected by provincial and territorial cancer agencies, we do know how many people get cancer in Canada every year, how many people die from it and where it occurs. These statistics are based on information such as hospitalizations and pathology reports. They are used by Health Canada, the Canadian Cancer Society and other agencies to monitor cancer incidence, and to study cancer patterns and trends.

This information tells us, for example, that cancer rates are continuing to rise across Canada and that in the twenty years, between 1990 and 2010, the number of new cancer cases diagnosed in Canada each year is expected to more than double. (Canadian Cancer Society).

Based on the work of the International Agency for Research on Cancer (part of the World Health Organization) and the United States National Toxicology Program, we also know that certain chemicals and compounds cause cancer. These are classified as substances that are known to cause cancer in humans, likely to cause cancer and possibly cause cancer in humans. These two programs set the international standard for the identification of carcinogens.

As authoritative as they are, however, these lists are far from complete. Of the thousands of chemicals either naturally occurring or in commercial use, there is very little known about their hazards. The U.S. National Institute for Occupational Safety and Health estimates that less than 2 per cent of the chemicals in commerce have been tested for carcinogenicity.

consisting of representatives of the parties to the agreement (the Great Lakes basin states and provinces) (Art.201).

- The regional body would assess whether the proposed withdrawal meets the decision-making standard established through the agreement (Art.506). The standard includes requirements that the jurisdiction from which the proposal for a withdrawal originates (Appendix 1):
    - Establish that there are "no reasonable water supply alternatives" within the basin
    - Demonstrate that the amounts to be withdrawn are limited to reasonable quantities,
    - That withdrawn waters are returned to basin with an allowance for consumptive use,
    - Demonstrate that the withdrawal will have no significant individual or cumulative adverse effects on the quantity or quality of the waters or water dependent natural resources of the basin
    - That the withdrawal plan incorporate a conservation plan
    - That the plan incorporate proposals for the improvement of the waters and water dependent natural resources of the basin.
- The regional body can reach a consensus decision regarding the accordance of the proposed withdrawal with the standard or request an independent assessment (by majority vote (Art 505.4)).
- In the event that there is no consensus, the regional body may issue a declaration of finding that presents the different points of view and indicates each party's position (Art 506.8)
- The originating jurisdiction is required to "consider" the declaration of finding in its decision making regarding whether to approve the proposed withdrawal of water (Art 506.9)
- The agreement also requires the management and regulation within a jurisdiction of diversions or withdrawals at specified thresholds (Art.201).
- Finally, the agreement includes provisions regarding the gathering and sharing of information regarding diversions and withdrawals within the basin (Art.301).

The Great Lakes Basin Water Resources Compact is a parallel agreement among the US Great Lakes states to the water resources agreement. In general, the compact mirrors the provisions of the proposed agreement, but does contain some important differences. The compact would be a legally enforceable document (Art.3.9), while the agreement would need to be incorporated into the domestic law of each party (provinces and states) to become enforceable. In addition, the compact establishes a decision rule for the approval of withdrawals requiring regional review, and other decisions, of a simple majority (art 2.4).

Comments on the proposed Agreement

Overall Objectives (Art 100)

Surprisingly, neither the draft agreement or compact (s.1.3) identify as one of their objectives the management of water resources in the Great Lakes basin in a manner that ensures their long-term sustainability, and the maintenance of the health and functions of the basin ecosystem.

Moreover, known human carcinogens are continually being added to these lists, as evidence of the relationship between exposures and the development of cancer is uncovered. Most recently IARC added formaldehyde to its list of known human carcinogens, and in its last report, the National Toxicology Program added wood dust, nickel compounds, beryllium and oral contraceptives, among others. Identifying the substances that cause cancer is critical to knowing which ones should be priorities for cancer prevention.

the Identification of Exposed Populations: Finding out new associations between exposures and cancer incidence

One of the major problems in identifying causes of cancer and how to prevent it is the lack of information about who is exposed, what they were exposed to, where and for how long.

The only database in Canada of confirmed and compensated occupational cancers is kept by the Association of Workers' Compensation Boards. This data represents workers who have contracted cancer at work, filed successful claims and been compensated.

This information is included in the Canadian Work Injuries and Diseases Databases. Although this database has some data on workplace cancers, it is not a reliable indicator of the incidence of occupational cancers in Canada. It grossly underestimates the number of occupational cancers in Canada for several reasons. In many cases, people who contract cancer in the workplace do not file claims because they may be unaware of the origin of their disease or the availability of compensation. In other cases, claims are denied if it cannot be proven definitively that the cancer was due to workplace exposure.

Epidemioloical studies are helpful in detecting associations between occupational groups and cancer risk but they are limited in their ability to detect the causes of the cancer. SOME MAJOR THOUGHT LINK IS MISSING HERE

Some research programs and investigators have tried to address this gap. In Canada the best practice in cancer research programs is the ongoing work of the Cancer Control Research Program of the British Columbia Cancer Agency in identifying populations at risk.

The British Columbia Cancer Agency has used death registrations in British Columbia and occupational information to evaluate occupational cancer risks. They are also conducting ongoing epidemiological studies into the links between cancer incidence and environmental carcinogens. The objective of their research is to lower the rate of cancer incidence and deaths in British Columbia.

Through this work, the Cancer Agency's Research Program has found new associations between occupational exposures and certain types of cancer. For

Decision-Making Process (Chapters 4 and 5)

The draft agreement proposes that a Great Lakes Water Resources Regional Body make determinations of whether a proposed withdrawal of water is consistent with the decision-making standard established through the accord.

Surprisingly, despite the central role to be played by the regional body in decision-making about the management of the basin's water, with the exception of requests for independent assessments of proposed withdrawals (Art.505.4), the draft agreement contains no voting or decision-rules regarding how the body would operate. Where no consensus is reached, the agreement proposes that a public declaration of finding presenting different points of view and indicating each party's position be made (Art. 506.7). By contrast, the proposed compact includes a clear decision rule, albeit of a simple majority (Art. 2.4).

Given shared nature of the resource, and the need for a precautionary approach to its management, the agreement should incorporate a much stronger decision-making structure regarding the acceptability of proposed withdrawals warranting regional review. Withdrawals (diversions and consumptive uses) triggering regional review should only be approved on the basis of unanimous consent of the parties. A consensus-based approach would be consistent with current Canadian practice in intergovernmental environmental decision-making, via the Canadian Council of Ministers of the Environment.[9]

At a minimum, given the shared nature of the resource, approval should require a binational majority. Such an approach would require approval by a majority of US parties, and at least one Canadian party. The jurisdiction of origin of a proposed withdrawal should not be permitted to vote on the approval of the proposed withdrawal.

The current draft agreement only requires that Parties "consider" the declaration of finding in decision-making regarding withdrawals (Art 506.8). In other words, parties may proceed with the approval of withdrawals, even if significant objections are raised. By contrast, the proposed compact clearly requires regional approval before proposals for withdrawals requiring regional review can be authorized (Art.3.3, 3.4). A similar approach should be incorporated into the proposed agreement, committing the parties not to authorize withdrawals warranting regional review without the approval of the regional body.

Role of the Governments of Canada and the United States in Decision-Making

The absense of the federal governments of Canada and the United States from the decision-making process is surprising. The two national governments are the parties to the international agreements regarding the stewardship of the Great Lakes basin waters, including the *Boundary Waters Treaty,* and should be participants in the decision-making process. More generally, the relationship between the proposed accord and the provisions of the *Boundary Waters Treaty* are unclear. The proposed regional body may reproduce or duplicate functions currently carried out by the International Joint Commission.

[9] See www.ccme.ca.

example, they found elevated risks of developing ovarian cancer for British Columbia women working as teachers, nurses and hairdressers. They pointed to the need to investigate the chemicals in these work environments so that prevention strategies could be established.

On the environmental side there have also been efforts to study the links between environmental carcinogens and cancer. A Canadian epidemiological study of chlorinated drinking water showed a consistent relationship between trihalomethanes with elevated levels of bladder cancer. Trihalomethanes are , the byproducts of chlorine added as a disinfectant to kill bacteria in drinking water supplies.

This study led to preventive action being taken in the United States. It contributed to lowering standards for trihalomethanes in drinking water. Based on this and other similar findings, the United States lowered its allowable levels of trihalomethanes from 100 micrograms per litre to 80. The Canadian government is also considering changing its guideline.

Another epidemiological study that looked at environmental exposures and health effects was the Great Lakes Human Health Effects Study. Health Canada studied the impacts of pollution in the 17 most contaminated areas around the Great Lakes on health in those communities, and found elevated levels of cancer in the Windsor-Detroit Area of Concern. This study was conducted as part of the Great Lakes Water Quality Agreement between Canada and the United States, and was intended to further the clean up of the Great Lakes.

When people are diagnosed with cancer in Canada, generally no information is collected from patients on their work histories. Similarly, no information is collected on their possible exposures to environmental carcinogens.

In Windsor the Windsor Occupational Health Centre for Workers in collaboration with the Windsor Regional Cancer Care Centre also tried to link occupational exposures with the incidence of cancer. In their investigations, they obtained occupational information from newly diagnosed cancer patients, using a computer and personal interviews. Their study, called CROME (Computerized Recording of Occupations Made Easy), was the first time that patients in Canada were asked for their occupational histories.

HOLMES from Larry – best practices, exposure, surveillance

A similar program was undertaken in Quebec to identify occupational respiratory disease. It was called Propulse. Between 1992 and 1993 all Quebec chest physicians and allergists were asked to report suspected new cases of occupational repiratory disease. They found that a physician based reporting procedure could provide better surveillance of occupational respiratory disease.

The Role and Nature of the Decision-Making Standard (Art.200 and Appendices 1 and 2)

Article ID and IID of appendices 1 and 2 should be redrafted to clarify that withdrawals will only be permitted when:

- There will be no significant individual or cumulative adverse impacts to the quantity and quality of the waters and the water dependent natural resources of the great lakes basin, with consideration of the potential cumulative impacts and precedent-setting consequences associated with the proposal.

Such a provision is essential to ensure that any authorized withdrawal does not adversely affect the basin. The other provisions of the standard speak to the justifications for proposed withdrawals, but do not establish a protective standard with respect to the integrity of the basin's waters. Similar language should be incorporated into the provisions regarding jurisdictional reviews of diversions and withdrawals (IVD. And VD)

Similarly, proposals for "improvement measures" (Art 1F and IIF) should not be considered in decision-making, as this concept relates to measures that are not directly related to the sustainable use of the basin's waters.

Standard Applicability (Article 201)

Article 201 establishes the triggers for regional reviews of proposed new or increased diversions or consumptive uses of waters of the great lakes basin. The provision also establishes triggers for jurisdictional management and regulation of diversions and withdrawals at a jurisdictional level.

All significant proposed removals waters from the basin, either via diversion or consumptive uses should trigger the regional review process. At a minimum, the trigger period for the applicability of the decision standard should be reduced from 120 days to 30 days in all cases. Such an approach would help to ensure that intense withdrawals over a short period of time are captured by the applicability rule.

It is unclear why the triggers for regional review for consumptive uses would be higher than those for diversions, given that diversions may not involve the removal of water from the basin, while consumptive uses almost certainly would. The trigger for consumptive uses should be at the same level as that for diversions (i.e. 4.5. million litres per day).

The agreement and compact should incorporate mechanisms requiring that the Parties notify each other (possibly through a website) of all proposed new or expanded water takings. The accords should also incorporate mechanisms through which individual jurisdictions can request the initiation of a regional review of any proposed new diversion or consumptive use.

The standard for management and regulation within a jurisdiction of withdrawals should be set at a level of not less than 50,000 litres per day, consistent with the provisions of the *Ontario Water Resources Act*.[10] It is important to note that questions have been raised in Ontario as to whether

[10] *Ontario Water Resources Act,* s.34(3).

Best practices Surveillance research – how to identify, measure, monitor and decide when to act.

In addition to this research, there are surveillance and monitoring programs underway in Canada that represent the best Canadian practices in primary cancer prevention. Best practices in surveillance can be considered to be those practices which identify carcinogens, measure the exposure of workers or communities, monitor the levels or the health effects and take action to minimize or eliminate exposures. WORKPLACE AIR MONITORING

If workers are knowingly exposed to carcinogens by employers, then the best practice would be to establish a registry that would track the length of time during which they are exposed and the levels to which they are subjected. In the field of occupational health, the federal government has established such a registry for workers exposed to radiation.

The National Dose Registry offers a model for monitoring exposures of workers who are exposed to a known carcinogen in the course of their work. In the case of the National Dose Registry, this carcinogen is radiation, and all workers in hospitals, laboratories, mines or nuclear power plants are monitored on a regular basis for their exposures. This information is collected in a national registry at Health Canada in Ottawa. When exposures go beyond a certain limit, employers and workers are notified so that workers may be transferred to an area of work where exposures are reduced.

The Ontario government also has a very limited Asbestos Registry for workers who are removing or encapsulating asbestos. Employers who use their own employees or outside contractors are required to file information on what kind of asbestos was handled and how many days of exposure the workers had.

On the environmental side, the best practices in surveillance in Canada are limited to a very few surveillance programs that link environmental contaminants and human health.

There is only one national surveillance program that looks at environmental exposures and cancer.

This is the National Enhanced Cancer Surveillance System, a database maintained by Health Canada. Up until 1997 it collected data from provincial cancer registries on newly-diagnosed cancer cases. Using a questionnaire, 20,000 people provided information on their smoking histories, occupations, residential histories and oral contraceptive use. Another database was also created – the Environmental Quality Database – that collected publicly available information on air and water pollution. These two databases together have the

even this trigger level is sufficient to ensure the sustainable management of the province's water resources.

Additional Decision-Making Criteria

The agreement and compact should require that in all cases:

- A no net loss approach to the question of withdrawals and consumptive uses in the basin. This would imply a 95% return rate for all approved diversions and consumptive uses.
- Diversions and consumptive uses should only be permitted for public purposes (i.e. the provision of municipal sewer and water services to existing settlements at their current population levels).
- There can be no adverse impacts on water flows in the basin.
- Diversions and consumptive uses should only be permitted if they are matched by equivalent reductions in consumption through conservation and demand side management among municipalities and other water consumers in the basin, such as industry and agriculture.

Concluding Comments

In general the parties to the proposed agreement and compact need to provide of the establishment of a much stronger understanding of the current state of the resource, and current withdrawals and diversions, before considering the authorization of major new diversions or consumptive uses. The development of a complete inventory of current authorized and actual takings of surface and groundwaters in the basin would be an important step in this regard.

On the whole, the agreement and compact should be strengthened in three areas:

- The triggers for both regional review and jurisdictional management of proposed diversions, consumptive uses and withdrawals should be designed to capture all significant withdrawals. The timeframes over which withdrawals are averaged should be reduced, and the triggers for consumptive uses made equivalent to those for proposed diversions. The trigger for jurisdictional management should be set at not less than 50,000 litres per day.
- The decision rules in the agreement and compact should be significantly strengthened, reflecting both the need for a precautionary and binational approach to decision-making. Decision-making regarding diversions and consumptive uses subject to regional review should take place on the basis of the unanimous consent of the parties or, at a minimum on the basis of a double (i.e. binational) majority rule.
- The decision standard should incorporate a stronger standard of review, requiring that there will be no significant individual or cumulative adverse impacts to the quantity and quality of the waters and the water dependent natural resources of the great lakes basin, with consideration of the potential cumulative impacts and precedent-setting consequences associated with the proposal.

potential to allow for detailed evaluation of air and water quality concerns in relation to a range of cancer types and to provide information to local public health officials advising them of hot spots. The usefulness of the Enhanced Cancer Surveillance System is limited, however, since Health Canada is no longer collecting information.

The Northern Contaminants Program also looks at environmental exposures but it is limited to Northern Canada. It monitors contaminants in humans and animals in the far North. The goal of this program is to reduce contaminants in fish and animals so that communities in Northern Canada can continue to eat traditionally harvested foods. The data is used in the negotiations on international agreements on persistent organic pollutants.

The best national Canadian monitoring program for environmental carcinogens is the National Pollutant Release Inventory, set up under the Canadian Environmental Protection Act, which is discussed in the next section under Right to Know.

The Alberta government has a unique program for monitoring environmental exposures of communities to industrial air pollution, including carcinogens such as benzene, mercury and arsenic called the Alberta Community Exposure and Health Effects Assessment Program Database. The health department has done several epidemiological and biomonitoring studies to evaluate the health of specific communities and their exposure to environmental contaminants. These community assessments have generally been done as a result of energy or utility board hearings into industrial expansions. Using volunteers equipped with personal air monitoring equipment, they have studied contaminants to which people in the nearby communities are exposed and have collected baseline data on health and environmental pollutants.

Best Practices in the United States

In the United States, the best practice in occupational disease surveillance is the National Occupational Mortality Surveillance which has created a large database for understanding occupational-related deaths. Another important best practice in the United States is the biomonitoring work done by the Centres for Disease Control and Prevention. The United States is also remarkable for its citizen resourcefulness, and in what would be an example of barefoot surveillance, citizens have done their own monitoring with simplified air testing equipment that galvanized the government into action.

National Occupational Mortality Surveillance

In the United States a large mortality surveillance project created a database that has been useful in identifying associations between occupations and industries

I would be pleased to respond to any questions that you may have regarding the Pembina Institute's views on this matter.

Yours sincerely,

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The Hon.L.Dombrowsky, Ontario Minister of the Environment
Gordon Miller, Environmental Commissioner of Ontario.

with cancer. The National Institute for Occupational Safety and Health (NIOSH), the National Cancer Institute and the National Centre for Health Statistics created a large mortality database by funding state health departments to code industry and occupation on death certificates. A total of 28 states were included for 2 years or more from 1979 to 1990, resulting in more than 5 million records. Researchers have used this database to examine cancer mortality and occupational risk factors.

Biomonitoring

The Centers for Disease Control and Prevention in the United States has done biomonitoring studies, a type of environmental surveillance that measures "pollution in people". Biomonitoring uses analyses of blood, urine or breast milk samples to identify the toxic chemicals that we carry as a result of our exposure to environmental chemicals.

In January 2003 the Centres for Disease Control and Prevention published their second "National Report on Human Exposure to Environmental Chemicals". The CDC found organophosphate pesticide residues in about 75 per cent of the general public and about 90 per cent of children. The average person in the United States had more than 13 pesticides in their bodies. This is known as the chemical "body burden".

In a study with the Mount Sinai School of Medicine in New York, researchers working with the Environmental Working Group identified contaminants in the blood and urine of nine people. Although the people tested do not work with chemicals on the job or live near an industry, they still had an average of 91 industrial chemicals in their bodies. Of the 106 chemicals detected in total, 76 are carcinogens or "probable" carcinogens.

This research has the potential to show which chemicals get into our bodies and at what concentrations. The data can indicate trends in chemical exposures. It can link environmental exposures and pollution-related disease, assess the effectiveness of regulations and set priorities for legislative action. For example, the discovery of brominated flame retardants in the breast milk of Swedish women led to a proposed phase-out of those substances in Sweden.

Very little biomonitoring has been done so far in Canada with the exception of the Northern Contaminants Program and breast milk studies by Health Canada looking at brominated flame retardants, and dioxins and furans.

Barefoot surveillance

In the United States communities exposed to toxic air emissions from oil refineries and chemical plants started to do their own air sampling after government authorities were not following up on accidents and releases from the

Comments on the Great Lakes Basin Sustainable Water Resources Agreement

By Sandra Postel, Director, Global Water Policy Project, Amherst, MA

Date: August 26, 2004.

I have studied and written about water policies and trends on a global level for twenty years. Over this period of time, problems of water scarcity, ecosystem degradation, and competition for water have deepened and spread throughout the world. Pressure to increase withdrawals and diversions from rivers, lakes, and aquifers is intensifying in most locations. Yet it is difficult to identify river basins or watersheds in which governing authorities have adopted proactive policies and strategies to safeguard the valuable benefits derived from healthy aquatic ecosystems.

It is against this backdrop that I have observed, with great interest, the adoption of the Great Lakes Charter Annex 2001. In our 2003 book, *Rivers for Life: Managing Water for People and Nature*, my coauthor Brian Richter and I write: "the eight U.S. states and two Canadian provinces that comprise the Great Lakes basin have taken a leadership step with the June 2001 adoption of an annex to The Great Lakes Charter." We noted the significance of the Annex's goal to ensure that future modifications to the Great Lake basins' rivers and streams be accompanied by measures that result in a net ecological benefit for the basins' freshwater ecosystems. We also noted the important recognition in the Annex that "the Great Lakes are a bi-national public treasure and are held in trust by the Great Lakes States and Provinces."

With this groundbreaking agreement, there is an opportunity for the Great Lakes region and its communities to pioneer a new, ecologically sustainable, and more beneficial approach to water management. *Whether or not this potential is realized, however, will depend on the implementation, enforcement, and monitoring of provisions to ensure that the stated goals are met.*

I have undertaken this review without any knowledge of the laborious process, discussions, and hard work that went into this draft document. Although this may allow for more objectivity, it also makes me aware that I am wading into waters that many others have been deeply immersed in for some time.

The draft of the Great Lakes Basin Sustainable Water Resources Agreement, and most importantly, the "Decision Making Standard for Regulating Withdrawals from the Waters of the Great Lakes Basin (Appendix 1) and the "Procedures Manual" (Appendix 2) constitute a good foundation for implementation of the Annex. In my opinion, however, they need greater specificity and some modification to ensure that the important goals of the Annex will be met and sustained into the future.

<u>Overarching Comments</u>

(1) I see no safeguard against the ecological tyranny of numerous "small" withdrawals or diversions. Without an upper limit or cap on total net withdrawals or cumulative impacts, there is no real protection assured for the Great Lakes ecosystems, especially if the "significance" of cumulative impacts is open to interpretation. Consistent with public trust and precautionary principles, it would make sense to establish interim caps on basin withdrawals and specific

ecological impacts, which would remain in effect until monitoring and scientific assessments justified new ones.

(2) Water conservation is key to the successful implementation of the Annex. But I am fairly certain that conservation will be marginalized if the conservation provisions remain unchanged from those in the draft agreement. The starting point for implementing ecologically sound and sustainable water management in the Basin should be reducing waste, inefficiency, and unproductive uses of water—and using the savings to meet new needs. To merely require a water conservation plan as part of a withdrawal application gives advantage to those applicants who are the most wasteful. They can easily devise a plan to achieve some big water savings while still remaining inefficient. *Water conservation will be marginalized and its potential unrealized unless the agreement includes quantified benchmarks against which to assess an applicant's current and projected water use performance.* (See additional comments concerning "Quantities that are Considered Reasonable" below.)

(3) There need to be clearer definitions of terms. In particular, how will the term "*reasonable*" be interpreted when deciding whether withdrawals and consumptive uses are appropriate under the agreement? For example, Section IIA of the Decision-Making Standard (Appendix I) says that a new or increased consumptive use will be approved as appropriate when "The need for all or part of the proposed Water Withdrawal cannot be reasonably avoided through the efficient use and conservation of existing water supplies." How will the term "reasonably" be interpreted? Is it reasonable to expect a water supplier to limit residential lawn watering in order to reduce consumptive water demands? Lawn irrigation is one of the most wasteful and environmentally destructive (especially when accompanied by pesticide applications) uses of water in the residential sector. Will it be considered reasonable or unreasonable when examining an application for additional withdrawals from the Great Lakes Basin? *The outcome of the Great Lakes Charter and Annex hinges on the answer to such questions, but the answer likely to be given is not clear.*

(4) Similarly, how will the term "*significant*" be interpreted in deciding whether a proposed withdrawal will be implemented so as to cause "no significant individual or cumulative adverse impacts…"

(5) It is not clear how the jurisdictional review for "smaller" diversions and withdrawals will take into account cumulative impacts, some of which may result from the actions of other jurisdictions. An assessment of cumulative impacts requires a basinwide view of ecosystem health, not a limited jurisdictional view.

<u>Some Specific Comments on Appendix II – Procedures Manual</u>

(1) The Application requirements intended to determine the "Quantities that are Considered Reasonable," are not sufficient to make this determination. *Two important elements are missing: First, a breakdown of water use by sector; and second, performance benchmarks against which to judge whether the applicant's water use is reasonable.* For example, in order to know whether a public water supplier's application for additional withdrawals is reasonable, one needs to know what the current average per capita daily indoor and outdoor residential usage is –

measured in gallons per capita per day (gpcd), along with peak summertime usage. These values would then be assessed against a benchmark for efficient residential water use. An applicant proposing to reduce residential water use by 15 percent may seem like it is doing effective conservation, but if that conservation program only brings per capita residential usage to 160 gpcd, it is very far from any benchmark of efficient household use. Similarly, the applicant may say in its plan that it will reduce system leakage (sometimes referred to as "unaccounted-for-water) by 10 percent. But if this brings its leakage rate down only to 20 percent, it is still far from any benchmark of system efficiency.

(2) Section E: Water Conservation is an excellent start for ensuring that water conservation is built into water management within the Great Lakes Basins. Reference to the conservation measures, incentives, and planning guidance contained in the *Handbook of Water Use and Conservation* (Vickers 2001) gives applicants an excellent platform for building effective water conservation programs. It is the most comprehensive and up-to-date conservation planning tool available. *It is critical, however, that the Handbook of Water Use and Conservation be used in conjunction with quantified conservation requirements and performance benchmarks in order to make the decision-making standard for water conservation more objective, concrete, and effective.*

(3) Similarly, the criteria for deciding whether a proposal has the potential for "significant" effects includes a very useful list of criteria (physical, chemical, and biological) for making this determination. These provide good guidance for assessing impacts. But as with the water conservation requirements, there is a need to anchor these criteria with some benchmarks. For example, what is a "significant" change to the pre-proposal range of variability of the hydrologic regime? How much degradation of structural habitat is too much? How much decline in native species populations is allowed before a "significant" impact has occurred?

(4) Section F: Improvement Measures also raises some concerns. It is unclear to me how a new or increased diversion or consumptive use can itself result in an ecosystem improvement, but the criteria for decisions suggests that this is possible. Moreover, I am concerned with the criterion that "improvement proposals should preferably address the Source Watershed of the proposed Withdrawal." To protect the health of the source ecosystem, improvements should be *required* (not merely preferred) to take place in that source ecosystem. Allowing a withdrawal from Source A by virtue of an "offsetting" improvement in Source B does not safeguard Source A from degradation. This reminds me of the U.S. experience with the "no net loss of wetlands" policy. Allowing the draining of wetland A because the developer proposes to protect wetland B in a different location does not at all guarantee a net improvement in ecological health. More often than not, net degradation will result.

(5) The section "Jurisdictional Management and Information," says that it is anticipated that the majority of new or increased diversions or consumptive uses would be below the threshold level for regional review. This makes the use of conservation performance benchmarks, ecological impact benchmarks, and interim caps on net withdrawals and cumulative impacts even more important.

To conclude: I am impressed with the progressive thinking and approaches embodied in this draft agreement. There is great potential here for the Great Lakes states, provinces, and communities to pioneer a new approach to sustainable water use and management. However, the agreement's water conservation and ecological impact requirements need to be anchored by benchmarks against which to judge an applicant's proposal for increased withdrawals, diversions, or consumptive uses. There is also a need to safeguard Great Lakes ecosystems from the cumulative damage inflicted by many small actions. Interim caps on net withdrawals and impacts would seem to be necessary to achieve this.

CONFIDENTIAL DRAFT

The Implications of the Draft 2004 Great Lakes Charter Annex Agreements For Canadian Environmental Law and Policy

Prepared for the Walter and Duncan Gordon Foundation

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August 9, 2004

The Implications of the 2004 Great Lakes Charter Annex Agreements For Canadian Environmental Law and Policy

Background

Concerns about the management and use of the Great Lakes have prompted a long history of bi-national agreements between Canada, the United States, and those provinces and states within the Great Lakes watersheds. These agreements date back to the Boundary Waters Treaty of 1909. The Great Lakes Charter of 1985 is a non-binding agreement between eight states, Ontario, and Quebec that sets out principles for the management of the Great Lakes. In response to growing concerns about the status of the Great Lakes, the Great Lakes Charter Annex was signed in 2001, committing the provinces and states to take further steps to improve and strengthen management regimes.

On July 19, 2004, the eight Great Lake states along with Ontario and Quebec published two draft agreements concerning water withdrawals, consumption, and diversions from the Great Lakes. The first agreement, the draft Great Lakes Basin Water Resources Compact (the "Compact") is an agreement among the eight Great Lake states to engage in joint decision-making about the uses of water from the Great Lakes. The provinces of Ontario and Quebec are not parties to this draft Compact, so it will not be assessed in this analysis.[1] The second agreement, the draft Great Lakes Basin Sustainable Water Resources Agreement (the "Agreement"), is a "good faith agreement among the ten Great Lake states and provinces" regarding future water management and will be the central focus of this analysis. These two draft agreements, the Compact and the Agreement, represent the partial fulfillment of commitments made by the Great Lakes premiers and governors in the Great Lakes Charter Annex of 2001.

The following assessment of the draft Great Lakes Basin Sustainable Water Resources Agreement will attempt to answer the two following questions:

> To what extent, if any, does the draft Agreement affect federal Canadian environmental laws and policies governing water withdrawals, diversions, or exports from the Great Lakes?
>
> To what extent, if any, does the draft Agreement affect provincial environmental laws and policies in Ontario and Quebec governing water withdrawals, diversions, or exports from the Great Lakes?

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[1] It is strongly recommended that the Walter and Duncan Gordon Foundation seek a legal opinion regarding the effect of the draft 2004 Agreements upon American environmental law and policy at both the state and federal levels.

The Draft Great Lakes Basin Sustainable Water Resources Agreement

The draft Great Lakes Basin Sustainable Water Resources Agreement is a non-binding draft agreement that may, at a later date, be formally signed by Ontario, Quebec, and the eight Great Lakes states following a period of public consultation. Even if the eight governors and two premiers eventually sign it, the draft Agreement does not have any legal force or effect unless and until provinces and states make changes to their legislative/regulatory regimes to incorporate the provisions of the Agreement. Pursuant to Article 102 of the draft Agreement, the parties commit to making such legislative/regulatory changes as are needed to comply with the terms of the Agreement. However, if parties such as Ontario and Quebec fail to fulfill this commitment there are no legal consequences, nor can they be legally compelled to fulfill it.

Withdrawals are defined in the draft Agreement as the "taking of water from surface water or groundwater, by any means." Withdrawals are divided into diversions (i.e. transfers between watersheds, either within or beyond the Great Lakes basin) and consumptive uses (water withdrawn from a Great Lakes watershed and partially not returned). The cornerstone of the draft Agreement is the establishment of a new Decision Making Standard for Regulating Withdrawals from the Waters of the Great Lakes Basin (the "Standard"). The Standard is explicitly described as a minimum standard, allowing states and provinces to apply stricter, more comprehensive measures to proposed water withdrawals (Article 200). The Standard applies to new or increased withdrawals, not to existing withdrawals (Article 201).

The Standard will be applied by individual jurisdictions in all cases as well as by a Regional Review Body in cases of large new or increased withdrawals (Article 400). The thresholds for regional review are diversions greater than 3.8 million litres per day as averaged over 120 days and consumptive uses greater than 19 million litres per day as averaged over 120 days. The Regional Review Body is intended to reach a conclusion as to whether a proposed withdrawal meets the Standard, but the Regional Review Body does not have decision-making authority, which remains vested in the individual states and provinces (Article 506).[2] The Standard states that large new or increased withdrawals should only be approved when seven conditions are met:

a) there is no reasonable alternative within the watershed, including more efficient use and conservation of existing water supplies;
b) the quantities proposed are reasonable for the intended purposes;
c) water withdrawn shall be returned to the same watershed, subject to a consumptive use allowance;
d) no significant adverse or cumulative effects, including the effect of setting a precedent on future cumulative impacts;
e) the proposed withdrawal incorporates a conservation plan to minimize water use;
f) the proposal must include an improvement to the water or other water-related resources of the Great Lakes; and
g) there is compliance with all state, provincial, and federal laws as well as interstate, interprovincial, and international agreements.

[2] In the United States, federal legislation gives each Great Lake state a veto over proposed diversions.

Smaller new or increased withdrawals (i.e. below the thresholds identified above) are not subject to review by the Regional Review body, but must meet the same elements of the Standard (except for the requirement to provide an improvement, which applies to smaller diversions but does not apply to smaller withdrawals). The Standard does not apply to new or increased withdrawals of less than 380,000 litres per day. It is worth noting that the thresholds for regional review under the draft Agreement are huge, and will rarely be triggered by ordinary agricultural, industrial, or municipal activities. For example, compare the one to five million gallon thresholds in the draft Agreement with Canada's *International Boundary Waters Treaty Act* or the *Ontario Water Resources Act*, both of which have thresholds of 50,000 litres per day for triggering water permit applications.[3] It would appear that the intent behind the proposed Standard is to make it extraordinarily difficult to get approval for massive new diversions or consumptive uses, without creating a blanket prohibition that could potentially be vulnerable to legal challenges under trade laws.[4]

The draft Agreement also includes provisions that may result in superior information gathering, water conservation programs, public access to information, and public participation (Articles 301, 302, and 503). However, to reiterate the point made earlier, none of the provisions in the draft Agreement have any legal force or effect in Canada until incorporated directly into law or regulation in Ontario or Quebec.

Federal Environmental Law and Policy Governing the Great Lakes

While there are many federal environmental laws relevant to the Great Lakes (e.g. *Fisheries Act*, *Canadian Environmental Protection Act*, *Species at Risk Act*, *Canadian Environmental Assessment Act*), the exclusive focus of this analysis will be on the *International Boundary Waters Treaty Act*. This *Act* governs the removal, diversion, and use of boundary waters such as the Great Lakes. In general, the *Act* prohibits the use or diversion of boundary waters in a manner that affects the natural level or flow of water in the United States (American legislation includes a similar protection for Canadian waters). The *Act* and associated regulations also prohibit the bulk export of water from the Great Lakes (in quantities exceeding 50,000 litres per day), with exceptions for bottled water; water for vehicles, animals, and humans in transit (e.g. as ballast); manufactured products containing water; and water for fire-fighting or humanitarian purposes.

It is important to understand that the proposed Agreement does not involve the participation of the Government of Canada, and that there will be no consequential amendments to the *International Boundary Waters Treaty Act* or associated regulations if the draft Agreement is finalized. The federal *Act* will continue to apply to proposals to remove or divert waters from the Great Lakes watersheds. In fact, the draft Agreement specifically acknowledges that "nothing in

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[3] *International Boundary Waters Regulations*, SOR/2002-445, s.2(1)(b); *Ontario Water Resources Act*, s. 34.

[4] For more information on the trade implications of blanket prohibitions on water exports please see Chapter 2.4 "Water Exports" in David R. Boyd. 2003. Unnatural Law: Rethinking Canadian Environmental Law and Policy Vancouver: UBC Press.

this agreement alters the legislative or other authority" of the federal Government of Canada (Article 701).

Key provisions of the Act and regulations are set forth below:[5]

International Boundary Waters Treaty Act, R.S.C. 1985, c. I-17.

11. (1) Except in accordance with a licence, no person shall use, obstruct or divert boundary waters, either temporarily or permanently, in a manner that affects, or is likely to affect, in any way the natural level or flow of the boundary waters on the other side of the international boundary.
(2) Subsection (1) does not apply in respect of the ordinary use of waters for domestic or sanitary purposes, or the exceptions specified in the regulations.
. . .

13. (1) Despite section 11, no person shall use or divert boundary waters by removing water from the boundary waters and taking it outside the water basin in which the boundary waters are located.
(2) For the purpose of subsection (1) and the application of the treaty, removing water from boundary waters and taking it outside the water basin in which the boundary waters are located is deemed, given the cumulative effect of removals of boundary waters outside their water basins, to affect the natural level or flow of the boundary waters on the other side of the international boundary.
(3) Subsection (1) applies only in respect of the water basins described in the regulations.
Exceptions
(4) Subsection (1) does not apply in respect of the exceptions specified in the regulations.

International Boundary Waters Regulations, SOR/2002-445

2. (1) In these Regulations, "removal of boundary waters in bulk" means the removal of water from boundary waters and taking the water, whether it has been treated or not, outside the water basin in which the boundary waters are located
(*a*) by any means of diversion, including by pipeline, canal, tunnel, aqueduct or channel; or
(*b*) by any other means by which more than 50,000 L of boundary waters are taken outside the water basin per day.
(2) The removal of boundary waters in bulk does not include taking a manufactured product that contains water, including water and other beverages in bottles or packages, outside a water basin.

6. (1) Subsection 13(1) of the Act does not apply to the removal of boundary waters other than the removal of boundary waters in bulk.
(2) Despite subsection (1), subsection 13(1) of the Act does not apply to boundary waters used in a conveyance, including a vessel, aircraft or train,

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[5] Full versions of the *Act* and regulations are available at http://laws.justice.gc.ca/en/I-17/78331.html

(*a*) as ballast;
(*b*) for the operation of the conveyance; or
(*c*) for people, animals or goods on or in the conveyance.
(3) Despite subsection (1), subsection 13(1) of the Act does not apply to boundary waters used in a non-commercial project on a short-term basis for fire-fighting or humanitarian purposes.

Provincial Environmental Law and Policy Governing the Great Lakes

The draft Agreement is not legally binding on either Quebec or Ontario, and would not be legally binding even when finalized and signed by the eight governors and two premiers. The draft Agreement will only be binding to the extent that it is eventually incorporated into provincial law. Both Ontario and Quebec have existing laws or regulations that address bulk water removals and diversions. In both provinces, the regulatory regime applies to both surface water and groundwater.

Ontario

Under the authority of the *Ontario Water Resources Act*, Ontario passed the *Water Taking and Transfer Regulation* in 1999 (O. Reg 285/99). Section 34 of the *Ontario Water Resources Act* requires anyone taking more than a total of 50,000 litres of water in a day, with some exceptions, to obtain a Permit from a Director appointed by the Minister. The type of takings for which permits are needed include: municipal, commercial, industrial, private communal water supplies, agricultural irrigation, recreational uses, water bottling, and other uses such as construction de-watering. Specific uses are exempt from the permitting requirement, namely individual household use, direct watering of livestock and poultry, and water for fire-fighting. The *Water Taking and Transfer Regulation* also prohibits the bulk transfer of water out of Ontario's three water basins: the Great Lakes-St. Lawrence Basin, the Nelson Basin, and the Hudson Bay Basin. The prohibition does not apply to water used in the water basin to manufacture a product that is subsequently removed from the basin, with the caveat that potable or other water is not a manufactured product. Other exceptions to the prohibition on bulk removal include water required for a "vehicle, vessel, or other form of transport" or people or livestock traveling therein and water packaged in containers of 20 litres or less.

The Ontario Ministry of the Environment is undertaking a review of the *Water Taking and Transfer Regulation* as part of the government's commitment to meet the recommendations of the O'Connor Inquiry into the Walkerton tragedy. The O'Connor Inquiry urged the province to strengthen rules on water taking. Ontario has already proposed amendments to the *Water Taking and Transfer Regulation*, and these amendments are available for public review on the Environmental Bill of Rights Registry.

The existing *Water Taking and Transfer Regulation* (the "existing regulation") requires the Director, when considering an application for a permit to take water, to ensure compliance with Ontario's obligations under the Great Lakes Charter. The Great Lakes Charter is defined in the existing regulation as the agreement signed in 1985, and the definition does not explicitly include

the 2001 Annex or other future agreements. The proposed amendments to the existing regulation maintain the provision requiring compliance with the Great Lakes Charter. The proposed amendments define the Great Lakes Charter as the agreement signed in 1985, as amended by the Great Lakes Charter Annex signed in 2001. However it is not clear whether this new definition will capture the draft 2004 Great Lakes Basin Sustainable Water Resources Agreement. There is a substantial likelihood that the draft Agreement is *not* incorporated into the definition of the Great Lakes Charter and therefore is not part of the proposed Ontario regulation. At present, the proposed agreement is in draft form, undergoing public consultation prior to final approval by the Great Lakes' provinces and states. It would be clearer if the proposed amendment to the *Water Taking and Transfer Regulation* specifically referred to either the 2004 Great Lakes Basin Sustainable Water Resources Agreement or future implementing agreements under the Great Lakes Charter and Great Lakes Annex. This enhanced clarity would ensure that the restrictive conditions in the Standard portion of the draft Agreement would be legally binding on proposals for new and increased water withdrawals in Ontario.

The proposed *Water Taking and Transfer Regulation* provides a much stronger and clearer regulatory regime for the issuance of permits to take water than the existing regulation. Despite the relative strength of the proposed regulation, it still falls short of the extensive criteria in the Standard portion of the draft Agreement. The proposed regulation requires the Director to consider the following factors:

a) the need to protect natural functions of the ecosystem (including minimum flows, habitat, and relationships between surface water and groundwater);
b) issues related to water availability (e.g. existing uses, low water conditions, planned municipal uses); and
c) the extent of proposed water conservation.

However, the proposed regulation does not refer to several of the conditions set forth in the Standard established by the draft Agreement, such as the absence of reasonable alternatives, the return of a substantial proportion of the water, and the avoidance of significant adverse or cumulative effects. The Standard would apply to all new or increased diversions, and to all new or increased withdrawals greater than 380,000 litres per day. Thus the Ontario regulatory regime for diversions and withdrawals from the Great Lakes would be strengthened if the draft Agreement were finalized and incorporated into Ontario law.

Quebec

Quebec passed the *Water Resources Preservation Act* in 2001 (S.Q. 2001, c. 48). The Act prohibits the removal of water from Quebec except for water taken:

1. to produce electric power;
2. for human consumption packaged in Quebec in containers of 20 litres or less;
3. to supply potable water to establishments or dwellings in a bordering zone;

4. to supply vehicles, vessels, and aircraft (whether for the needs of persons, animals, ballast, or operation of the vehicles); and
5. for urgent humanitarian reasons, or any other reason deemed to be in the public interest.

It is evident that the Quebec legislation offers more loopholes that could be exploited for the withdrawal of water than the Ontario legislation. Also problematic is the fact that Quebec's legislation does not provide any criteria upon which the exceptions to the general prohibition must be assessed. Nor are there any criteria in the legislation that define the broad "public interest" exemption for allowing water withdrawals.

Quebec has not yet proposed amendments to the *Water Resources Preservation Act*, although the law does include a mandatory review mechanism. The responsible Minister must review the *Act* and provide advice on maintaining or amending it by December 18, 2006. This presents a window of opportunity for ensuring that the law is amended to reflect Quebec's commitments under the draft Agreement, in the event that the Agreement is finalized and signed.

Most importantly, the criteria set forth in the Standard contained in the draft Agreement, if finalized and incorporated into Quebec's regulatory scheme, would significantly strengthen protection for Great Lakes water under Quebec's jurisdiction.

Conclusions

With respect to the influence of the draft Great Lakes Basin Sustainable Water Resources Agreement upon provincial and federal law in Canada, the overall impact is currently negligible but appears to have the potential to be positive if and when incorporated into Canadian law. The draft agreement between the provinces of Ontario and Quebec plus the eight Great Lake states has no direct impact on federal legislation in Canada. The restrictions on diversion and export imposed by the *International Boundary Waters Treaty Act* and that *Act's* regulations remain in place. Ontario's regulatory regime will be slightly strengthened if proposed or future amendments to the *Water Taking and Transfer Regulation* incorporate the draft Agreement. The strengthening consists of stronger criteria for evaluating proposals to divert or withdraw water, while the province's prohibition on transfers from the Great Lakes basin continues to apply. If Quebec takes similar steps to incorporate the draft Great Lakes Basin Sustainable Water Resources Agreement into provincial law, there will be a similar strengthening effect. In light of the weaker nature of Quebec's existing legislation, this buttressing will be of greater relative value.

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David Naftzger, Executive Director
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September 7, 2004

Dear Mr. Naftzger:

Enclosed with this letter, please find a Joint Submission by Friends of the Earth Canada and the POLIS Project for Ecological Governance at the University of Victoria. This Submission is respectfully submitted in response to the 90 day public review period for the Draft Annex 2001 Implementing Agreement.

Please be advised that this work was supported by the Walter and Duncan Gordon Foundation of Toronto, and that this Submission will also appear as part of the package submitted by the Foundation.

Thank you for the opportunity to contribute to this process.

Yours very truly,

/S/

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cc: Beatrice Olivastri, Chief Executive Officer
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PART I: INTRODUCTION AND RECOMMENDATIONS

> If all interests in the Basin are considered, there is never a "surplus" of water in the Great Lakes system; every drop of water has several potential uses and trade-offs must be made when, through a human intervention, waters are removed from the system.
> International Joint Commission, *Protection of the Waters of the Great Lakes* (2002), p. 43.

Our concerns begin from a premise that we state in Part II of our Submission: *viz.*, ***greater water efficiency and greater water conservation are the main line of defense for protecting the Great Lakes basin ecosystem and fostering sustainable use of the region's fresh water.*** Research findings in recent decades indicate they are a very powerful line of defense. No less than one-third of all urban water uses can be saved with cost-effective efficiency measures alone, and at least as much again with individual and communal decisions regarding urban design and industrial development that save water. The same approaches will reduce flows into wastewater collection and treatment systems and, therefore, the need to invest in large-volume infrastructure. National water withdrawals are stabilizing in the United States and *may* be doing so in Canada. Why, we ask, should they continue to increase in the Great Lakes basin, if indeed they are increasing?

Recommendation 1: Full implementation of water efficiency measures and greater attention to water conservation options become mandatory strategies, rather than merely advisable options as per the current draft Annex, before any withdrawal or diversion can be considered.

In Part III of our Submission, we reiterate a point made by others about deficiencies in the data available to make decisions about either withdrawals within the Great Lakes basin or diversions to users outside the basin. Not only is hydrological badly deficient, we have only the most aggregate information about how current withdrawals are used within the basin. We know even less about the forces that are leading to greater than anticipated levels of conservation. As a result, we have no way of projecting impacts of decisions about increasing (or decreasing) the use of the waters of the Great Lakes basin. Though all decisions about natural resources are made with some degree of uncertainty, making decisions with long-term social and ecological consequences in the absence of vital information runs counter to the precautionary principle.

Recommendation 2: Adopt a precautionary approach in the Annex to ensure that no further major withdrawals or diversions are permitted until specific improvements are made in the data base available for water policy and management.

Finally, in Part IV we take issue with a single word in what is, in our view, the best public document from a Canadian perspective on Annex 2001: Andrew Nikoforuk's *Political Diversions: Annex 2001 and the Future of the Great Lakes* (www.powi.ca/nikoforuk-june2004.pdf). Mr. Nikiforuk's Recommendation 13 reads as follows:
"Set conditions for out-of-basin withdrawals based on three simple standards:
"1.) A public trust standard
"2.) A conservation standard
"3.) A no-net-loss standard."

Our point is that none of these three standards are "simple" (nor do we believe that Mr. Nikoforuk intended to imply that they are). We accept the legitimacy of each of these standards. Therefore, we conclude with a two-part recommendation:

Recommendation 3a: Explicit public trust, conservation and no-net loss standards be made operational for all use of water in the Great Lakes basin; Recommendation 3b: The same standards should apply both to out-of-basin diversions and also to new withdrawals within the basin.

In putting our position forward in this Submission, we want to acknowledge the large body of work that has already been written on the Great Lakes. We cannot even begin to cite all this work, but its burden shows that we already know a lot more about water efficiency and water conservation than we apply. We therefore fully support Mr. Nikoforuk's position that ***the greatest concern about water use in the Great Lakes basin is not diversion outside the basin but needless and heedless over-use within the basin.***

The remainder of this submission is devoted to providing basic evidence in support of each of the three recommendations.

PART II: THE CASE FOR WATER EFFICIENCY AND CONSERVATION

The traditional response to gaps between water supply and demand is to increase supply. Beginning from Roman times, we have brought water to cities and fields by building larger dams, drilling more deeply, and extending pipelines further. However, costs to develop new water supplies are doubling every decade. And increasingly, as in the Great Lakes basin, the need to avoid or mitigate social and environmental impacts is adding to those costs – and in some cases halting supply projects altogether. The problem is not with the engineering but with the goals of the entrenched supply-side approach, which relies on ever greater, ever more distant sources of supply.

The alternative to conventional supply-side management is demand management. The scope for cutting water use by managing demand is huge, particularly in Canada and the United States, which have been egregiously wasteful in their use of fresh water. That scope depends upon two forces: *water efficiency* and *water conservation*. Though overlapping in both cause and effect (each is, for example, promoted by higher prices for water), the two are conceptually distinct. "*Efficiency*" refers to technical and economic approaches to reducing the quantity of water used to achieve a given task, as with watering lawns with low-flow sprinklers; "*conservation*" refers to changes in the nature of the task, as with planting greenery that does not require watering.

Determining the potential for water-use efficiency is time-consuming but can be accomplished through sector-by-sector and use-by-use measurements that do not strain known methodologies. A large literature is already available on water-saving technologies together with estimates of their cost-effectiveness for various degrees of water saving. Determining the potential for water conservation is more difficult. Conservation includes some relatively easy changes in individual habits and practices, such as replacing lawns with drought-tolerant ground cover, or using grey water for outdoor use around buildings and homes. However, conservation also includes more complex communal decision-making concerning urban design and industrial planning to reduce the impact of suburbanization and limit the growth of such water-intensive industries as aquaculture, aggregate mining, and irrigated agriculture. Conservation therefore has much broader social and economic impacts than efficiency, and is even more powerful in achieving significant, lasting water use reductions.

Though Draft Annex 2001 Implementation Agreements include some positive wording relating to water efficiency and conservation, the full potential of these approaches to protect the Great Lakes ecosystem and move toward sustainable use of the basin's fresh water remains largely unrecognized. Our central criticism is that water efficiency and conservation are tabled in the Annex as *components* of the withdrawal/diversion proposal process rather than the *basis* of a strategic approach to ecologically sustainable water management. Further diversion or withdrawal of water, both within and outside of the Great Lakes basin, should be a last resort, open to consideration only when all opportunities to reduce current demand have been implemented.

Substantial reductions in water use are possible without reducing the quality or quantity of end-use services through comprehensive, strategic planning and implementation of water efficiency and conservation. Water 'saved' through such measures can be redistributed to support economic development or to restore degraded ecosystems – or it can be left in place to support in-situ uses. The overall impact is a reduction (or ideally, elimination) of further diversion and withdrawal of Great Lakes water. Water efficiency and conservation also often result in financial benefits. For example, reducing water use can delay or eliminate the need for costly expansion of water and wastewater infrastructure.

Water made available as a result of increased efficiency and conservation must come to be recognized as a legitimate, dependable "new" source of water. Indeed, "it has been demonstrated in many countries that saving water rather than the development of new sources is often the best 'next' source of water, from both an economic and environmental point of view" (Wegelin-Schuringa, 2002). The following examples illustrate the potential for water efficiency and conservation to save money and reduce water use.

- In 2003, the Pacific Institute in Oakland, California published one of the most compelling cases for increasing the efficiency of urban water use. Based on a detailed analysis of water demands, and technical and policy options for increasing water use efficiency, the authors estimate that water use in the state could be reduced by one third with existing technology. At least 85% of this reduction can be achieved cost-effectively.[1] The study, entitled "*Waste Not, Want Not*," concludes that "the largest, least expensive, and most environmentally sound source of water to meet California's future needs is the water currently being wasted in every sector of our economy."

- An earlier report by the same group, entitled *"Sustainable Use of Water: California Success Stories"* provides details on 28 different initiatives that have proven successful in reducing water use. Initiatives documented span municipal, industrial and agricultural sectors. Examples include ascending rate structures, water efficient landscaping, leak detection and repair, installing water saving equipment, altering or introducing crop rotations, and ecological restoration activities.

- A number of successful water efficiency efforts also exist within the Great Lakes basin. For example, the Region of Waterloo's water conservation program reduced per capita water use by 10% in its first three years, and the community of Port Elgin avoided a $5.5 million expansion of water treatment facilities by investing $550,000 in a water conservation program (Brandes and Ferguson, 2004; Canadian dollars).

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[1]The authors define cost-effectiveness as the point where the marginal cost of the efficiency improvements is less than or equal to the marginal cost of developing new supplies.

Despite these and other indications of the potential for water efficiency and conservation, they remain largely under-utilized in water planning and management. For the most part, water managers and policy makers view these approaches as emergency measures to deal with seasonal variability of supply (*e.g.*, summer drought) rather than as the basis of a long-term strategy for sustainable water use.

Much of the resistance to water policies based primarily on efficiency and conservation stems from the common assumption that a reduction in water use is associated with reduced economic prosperity or standard of living. However, data from a number of countries indicate that this is not the case. In the US, total water withdrawals increased in lock step with rising GDP for much of the 20th century. During the 1980's these trends began to diverge, and since 1985, total withdrawals have been declining while GDP has continued to rise. This "decoupling" of water demand and economic output has also been observed in Japan, China and Finland (Gleick, 2003; Wolff and Gleick, 2002). Although there is no conclusive evidence of this trend in Canada, regional information (which is badly outdated), suggests that it is occurring here as well.

These examples clearly support the potential for efficiency and conservation to address the growing cultural, economic and ecological needs for fresh water. To realize this potential, the focus of Great Lakes water policy and planning must shift from conventional approach of regulating supply (withdrawals and diversions) to eliminating waste and managing demands. Over the long term, water managers and policy makers should be looking to share knowledge and experience, not water, with those areas that continue to base community and regional planning on new or expanded access to water from the Great Lakes basin.

PART III: MISSING INPUTS FOR DECISION MAKING

Insufficient information is available to reach effective , long-term decisions about further withdrawals of water from the Great Lakes basin or diversions of water to other basins. These information deficiencies are equally significant with respect to a) hydrological and ecological characteristics of basin's natural resources, and b) socio-economic characteristics of demand patterns for use of water from the basin. In making this claim we are mindful of the efforts that have already been made, particularly by the International Joint Commission and the Great Lakes Commission to provide an adequate data base (see, for example, the tabs for Water Use and for Data and Monitoring on the latter's web site: www.glc.org). Academics have also been active in supplementing these efforts, particularly in the more difficult areas, such as agriculture where we note the work of de Loë, Kreutzwiser and others at the University of Guelph. However, data gaps remain so large as to preclude sound management and planning. For example:

- All reports from the IJC and Galloway and Pentland's report (2003) for the Munk Centre at the University of Toronto emphasize how little we know about what is increasingly referred to as the sixth great lake: the groundwater basin. Given that the basin appears to be shrinking, and that ground waters and surface waters interact in complex ways, it is dangerous to presume, simply from the fact that only a small share of current withdrawals are from groundwater, that no long-term damage is being done. As stated in a report prepared for the IJC by the International Water Uses Review Task Force (2002; p. 76), "Mapping groundwater throughout the Great Lakes region will be a long, arduous process." The same report notes that an official from the USGS commented that to then there had "been little done in response to the Commission's call for unified consistent mapping of boundary and transboundary hydrogeological units" (p. 77).

- We are equally incapable of determining, on the basis of current knowledge, how much water can be withdrawn from the Great Lakes without impairing their ability to provide the wide range of services – some commercial, as with fishing and transportation; some not, as with habitat preservation – on which all residents of the basin rely. General estimates (not related specifically to the Great Lakes basin) range from 30% or 40% (typically prepared by agriculturally inclined organizations) to 10% (typically prepared by environmentally inclined organizations). In the one reference specific to the Great Lakes, Nikiforuk cites a statement by David Schindler of the University of Alberta to the effect that even 5% withdrawal outside the basin could cause permanent damage to the Great Lakes. This issue is further complicated because of the uncertainty as to just which uses are consumptive, and by how much. At present, the share of use that is consumptive is typically set by convention, not by measurement. The same USGS official referred to in the previous paragraph also lamented that no progress had been made on obtaining "improved estimates that reliably reflect the true level and extent of consumptive use" (p. 77).

- Turning to socio-economic information, the IJC's Final Report *Protection of the Waters of the Great Lakes* just four years ago indicated that experts were divided even on whether consumptive uses of water were growing or declining. A more recent report states that ". . . we can now say with a relatively high degree of confidence that the consumptive use 'problem' has been consistently and significantly overstated for the past three decades." Unfortunately, current data surveys and estimation methods provide few indications of *why* this has occurred. We have only the most general idea of the extent to which conservation and efficiency are factors in reducing water use, as compared with other factors, such as lower-than-expected economic growth. More importantly, assuming that conservation and efficiency are playing a role, we have no idea at all where this is occurring – across the board, or only in certain sectors; in one or all jurisdictions. Nor do we know why it is occurring – in response to higher prices, as a result of environmental concerns, on the basis of better technology, or a combination of these and other factors. As indicated in the IJC Final Report, there is little reason to place much trust in available data for anything but gross withdrawals; sectoral and jurisdictional data are too inconsistent to be of value in decision-making.

In summary, the states and provinces working within the Great Lakes Compact are in no position to reach long-term decisions in the face of divergent claims about the water resource and its use. Though it is typically necessary to reach decisions in the absence of full information, we maintain that, based on the precautionary principle, current data gaps are so great that it is inappropriate to increase either in-basin withdrawals or out-of-basin diversions. Moreover, all of these elements of uncertainty are significantly increased by climate change. As stated succinctly by Nikiforuk, "Climate change has left no margin for error in water management on the Great Lakes" (p. 15).

PART IV: CRITERIA FOR DECISIONS

As indicated earlier, Nikiforuk suggests that three standards be satisfied before out-of-basin diversions can be considered:
1) Public Trust standard
2) Conservation standard
3) No Net Loss standard.

We agree that these three standards are appropriate and, further, that they are equally as appropriate to within basin withdrawals as to out-of-basin diversions. However, none of the three is easy to define in an operational manner as is necessary when making decisions regarding shared or common resources such as the Great Lakes waters. We therefore outline approaches to applying them, starting from "No Net Loss," which is easier to define than "Conservation," which is in turn easier to define than "Public Trust."

No Net Loss Standard

The standard of No Net Loss seems to be more quantitatively clear than it really is. In addition to ensuring that diversions involve no quantitative loss of water from the basin, at least two further questions immediately arise:

- Does "No Net Loss" refer only to water quantity or to water quality as well?

- Does "No Net Loss" apply regardless of timing, or does it apply over a period of time.

Our answers are that No Net Loss must be defined in terms of quality as well as quantity, and that both should apply over relatively short periods of time. For example, water that is withdrawn for use in farming and that flows back to the basin will be degraded to some degree. On the other hand, water that is withdrawn for urban purposes and that passes through tertiary treatment before return to the basin may be improved in quality. (We are writing in principle; in practice, many water treatment plans are major sources of pollution.)

Similarly, if the No Net Loss standard is to be applied over time, how long a time period is acceptable? If interpreted without a time criterion, neither diversions nor withdrawals for consumptive uses could be accepted, which is not reasonable. Therefore, some balancing is required. One year seems appropriate: Within any year diversions or withdrawals could exceed return flows or be of diminished quality, but over a year they should be equal in both quantity and quality. An escape clause would have to be added to allow for prolonged drought or heavy flood. Such an escape clause should be narrowly written and only come into effect after agreement at the highest levels.

Conservation Standard

A conservation standard must include both water efficiency and water conservation, as we have defined the terms above. Therefore, it should have two general components. The first component would require that all reasonable water efficiency measures be in

place prior to permitting further diversions or withdrawals. The second component would require that reasonable efforts toward water conservation also be in place. Each component requires further definition.

- The efficiency portion of the Conservation Standard could be effected by a list of measures, including full cost water pricing, that can be used to assess the extent to which reasonable water efficiency measures are being implemented. "Reasonable" would be defined by cost-effectiveness, and more particularly by cost-effectiveness from the perspective of the water system. Though considerable gains can be made by charging water users the full cost of supplying water to them, even greater efficiencies can be achieved by valuing water in comparison with the cost of the next increment of water supply that would be required in the absence of efficiency – what economists refer to as "opportunity costs." (In principle, this too can be accomplished by pricing. However, it is much easier to explain politically why water price should be based on full costs than on opportunity cost.) Further, not only do market failures block full operation of the price system, but some costs, as with environmental protection, are social in nature and not easily allocated to individual transactions. Pricing is therefore a necessary but not sufficient condition for effecting efficiency. In addition to full cost pricing, non-voluntary water efficiency measures will have to be enacted by appropriate jurisdictions, particularly for uses that are highly consumptive or that significantly degrade water quality. Application of this sort of efficiency component is exactly what we have proposed be applied to new Permits to Take Water in the Province of Ontario, as expressed in our joint submission on the Government of Ontario's *White Paper on Source Protection*.

- The conservation component of the Conservation Standard is more difficult to establish. Again a list of possible measures can be used, but it would be inappropriate to impose particular values or particular growth limitations on each jurisdiction. On the other hand, it is one thing to respond to requests to supply water for drinking and sanitation purposes and quite another for watering lawns or for promoting ecologically destructive industries. Therefore, the conservation component would likely have to be effected by a mathematical calculation applied to each jurisdiction in the basin. The calculation would have the effect of mandating a percentage reduction in water use above gains that can be made through greater efficiency. That percentage might reasonably be expected to increase over time. Purely as an example, for the first five-year period, conservation savings of only 5% above efficiency gains would be expected, and then 10% for the second five-year period, and 15% for the third. Of course, expected efficiency gains would also be increasing in time, so these measures would, cumulatively, represent significant efforts toward reducing water use.

Public Trust Standard

The Public Trust Standard is by far the hardest to define. (We are aware that Public Trust has a specific meaning in US law. Here we are speaking more generally.) Society, working through its elected officials, must determine just what is included within

the concept of public trust for management of the Great Lakes. Further, each component of that determination must have sufficient objective content to make it measurable in some way, otherwise the criterion has hortatory but not operational value. The ultimate goal of the concept of Public Trust is to express in concrete terms the application of the goals of sustainable and equitable development for the people and the ecology the Great Lakes basin.

Time does not permit even a cursory discussion of how to establish a Public Trust Standard. We suggest only that it would have to include such diverse issues as:

- preserving basin ecosystems
- defining different but complementary roles for scientific advisory bodies and political decision-making bodies
- setting absolute limits on how much of a given resource can be captured for use in any period of time, and to what extent (if any) the quality of return flows may be degraded
- ensuring adequate participation of stakeholders in decisions that affect them
- ensuring equity within and among water using sectors and groups
- making special provisions for First Nations using water in traditional ways
- ensuring equity among current and future generations.

Though far from easy, we are convinced that something on the order of an operational Public Trust Standard must be created in order to reach long-term decisions about the use, and the non-use, of the waters of the Great Lakes basin.

We have stated our case as succinctly as possible, and we respectfully commend it to your attention. For further information, please contact:

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in response to the 90-day public review period for

DRAFT ANNEX 2001 IMPLEMENTING AGREEMENTS

PREPARED FOR THE WALTER AND DUNCAN GORDON FOUNDATION

03 September 2004

This Submission is presented to the Council of Great Lakes Governors to express our concerns with respect to the Draft Annex 2001 Implementing Agreements to the Great Lakes Compact. Before starting, we emphasize that our concerns focus on the mechanisms incorporated in the Draft Annex, not its objectives. We subscribe fully to the imperative to protect the entire ecosystem of the Great Lakes basin, including both its surface and its underground waters and its associated shorelines and wetlands.

As requested, we limit the extent of our argument and focus on recommendations. When we refer to the provisions or requirements applicable to the Council of Great Lakes Governors, we intend that those same provisions or requirements are or should be equally applicable in Ontario and Québec, the two Canadian provinces that are associate members of the Great Lakes Commission (www.glc.org/about/). Our submission is organized as follows:

I. INTRODUCTION AND RECOMMENDATIONS
I. THE CASE FOR WATER EFFICIENCY AND CONSERVATION
II. MISSING INPUTS FOR DECISION MAKING

III. CRITERIA FOR DECISIONS

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PART I: INTRODUCTION AND RECOMMENDATIONS

If all interests in the Basin are considered, there is never a "surplus" of water in the Great Lakes system; every drop of water has several potential uses and trade-offs must be made when, through a human intervention, waters are removed from the system.
International Joint Commission, *Protection of the Waters of the Great Lakes* (2002), p. 43.

Our concerns begin from a premise that we state in Part II of our Submission: *viz.*, ***greater water efficiency and greater water conservation are the main line of defense for protecting the Great Lakes basin ecosystem and fostering sustainable use of the region's fresh water.*** Research findings in recent decades indicate they are a very powerful line of defense. No less than one-third of all urban water uses can be saved with cost-effective efficiency measures alone, and at least as much again with individual and communal decisions regarding urban design and industrial development that save water. The same approaches will reduce flows into wastewater collection and treatment systems and, therefore, the need to invest in large-volume infrastructure. National water withdrawals are stabilizing in the United States and *may* be doing so in Canada. Why, we ask, should they continue to increase in the Great Lakes basin, if indeed they are increasing?

Recommendation 1: Full implementation of water efficiency measures and greater attention to water conservation options become mandatory strategies, rather than merely advisable options as per the current draft Annex, before any withdrawal or diversion can be considered.

In Part III of our Submission, we reiterate a point made by others about deficiencies in the data available to make decisions about either withdrawals within the Great Lakes basin or diversions to users outside the basin. Not only is hydrological badly deficient, we have only the most aggregate information about how current withdrawals are used within the basin. We know even less about the forces that are leading to greater than anticipated levels of conservation. As a result, we have no way of projecting impacts of decisions about increasing (or decreasing) the use of the waters of the Great Lakes basin. Though all decisions about natural resources are made with some degree of uncertainty, making decisions with long-term social and ecological consequences in the absence of vital information runs counter to the precautionary principle.

Recommendation 2: Adopt a precautionary approach in the Annex to ensure that no further major withdrawals or diversions are permitted until specific improvements are made in the data base available for water policy and management.

Finally, in Part IV we take issue with a single word in what is, in our view, the best public document from a Canadian perspective on Annex 2001: Andrew Nikoforuk's *Political Diversions: Annex 2001 and the Future of the Great Lakes* (www.powi.ca/nikoforuk-june2004.pdf). Mr. Nikiforuk's Recommendation 13 reads as follows:
"Set conditions for out-of-basin withdrawals based on three simple standards:
"1.) A public trust standard
"2.) A conservation standard
"3.) A no-net-loss standard."

Our point is that none of these three standards are "simple" (nor do we believe that Mr. Nikoforuk intended to imply that they are). We accept the legitimacy of each of these standards. Therefore, we conclude with a two-part recommendation:

Recommendation 3a: Explicit public trust, conservation and no-net loss standards be made operational for all use of water in the Great Lakes basin; Recommendation 3b: The same standards should apply both to out-of-basin diversions and also to new withdrawals within the basin.

In putting our position forward in this Submission, we want to acknowledge the large body of work that has already been written on the Great Lakes. We cannot even begin to cite all this work, but its burden shows that we already know a lot more about water efficiency and water conservation than we apply. We therefore fully support Mr. Nikoforuk's position that ***the greatest concern about water use in the Great Lakes basin is not diversion outside the basin but needless and heedless over-use within the basin.***

The remainder of this submission is devoted to providing basic evidence in support of each of the three recommendations.

PART II: THE CASE FOR WATER EFFICIENCY AND CONSERVATION

The traditional response to gaps between water supply and demand is to increase supply. Beginning from Roman times, we have brought water to cities and fields by building larger dams, drilling more deeply, and extending pipelines further. However, costs to develop new water supplies are doubling every decade. And increasingly, as in the Great Lakes basin, the need to avoid or mitigate social and environmental impacts is adding to those costs – and in some cases halting supply projects altogether. The problem is not with the engineering but with the goals of the entrenched supply-side approach, which relies on ever greater, ever more distant sources of supply.

The alternative to conventional supply-side management is demand management. The scope for cutting water use by managing demand is huge, particularly in Canada and the United States, which have been egregiously wasteful in their use of fresh water. That scope depends upon two forces: *water efficiency* and *water conservation*. Though overlapping in both cause and effect (each is, for example, promoted by higher prices for water), the two are conceptually distinct. "*Efficiency*" refers to technical and economic approaches to reducing the quantity of water used to achieve a given task, as with watering lawns with low-flow sprinklers; "*conservation*" refers to changes in the nature of the task, as with planting greenery that does not require watering.

Determining the potential for water-use efficiency is time-consuming but can be accomplished through sector-by-sector and use-by-use measurements that do not strain known methodologies. A large literature is already available on water-saving technologies together with estimates of their cost-effectiveness for various degrees of water saving. Determining the potential for water conservation is more difficult. Conservation includes some relatively easy changes in individual habits and practices, such as replacing lawns with drought-tolerant ground cover, or using grey water for outdoor use around buildings and homes. However, conservation also includes more complex communal decision-making concerning urban design and industrial planning to reduce the impact of suburbanization and limit the growth of such water-intensive industries as aquaculture, aggregate mining, and irrigated agriculture. Conservation therefore has much broader social and economic impacts than efficiency, and is even more powerful in achieving significant, lasting water use reductions.

Though Draft Annex 2001 Implementation Agreements include some positive wording relating to water efficiency and conservation, the full potential of these approaches to protect the Great Lakes ecosystem and move toward sustainable use of the basin's fresh water remains largely unrecognized. Our central criticism is that water efficiency and conservation are tabled in the Annex as *components* of the withdrawal/diversion proposal process rather than the *basis* of a strategic approach to ecologically sustainable water management. Further diversion or withdrawal of water, both within and outside of the Great Lakes basin, should be a last resort, open to consideration only when all opportunities to reduce current demand have been implemented.

Substantial reductions in water use are possible without reducing the quality or quantity of end-use services through comprehensive, strategic planning and implementation of water efficiency and conservation. Water 'saved' through such measures can be redistributed to support economic development or to restore degraded ecosystems – or it can be left in place to support in-situ uses. The overall impact is a reduction (or ideally, elimination) of further diversion and withdrawal of Great Lakes water. Water efficiency and conservation also often result in financial benefits. For example, reducing water use can delay or eliminate the need for costly expansion of water and wastewater infrastructure.

Water made available as a result of increased efficiency and conservation must come to be recognized as a legitimate, dependable "new" source of water. Indeed, "it has been demonstrated in many countries that saving water rather than the development of new sources is often the best 'next' source of water, from both an economic and environmental point of view" (Wegelin-Schuringa, 2002). The following examples illustrate the potential for water efficiency and conservation to save money and reduce water use.

- In 2003, the Pacific Institute in Oakland, California published one of the most compelling cases for increasing the efficiency of urban water use. Based on a detailed analysis of water demands, and technical and policy options for increasing water use efficiency, the authors estimate that water use in the state could be reduced by one third with existing technology. At least 85% of this reduction can be achieved cost-effectively.[1] The study, entitled "*Waste Not, Want Not*," concludes that "the largest, least expensive, and most environmentally sound source of water to meet California's future needs is the water currently being wasted in every sector of our economy."

- An earlier report by the same group, entitled *"Sustainable Use of Water: California Success Stories"* provides details on 28 different initiatives that have proven successful in reducing water use. Initiatives documented span municipal, industrial and agricultural sectors. Examples include ascending rate structures, water efficient landscaping, leak detection and repair, installing water saving equipment, altering or introducing crop rotations, and ecological restoration activities.

- A number of successful water efficiency efforts also exist within the Great Lakes basin. For example, the Region of Waterloo's water conservation program reduced per capita water use by 10% in its first three years, and the community of Port Elgin avoided a $5.5 million expansion of water treatment facilities by investing $550,000 in a water conservation program (Brandes and Ferguson, 2004; Canadian dollars).

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[1]The authors define cost-effectiveness as the point where the marginal cost of the efficiency improvements is less than or equal to the marginal cost of developing new supplies.

Despite these and other indications of the potential for water efficiency and conservation, they remain largely under-utilized in water planning and management. For the most part, water managers and policy makers view these approaches as emergency measures to deal with seasonal variability of supply (*e.g.*, summer drought) rather than as the basis of a long-term strategy for sustainable water use.

Much of the resistance to water policies based primarily on efficiency and conservation stems from the common assumption that a reduction in water use is associated with reduced economic prosperity or standard of living. However, data from a number of countries indicate that this is not the case. In the US, total water withdrawals increased in lock step with rising GDP for much of the 20th century. During the 1980's these trends began to diverge, and since 1985, total withdrawals have been declining while GDP has continued to rise. This "decoupling" of water demand and economic output has also been observed in Japan, China and Finland (Gleick, 2003; Wolff and Gleick, 2002). Although there is no conclusive evidence of this trend in Canada, regional information (which is badly outdated), suggests that it is occurring here as well.

These examples clearly support the potential for efficiency and conservation to address the growing cultural, economic and ecological needs for fresh water. To realize this potential, the focus of Great Lakes water policy and planning must shift from conventional approach of regulating supply (withdrawals and diversions) to eliminating waste and managing demands. Over the long term, water managers and policy makers should be looking to share knowledge and experience, not water, with those areas that continue to base community and regional planning on new or expanded access to water from the Great Lakes basin.

PART III: MISSING INPUTS FOR DECISION MAKING

Insufficient information is available to reach effective , long-term decisions about further withdrawals of water from the Great Lakes basin or diversions of water to other basins. These information deficiencies are equally significant with respect to a) hydrological and ecological characteristics of basin's natural resources, and b) socio-economic characteristics of demand patterns for use of water from the basin. In making this claim we are mindful of the efforts that have already been made, particularly by the International Joint Commission and the Great Lakes Commission to provide an adequate data base (see, for example, the tabs for Water Use and for Data and Monitoring on the latter's web site: www.glc.org). Academics have also been active in supplementing these efforts, particularly in the more difficult areas, such as agriculture where we note the work of de Loë, Kreutzwiser and others at the University of Guelph. However, data gaps remain so large as to preclude sound management and planning. For example:

- All reports from the IJC and Galloway and Pentland's report (2003) for the Munk Centre at the University of Toronto emphasize how little we know about what is increasingly referred to as the sixth great lake: the groundwater basin. Given that the basin appears to be shrinking, and that ground waters and surface waters interact in complex ways, it is dangerous to presume, simply from the fact that only a small share of current withdrawals are from groundwater, that no long-term damage is being done. As stated in a report prepared for the IJC by the International Water Uses Review Task Force (2002; p. 76), "Mapping groundwater throughout the Great Lakes region will be a long, arduous process." The same report notes that an official from the USGS commented that to then there had "been little done in response to the Commission's call for unified consistent mapping of boundary and transboundary hydrogeological units" (p. 77).

- We are equally incapable of determining, on the basis of current knowledge, how much water can be withdrawn from the Great Lakes without impairing their ability to provide the wide range of services – some commercial, as with fishing and transportation; some not, as with habitat preservation – on which all residents of the basin rely. General estimates (not related specifically to the Great Lakes basin) range from 30% or 40% (typically prepared by agriculturally inclined organizations) to 10% (typically prepared by environmentally inclined organizations). In the one reference specific to the Great Lakes, Nikiforuk cites a statement by David Schindler of the University of Alberta to the effect that even 5% withdrawal outside the basin could cause permanent damage to the Great Lakes. This issue is further complicated because of the uncertainty as to just which uses are consumptive, and by how much. At present, the share of use that is consumptive is typically set by convention, not by measurement. The same USGS official referred to in the previous paragraph also lamented that no progress had been made on obtaining "improved estimates that reliably reflect the true level and extent of consumptive use" (p. 77).

- Turning to socio-economic information, the IJC's Final Report *Protection of the Waters of the Great Lakes* just four years ago indicated that experts were divided even on whether consumptive uses of water were growing or declining. A more recent report states that ". . . we can now say with a relatively high degree of confidence that the consumptive use 'problem' has been consistently and significantly overstated for the past three decades." Unfortunately, current data surveys and estimation methods provide few indications of *why* this has occurred. We have only the most general idea of the extent to which conservation and efficiency are factors in reducing water use, as compared with other factors, such as lower-than-expected economic growth. More importantly, assuming that conservation and efficiency are playing a role, we have no idea at all where this is occurring – across the board, or only in certain sectors; in one or all jurisdictions. Nor do we know why it is occurring – in response to higher prices, as a result of environmental concerns, on the basis of better technology, or a combination of these and other factors. As indicated in the IJC Final Report, there is little reason to place much trust in available data for anything but gross withdrawals; sectoral and jurisdictional data are too inconsistent to be of value in decision-making.

In summary, the states and provinces working within the Great Lakes Compact are in no position to reach long-term decisions in the face of divergent claims about the water resource and its use. Though it is typically necessary to reach decisions in the absence of full information, we maintain that, based on the precautionary principle, current data gaps are so great that it is inappropriate to increase either in-basin withdrawals or out-of-basin diversions. Moreover, all of these elements of uncertainty are significantly increased by climate change. As stated succinctly by Nikiforuk, "Climate change has left no margin for error in water management on the Great Lakes" (p. 15).

PART IV: CRITERIA FOR DECISIONS

As indicated earlier, Nikiforuk suggests that three standards be satisfied before out-of-basin diversions can be considered:
1) Public Trust standard
2) Conservation standard
3) No Net Loss standard.

We agree that these three standards are appropriate and, further, that they are equally as appropriate to within basin withdrawals as to out-of-basin diversions. However, none of the three is easy to define in an operational manner as is necessary when making decisions regarding shared or common resources such as the Great Lakes waters. We therefore outline approaches to applying them, starting from "No Net Loss," which is easier to define than "Conservation," which is in turn easier to define than "Public Trust."

No Net Loss Standard

The standard of No Net Loss seems to be more quantitatively clear than it really is. In addition to ensuring that diversions involve no quantitative loss of water from the basin, at least two further questions immediately arise:

- Does "No Net Loss" refer only to water quantity or to water quality as well?

- Does "No Net Loss" apply regardless of timing, or does it apply over a period of time.

Our answers are that No Net Loss must be defined in terms of quality as well as quantity, and that both should apply over relatively short periods of time. For example, water that is withdrawn for use in farming and that flows back to the basin will be degraded to some degree. On the other hand, water that is withdrawn for urban purposes and that passes through tertiary treatment before return to the basin may be improved in quality. (We are writing in principle; in practice, many water treatment plans are major sources of pollution.)

Similarly, if the No Net Loss standard is to be applied over time, how long a time period is acceptable? If interpreted without a time criterion, neither diversions nor withdrawals for consumptive uses could be accepted, which is not reasonable. Therefore, some balancing is required. One year seems appropriate: Within any year diversions or withdrawals could exceed return flows or be of diminished quality, but over a year they should be equal in both quantity and quality. An escape clause would have to be added to allow for prolonged drought or heavy flood. Such an escape clause should be narrowly written and only come into effect after agreement at the highest levels.

Conservation Standard

A conservation standard must include both water efficiency and water conservation, as we have defined the terms above. Therefore, it should have two general components.

The first component would require that all reasonable water efficiency measures be in place prior to permitting further diversions or withdrawals. The second component would require that reasonable efforts toward water conservation also be in place. Each component requires further definition.

- The efficiency portion of the Conservation Standard could be effected by a list of measures, including full cost water pricing, that can be used to assess the extent to which reasonable water efficiency measures are being implemented. "Reasonable" would be defined by cost-effectiveness, and more particularly by cost-effectiveness from the perspective of the water system. Though considerable gains can be made by charging water users the full cost of supplying water to them, even greater efficiencies can be achieved by valuing water in comparison with the cost of the next increment of water supply that would be required in the absence of efficiency – what economists refer to as "opportunity costs." (In principle, this too can be accomplished by pricing. However, it is much easier to explain politically why water price should be based on full costs than on opportunity cost.) Further, not only do market failures block full operation of the price system, but some costs, as with environmental protection, are social in nature and not easily allocated to individual transactions. Pricing is therefore a necessary but not sufficient condition for effecting efficiency. In addition to full cost pricing, non-voluntary water efficiency measures will have to be enacted by appropriate jurisdictions, particularly for uses that are highly consumptive or that significantly degrade water quality. Application of this sort of efficiency component is exactly what we have proposed be applied to new Permits to Take Water in the Province of Ontario, as expressed in our joint submission on the Government of Ontario's *White Paper on Source Protection*.

- The conservation component of the Conservation Standard is more difficult to establish. Again a list of possible measures can be used, but it would be inappropriate to impose particular values or particular growth limitations on each jurisdiction. On the other hand, it is one thing to respond to requests to supply water for drinking and sanitation purposes and quite another for watering lawns or for promoting ecologically destructive industries. Therefore, the conservation component would likely have to be effected by a mathematical calculation applied to each jurisdiction in the basin. The calculation would have the effect of mandating a percentage reduction in water use above gains that can be made through greater efficiency. That percentage might reasonably be expected to increase over time. Purely as an example, for the first five-year period, conservation savings of only 5% above efficiency gains would be expected, and then 10% for the second five-year period, and 15% for the third. Of course, expected efficiency gains would also be increasing in time, so these measures would, cumulatively, represent significant efforts toward reducing water use.

Public Trust Standard

The Public Trust Standard is by far the hardest to define. (We are aware that Public Trust has a specific meaning in US law. Here we are speaking more generally.)

Society, working through its elected officials, must determine just what is included within the concept of public trust for management of the Great Lakes. Further, each component of that determination must have sufficient objective content to make it measurable in some way, otherwise the criterion has hortatory but not operational value. The ultimate goal of the concept of Public Trust is to express in concrete terms the application of the goals of sustainable and equitable development for the people and the ecology the Great Lakes basin.

Time does not permit even a cursory discussion of how to establish a Public Trust Standard. We suggest only that it would have to include such diverse issues as:

- preserving basin ecosystems
- defining different but complementary roles for scientific advisory bodies and political decision-making bodies
- setting absolute limits on how much of a given resource can be captured for use in any period of time, and to what extent (if any) the quality of return flows may be degraded
- ensuring adequate participation of stakeholders in decisions that affect them
- ensuring equity within and among water using sectors and groups
- making special provisions for First Nations using water in traditional ways
- ensuring equity among current and future generations.

Though far from easy, we are convinced that something on the order of an operational Public Trust Standard must be created in order to reach long-term decisions about the use, and the non-use, of the waters of the Great Lakes basin.

We have stated our case as succinctly as possible, and we respectfully commend it to your attention. For further information, please contact:

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GREAT LAKES AGREEMENT AND COMPACT: DRAFTS of 19 July 2004

REVIEW FOR GORDON FOUNDATION

James P. Bruce

26 August, 2004

1. INTRODUCTION

The drafts of "The Implementing Agreement for Annex 2001" and the related U.S. States Compact, released on July 19, 2004, are the most recent proposals for preventing the Great Lakes-St. Lawrence waters from becoming a tragedy of the commons, through multiple withdrawals and diversions. Both the "international" Annex Agreement and the U.S. States Compact, address the taking of water from the Great Lakes system as a process by which proponents of the withdrawals or diversions must return as much as possible, and/or provide "improvements" to the ecosystem in compensation. Such improvements, however helpful to the ecosystem, would generally not replace the lost volume of water which, downstream in the system, has many beneficial uses, for hydro-electric power, shipping, recreation, etc. Comparing "resource improvements" with "water withdrawals" will be comparing apples and oranges.[1]

Thus while this attempt to come to grips with the critical issue of water takings is to be commended, the proposals are seriously flawed and would not really solve the problem. In addition, the proposal to divert water to communities close to, but outside, the basin has potentially serious adverse effects on Canada and indeed may compromise provisions of the Boundary Waters Treaty of 1909.[2]

2. POSITIVE ASPECTS IN FACE OF THREATS TO BASIN WATERS:

The draft Annex Agreement and Compact represent an important and valiant attempt of 8 Great Lakes States, Ontario and Quebec to agree to rules governing withdrawals, diversions and consumptive uses of waters from the Great Lakes-St. Lawrence system.

They could form a basis for protecting and conserving waters of the basin, if they were to be significantly modified. The modifications the documents required would be quite extensive if full protection of the waters is to be achieved. The urging of water conservation programs on all jurisdictions, in the Agreement Articles could be helpful.

Threats to the waters of the basin, many alluded to in the proposals, are very real and growing, making consideration of this issue timely, even urgent. Such threats include:

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[1] Pentland, R., June 2004.

[2] Olson, James, June 2004.

a) Increased evaporation and reduced lake levels and flows of interconnecting rivers and the St. Lawrence due to climate change. The trend towards declining average annual flow at Niagara River, which integrates all of the basin effects above that point, has continued to the end of 2003 beyond the 500 cms (17,600 cfs) loss (7%) in average flow from 1970 to 2000 reported earlier. Eighty percent of this loss can be attributed to changing climatic conditions and 20% to increased consumptive uses upstream.[3]

b) Increased polluting discharges from agricultural and urban areas due to increased rain intensities with climate change and growth of intensive farming.[4]

c) Growing water shortages in the U.S. mid-west and southwest as well as in communities, closer to, but outside the surface water boundaries of the basin.

d) Expanding use of waters of the basin for bottled water, most of it subsequently exported.

e) Increasing exploitation of ground water for growing communities, industry, including bottled water plants, reducing ground water contributions to the Great Lakes through lowered flow of tributary streams.

f) Lack of adequate water conservation programs by jurisdictions within the basin.

g) Reductions of monitoring, surveillance and research programs, due to government funding restraints, making accurate assessments of quantities and quality of water within the basin, increasingly difficult. This reduces the capability to make informed judgments on water management issues.

In short there is a rapidly growing crisis, and attention by jurisdictions to better control of water withdrawals and consumptive uses, which recognizes the above issues, is to be welcomed.

3. PROBLEMS POSED BY PRESENT PROPOSALS:

However, from a perspective of water conservation and protection, the proposals have serious flaws, particularly from a Canadian point of view.

3.1 The Annex Agreement and Compact are only about withdrawals, diversions out and consumptive uses, and pay no attention to **diversions into the system.** Since the early 1940s. the Canadian Ogoki and Long Lac diversions into Lake Superior averaging about 5400 cfs (153 cms)

[3] Bruce, J.P., et al., 2003.
[4] Soil and Water Conservation Society, 2003.

(3.5 billion gal./day), far more than compensates for Canadian consumptive uses within the basin. (While gaining credit for hydro-electric production from this additional water at Niagara Falls, Canada does not receive this credit at power plants along the St. Lawrence River or at Sault Ste. Marie.)

3.2 There is considerable discussion of protecting water quality and ecosystem values in the Annex Agreement and Compact but little recognition of the **economic and atmospheric environment values**, particularly for non-consumptive hydro-power production and shipping uses. These too need protection. This is especially true for hydro-electricity production since thermal power generation of similar amounts of electricity would seriously increase the region's greenhouse gas emissions, as well as smog precursors. Reduction of greenhouse gas emissions and other air pollutants, which can affect the lakes, could also be considered "improvements",

3.3 There is some **geographical confusion.** The Annex Agreement speaks of the basin waters down to the St. Lawrence River at Trois Rivieres. This then should include the Lake Champlain-Richelieu River system (as well as the Ottawa River). Yet the State of Vermont bordering Lake Champlain is not a party to either the Annex Agreement or the Compact.

3.4 The Annex Agreement and Compact propose **new Regional Bodies** to manage the Agreement. However, many of the water quantity and ecosystem issues are already dealt with by the 1909 Boundary Waters Treaty and the 1978 Great Lakes Water Quality Agreement as administered by the bilateral International Joint Commission. There would be very extensive overlap and possible conflict between the Regional Bodies and the IJC if no changes are made. This could seriously weaken IJC. U.S.A. and Canada have equal representation on the IJC, but it would be 8 to 2 on any Annex Body.

3.5 One of the greatest and most imminent threats to Great Lakes basin waters lies in the potential for far greater withdrawals (from present 3,200 cfs to as much as 9,000 cfs) from Lake Michigan-Huron **through the Chicago Diversion** to meet needs in the drying mid-West and south-West U.S.A. Yet the wording of the Agreement (Chapter 2.11) and of the Compact (Article 3.10) give very little assurance that this could be prevented. Indeed, the Compact would only do "best efforts to ensure participation of provinces" if there were hearings to consider additional diversions out of the system. The Annex Agreement does not address potential for additional diversion at Chicago, but only states (Article 203, #11) that the withdrawals presently approved by the U.S. Supreme Court, are not subject to review by the process of the Annex.

3.6 The **First Nations and Tribes** are to be consulted, but only along with the general public, in any consideration of withdrawals. What if a First Nations group wishes to withdraw water for irrigation or a commercial enterprise? Would this be treated in the same way other applications are treated?

3.7 The **dispute resolution process** (Article 601 of Draft Agreement) appears to be open only to the Parties, i.e. the 10 jurisdictions. There is no provision for a public interest group or a company to appeal decisions or to be a direct party to resolution of disputes. An "independent" assessment of proposed withdrawals or diversions is not a requirement, only an option.

3.8 The **criteria proposed for decisions** on withdrawals by the jurisdictions or the Annex Regional Body, (Appendix 1 and 2 to Annex Agreement including Procedures Manual) are constructive and well intentioned. However, some are vague and difficult to interpret. For example, water for communities less than 12 miles (19.3 km) from the basin boundary may be permitted "where adequate quantities of potable-quality water are not available". – Adequate for what? – a rapidly growing urban area where such growth is unwise, and "not available" taking into account other potential sources from how far away? Or, "disruption of pre-proposal temperature regime of the hydrologic system: - by how much, how far from the power plant or cooling water source?

Note: Toronto is moving towards use of Lake Ontario waters to cool large downtown buildings in order to save energy? Reducing greenhouse gas emissions in this and others ways does not seem to enter into the improvements criteria of the Annex Agreement. Some of the suggested off-setting water protection measures, such as removal of dams, say for flood control, could be counterproductive to present ecosystems, water levels, flows and food damages.

3.9 The list of **water conservation measures** given in Table 1 of Appendix 2 is very helpful. However, these are just suggestions to those applying for water takings and in no way are they required actions. As has been pointed out (e.g. Nikiforuk)[5] per capita consumption of water in Great Lakes jurisdictions is among the highest in the world, several times greater than European consumption. Thus, there are many opportunities for offsetting new water takings with conservation measures.

3.10 The requirement for returning flows of water withdrawn, less consumptive use, sounds reasonably good initially. However, under IV Jurisdictional Review of Appendix 1 the return flow requirement is seriously compromised, especially for uses near (within 19.3km) but outside the

[5] Nikiforuk, Andrew, June 2004.

basin or where the return flow "is not feasible", whatever that means. In addition, the quality of the return flow is not necessarily required to meet the water quality objectives of the Great Lakes Water Quality Agreement.

3.11 While the Draft Annex Agreement and Compact wisely call for greater efforts at monitoring and surveillance by all jurisdictions of both withdrawals and of the ecosystem itself, it is clear that budget reductions of the last decade, on both sides of the border, have resulted in inadequate data and understanding for wise management decisions. Ground water resources and their effects on the Lakes are poorly known. These create serious uncertainties, compounded by the uncertainties about the rates of climate change and its impact – probably large. In this condition of major uncertainty, the internationally accepted approach is to follow the Precautionary Principle. In this case, this Principle would require no net diversions out of the basin.

4. CONCLUSIONS AND RECOMMENDATIONS:

From the above comments, the evident conclusion is that the Draft Annex procedures and Compact will not adequately protect the waters and ecosystems of the Great Lakes-St. Lawrence basin. Indeed, the basic idea or principle that the withdrawal or diversion of water from the basin can be compensated for by "resource improvements" somewhere in the basin, is seriously flawed. The proposals would compromise the work of the IJC in implementing provisions of the Boundary Waters Treaty and Great Lakes Water Quality Agreement.

Several alternative proposals have been put forward by the IJC[6], by A. Nikiforuk[5] and others. After considering these and the current proposals, I would recommend major revisions to Annex procedures and the Compact as follows:

(i) A policy of **no-net additional diversions** or withdrawals from the basin be adopted. (See A. Nikiforuk[5]) Each jurisdiction proposing an additional withdrawal or diversion would be required to provide for off-setting reductions in existing water takings. Such reductions should be readily achievable by some of the methods listed in Table 1 in Appendix 2. The present relative profligacy of water use within the basin makes it clear that substantial reductions in use, through conservation measures, are readily achievable.

(ii) A requirement that all return flows be of a quality that meets the **water quality objectives of the 1978 Great Lakes Water Quality Agreement.**

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[6] International Joint Commission, Feb. 2000.

(iii) Rather than establishing a new Regional Body to administer any process dealing with withdrawals and diversions, assign these **responsibilities to the IJC.** This will avoid overlap and conflicts.

(iv) Once the needed monitoring, surveillance and data collection systems are fully in place by all jurisdictions in order to assess both local and cumulative impacts and change, **a further review of these policies and procedures** be implemented. This would require an estimated **10 years** to put the programs in place and assemble sufficient data to support a review.

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The Nature Conservancy
SAVING THE LAST GREAT PLACES ON EARTH

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August 24, 2004

RECEIVED AUG 3 0 2004

Ms. Sarah Miller
Coordinator
Canadian Environmental Law Association
130 Spadina Avenue, Suite 301
Toronto, ON MSV 2
Canada

Dear Ms. Miller:

The Great Lakes continue to capture headlines, and the Conservancy's Great Lakes Program continues to engage in protecting this national treasure along with the many leaders—from the halls of the U.S. Congress and the White House to state capitols and the offices of city mayors. As importantly, we are engaged with leaders in science, conservation and industry. Our role is to bring scientific integrity, analytical tools and conservation resources to the plans and actions of protecting and restoring our natural resources. The following is a brief update of our activities:

- As part of our ongoing engagement in public policy, we issued our **"Principles and Priorities for Great Lakes Protection and Restoration Legislation"** late last year. This document was presented to members of Congress and the administration. It is reflected in Congress' restoration bills, as well as the president's recent executive order, which recognizes protection of Great Lakes biodiversity as a central goal.

- Our influence on restoration policy is due in large part to the impact of the Conservancy-led Great Lakes Ecoregional Plan. Development of the plan—which sets priorities for biodiversity conservation in the U.S. portion of the Great Lakes region—was based on the input of more than 220 scientists and experts over a five-year period. Last fall, we published a brief summary of the plan, **"Conservation Blueprint for the Great Lakes."** We distributed hundreds of copies to government officials and public agency and community leaders. Since that time, the Blueprint and its associated documents have been praised as a model of excellence in conservation planning at several restoration conferences in the region.

- We completed a **comparative mapping analysis of all projects that identify high-quality ecosystems** across a substantial extent of the Great Lakes region. This analysis was called for in the **U.S. Policy Committee's Great Lakes Strategy 2002** and serves to identify opportunities for collaborative conservation efforts.

- The **Great Lakes Charter Annex** proposes a new water management policy that will "protect the water and water dependent natural resources of the Great Lakes." The governors recently presented it to the public for comment. The Conservancy serves as an advisor to the Annex, providing a scientific understanding of aquatic ecology, which includes the protection of natural water flow patterns and lake level fluctuations. We are **building tools for implementing the new water management standard.** Our aquatic ecologist, Michele DePhilip, leads a team of scientists from the University of Michigan and Limno-Tech in developing and testing computer models to measure the impact that withdrawals from tributaries and groundwater have on river flows.

Recycled Paper

- We are working with the International Joint Commission (IJC) to bring **adaptive management to the Moses Saunders Dam, which controls Lake Ontario's water levels**. We also are working with the IJC and Northeast Midwest Institute to **prevent future invasions of harmful, exotic species** into the Great Lakes system.

- The Great Lakes contain the world's largest collection of freshwater islands, where biodiversity is globally significant. In partnership with the Northeast-Midwest Institute, Nature Conservancy of Canada, the University of Minnesota and the U.S. Fish and Wildlife Service (USFWS), the Conservancy is implementing a **binational collaboration for the conservation of Great Lakes islands.** The partners completed a system to identify islands with the highest conservation priority and will rank them later this year. In May, Dave Ewert, our Director of Conservation Science, presented a paper on the ranking system at the annual conference of the International Association for Great Lakes Research.

- This spring, Dave's team accepted one of **Partners in Flight's eight national awards** for outstanding contribution to bird conservation for the **Kirtland's warbler project.** The Kirtland's warbler is one of North America's rarest songbirds, breeding only in small areas of Michigan and wintering in the Bahamas. The project is a cooperative venture with the International Division of the U.S. Forest Service, International Institute of Tropical Forestry, Bahamas National Trust and the Conservancy.

- The U.S. Forest Service partners with the Conservancy in the basin in other ways as well. This spring we signed a **participating agreement with the Forest Service.** The agreement allows Mark Fedora, a USFS Forest Hydrologist, to study and make management recommendations on the impacts which forest and road management have on stream and wetland ecosystems in the northern Great Lakes region. Mark currently is leading the assessment of the St. Louis River headwaters in Minnesota. He will work with other Conservancy chapters to conduct similar analyses in landscapes of interest to the Conservancy and the USFS.

- Recognizing that coastal habitat is a precious and rapidly declining resource in the region, we launched a project with several partners targeting **migratory bird stop-over sites in the western Lake Erie basin.** Partners include Ducks Unlimited, Inc., the Michigan and Ohio Departments of Natural Resources, Black Swamp Bird Observatory and USFWS.

Our work in the Great Lakes is part of a much larger story that includes unrelenting dedication, smart partnering and plain and simple hard work toward an emerging vision for restoring the Great Lakes. We appreciate the support of many organizations and wish to thank the Joyce Foundation and the Kohler Foundation for their new and generous support. Their commitment to protecting the Great Lakes ecosystem is much appreciated. For more information about the Conservancy's Great Lakes Program, please **visit our new website, nature.org/greatlakes.** Our goal is to make this site a valuable resource for you, so we would appreciate any feedback you may have.

Sincerely,

John A. Andersen, Jr.
Great Lakes Director

The Nature Conservancy

SAVING THE LAST GREAT PLACES ON EARTH

Comments

August 30, 2004
Genie Lester, The Nature Conservancy

Contact:
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The Nature Conservancy Comments on the Annex 2001 Draft Implementing Agreement

(to be read aloud by The Nature Conservancy at Public Comment meetings)

The Nature Conservancy recognizes the importance of sound water management as a necessary component to the health of biodiversity within the Great Lakes region. Consequently, we have been actively engaged in the process that developed this draft agreement. Our focus is on how this agreement will affect ecosystems of the Great Lakes.

The Nature Conservancy has sought opportunities worldwide to bring sound science to water management because natural patterns of water levels and flows – often disrupted through water management – are critical to freshwater biodiversity.

Net water loss to the Great Lakes basin is not the sole source of harm to this ecosystem. How water is withdrawn and returned also has potential to disrupt flow patterns, including the natural magnitude, frequency, timing and duration of critical flow conditions, and the natural rate at which flow conditions change.

We are encouraged that the governors and premiers have collaborated to produce this draft agreement to guide their management of the world's largest freshwater ecosystem. This agreement has the potential to be a model for water policy worldwide.

Currently our states and provinces are managing the waters of the Great Lakes under a patchwork of rules and policies. This new draft agreement provides an opportunity for clear and consistent water management policy.

For the first time, this agreement puts forth consistent standards for evaluating proposed water withdrawals from all of the waters of the Great Lakes basin. These standards are based on environmental criteria and will be applied by all Great Lakes states and provinces.

In addition to the commitment by the states and provinces to manage withdrawals from all waters of the Great Lakes basin - the Great Lakes themselves, headwater streams, large rivers, inland lakes, wetlands, and groundwater - as a single, connected ecosystem under a uniform set of standards, the state and provincial leaders are setting a precedent for environmental policy.

With the inclusion of the Improvement standard, Great Lakes Governors and Premiers commit themselves to improve the Great Lakes ecosystem through responsible water use. This agreement is the first example of water policy to link protective use of an ecosystem, such as the

Great Lakes, with restoration of the same system. This is a laudable and critical step forward in our road to restoration of the Great Lakes.

While we support this agreement overall, in order to effectively protect and improve the Great Lakes ecosystem, the agreement needs to be strengthened in four specific areas - water conservation, the averaging period, the phase-in time to implementation and the application of the Improvement standard.

Our first recommendation is that the agreements specify what is required to meet the water conservation standard.

- We encourage the states and provinces to develop and commit to regional water conservation goals that will be met by implementation of environmentally sound and economically feasible water conservation measures.

- Around the world, cities, industries and farms have demonstrated that water conservation can reduce water usage by 25 to 50 percent or more, saving money and energy, while protecting freshwater ecosystems (Postel and Richter 2003).

- Chicago's Mayor Daley recently announced at the 2004 Great Lakes St. Lawrence Mayors' conference that "every five percent reduction in water use saves the City $1.2 million in the cost of treating and pumping water." (http://egov.cityofchicago.org/city).

- The United States and Canada have twice the per-capita water use as Europe. Per capita water consumption in the United States is more than four times higher than the global average. There is opportunity for water conservation in every sector.

Our second recommendation is that the averaging period be 30 days so that all water use sectors are subject to the same standards. This will prevent harm to freshwater ecosystems caused by unmanaged withdrawals.

- The 120-day averaging period proposed in the agreement is not based on environmentally sound science and poses considerable risk to freshwater ecosystems.

- Averaging periods longer than 30 days would exempt from oversight many withdrawals that are likely to damage freshwater ecosystems.

- The long averaging period would allow users to withdraw the highest quantities of water during the driest months; these are the months when streams and other sensitive ecosystems are most vulnerable. They could do this without meeting any of the standards as long as their average was below 100,000 gallons per day over 120 days.

We recommend a five-year phase-in period to develop jurisdictional programs to manage withdrawals.

- We understand that states and provinces may need time to develop new water management programs that are consistent with these new standards. However, as a region we need to implement consistent water management standards in a timely manner, and should not wait the proposed 10 years to implement this policy across jurisdictions.

- These standards should be implemented as soon as possible to avoid further degradation to the Great Lakes ecosystem from unmanaged withdrawals.

And finally, we recommend that all water users should be required to improve the ecosystem.

- Holding all withdrawals to the standards of no harm, water conservation, and improvement was the core commitment of Annex 2001.

- This commitment is precedent-setting. A strong Improvement standard catalyzes the region to think creatively and collectively about how our natural systems can be improved. This policy loses its restorative power when all users are not required to improve the ecosystem through water use.

- Individually, these improvements do not need to be large and costly. Users will do incremental good rather than incremental damage.

The commitment to the Great Lakes basin and collaboration shown by the states and provinces encourages and inspires us, and we continue to support the region's leadership in the development of this precedent-setting water management policy.

The foundation is laid for a water policy that could lead to real ecosystem benefits for the Great Lakes basin. Its effectiveness depends on whether the states and provinces make the necessary changes to the agreement, adopt it, apply these standards consistently, and enforce them.

The Nature Conservancy is a leading international, non-profit organization that preserves the plants, animals and natural communities representing the diversity of life on Earth by protecting the lands and waters they need to survive. To date, the Conservancy and its more than one million members have been responsible for the protection of more than 15 million acres in the United States and have helped preserve more than 102 million acres in Latin America, the Caribbean, Asia and the Pacific. Visit us on the Web at *nature.org*.

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International agreement will shape future of Great Lakes

July 19, 2004

Dear Editor,

Living on the edge of the Great Lakes, it's easy to believe that such a vast water supply must be infinite. Unfortunately, no natural resource is inexhaustible. Consider the Aral Sea on the border between Kazakhstan and Uzbekistan. Once the world's fourth largest lake, the Aral Sea has lost more than 75 percent of its volume and massive diversions of water have caused the lake's shoreline to retreat as much as 75 miles.[1]

To put that in perspective, if the Great Lakes were to lose as much water as the Aral Sea, it would be the equivalent of draining both Lake Erie and Lake Ontario.[2] Of course, while such a massive environmental catastrophe here is currently unthinkable, the Aral Sea still provides an important object lesson for those of us who live with and depend upon the Great Lakes. The Aral Sea reminds us that without careful management and stewardship, no natural resource is limitless.

To help preserve the Great Lakes for future generations, policymakers within the region are developing a comprehensive policy to address the way water is used, withdrawn and diverted from the Great Lakes basin.

In June 2001, the Great Lakes region's American governors and Canadian premiers signed the Great Lakes Charter (Annex, 2001), to begin to develop a set of binding agreements to govern Great Lakes water use within the Great Lakes Basin. After three years of work and input from industrial, agricultural, and municipal water representatives as well as conservation organizations such as The Nature Conservancy, the first draft of the implementing agreement is ready for public review and comment.

The implementing agreement is important because, if it is properly designed, this regional policy will prevent harmful withdrawals of water from the Great Lakes and advance water management practices throughout the basin. If carried out as currently planned, this framework would become the first effort in the world to link use of a natural system with the restoration of that system.

Under the proposed policy, all decisions on whether or not to grant requests for Great Lakes water will be filtered through three protective principles. Each request for water must prevent or minimize water loss in the basin through environmentally and economically sound water conservation measures and maximized return water flow. Requests for water must not result in significant harm to the quantity nor quality of the waters, nor to dependent resources such as fishes, within the basin. And finally, the restoration component of the policy requires that requests for water must constitute an improvement to the Great Lakes and its natural resources.

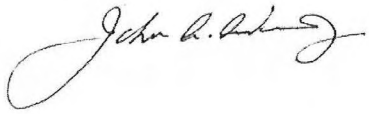
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[1] From "Visualizing Earth Project" of the University of California at San Diego, shoreline statistic also cited in an article from the August 2001 *Ecological Applications*. "Water in a Changing World"
[2] From "Visualizing Earth Project" of the University of California at San Diego

The governors and premiers have issued their preliminary agreement without recommendation and are seeking input from the public to incorporate their ideas and concerns into the development of this important policy. As residents of a Great Lakes state, we have a responsibility to pay attention to the way policymakers are stewarding our resource. They are making decisions that will affect the quality and quantity of our water supply.

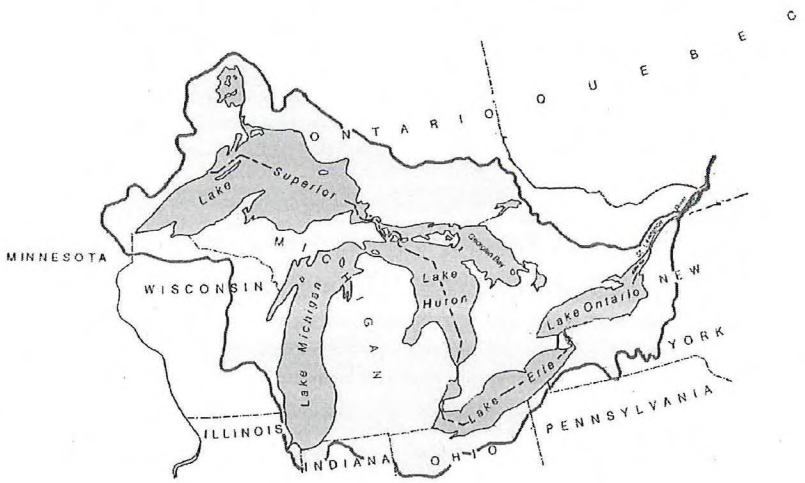
I urge you to take this opportunity to review and comment on the terms of the implementing agreement. It will shape the future of our resource and, ultimately, our way of life.

Sincerely,



John A. Andersen, Jr.
Great Lakes Director
The Nature Conservancy

Summary and Analysis:
The Great Lakes Water Resources Compact
and Great Lakes Basin Sustainable Resources Agreement



Prepared by The Cadmus Group
G. Tracy Mehan[1], Principal (703) 247-6106
Jeffrey E. Edstrom[2], Associate (312) 588-1670
August 2004

Background

The Great Lakes Water Resources Compact (Compact) is a draft document released for comment by the Great Lakes Governors and Premiers. The Compact outlines a general consensus among the jurisdictions on a process governing the review of new or increased Great Lakes water withdrawals. It delineates a standard of review, that among others, requires that out-of-basin diversions and some larger in-basin uses incorporate an improvement to the Great Lakes ecosystem. A companion document, the Great Lakes Basin Sustainable Resources Agreement (Agreement), is a voluntary "good faith" agreement that provides greater detail on the intent of how the Governors and Premiers will implement the agreements before and after implementation of the Compact. The agreements affect only new or increased Great Lakes water withdrawals. Existing water uses would not be affected by the agreements. The Governors and Premiers request comments on the two documents in general, but identify a series of specific issues where public input is needed to inform consensus.

The proposed Compact is intended to build on two previous voluntary agreements, the Great Lakes Charter of 1985 (the Charter) and the Great Lakes Charter Annex of 2001 (Annex) and make many of The Charter and Annex provisions legally binding. Further, the Compact also builds upon the requirements of

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[1] **G. Tracy Mehan, III, a Principal with The Cadmus Group**, served as Assistant Administrator for Water at the U.S. Environmental Protection Agency from 2001 to 2003, directing the Clean Water and Safe Drinking Water Act programs. Prior to that he served eight years as Director of the Michigan Office of the Great Lakes and as a member of Governor John Engler's Cabinet. Mr. Mehan has broad experience in water management issues in the Missouri River and Great Lakes Basins. He was involved in the early discussions on the Great Lakes Charter Annex.

[2] **Jeffrey E. Edstrom, an Associate with The Cadmus Group,** has over 13 years of experience in Great Lakes environmental policy. He is a recognized authority on the effects of the proposed new standard for reviewing water withdrawals on communities and businesses. He staffed the negotiations of the Great Lakes Charter Annex while working for the Council of Great Lakes Governors.

the U.S. Water Resources Development Act of 1986 (WRDA) which requires that any new or increased diversion of Great Lakes water be approved by all eight Great Lakes Governors.

Who Should Be Interested in What Happens?

Companies, entities and individuals who are located inside the Great Lakes basin and may have large new or increased water withdrawals where there is a high consumptive rate should understand that the Compact will affect them in the future. While the agreements will not likely be fully operative for several years, it is likely that some states may enact some or all of their provisions in the interim. Further, there is potential for the Standard's application for water withdrawals that result in consumptive uses of less than five million gallons per day. The Compact leaves that to the states.

Communities near the Great Lakes basin with water quantity or quality problems should also monitor the agreements because they provide the criteria for what these communities will be required to undertake to obtain Great Lakes water.

Current System: A Patchwork of Agreements and Laws

The Charter provides a framework for the states and provinces for collective management of Great Lakes water resources. It outlines a process for notice and consultation among the states and provinces for new or increased diversions of water outside the Great Lakes basin and new or increased in-basin withdrawals of Great Lakes water that result in the loss of over five million gallons per day to the Great Lakes system. Diversions are withdrawals of water for use outside the Great Lakes drainage basin where the water would not naturally flow back to the Great Lakes and their tributaries. Consumptive uses occur where water withdrawn from the Great Lakes system evaporates, incorporated into products or otherwise lost to the Great Lakes system. A consumptive use is not the entire water withdrawal. It is only that part that is not returned to the system or lost to the system.

The Charter outlined the creation of a regional water resources management plan around which to make decisions. The Annex amends the Charter and outlines a new standard for reviewing withdrawals of water from the Great Lakes. The most discussed component of the standard is one that would require improvements as part of proposals for new or increased withdrawals. The Annex also identifies the issues and goals around which the Governors and Premiers wanted to build a new binding agreement.

The Annex serves as a bridging document between the Charter and WRDA. The original intent of the Charter was to provide a foundation for better managing water resources. The WRDA, passed one year after the signing of the Charter, changed the focus of regional water management by focusing on a specific category of water withdrawals. The Charter's goal is to effectively manage all water uses on a regional basis through water resource management planning. WRDA focuses on binding decisions only for proposed uses of Great Lakes water outside the drainage basin. Put another way, the Charter is about how "we" in the basin manage Great Lakes water resources, while WRDA is about whether "they" outside the basin can access Great Lakes waters. The Annex was an attempt to shift focus to broader watershed management planning goals by linking how "all improve water resources.

Proposed System: A Binding Agreement and Managing Large Withdrawals

The Annex's goals were far-ranging and ambitious. The Governors and Premiers pledged that these goals would be further developed in a binding set of agreements within three years. The Compact represents agreement among the Great Lakes states that would be binding once enacted into law following approval by Congress, signature by the President, and enacted into law by the eight states. The Agreement is a good-faith agreement among the states and provinces that provides additional detail regarding their consultation process. Despite being signatories to the Agreement, the Premiers of Ontario and Quebec

will not have statutory authority in the approval or disapproval of U.S. withdrawals and vice versa because there can be no binding agreements between states and provinces.

The draft Compact and Agreement will affect significantly fewer withdrawals than the Annex outlined. The Annex based application of the new standard for all new withdrawals. The Compact and the Agreement would require regional review for withdrawals for use inside the Great Lakes basin that result in a consumptive loss of over five million gallons per day and for diversions that result in a loss of over 1 million gallons of water per day.

One criticism of the different trigger levels for diversions and in basin uses is that it builds a discriminatory system. There is concern in some quarters that treating in-basin withdrawals so differently from diversions may be declared unconstitutional, or in violation of international trade agreements, if challenged. Specifically, all diversions must include return flow and improvements, but withdrawals smaller than five million gallons per day will not have to include an improvement. Further, diversions must be approved by all eight Great Lakes Governors, while consumptive uses requires only six affirmative votes.

Diversions of less than 1 million gallons per day do not require approval from all eight Governors, but the regulating State must find that the proposal meets all of the standard criteria. The lone exception is for diversions of less than 250,000 gallons per day. These small diversions are exempted from the return flow requirement for public supply where there is no alternative potable water supply.

The Compact would repeal any parts of acts that are inconsistent with the Compact. As such, once the Compact is approved the WRDA would be repealed for diversions under 1 million gallons per day. Until that time, all proposed new diversions will need approval of all eight Governors. The average time for approval of such Compacts has been 10-15 years so it is unlikely that any of its provisions will be legally binding for some time.

The Standard: Improving the Great Lakes Ecosystem

The Standard of review for new or increased water withdrawals originally outlined in the Annex has been viewed as groundbreaking in its requirement that these water uses result in an improvement to the water dependent natural resources of the Great Lakes. The primary purpose for a standard is to fix the primary perceived weakness of WRDA in that it does not have standards or criteria for reviewing diversions. The Compact and the Agreement build on that standard. Under the draft agreements, water withdrawals subject to the Standard must incorporate the following criteria:

- There is no reasonable water supply alternative
- Withdrawals are limited to reasonable quantities for the proposed purposes.
- All Water Withdrawn from the Great Lakes Basin is returned to the Great Lakes Basin minus a reasonable consumptive rate
- The Withdrawal results in no significant individual or cumulative adverse impacts
- The proposal incorporates Environmentally Sound and Economically Feasible Water Conservation Measures
- The proposal incorporates Improvement to the Waters and Water Dependent Natural Resources of the Great Lakes Basin, and
- The proposal complies with applicable State and federal laws as well as regional interstate and international agreements.

Appendix 2 of the Agreement provides guidance regarding the application of improvements by reference to a report led by current Cadmus Group Associate, Jeffrey E. Edstrom when he worked at Tetra Tech EM Inc. and provides examples of improvement activities from that report. These examples focus

primarily on hydrologic improvements that improve water quantity and quality, watercourse timing, flow and groundwater infiltration, among many others.

Future Application: Diversions and Large Scale Consumptive Loss

Since the Charter and the WRDA went into effect, there have been only three diversion proposals and two consumptive use proposals subject to regional review. The draft agreements would not have added or subtracted any proposals for review, nor would the voting procedures have changed the outcome on any proposals. It is unlikely that significant numbers of proposals will need to be reviewed under the Compact of the agreement in the coming years. For in-basin users, unless they trigger the regional review, water users will not have to go through notice and consultation, and will only be subject to existing state permitting law. A change in measuring consumptive use from "in any 30 day period" to "in any 120 period" allows water withdrawers whose use change seasonally or annually means to not be subject to regional review as often as they might under the current system. The extended period allows withdrawal peaks to be averaged out more easily.

The Standard will not be required for in-basin uses until passage of individual state or provincial laws. Binding regional review of in-basin uses will not occur until the Compact is passed by Congress and all eight legislatures. The Standard will apply for out-of-basin diversions once the Agreement is signed by the Governors and Premiers, if not sooner. This is because the Governors have statutory authority to review all out-of basin diversions through WRDA. There are currently two diversion proposals under development with and possibly several more in the next 5-7 years.

Issues Where Input Is Requested

A release accompanying the draft Compact and Agreement ask for guidance from the public on a series of issues. These are areas where there may not be consensus among the states and provinces or where the negotiators are seeking additional information to make the Compact and Agreement more effective. Specifically, the Governors and Premiers request comment on:

- Regional review and public participation processes;
- Thresholds for regional review of withdrawals and consumptive uses;
- The adequacy of the improvement component of the Standard;
- The extension of the averaging from any 30 day period to any 120 period;
- The definition of "Existing Water Users"

Where to Send Comments

The agreements and associated documents are available online at the Council of Great Lakes Governors website at www.cglg.org (www.cglg.org/1projects/water/Annex2001Implementing.asp). Comments on the Compact, Agreement and their Appendices can be mailed, e-mailed, or faxed to the following:

David Naftzger, Executive Director
Council of Great Lakes Governors
35 East Wacker Drive, Suite 1850
Chicago, IL 60601
Facsimile: (312) 407-0038
E-mail: comments@cglg.org

If you have additional questions about the Compact or Agreement, please contact either G. Tracy Mehan at 703- 247-6106 (gmehan@cadmusgroup.com) or Jeffrey E. Edstrom at 312-588-1670 (jedstrom@cadmusgroup.com).

prevent a proponent from diverting in several small increments over time rather than all at once, thereby avoiding certain requirements? What would prevent a proponent from diverting for one use with little or no return flow, and then changing that use later? What would prevent a proponent from diverting a short distance to avoid the agreement requirements, and then selling that water to some more distant location later?

Concluding Remarks

In a recent commentary, the former co-chair of the International Joint Commission panel on Great Lakes diversions, Ralph Pentland, raised an interesting point about the existing veto power. Great Lakes governors, individually and collectively, presently have the legal right to veto interbasin diversions under the U.S. Water Resources Development Act. It is entirely possible that, once the agreements are signed, the courts will force states to exercise that veto power in strict accordance with the provisions of the agreements. Unfortunately, the way the draft agreements are worded, many decisions will still be largely arbitrary. Ultimately the interpretations themselves may end up in the hands of courts and trade tribunals. Do the basin jurisdictions really want to give up their existing veto power, and leave diversion decisions to the vagaries of national and international judicial systems? It is also possible that if this agreement goes forward it would replace WRDA with a much weaker approach.

The Sierra Club of Canada urges the Government of Ontario to re-negotiate the draft implementation plan for Annex 1. The option of just saying no (or at least insisting on the principle of "no net loss" of water) to all out-of-basin diversion proposals is still open and should underpin any agreement. Failure to do so could actually pleace the Annex in opposition to the 1909 Boundary Waters Treaty. It would be in the best long term interest of the regional environment, and likely even in the best long term interest of the regional economy. It is our view that such a restriction, as long as it is related to legitimate local concerns such as preservation of the water resources of the basin, and is grounded in scientific analysis, would be valid even if it may have an incidental effect on interstate commerce and international trade. On the other hand, it seems to us that the agreements as drafted would be ripe for dispute and litigation as the demand for and stakes over water rise.

Are current leaders in the Great Lakes region really prepared to jeopardize the long-term future of one of the most valuable ecosystems in the world for what would appear to be, at best, very small, short term and illusory political and economic gains?

v) The IJC recommended a clear and unambiguous return flow requirement, that is "no net loss from the area from which the water is taken and, in any event....no greater than a 5% loss" (the average loss of all consumptive uses within the basin). The draft agreements, by speaking about but not defining water use sectors open up a number of loopholes regarding the amount of return flow, and are at times confusing and seemingly inconsistent -6- about where the return flow will come from and where it will be returned. This level of ambiguity could lead to all kinds of acrimony and legal problems.

vi) The IJC recommended that all return flow should meet the objectives specified in the Great Lakes Water Quality Agreement. The draft agreements requirements with respect to the quality of return flows are much less specific, and depending on how they are ultimately interpreted, could even end up being quite inconsistent with Water Quality Agreement requirements.

vii) The draft agreements make no mention at all about preventing the introduction of alien invasive species by way of return flow, as recommended by the IJC. This is a very serious omission.

viii) The draft agreements exempt diversions for straddling communities and smaller diversions of less than 12 kilometres from most requirements. This could lead to serious problems, especially with respect to both water quality requirements and preventing the introduction of alien invasive species.

ix) Regarding withdrawals and consumptive uses within the basin, there is a clear emphasis on new and expanded uses. We understand the agreements also call for broader conservation measures, but that seems to be an afterthought much as it was in the 1986 Great Lakes Charter, with the result that many uses are still not even metered nineteen years later. There is a lot of potential for water saving within the basin, but those savings will only be achieved by dealing seriously with 100% of the uses 100% of the time.

x) The Great Lakes Charter of 1986 required that an inventory be prepared of water uses and conservation plans within the basin. This has not yet been done. Clearly, creating a scheme for diversions without such an inventory is reckless.

xi) There are several problems of potential "incrementalism" that are not dealt with adequately in the agreements. For example, what would

register additional concerns at a more fundamental level:

i) The most immediate threat to the Great Lakes ecosystem is a possible increase to the Chicago Diversion, because it could take place without significant new works. We understand a request may already be on the table from Illinois to do just that, and all jurisdictions may have agreed to keep that request "under wraps" until after the 90 day review period. If that turns out to be the case, we would consider that to be hugely disrespectful of the public's "right to know". What is even more disconcerting is that at least some reviewers have interpreted the agreement as exempting increases to the Chicago Diversion from most provisions in the agreement. We will give negotiators the benefit of the doubt on that question for now, but would request that it be made very clear in any agreements that all increases to existing diversions will be treated the same as new diversions.

ii) The International Joint Commission concluded that there should be a bias in favour of retaining water within the basin and using it more efficiently and effectively, and in its recommendations followed through on that conclusion. They also made it clear that different treatment of in-basin and out-of-basin withdrawals would be quite consistent with national and international traditions and legal requirements. The draft agreements, on the other hand, require exactly the same tests to be applied to in-basin and out-of-basin withdrawals, even though they would in some circumstances be applied by different people. That identical treatment is entirely inconsistent with water management and environmental principles and practices as they are applied all around the world. The result would be that either in-basin withdrawals would be treated too stringently or outof- basin withdrawals would be treated too leniently.

iii) Resource improvement as defined is very clearly tantamount to offering water in its natural state for sale, and would therefore support the position of those who would argue that Great Lakes waters have effectively become a "good" under the terms of international trade agreements. That could in turn lead to pressures from both foreign public and private interests for offshore exports, pressures that may very well be supported by international trade tribunals.

iv) The agreements use a number of terms that are ambiguous and undefined. These include, for example, "reasonable use", "significant impact" and "evolving tools". Because these notions include no clear or objective tests, they would seriously weaken any attempts to ward off challenges under international trade or interstate commerce rules. As suggested by the IJC, it is critical that water management policies be clearly articulated and consistently implemented so that undue expectations are not created.

sacrificing those uses to meet outside demands that may not be fully legitimate.

We would also like to challenge those that argue the agreements will "unleash market forces in favour of the environment." The primary market force that will be unleashed is water for sale to the highest bidder. And what will the revenues be used for? They will be used to meet the responsibilities of some "environmental bad guy" within the basin - what economists refer to as a perverse incentive. And, application of the resource improvement standard within the basin is tantamount to a new tax on the wrong people for the wrong reason. It is important to get water prices right, and there is a well defined science to do that. In many cases that would result in a higher price, but at least those paying it would receive the local benefits. But, to raise additional revenue through a new tax on local water bills for the purpose of meeting the responsibilities of "environmental bad guys," perhaps hundreds of miles away would be entirely inappropriate.

Last, but not least, we would like to raise a conceptual concern about the extent to which the proposed agreements may shift property rights in favour of claims of private ownership of water. We would like to quote a paragraph from a recent essay by U.S. environmental lawyer James Olson to illustrate this point.

"Beyond impacts, this Great Lakes Basin water issue goes to the heart of citizens' liberty and freedom as members of communities that have evolved for centuries, all of them interdependent but dependent on water as a secure public commons. The agreement must be carefully evaluated for any risk of any unintended subordination or privatization of this commons. When the commons is not respected or citizens fundamental right to water is alienated or at the mercy of private interests, people rebel. Citizens revolted in Bolivia, and they organized in Plachimada, India to stop Coca Cola from capturing a century old common water supply for bottles of soda pop. Citizens in Michigan and around the Great Lakes have successfully resisted efforts by Nestle to remove or divert water that would shift property rights in favour of claims of private ownership of water. These agreements could allow others to turn communities into vast water farms to serve a global economy in which citizens have little say."

c) Concerns about the Details There are some good things about the draft agreements, for example, the information sharing provisions and the procedures for citizen participation, as well as the consent process itself. We also agree with many of the specific suggestions being in comments being offered by Great Lakes United regarding trigger levels, phase-in periods, etc. However, we would like to

water because that will be offset by waters returned to the basin by the diverters. The problem here is that there seems to be an attempt to achieve a delicate "balancing act" in the agreements. That balancing act seems to be designed to allow just enough permanent water loss to satisfy out-of-basin constituents within the agreement jurisdictions, but not enough to satisfy demands from other North American or offshore jurisdictions.

There are a few things wrong with that scenario. First, the return flow regime itself may turn out to have more loopholes than anticipated. Just as with the resource improvement standard, sometimes imprecise language in the draft agreement would suggest that return flow decisions may also turn out to be largely arbitrary. But just as importantly, the very fact that the return flow provisions at least appear to be designed with inter-jurisdictional discrimination in mind suggests that they would be unlikely to withstand legal challenges related to interstate commerce and international trade. What we are suggesting is that the arbitrary nature of both "have your cake and eat it too" concepts may turn the "trickles" of water losses into "cascades", and subsequent legal challenges may turn them into "torrents".

But, some will argue that they have yet another safeguard against that eventuality, namely provisions related to "significant" cumulative impact. However, we know the science needed to identify "significant" impacts in this context is ill-defined. Is it possible to define "the straw that breaks the camel's back?" And even if it were possible, would anybody actually allow proposals to proceed until some threshold level of harm is reached, and then suddenly prohibit any additional water- dependent development in the region? In any event, if inter- jurisdictional discrimination is demonstrated in any one of the many inevitable legal challenges, this safeguard may also be struck down.

We would question whether demands from outside the basin are really legitimate. All of eastern North America is blessed with a vast abundance of freshwater. Those immediately outside the basin receive the same three feet of precipitation and one foot of runoff as those inside. We can fully understand that there are several situations where the least cost short term solution would entail siphoning water out of the Great Lakes. But, that is only because in the short run bad water and environmental management is nearly always cheaper than good water and environmental management. Even without looking at the individual cases, we would hazard a guess that each and every one of them would be better off both economically and environmentally in the long run if they were to find a more local solution. Every drop of Great Lakes water is already serving some useful purpose where it is, so as a matter of principle one should think long and hard before

in the public interest. Those rights cannot be adequately exercised in the abbreviated and superficial review process that is now underway.

The Sierra Club of Canada urges the government of Ontario to press for an extension of the consultation period until at least March 2005.

b) Concerns about the Concepts The proposed decision-making regime appears to be based on two largely illusory "have your cake and eat it too" notions. The first is the so-called "resource improvement standard." Under this standard, the price to be paid for removing water from the Great Lakes Basin would be an improvement to some water related resource within the basin. On the surface, this has obvious political appeal. Constituents outside the basin would get access to Great Lakes water, and those inside would somehow be convinced their ecosystem was being improved even as the water disappears.

There could in fact be local environmental improvements in the short run. But, if we look a little deeper and broader, and assume accelerating removals over time, very serious social, economic and environmental issues begin to arise. For example, look ahead to the time when lake levels are permanently lowered by several feet, which is a very likely due to the combined effects of accelerating diversions, uncertain future consumptive use patterns, climate change, and probable changes to the connecting channels for navigation purposes. Local environmental improvements such as the protection and enhancement of fish and wildlife habitat will become meaningless as the wetlands become drylands. And local water quality improvements will be more than offset on a system-wide basis, as the amount of water flowing through the system is diminished, and as significant amounts of toxic substances that are now trapped in sediments become re-suspended.

There are other problems with the resource improvement standard as well. First, as a matter of ecological principle, it is never a good idea to encourage the trading off of one ecosystem component against another. Ecosystem health depends on a number of very sensitive interrelationships that need to be preserved. Secondly, those trade-offs will have to be largely arbitrary, because one cannot logically equate quantities of water with environmental protection measures. That arbitrariness will inevitably lead to all kinds of political rancour and unpredictable legal problems further down the road.

The second illusory "have your cake and eat it too" concept is return flow. Proponents will claim that nobody should worry about "selling"

If the proposed compact and state-province agreement were consummated tomorrow, the most significant immediate change would be a few additional "trickles" of water out of the Great Lakes Basin to meet requests from several nearby communities. But that precedent, combined with a fundamentally flawed decision-making regime could very well result in those short-term "trickles" turning into mid-term "cascades", and then into long-term "torrents" of water travelling well beyond the borders of the ten Great Lakes jurisdictions, and perhaps even beyond the boundaries of the two countries. I would like to stress that we do not view this as a Canada - U.S. issue. The consequences could be disastrous for the ecology, the economy and the social fabric of the entire region in both countries.

The Sierra Club
of Canada would like to register concerns about

a) the process,

b) the concepts and

c) the details of this initiative.

We will summarize those concerns in the following three subsections, and before offering a few concluding remarks and suggestions.

a) Concerns about the Public Process

The draft agreements represent what could turn out to be one of the most far-reaching natural resource and environmental policy initiatives in the history of North America. In spite of that, the draft agreements were passively released on the internet in the middle of the summer holiday period, with a request for comments within 90 days. To our knowledge, there has been no attempt at all to inform the general public about the risks inherent in the proposed decision process. We also understand no specific effort was made to consult First Nations.

This not "just another water agreement." The proposals would very fundamentally change the Great Lakes diversions and consumptive use issue from an environmental one to a resource trading issue. It could also conceivably lead to the commercialization of water and related natural resources in an unprecedented way. The public has a right to know what is being contemplated for their resources. The public has a right to become fully informed all the possible consequences. And the public has a right, once fully informed, to express its views on whether or not they think such a fundamental change in direction is

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Reply-To: jeaton@ca.inter.net
Priority: normal
Content-description: Mail message body
Subject: [Wateract-l] SCC Brief to the Ontario Government on Draft Implementing Agreement for Annex 1 Great
Errors-To: wateract-l-admin@list.web.net
Precedence: bulk
List-Help: <mailto:wateract-l-request@list.web.net?subject=help>
List-Post: <mailto:wateract-l@list.web.net>
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<mailto:wateract-l-request@list.web.net?subject=subscribe>
List-Id: A listserv for Canadian Water Activists <wateract-l.list.web.net>
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<mailto:wateract-l-request@list.web.net?subject=unsubscribe>
List-Archive: <http://list.web.net/lists/private/wateract-l/>
Date: Sun, 26 Sep 2004 11:47:14 -0300

fyi-janet

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http://www.sierraclub.ca/national/postings/scc-comments-proposed-annex.pdf

Submission to the Ontario Ministry of Natural Resources

On the subject of the Draft Implementing Agreement for Annex 1 of the Great Lakes Charter currently under consideration by the Council of Great Lakes Governors

From The Sierra Club of Canada

September 20, 2004

The Sierra Club of Canada urges the government of Ontario to reject the existing draft and renegotiate the agreement to better meet its stated goals. All leaders of jurisdictions in the great Lakes Basin must exercise extreme caution in considering any new regime dealing with diversions and other forms of bulk removal of water from the Great Lakes. Reduced groundwater levels of 150 feet or more in the Ogallala Aquifer in the southwestern part of the United States, and offshore examples like Lake Chad with a sharp decline in lake surface area of over 80 % and the Aral Sea with its surface area reduced by two-thirds are but a few examples of many recent "water follies" all around the world. These kinds of disasters always start out quite innocently. But, even very small political, economic or legal errors can lead to virtually irreversible trends. We often hear the expression "the devil is in the detail". That is true, but in these kinds of cases the devil is also in the precedent.

doesn't go far enough in protecting the Great Lakes.

Four years ago, the International Joint Commission - an independent binational body set up in 1909 to advise Ottawa and Washington on boundary water issues and help resolve disputes - issued its own set of recommendations for protecting the waters of the Great Lakes.

While the governors' and premiers' draft agreement mirrors the IJC report in some respects, it falls short in other areas, most notably in its failure to incorporate a key IJC recommendation on water removals that would limit the total net loss of water to 5 per cent. That is the current average loss resulting from all uses within the Great Lakes.

Since the release of the governors' and premiers' draft agreement, the IJC had the perfect chance to help Ontarians, Quebecers and residents of the Great Lakes states conduct an informed discussion of the issues. In a new report on protecting the Great Lakes waters, the IJC could have offered its own critique of the governors' and premiers' draft agreement.

Instead the IJC chose not to get into a political debate, masking its evident disappointment with the draft accord in language urging governors and premiers to follow the recommendations it made in its 2000 report.

That's a cop-out. We have a right to know exactly what the IJC thinks. The future of the Great Lakes is too important - and too fragile - to be decided without the benefit of the best, independent advice available.

Wateract-l mailing list
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http://list.web.net/lists/listinfo/wateract-l

In response, Ottawa and Washington introduced new laws in an attempt to safeguard the Great Lakes. For its part, the Canadian government amended the International Boundary Waters Treaty Act and International Boundary Water Regulations to prohibit any removals from Canadian boundary waters of the Great Lakes.

The U.S. chose a different route. Its 1986 Water Resources Development Act allowed for the diversion of Great Lakes water, but only with the agreement of all governors of the eight states that border the Great Lakes.

This asymmetry in U.S. and Canadian laws has recently taken on a special significance because demands for diversions are increasingly coming from communities outside the Great Lakes Basin, but in the Great Lakes states, such as Lowell, Ind. and New Berlin, Wisc.

In part because the conflicting interests of the state governors do not coincide with the interests of Ontario, which has its own ban on Great Lakes water transfers, or Quebec, with its jurisdiction over most of the St. Lawrence River, it has fallen to these two provinces and the eight states to work out a Great Lakes management agreement. Among other things, the accord would set a standard for water withdrawals from the Great Lakes.

After three years of negotiation, their draft agreement was released for public discussion in mid-July. Since then, many Canadian environmentalists have argued that the document amounts to little more than a box of straws for sucking more and more water out of the Great Lakes.

While this assessment is unfair - the critics ignore the fact there is at present no standard for water diversions and no uniform goals or instruments for conservation - the environmentalists do have a point: the draft agreement

From: "M Reilly" <maureen.reilly@sympatico.ca>
To: <jeaton@ca.inter.net>, <wateract-l@list.web.net>
References: <414F0763.1361.693818A@localhost>
Subject: [Wateract-l] Toronto Star Editorial -IJC cops out on protecting lakes
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<mailto:wateract-l-request@list.web.net?subject=subscribe>
List-Id: A listserv for Canadian Water Activists <wateract-l.list.web.net>
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List-Archive: <http://list.web.net/lists/private/wateract-l/>
Date: Sat, 25 Sep 2004 13:48:18 -0400

Sep. 25, 2004. 01:00 AM

Troubled waters on Great Lakes

When it comes to water, the 40 million Canadians and Americans who live within the boundaries of the Great Lakes Basin are truly blessed. Although they represent only two-thirds of 1 per cent of the world's population, they have access to 20 per cent of all fresh water on the planet.

While those numbers suggest we have a vast reservoir of water to share with others, the Great Lakes are for all intents and purposes a non-renewable resource. Just 1 per cent of Great Lakes' water is renewed each year. Draw off too much, and there could be dire consequences for the entire Great Lakes ecosystem and every community it now supports.

That threat to the health of the Great Lakes took on a new dimension in the mid-1980s when some Canadian businesspeople proposed bulk export of Great Lakes water by tanker.

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Woodrow Wilson International Center for Scholars

THE CANADA INSTITUTE

1 2 One Issue, Two Voices

Decision Time: Water Diversion Policy in the Great Lakes Basin

Decision Time: Water Diversion Policy in the Great Lakes is the first publication in our *One Issue, Two Voices* series. Using expertise from both sides of the Canada–U.S. border, this series is our contribution to dialogue on policy issues relevant to the bilateral relationship. In this first paper, the issue is "water," specifically the developing policy on diversions from the Great Lakes. Our two authors are leading experts on the Great Lakes, who have willingly entered the debate to share their informed opinions.

Canada and the United States share one of the world's largest supplies of fresh water; how both countries choose to use that water has global consequences. On both sides of the Canada–U.S. border, important policy is being made which will have far-reaching consequences for the Great Lakes basin. The Annex 2001 Agreement, initiated by the Council of Great Lakes Governors and developed over the last few years, entered a 90-day public comment period on July 19, 2004. As a supplement to the Great Lakes Charter, the agreement will set a common standard for water diversions for both states and provinces in the basin. At the Canada Institute, we recognized the opportunity to initiate timely dialogue on this significant bilateral issue. We have not attempted to present all sides of this complicated issue but are sure that this publication will generate important dialogue. The publication of these papers will be marked by a forum with the two authors in Washington at the Woodrow Wilson International Center for Scholars on September 14, 2004, with interactive video-teleconferencing in Toronto, Ontario and Ann Arbor, Michigan.

This project has been made possible through the efforts of several organizations and people. First, I would like to thank The Canada Institute on North American Issues for their support of our *One Issue, Two Voices* series. I would also like to thank Adèle Hurley and the Program on Water Issues at the Munk Centre for International Studies, University of Toronto, for inspiring the first of our publications and for the efforts that have gone into organizing the September 14 forum. Most of all, a sincere thank you goes to Ralph Pentland in Canada and Jim Olson in the United States who met the tight deadlines most graciously. Their dedication to the development of appropriate policy to guide the use of the Great Lakes is clearly evident in their writing.

We hope that you enjoy this publication and that it encourages your personal participation in the debate.

David N. Biette
Director, Canada Institute
September 2004

Ralph Pentland

Great Lakes Compact—Water for Sale?

"Whiskey is for drinkin', but water is for fightin'."

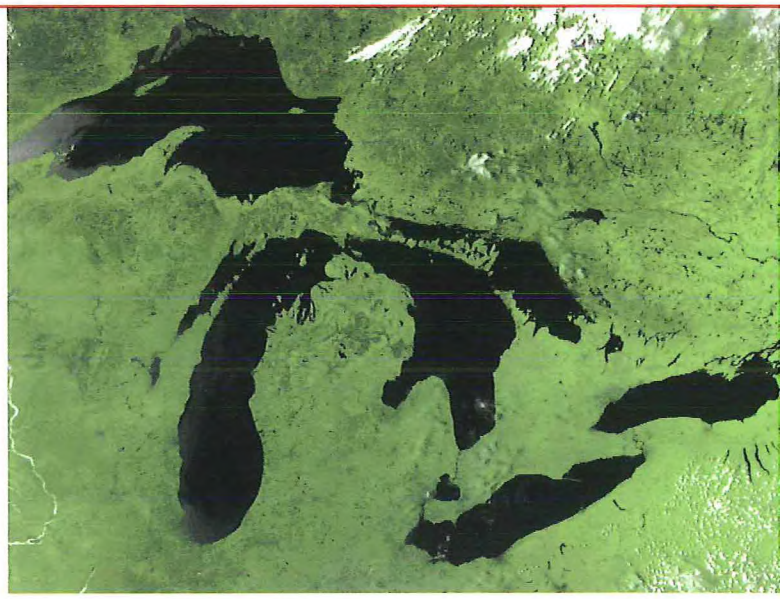
The Aral Sea in central Asia used to be the third largest lake in the world. Since 1960, its area has declined more than 60 percent and salinity levels have tripled. All native fish species have disappeared. Winds pick up millions of tons of toxic dust, poison nearby farmlands and contribute to respiratory illnesses. Drinking water from low river flows has become hazardous and incidences of fevers and diseases are alarming. Shrinking the size of the sea has also led to a more continental climate of hotter summers and colder winters, with a shorter growing season. It is critical that any approach adopted for managing the waters of the Great Lakes not start the region down the kind of slippery slope that caused the Aral Sea disaster, and numerous similar disasters around the world.

In this short opinion piece, I will be suggesting that **the recent proposals by the Council of Great Lakes Governors (CGLG) Working Group for managing Great Lakes water uses and removals represent a very high risk strategy**, and will discuss several other options. The views expressed are those of an interested and concerned citizen only.

Great Lakes net water supplies and water levels now face major uncertainties related to climate change, unpredictable future consumptive use patterns, potential diversions and other forms of bulk removal, and possible modifications to their connecting channels. What is most disconcerting is that each and every one of these factors is likely to diminish supplies and/or water levels in a cumulative way over the next several decades. For that reason, the International Joint Commission, in its year 2000 report on Protection of the Waters of the Great Lakes, concluded that there should be a bias in favour of retaining water in the system and using it more efficiently and effectively.

The draft Great Lakes basin Water Resources Compact and associated state-provincial arrangements are based primarily on concepts recommended by a Denver law firm in mid-1999. In essence, that firm suggested that decisions regarding new or increased withdrawals of water, either for use within the basin or for removals from the basin, should be based on a common "benefits" standard. The theory was that new or increased withdrawals, for whatever reason should be offset by an improvement in the basin to either the water resource or a related resource. At the time, a staff member in the office of the CGLG asked me for my personal views on that approach. I would like to reiterate four of the points that I made in an e-mail response dated 23 June 1999, because I believe they continue to have relevance:

- "It is absolutely impossible to compensate for bulk removals, in the sense of being able to maintain enough resilience to cope with future unpredictable stresses like climate change."
- "We cannot, at this time, quantify the negative effects of bulk removals in order that they could be mitigated. Consultants (like me) could make a case for almost anything, but they would in reality be meaningless."
- "One might argue that the Great Lakes ecosystem could be compensated by doing something else 'good' in the same or some other area, but that would merely



encourage harmful bulk removals, while at the same time excusing other 'bad' environmental actors from meeting their responsibilities. While environmentalists might like the idea initially, they would eventually realize that it is conceptually self-defeating environmental policy."

- "With respect to the primary (I assume) objective of discouraging or preventing large scale, irreversible southward diversions, it would have the opposite effect to what you intend i.e. it would end up being a 'water chasing dollars' approach. And once the public figured that out, it would become extremely bad politics."

Before the CGLG chose a specific way forward in the Great Lakes Charter Annex in 2001, they had not only the advice of the Denver law firm, but also the advice of the International Joint Commission (IJC). The IJC recommended a standard based on preserving "ecosystem integrity," as opposed to "benefits," and added other safeguards related primarily to return flow and cumulative impact. For Annex 2001, the CGLG chose a mixture of the two—the benefits standard combined with the IJC safeguards related to return flow (albeit a very much-watered down version) and cumulative impact. In private conversations with those involved about why they chose "benefits," since renamed "resource improvement" over "ecosystem integrity," the answer is always similar—they need the flexibility offered by the benefits approach (interpreted net benefit) to deal with demands from outside the basin. I am reminded of the political reality—that in the Great Lakes states, there are more voters outside the basin than inside.

Now that the draft agreements are out for public review, my concerns are even greater than they were in 1999 and 2001. The way I think the agreements will eventually be interpreted with respect to diversions and other forms of bulk removal, especially by international trade panels and the courts is as follows:

- The **resource improvement standard**, as defined, is tantamount to a "Water for Sale" sign. It necessarily implies an exchange of money, or at least bartering, with the proceeds going towards meeting the responsibilities of resource abusers, or to agencies dealing with resource abusers or abuses within the basin.
- The **return flow** requirements will discriminate, probably quite arbitrarily, between who gets to buy and who does not.
- The **cumulative impact** requirement is a very loose way of deciding when to stop selling, especially where the term impact is limited to only "significant."
- The four questions that I raised in 1999, plus the fact that the resource improvement standard encourages trade-offs between components of the ecosystem, and therefore requires comparing "apples and oranges," will make the selling "price" quite arbitrary. As well, because of substantial "wiggle-room" in the return flow provisions, the selection of "buyers" will also be quite arbitrary. Based on numerous studies and workshops over the past four years, it is also clear that the use of the cumulative impact concept in a regulatory or quasi-regulatory way in the Great Lakes water level context will pose serious conceptual problems (e.g. what is impact and what is meant by "significant"), as well as difficult scientific challenges. The fact that these

hurdles will not be overcome in the foreseeable future will create a third source of arbitrariness in the decision process.

I would prefer not to get into the nitty-gritty of the wording in the agreement, because that would detract from the real issues, which are at a conceptual level. Nevertheless, just a few examples of "wiggle-room" in the return flow provisions include:

- The fact that the term "applicable water use sector" is not fully defined;
- the fact that at least some uses will have little or no return flow;
- the fact that there would be nothing to stop a use from being approved in one sector, and later changing to another sector;
- the fact that diversions of less than 12 miles would be exempt and there would be nothing stopping them from being extended further after the fact;
- the fact that the source of return flow is unclear; and because of phrases like "except under exceptional circumstances," "it is understood that specific use situations may vary and that in some cases higher use amounts may be justified," and "the coefficients will be updated periodically." Arguably, the current wording may actually exempt the most serious threat of all, namely increases to the Chicago Diversion.

Why do I think the proposed regime could start the region down a slippery slope? In the first instance it would facilitate several small diversions to nearby communities right away—in fact some people suggest that maybe the "tail is wagging the dog." That, in and of itself, would not be a major problem. The amount of water involved would be very small—I would venture a guess that in total the net loss may be equivalent to about one percent of the Chicago Diversion. But, it will have established the respectability of new and formally sanctioned diversions. That precedent, combined with a conceptually flawed regime that will necessarily be applied quite arbitrarily, will eventually lead to larger diversions over longer distances.

But, the most serious problems will likely come about through legal challenges related to international trade agreements or the Dormant Commerce Clause in the U.S., combined with accelerated external demands due to climate change or other

The resource improvement standard, as defined, is tantamount to a "Water for Sale" sign. It necessarily implies an exchange of money, or at least bartering, with the proceeds going towards meeting the responsibilities of resource abusers, or to agencies dealing with resource abusers or abuses within the basin.

unforeseen factors. In order to comply with Commerce Clause and international trade rules prohibiting discriminatory restrictions, the adopted policy must be rationally related to legitimate local interests (such as preservation of basin water resources), be scientifically grounded, be clear and unambiguous, and be capable of being implemented in a consistent manner. In my opinion, the proposed regime does not meet any of those criteria.

Over the longer term, the slipperiness of the slope will also be accentuated by the fact that, by merely entering into the agreements, some existing safeguards will be weakened. For example, even though the relevant Boundary Waters Treaty provisions will continue to exist, they are less likely to be invoked where there is state-provincial agreement. And existing protections afforded by the public trust doctrine in the U.S. portion of the basin will be weakened because the agreements do not include any public purpose or other standards required by the public trust.

It seems to me there are at least five basic regimes that the CGLG could consider:

- No diversions or other forms of bulk removal combined with wise use in the basin
- The IJC recommendations
- The Nikiforuk proposal
- The status quo
- The draft Annex agreements that were recently released for public comment

The Nikiforuk proposal was recently developed by investigative journalist Andrew Nikiforuk after interviewing about 20 experts both within and outside the region. He proposed three simple standards for judging removal proposals:

- A public trust standard
- A conservation standard
- A no-net loss standard. No net loss of water would be achieved by limiting net losses via diversions and other forms of bulk removal to gains achieved through conservation within the basin.

The options are presented according to my assessment of the level of protection they would provide to the Great Lakes ecosystem, with the "no diversions or other forms of bulk removal" option providing the highest level of protection, and the draft CGLG agreements the lowest level. The IJC and Nikiforuk proposals would lie somewhere between the two extremes, but either would be preferable to both the status quo and the draft agreements.

I would like to clarify a few things about the rankings. Why do I rank the IJC recommendations well ahead of the draft agreements vis-à-vis level of protection? In the draft agreements, the resource improvement standard opens the door very wide for removals (by allowing trade-offs between different components of the ecosystem), and then selectively plugs some but not all of the leaks. In the IJC proposal, the ecosystem integrity standard only leaves the door slightly ajar, and then closes it even further with very "water-tight" return flow requirements.

With respect to withdrawals and consumptive use within the basin, I would rank "wise use" well ahead of the draft Annex agreement approach. Habitat protection is worth doing—so let's do it. Water quality enhancement is worth doing—so let's do it.

A 90-day call for comments, half over the summer months, with no attempt to inform the public of the seriousness of and risks associated with the proposals is entirely insufficient.

And water conservation is worth doing—so let's do it. But let's not waste the time and energies of the region's best water and environmental experts trying to equate buckets of water with dozens of ducks. Wise use will not come about by creating fiction and trying to fool people. And it will not come about by turning off local decision makers with questionable concepts from on high. But it will come about by dealing with 100 percent of the uses all the time, not just the one percent or so that are new or expanded each year. And it will come about by empowering all citizens, broadly defined, with the knowledge and policy frameworks they need to make responsible decisions, and by giving them the opportunity to act responsibly each and every day.

One last topic that I was asked to touch on briefly is the role of Canadians and Canadian Provinces in the Great Lakes policy environment. One way to approach that topic, even though it is admittedly superficial, would be to look back at prior issues such as eutrophication and acid rain. Typically, these issues mature over about a 25-year period. In the early years, Canadians tend to be somewhat more idealistic than their good neighbors to the south. During those early years, Canadians tend to try to lead by example, by moving more quickly with regulation and other incentives and disincentives. In the middle years, Canadians, in a variety of ways, try to influence public opinion south of the border. At some point, U.S. jurisdictions usually come on board, and do so with a vengeance, soon surpassing their idealistic neighbors to the north.

Is the current Great Lakes diversion and consumptive use issue typical from that perspective? Maybe, if it is actually dealt with as an environmental issue. The Canadian government and both provinces have already banned, or at least effectively banned major diversions, mainly for environmental reasons, while their U.S. counterparts appear to view diversions as an economic opportunity. We will have to wait and see if the rest of the 25-year maturing period unfolds as it has with other issues. If so, you might expect attempts by Canadians to influence U.S. public opinion to begin very soon, and with any luck, the "conversion" south of the border in about another decade.

On the other hand, this issue could turn out to be quite atypical. In essence what the proposed agreements do is turn an environmental issue into a resource trading issue, where market forces may eventually overwhelm public administration. The potential impact on the two national economies could be quite profound, and would almost surely be negative. There may simply be no prior model to rely on for guidance. At this time it is unclear how national interests are or will be reflected in the negotiating process.

I will just finish up with two specific suggestions.

There is an urgent need for a substantial and very public debate on whether the citizens of the Great Lakes basin, the region, and the two countries are ready to embark on the very high-risk strategy inferred by the draft agreements. A 90-day call for comments, half over the summer months, with no attempt to inform the public of the seriousness of and risks associated with the proposals is entirely insufficient. As part of the reconsideration, some independent group or groups should convene two major workshops—one on legal risks associated with all reasonable options, and one on risks and rewards more generally. Those workshops should include at least as many experts not now involved with the process as experts who are involved. They should also provide for much more substantive citizen involvement than has been the case to date.

James M. Olson

Annex 2001 and the Future of the Great Lakes: New Wine into Old Wine Skins

The value of Great Lakes basin water is found in its inexpressibly precious commons. While the value of the Great Lakes may be important to everyone on earth, this does not mean they are there for the taking, to be diverted and used to meet the needs of everyone, everywhere. Histories of civilizations have told us where that leads. Some view water as a *global resource*, the idea of allocation and shared use. But the word "resource" implies use, not necessarily protection. The right to use water is a qualified one; it must be reasonable in relation to others—including respect for the water itself, its biota, and the needs of ordinary citizens included. And, as with any public commons, shared use implies limits. Without limits the commons is doomed. The basic limits on the Great Lakes and their tributary waters spring from their very nature. A very small percentage of the water is renewed each year. Limits also stem from the roots of common law. "Water is a moveable thing, and must of necessity *continue common* by the law of nature."[1] Any agreement that fails to safeguard the naturally sustaining nature of this commons would betray the public trust that protects these Great Lakes basin waters for present and future generations.

On July 19, 2004, the Council of Great Lakes Governors released drafts of "The Implementing Agreements for Annex 2001" and announced a public comment period of 90-days because the "voice of the people" is "critical." Some circles are pushing hard for an immediate decision, "it'll be worse if we don't" or "this is our only chance." Those who have steered the draft Agreements this far have made a huge contribution, but the interests in the commons and ordinary citizens are paramount. I believe the magnitude of the values at stake and complexity of issues cautions us to go slowly and with utmost care. There are many questions that must be independently and thoroughly addressed beyond the scope of this essay. The following comments raise just a few of them. In order to put them in context, a brief summary of the policy and legal history leading up to the Agreements follows immediately below.

The Public Trust Doctrine

The *Institutes of Justinian* recognized water was a commons for ordinary citizens to satisfy their basic needs— the *jus publicum*. Thanks to the Magna Carta, attempts by the Crown to transfer possession of sea beds to favorite Lords were nullified because they violated rights of citizens for fishing and navigation.[2] Courts of the states expanded these principles to sovereign ownership and public rights in water, believing water "common to all citizens."[3] In 1892, the U.S. Supreme Court extended the public trust doctrine to the Great Lakes and its tributary waters,[4] reserving a navigational easement to assure commerce and passage over these waterways. States, within the Great Lakes basin, have in some form adopted the public trust doctrine.[5] Under the public trust, waters are owned by the state in which they flow, and are held for the benefit of citizens for navigation, fishing, boating, swimming, domestic, or recreational purposes. Public trust waters can never be alienated, disposed of, or subordinated unless authorized by state statute and shown to meet the following standards:

- It must be for a primarily public, non-private purpose;

- It must be consistent with public trust uses or needs such as navigation, boating, swimming, fishing, or other recreational purposes;
- The present and future uses of the water must be protected; this means planning for the foreseeable and unpredictable future;
- It must not impair the public trust uses or resources; the *di minimis* harm rule does not apply; "nibbling effects" cannot be ignored.

Substantial public value is presumed. Those who seek to alienate or alter the commons in these waters have the burden of proof to show, affirmatively, that each of these standards will be satisfied before any authorization can be granted. In this sense, the public trust doctrine democratizes the public and citizen interests and internalizes the costs of those who seek to alter it.[6] Like the Magna Carta, the doctrine protects takeovers of the interests in the public trust of ordinary citizens. Not surprisingly, courts have called the public trust doctrine a "high, solemn, and perpetual" duty.

Boundary Waters Treaty of 1909

The Treaty grants Canada and the United States, through the International Joint Commission, exclusive jurisdiction to resolve disputes over and protect the quality and quantity of surface waters of the Great Lakes and connecting waterways. As a matter of public policy and legal principle, the Treaty prohibited any further diversions of the Great Lakes unless authorized by both countries, and that even then a diversion could not "affect the natural flow or level" of the boundary waters nor interfere with domestic uses, boating, and navigation.

The Great Lakes Charter of 1985

The Charter declared that, "The water resources of the Great Lakes basin are precious public resources, shared and held in trust." The Charter carried forward the policy against diversions of Great Lakes waters, and extended it to all water resources, including tributary streams and groundwater. It also extended water management programs to "consumptive uses," meaning water withdrawn or withheld that is lost to the basin by evaporation, incorporation into products, or other processes. But it ignored standards of the public trust doctrine completely, and foreshadowed a more lenient standard found more in regulations that govern private rights not public ones. Diversions would be prohibited only where there would be "significant adverse impacts."

The Federal Water Resources Development Act (WRDA) of 1986 (amended 2000)

Recognizing that diversions of water from the Great Lakes and tributary waters would adversely impact domestic, industrial, electrical generating, the environment, and navigational uses in the basin, Congress passed a law that "No water shall be diverted or exported from any portion of the Great Lakes within the United States, from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lakes states."[7] The word "export" was added by an amendment in 2000. Then Senator Abraham sought to limit WRDA to "bulk" diversions and exports. Senator Levin and others defeated the limitation. While WRDA failed to include the public trust as a standard, the non-diversion standard is consistent with its principles.

Annex 2001

In June 2001, Annex 2001 was signed by the governors of the Great Lakes states and premiers of Ontario and Quebec to implement a decision-making standard for "withdrawals" of waters from the Great Lakes basin. Until finally implemented, the parties agreed to follow the consent requirement of WRDA and the consultation process of the Charter. The Great Lakes were found to be a bi-national treasure, held in trust by the states and provinces. But the Annex, too, abandoned public trust standards when it offered four of its own that required: (1) return flow and conservation measures; (2) again, a showing of no "significant adverse impacts;" (3) improvement of the waters and water resources; (4) compliance with state, provincial, federal laws and international treaties. Oddly, the Annex also abandoned the idea of regulating diversions altogether, choosing instead to focus only on withdrawals and impacts without regard to whether it is public or private or a diversion or consumptive use.

The Michigan Citizens v. Nestlé Waters North America, Inc. Lawsuit

Nestlé constructed a large well-field to pump, divert and sell 210 million gallons of water a year from springs and groundwater that replenish a stream and lake system that turns into the West Branch of the Little Muskegon River—water that would have flowed to Lake Michigan. Michigan Citizens filed a lawsuit claiming that Nestlé's private diversion of water for sale out of the watershed violated water law and public trust principles. Nestlé argued for a lenient standard that would allow it to divert and sell water up to the point of "significant" or "unreasonable" injury.[8] But what is meant by serious injury? After a long arduous trial, the court ruled that Nestlé's extraction of water and diversion and sale out of the watershed was illegal under Michigan property law because it diminishes the flow of a stream and two lakes.[9] If the threshold of "significant" or "unreasonable" had been accepted, as Nestlé argued, it would have shifted Michigan's water common law in favor of diversion or export of water out of a watershed up to serious levels of impact, chilling any attempts to regulate them based on takings, Commerce Clause, and international trade agreement challenges. It would also adversely impact farmers, golf course or ski area operators, and the public whose water use within watersheds would be suddenly forced to compete with those who sought to sell the water elsewhere.

The Draft Annex Implementing Agreements of 2004

The Council released its "Draft Annex Implementing Agreements" for 90-day public comment from Seattle. While there are two basic agreements covering the compact and sustainability (they are referred to in this essay collectively as "Agreement.") The governors, through their representatives and staff, met with stakeholders, in sometimes-closed meetings, to hammer out a proposed consensus. The Council's news release says the "voice of the people is a critical component." It is. Public comment can foster fresh ideas or insights, or test the waters of the Agreements themselves. While this is the first real opportunity for the general public to comment on the Agreements (drafts have been circulating since last year), it does not appear an extension will be granted.

The draft compact restates the finding that the water resources are a "public resource held in trust" by the states. Yet despite the recognition of this public trust, it has been abandoned in the Standard.

The concept of "multiple use" has resurfaced. The notion of "multiple use," built on Bentham's utilitarian idea of maximizing the greatest good for the greatest number,

The Implementing Agreements could be putting "new wine into old wineskins." As the parable warns, new wine will burst the old wine skins.

subjects the commons to the utilitarian value of competing users. Other values tend to be excluded. In practice, it means that applying multiple use ideas to a precious commons like the Great Lakes, would abdicate the precious value of the commons in favor of utilitarian ones. As a first priority, the trust and values that transcend competing uses should be placed beyond reach, or the basin's water will not meet the unanticipated needs of future generations.

The Agreement is based on the overriding goal of "protecting, conserving, restoring, and improving the Great Lakes." But the Standard in the Agreements does not accomplish this goal. The thresholds for application by the consent mechanism of the Council are one million gallons per day (gpd) for diversions and five million gpd for consumptive uses. For most proposals the consent requirement or WRDA or the Agreements will not apply. The aim of the thresholds seeks to prohibit only "bulk" diversions, but WRDA is not limited in this way. Indeed, the Senate dropped the "bulk" limitation in the 2000 amendment. A compact would effectively limit or repeal the WRDA.

Water diverted and shipped out of the basin in containers less than 5.6 liters will no longer be defined as a "diversion," but "consumptive use." Consumptive uses are not subject to the veto and consent mechanism unless it is above five million gpd, and in any event it won't apply for 10 years. There are only a few, if any, consumptive uses of water anywhere in the basin that exceed the threshold. The water marketing industry, in whatever form it takes with a world water crisis, has been handed over "liquid gold."

The Standard contains two standards, not found in WRDA, which, if adopted, will weaken WRDA and invite approval of various projects. First, the "no significant adverse impacts" standard is typically easy to show in most permit schemes in the United States. The Treaty imposed a "no affect" standard. WRDA banned diversions or exports. Under the *Michigan Citizens v Nestlé* ruling, the common law of riparian rights prohibits a diminishment of flow or levels. Public trust law, among other standards, forbids impairment and requires a public purpose. Allowing diversions or uses to the point of "significant injury" could shift property law from riparian and public trust standards in a way that would favor diversion and export. This would strengthen the hand of those out of the basin under Commerce Clause, takings, and international treaty arguments, which is contrary to goals of the Charter, WRDA, and the history of existing law and policy.

Second, the standard allows for an "improvement of the water or water-dependent resources." The improvement is not necessarily required to be made to offset the harm (less than "significant" but enough to require improvement) at the site of removal. Improvements elsewhere may be substituted for impacts to the persons, environment, or community where the water is removed.[10] Wetland mitigation or "no net loss" of wetlands ideas have had a dismal record. Such trading, like "bubble" trading in the air business, tends to treat the environment or a commons as a balance sheet without regard to real long-term or even immediate impacts.

The Charter, Annex, and Agreements rightly recognize that Great Lakes basin waters are a "public resource held in trust," but the public ownership and public trust are given lip service. As indicated above, the Standard weakens the public trust. Anyone with a true interest in preserving the water of the basin should incorporate the public trust doctrine as the basic line of protection.

There are some positive parts of Agreement. It moves toward conservation principles, although not strictly enough. It ties multiple levels of national and state governments to one mechanism and process, and requires notice, consultation, public participation, and

consultation with tribes and first nations. Judicial review and enforcement mechanisms are established, although in some instances court access is hampered by an exhaustion of administrative remedies hurdle and a short fuse (90 days) for filing lawsuits. Compliance with state law is required, but it is not clear how courts will respond if diverters claim the compact has modified or repealed state or other legal standards under doctrines of express or implied preemption; courts have the discretion to refuse to apply state standards that are more strict if it finds the federal law, or in this case a compact, has occupied the field. And, while a state can veto a diversion, if five of the eight states don't like what is going on they can "terminate" the compact Agreement altogether!

The Implementing Agreements could be putting "new wine into old wineskins." As the parable warns, new wine will burst the old wine skins. Out of fear of proposed diversions to America's western states and adverse impacts from withdrawals due to over-consumption, the 1985 Charter charged the states and provinces to implement regulations to manage "consumptive uses and diversions of basin water resources." Since that time, a world water crisis looms far beyond 1985 concerns. Investment or trade agreements, like NAFTA or WTO, have been signed. Science and technology have advanced. Global warming and climate change are no longer speculation, although their effects remain, alarmingly, unpredictable.[11] The value of water is worth more than a gallon of oil. Life can survive without oil, but not water. Ownership of water may well trump oil in terms of our national and international security.

Great Lakes Diversions and Democracy

Beyond impacts, this Great Lakes basin water issue goes to the heart of citizens' liberty and freedom as members of communities that have evolved for centuries, all of them interdependent but dependent on the water as a secure public commons. The Agreement must be carefully evaluated for any risk of unintended subordination or privatization of this commons. When the commons is not respected or citizens' fundamental right to water is alienated or at the mercy of private interests, people rebel. They revolted in Bolivia, they organized in Plachimada, India to stop Coca-Cola from capturing a century old common water supply for bottles of soda pop. Citizens in Michigan and around the Great Lakes have successfully resisted efforts to remove or divert water that would shift property rights in favor of claims of private ownership of water. Does the Agreement allow for the possibility that others could turn communities into vast water farms to serve a global economy in which citizens have little say?

There is also a dimension that involves ethics. A first principle of ethics is "do no harm." But when it comes to water, it may be even more than ethics. Ontologically, just what is the beingness of water? I don't pretend to know the answer to this question. It is not necessary. What is necessary is to give room and life for this beingness, and all that this entails, in the Implementing Agreements so the most basic dimension is respected.

Notes

1. Cooley, Thomas, Cooley's Blackstone, Vol I, Chpt 2, p. 16.
2. *Shively v. Bowlby*, 152 Us 1 (1894); *Arnold v. Mundy*, 6 N.J.L. 1, 71 (1821).
3. *Arnold v. Mundy*.
4. *Illinois Central Railroad v. Illinois*, 146 US 387, *aff'd* 154 US 225 (1894); Sax, Joseph, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1970);
5. *Obrecht v. National Gypsum Co*, 361 Mich 399, 412, 105 NW2d 143 (1960); *Collins v. Gerhardt*, 237 Mich 38; 211 NW 115 (1927); *People ex rel Scott v. Chicago Park District*, 66 Ill 2d 65, 360 NE2d 773 (1976);

6. Olson, *Burden of Proof: How the Common Law Can Safeguard Nature and Promote an Earth Ethic*," 20 Env Law 891 (1990).
7. 42 USC 19662d-20(d).
8. Nestlé also argued that its use was no different than any other products that needed water, but the court ruled that putting water in a bottle, where water itself is the product, is a diversion.
9. Opinion and Order, Nov 25, 2003 (Appeal pending). To read or download opinions, go to www.envlaw.com.
10. In the *Michigan Citizens v. Nestlé Waters* case, representatives of the company touted a $500,000 contribution out of the watershed or source area for stream restoration or other programs as an example of meeting the spirit of the standard.
11. Schwartz and Randall, "Imagining the Unthinkable," *An Abrupt Climate Change Scenario and Its Implications for the United States National Security* (Oct. 2003).

Pentland Response

I find Mr. Olson's essay to be both very eloquent and well reasoned. The following are a few more specific comments:

1. Mr. Olson's overall conclusion appears to be somewhat similar to mine. My overall conclusion is that the proposed agreements, if consummated in their current form could pose a significant risk to the waters of the Great Lakes. Mr. Olson suggests that the process should move forward very cautiously, and that considerable attention should be paid to preserving some very important existing safeguards. I must admit that I find many of his arguments related to the "commons" and "public trust" particularly appealing.

2. In a variety of ways, Mr. Olson contends that the Agreements would strengthen the hand of those in other jurisdictions and other countries who want to divert or export water from the Great Lakes basin. I would go even further. Whether by accident or by design, the Agreements seem to be actually constructed around a fundamentally flawed assumption that everyone in the world has the same right to Great Lakes water as basin residents, as long as they can find some loophole in a seemingly porous return flow regime. That inappropriate policy thrust probably originated with an analysis by a southwestern U.S. law firm five years ago. It has since been challenged by several lawyers who are more familiar with the legal regimes and traditions surrounding Great Lakes water and environmental management, as well as by many international trade and interstate commerce experts. Based on 40 years of national and international experience, I would suggest that a policy of essentially equal access by anyone anywhere in the world is entirely inconsistent with water management and environmental principles and practices as they are applied all around the globe.

3. Many of the very valid criticisms raised by Mr. Olson could have been avoided if negotiators had taken the year 2000 report by the International Joint Commission (IJC) more seriously. For example, his contention that, "The right to use water is a qualified one; it must be reasonable in relation to others—including respect for the water itself, its biota, and the needs of ordinary citizens" could have been better recognized by way of the IJC's ecosystem integrity requirements. Mr. Olson's concern that "Improvements elsewhere may be substituted for impacts to the persons, environment or community where the water flows" could likely have been overcome by the IJC's

recommendation of "no net loss from the area from which the water is taken..." In addition to Mr. Olson's observation that the Agreement's standard is considerably less stringent than (Boundary Waters) Treaty requirements, I would add the fact that negotiators ignored the IJC's advice that return flow should meet Great Lakes Water Quality Agreement standards, as well as the IJC's advice about avoiding the introduction of alien invasive species.

4. I would like to add to Mr. Olson's legal point that "courts have the discretion to refuse to apply state standards that are more strict if it finds the federal law, or in this case a compact, has occupied the field." Great Lakes governors, individually and collectively, presently have the legal right to veto diversions under the Water Resources Development Act. It seems to me that, once the Agreements are signed, any private interest could ask the courts to force states to exercise that veto power in strict accordance with the provisions of the agreement. Because of the amorphous and ambiguous nature of many of those provisions, the interpretations themselves are likely to end up in the hands of courts or trade tribunals. Do the basin jurisdictions really want to give up their existing veto power, and leave decisions regarding potentially irreversible diversions and water export to the vagaries of national and international judicial systems?

5. Finally, the notion of public trust is very prominent throughout Mr. Olson's essay. I would like to comment very briefly on that notion in the Canadian context. The public trust doctrine preserving the right of the public to use of water and other resources has played a central role in water and environmental protection in the United States for the past 20 to 30 years. For the most part, the doctrine has been notable in Canada only by its absence. Nevertheless, introduction of the public trust in at least two environmental protection statutes in our northern territories, plus frustrations with the limitations of other approaches, suggest that the time may be ripe for a re-examination of the concept and its broader potential throughout Canada.

Olson Response

Ralph Pentland's essay answers the question "Water for Sale?" with clear, cogent arguments that the answer is "Yes." But he offers more than argument. He offers wisdom. Where I have suggested the Agreements are flawed and a direction to correct them, such as public trust and the commons in water, he has shown why the Agreements as proposed should be rejected.

1. In Mr. Pentland's view the Agreements are a "slippery slope" to water diversions out of the basin. Given the "flexibility" of the Standard, the slope may be inevitable.

2. It would seem that an "improvement" standard (or "common benefits") concedes that even those diversions that do not violate the "significant adverse impacts" standard, would cause sufficient impacts that merit compensation in some way. What this does is to require a "balancing" between harm and compensation. Mr. Pentland suggests this creates a framework for those outside the basin to obtain approval. It should be noted that to many who have worked on environmental problems over the years, the notion of "balancing" (e.g., National Environmental Policy Act) has been a common approach for addressing both the "good" and "bad" parts of a proposed proj-

ect. Perhaps, the real problem with this approach in the Agreements is that management of water resources, or as I prefer commons, involves more than "impact," "risk," and "cost-benefit" analysis. Public water quantity issues are not the same as pollution issues, and (as I indicated in my essay) should not be put in the same wine skins.

3. Mr. Pentland, like the recommendations in the IJC Report, favors protecting the *integrity* of the ecosystem over the "benefit" or "improvement" standard. This would at least assure that values beyond trading and just impacts would be accounted for in a decision. But even this does not address the structural flaw within the Decision Standard itself. Diversion of the Great lakes water is not like reviewing a wetlands, water quality, or zoning permit. The water is a commons, a public resource, which cannot be converted to private ownership for use beyond the basin except as a privilege on consent of the states or provinces in this case. The Standard for public resource or domain requests is more like "prohibited unless"—that is, the principles of the commons, public trust, and "no affect on flows or levels"—are a more accurate test of integrity and up to the discretion of the states and provinces without threat of a private right or claim of entitlement.

4. The ranking of standards by Mr. Pentland is useful for choosing the right policy. The draft Standard should be revisited with the idea that it may not be one or the other but a combination, depending on the public or private purpose, or whether it is a consumptive use.

5. Pentland suggests that either the IJC or Nikiforuk proposals would better protect the waters of the basin than the draft agreement approach. But before these can be utilized, as indicated above, I think it is necessary to consider the nature of diversions. One category of diversions is the supply of water to an expanding municipality that extends beyond the boundary. Another would be as proposal to improve navigation. Another would involve diversions for private ownership and sale. The first two could be more carefully defined and treated as public projects, then measured by the IJC or Nikiforuk standards. But the latter is a totally different kind of diversion, with a different set of questions. Mr. Pentland's "no diversion" standard would fit best for these, particularly because most of the states have not addressed this question directly through legislative authorization to allow a private license to sell water.

6. The "integrity of ecosystem" standard is important. If diversions are to be judged by a separate Standard, the suggestion of following the IJC approach, building on the "flows and levels" standard in the Treaty is more reasonably related to "integrity" than the current standards. As a general rule, diversions of surface water out of a watershed that measurably affect flows or levels are unlawful under common law principles. If diversions, that reduced flows and levels, are prohibited, then this would also address the tributary groundwater problem presented by the Nestlé type of a case. It would protect "integrity of the ecosystem" from the headwaters of a stream to the Great Lakes themselves.

7. Mr. Pentland, like others, points to the political pressure (votes and the whole area of historical conflicts between eastern and western state interests). But I think, too, the world water crisis, the global economy, and how countries begin to respond and either agree or fight over water will also influence decisions considerably. The assurance of the "integrity" of the Lakes must be shielded from policies that would treat the Lakes as a "resource" to meet the needs of the rest of the world, at least for all but emergency, single-event humanitarian needs.

8. Mr. Pentland believes "the most serious problems will come about through legal challenges related to international trade agreements or the Dormant Commerce Clause."

Given the history of water battles and protectionism in general, this seems inevitable. After all, until a state or provincial law states that water is an "article of commerce," such as the U.S. Supreme Court's *Sporhase* case, it should not be considered an "article of commerce" or "private good" under either basis for such a challenge. This is even more reason to make sure the water in the basin is public, subject to public trust, and not made available as a product itself. It is also a good reason to avoid the "flexibility" problem.

9. Probably it's a lack of fully understanding the full ramifications of the "no-net loss" standard, but at present I'm not convinced that it belongs or should be included as a standard for diversions, as opposed to consumptive uses. Tying diversions to conservation of water as an "offset" seems unfair to in-basin users, the waters, and water dependent natural resources.

10. I agree with Mr. Pentland's immediate recommendations at the end of his essay. I would only add that, irrespective of public comment, the Council should be encouraged to revisit the structural approach and standards for addressing diversions and consumptive uses.

James M. **Olson**

Jim Olson has been practicing and writing about environmental law for over twenty-five years, and is a principal in the Olson & Bzdok, P.C. law firm in Traverse City, Michigan. Olson received a B.A. from Michigan State University, J.D. from Detroit College of Law, and LL.M. in environmental and law from University of Michigan Law School, concentrating on the law of publicly owned resources. In 1998, Michigan Lawyer's Weekly named him "Lawyer of the Year."

He and his firm have been involved in trial and appellate court decisions that have resulted in significant protection of water resources, wetlands, wilderness, rivers and lakes (including the Great Lakes) and the public trust, and a balanced approach to environmental regulation and takings of private property. He has also pioneered citizen suits in the development of law under Michigan's environmental citizen suit.

Currently, Olson represents Michigan Citizens for Water Conservation, who recently won a landmark lawsuit against Nestlé's Waters North America, Inc., in which the trial court ordered the company stop pumping and diverting water for sale out of a watershed and Great Lakes basin because the operation violated basic principles of water law and the integrity of riparian streams and lakes.

Ralph **Pentland**

Ralph Pentland is currently president of Ralbet Enterprises Inc., where he is active in consulting on a variety of water and environmental policy issues. From 1978 to 1991, he was Director of Water Planning and Management in the Canadian Department of the Environment. In that capacity, he was responsible for negotiating and overseeing numerous Canada-U.S. and federal-provincial agreements and arrangements, and was a prime author of the Federal Water Policy that was tabled in Parliament in 1987.

With respect to Great Lakes issues, he served as Canadian Co-Chairman of the International Joint Commission's (IJC) International Great Lakes Diversions and Consumptive Uses Study Board (1978-1982), the IJC's Great Lakes Water Uses Study (1999-2000), and the IJC's International Great Lakes Water Uses Review Task Force (2002-2003). Since 1991, he has worked on water and environmental policy issues in a number of countries, including Canada, the United States, Venezuela, Indonesia, Poland, China and India.

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TROUBLED WATERS:

5 Things You Should Know About The Annex

The Council of Canadians has serious concerns that the Great Lakes Draft Annex 2001 will jeopardize the well being of our Great Lakes, the largest freshwater ecosystem in the world and a drinking water source for one third of all Canadians. This new agreement leaves many reasons for all Canadians to be concerned.

1. Allows for new, large-scale water withdrawals

There is nothing in the Annex that restricts how much water can be withdrawn from the Great Lakes. With only 1% of the Great Lake waters being renewed every year, the science is still out on whether or not we are already consuming more than can be sustained. Our Great Lakes cannot be protected by an agreement that allows for new water withdrawals. There must be clear limits on water takings, and there can be no new water withdrawals until it is determined that current water takings are not compromising the health of the Great Lakes.

2. Opens the door to water exports

The Annex makes no distinction between water uses inside the water basin and water uses outside the Great Lakes ecosystem. By avoiding this distinction the Annex leaves the door open to long-distance water removals and even water exports.

3. Undermines Canadian jurisdiction

The Federal government has a responsibility to protect Canada's international waters. By allowing Ontario and Quebec to enter into an agreement with U.S. states, the Annex could undermine Canada's share of control and responsibility over Great Lakes waters, and all of our shared waters as a result. The Canadian government must take action by condemning the Annex and referring the matter to the International Joint Commission, where Canada and the U.S. have an equal seat at the table.

4. Marginalizes water conservation

Conservation principles in the Annex will only apply to new water takers, and will not be monitored or enforced. It has been estimated that if current Great Lakes water users implemented water conservation principles, there would be sufficient water savings to offset new water usage in the area for almost a decade. Tangible water conservation measures should be mandated for all water takers from the Great Lakes, and should be strictly enforced.

5. Ignores public concerns

To date there have been minimal opportunities for legal experts, indigenous peoples, environmentalists and concerned citizens to review the implications of this landmark agreement. With nothing more than a 90-day comment period during the summer months, it is feared that this crucial agreement will be pushed through with little or no scrutiny. Before implementing the Annex, a more extensive public consultation is required.

We must ensure that any agreement safeguards the Great Lakes as a public trust; protects Canada's share of control and responsibility over the Lakes; establishes limits on water takings from the Great Lakes Basin based on sound science and the precautionary principle; closes the door to large-scale, long-distance water diversions; and enforces water conservation for all users.

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PRESS RELEASE
FOR IMMEDIATE RELEASE **SEPTEMBER 20, 2004**

Great Lakes Annex condemned by Council of Canadians

TORONTO - The Council of Canadians will join with citizens in Toronto today to stop the Great Lakes Annex. We are calling on the federal government to prevent water diversions and to assert Canada's rightful jurisdiction over the Great Lakes.

Council of Canadians National Water Campaigner Sara Ehrhardt will be presenting at the public consultations, to be held in Toronto this evening.

The Draft Annex 2001 has been widely criticized for enabling the diversion of Great Lakes waters and jeopardizing the largest freshwater ecosystem in the world.

With only 1% of the Great Lakes waters being renewed every year, the science is still out on whether we are already consuming more than can be replenished. Experts warn that if implemented, the Annex could lead to an environmental disaster.

Under the Annex, Canada will not be able to prevent water diversions, regardless of their duration, scale, or impact on the Great Lakes.

Only the government of Canada has the jurisdiction to negotiate and enter into agreements with the United States. The provinces, and therefore Canadian concerns, are sidelined in the Great Lakes Governors' negotiations.

"This agreement undermines Canada's jurisdiction over the Great Lakes and erodes our authority over this shared resource," says Ehrhardt. "This is nothing more than a US scheme to drain our Great Lakes dry."

According to Steven Shrybman, an international trade lawyer, the Annex also could not withstand challenges from the North American Free Trade Agreement (NAFTA) and could increase our exposure to international trade disputes.

"By allowing the Great Lakes Governors to push the Annex through, our federal government is abdicating its responsibility to protect Canada's shared waters and is allowing US economic interests to set the agenda for Great Lakes water management," says Eduardo Sousa, Ontario regional organizer for the Council of Canadians.

"Why is our federal government remaining silent while the provinces rubber-stamp what is clearly a unilateral US water grab?" asks Ehrhardt. "Paul Martin must stand up in defense of Canada's water and sink the Annex."

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