Great Lakes United

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

Statement to the Standing Committee on the Environment and Sustainable Development from the Canadian Environmental Law Association and Great Lakes United on the Great Lakes Charter Annex

Summary

The Canadian Environmental Law Association and Great Lakes United support the efforts of the Provinces and States to entrench long overdue Great Lakes water protection in a legally binding environmental protection framework set out in the two draft Annex agreements released for comment in July 2004. We have requested a considerable number of changes to these drafts to strengthen them so that they will be more equitable, effective, enduring and fair.

We are grateful for the invitation to appear before you today. We hope to address questions that have been raised about these agreements in your previous committee hearings and outline our belief that the Annex in combination with measures taken by the Federal Government of Canada will stop leaks, wastage and future diversions from the Great Lakes. Strong federal, provincial, and state action are all essential to full protection of the entire Great Lakes - St. Lawrence River ecosystem. This can be done without causing conflicts with existing agreements, treaties or laws and without encroaching on the sovereignty of any jurisdiction.

Background

The Canadian Environmental Law Association (CELA) is a public interest legal clinic that provides legal advice and representation to the public and has a mandate that extends to environmental law and policy reform. CELA has been involved in Great Lakes water management and protection for over 30 years. CELA written and published popular reports and made many submissions to governments on water protection and sustainability and has carried out law reform campaigns to strengthen Great Lakes and Ontario regulation.

Great Lakes United (GLU), founded in 1982, is an international coalition dedicated to preserving and restoring the Great Lakes-St. Lawrence River ecosystem. Great Lakes United is made up of member organizations representing environmentalists, conservationists, hunters and anglers, labor unions, community groups, and citizens of the United States, Canada, and

First Nations and Tribes. The Great Lakes United Sustainable Waters Taskforce has worked with member groups to develop policies and resolutions on local water conflicts and to improve water management regimes in the Great Lakes Basin.

Both organizations were involved in efforts to strengthen the Great Lakes Charter as early as 1984 and have been involved in opposing each of the seven harmful large U.S. withdrawal and diversion proposals originating from the US side of the Great Lakes after the signing of the Charter in 1985. We also actively opposed both significant Ontario withdrawal schemes since the Charter, the GRAND (Great Recycling and Northern Development) Canal proposal and a proposal to divert water from Georgian Bay to York Region. In 1997, CELA and Great Lakes United (GLU) received standing in the Ontario Court of Appeal. The Appeal was to consider the permit given by the Province of Ontario to the Nova Group to export bulk water in ships from the Canadian waters of Lake Superior to the Orient. As the result of negotiations with the Government of Ontario, that permit was withdrawn before it established a dangerous precedent.

In our 1997 publication "*The Fate of the Great Lakes~Sustaining or Draining the Sweetwater Sea?*" CELA and GLU chronicled the continuing problems with Great Lakes water management after the Great Lakes Charter. We have provided copies of this report as supplementary materials for you today. Some of the report's findings are, as follows:

- Decisions on water diversion proposals between 1985 and 1997 were purely political and did not protect the environment;
- Although the Provinces received notice of U.S. diversions over 5 million gallons (19 million liters), they did not have a direct role in decision-making on those diversions;
- The report accurately predicted that communities adjacent to, but outside, the boundaries of the Great Lakes Basin would be turning to the Great Lakes for their future water supplies;
- Little was done by the states and provinces after they signed the Great Lakes Charter to reduce water use and wastage within the Great Lakes Basin;
- The Great Lakes States may not have the powers to refuse a request from the thirsty U.S. southwest states; and
- Data gathering in the region on current water use is inconsistent and incompatible and has not led to reliable sound science on the cumulative and individual impacts of the waters already being taken from the Great Lakes.

Our report concluded that it would be unconscionable to continue with the status quo. This is why CELA and GLU have participated for the past three years on an Advisory Committee to the Governors' and Premiers' representatives negotiating the Annex drafts. This is also why we will continue to work to strengthen the two draft Annex 2001 agreements. We agree with the Ontario government that the status quo is no longer an option.

Even though Ontario, Quebec and the Canadian Federal government have moved to prevent diversions from Canada, we have to remain involved to ensure that protection is put in place on the U.S. side of the Great Lakes.

The Canadian Federal Government and the Annex

When many of these problems received attention after the Nova Group proposal, CELA concurred with the legal opinions of the Canadian Government that formed the basis of the Governments three- part strategy.

Central to the Federal government strategy was the conclusion that an outright ban of diversions could result in trade challenges by evoking Chapter XX of the GAT. Entrenching both federal and provincial protections over their distinct areas of jurisdictional responsibility would be the wisest and best defence against harmful and opportunistic bids for our waters.

1. The International Joint Commission (IJC) was called upon to conduct a reference on the future challenges for the sustainability of the waters of the Great Lakes. The recommendations of the IJC were welcome ones. They provide a roadmap to protecting the Great Lakes from future uncertainties. Provisions of the Annex are addressing most of the IJC recommendations to the Provinces and States. CELA and GLU maintain that the wheels that the federal government set in motion will become mired and stuck if the two Canadian Provinces and eight U.S. States fail to implement these agreements. Huge areas of the Lakes will remain vulnerable to future diversion proposals.

2. The Government of Canada also passed the *Boundary Waters Treaty Act Amendments* giving the Minister of Foreign Affairs and Trade powers to veto
future diversion proposals in **Canadian** Boundary waters. These powers however do **not** cover proposals coming from the U.S. side of the Lakes. Critics of the Annex have implied that the Agreements may be in conflict with the Boundary Waters Treaty of 1909. It is our belief that the Annex and the Treaty are compatible and that the Annex addresses weaknesses and limitations of the Treaty. The Federal government has jurisdiction over boundary waters, shipping, trade, fisheries and provision of waters to First Nations and to federal facilities. When the Boundary Waters Treaty of 1909 was passed, it included a hierarchy of uses. At that time little was understood about the environment and ecology of the Great Lakes. The Treaty is silent on the environment. The Annex is intended to address the Provincial responsibilities for the day to day allocation of water for drinking water and sewage treatment, agriculture, industrial use, manufacturing including food and beverage production and emergency response like fire fighting. The focus of the Annex on environmental criteria offers us long overdue legally-binding environmental protection

tools. The Treaty provisions with the Annex protect all of the uses and all of the waters making up the Great Lakes ecosystem.

3. The final piece of the federal government strategy was to seek a Federal-Provincial Accord to prevent bulk water export. Not all provinces were willing to enter into such an accord. However, Ontario and Quebec acted to further protect the Great Lakes. Ontario passed a law that prohibited water transfers out of the major water basins in the Province. New source protection legislation with a watershed management focus is expected in 2004. It will include strengthened Ontario 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.

These combined actions make it highly unlikely that future Great Lake diversion proposals will originate from the Canadian side of the Lakes. However, it is still likely that a proposal for a large Canadian withdrawal for domestic use could be subject to an Annex review. However, further steps are necessary to increase protections on the U.S. side of the Lakes.

Protecting the ecological integrity of the Great Lakes St. Lawrence River ecosystem requires participation of all ten jurisdictions in future decision-making. Ontario and Quebec need to be at the table for this to happen.

U.S. Weaknesses Make the Region Vulnerable

The current US Water Resources Development Act (WRDA) gives any one Governor the power to veto a diversion proposal. Some maintain that this is adequate protection. We have learned that most experts have little confidence in WRDA standing up to a legal challenge. It may be contradictory to the commerce clause of the US constitution. This clause makes water an article of commerce and has been evoked by the U.S. federal government to compel states to share water beyond their boundaries. It also does not cover all the waters of the Great Lakes Basin because it excludes groundwater, the source of several high profile debates over the siting of water bottling plants in the U.S.

Outright bans of water export in the U.S. would likely also violate the commerce clause. This is why the states have chosen to legally bind themselves to each other in the Draft Great Lakes Water Resources Compact. It gives them strength in numbers, allows them to jointly administer their obligations to review proposals, collect data and implement conservation provisions. The Compact Agreement makes it less likely that the U.S. Federal Government will interfere with state decisions. In Canada the Great Lakes is considered a national concern as it provides drinking water to a quarter of our population. In the U.S. the Great Lakes are viewed as a regional issue concern. The Region recently lost nine seats in Congress due to

population shifts to the arid southwest. We should not underestimate the value to the States of the ability to bring international support to the region through the Great Lakes Sustainable Water Resources Agreement.

CELA and GLU support the choice of going forward with two Annex agreements, the legally-binding Great Lakes Water Resources Compact and the non-binding Great Lakes Sustainable Water Resources Agreement. After years of discussion, we agree that this is the best way to preserve the sovereignty of all jurisdictions while overcoming constitutional barriers to governments binding themselves in laws across borders. We would expect that Ontario and Quebec will bind themselves to the Great Lakes Basin Sustainable Water Resources Agreement by incorporating its important provisions into their provincial water protection laws.

The Annex Agreements are not only setting out to prevent harmful withdrawals from the Great Lakes. They are building a system to better understand and improve water management decision-making within the Basin. Most critics of the Annex have ignored these provisions, set out in Chapter 3 of the Great Lakes Basin Sustainable Water Resources Agreement. CELA and GLU supports them because they require for the first time that each of the ten jurisdictions initially report on all water allocations and management programs in order to establish a baseline. They prohibit harmful intra-basin diversions (from one Great Lake to another). Subsequent annual reports will be reviewed by all ten jurisdictions making up the Regional Commission for compliance with the agreements' environmental and conservation requirements. This will give Canadians a direct role in monitoring and commenting on any lack of progress in water protection in the U.S.

While Ontario and Quebec have already acted to strengthen their water allocation systems, many of the U.S. States have not acted since the Great Lakes Charter. They will have much more work to do to comply with requirements set out in these agreements. Indeed, Ontario is leading by example because they require that all withdrawals over 50,000 liters (13,800 U.S. gallons) are examined under their permit to take water regulations. The public is given advance notice of these permits on the Environmental Registry and they are able to comment on permit applications.
Many of the U.S. States do not have permitting systems but simply register water allocations. This means they have no way to impose terms and conditions on withdrawals. With the exception of Minnesota, no Great Lake state requires reviews of water withdrawals at the low quantity levels that Ontario does. CELA sees these Agreements as a way to compel the States with weak water management regimes to strengthen their regulations over time and for the Provinces to have a role in seeing that progress is made. However, this does not mean that Ontario will be required to lower their standards.

The agreement explicitly states in Chapter 7, Article 701(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."

As well it does not mean that there will be conflicts with the Boundary Water Treaty Act of 1909. Chapter 7, Article 702, states that:
"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."

The burden of proof in the Annex is sufficiently high for applicants and will result in few, if any approvals, ever being granted. The fact that compliance is required with **all** of the Annex environmental standards as well as consensus of all ten jurisdictions will be a major deterrent to an applicant for Great Lakes water. The existence of these two Annex Agreements will let the world know that the Great Lakes are not for sale.

Without these Agreements, Quebec and Ontario will continue to be sidelined in decisions on diversions from the Great Lakes. If we continue to pass up chances to entrench protection and make our own use of the Great Lakes sustainable we can be assured of many more diversion proposals and challenges. It is very likely that our cumulative everyday use of the Great Lakes, rather than a single diversion, will be ultimately where the harm is done to the integrity of the ecosystem and all creatures and enterprises dependent on their waters. We will have failed others in an increasingly water short world if we do not do everything we can to sustain one fifth of the world's fresh water. Others already put us to shame with their conservation and water efficiency practices.

The only other alternative we have now to challenge a U.S. diversion would be to try our luck in the U.S. Courts something that has proven unsuccessful for us. The recent NAWS decision between North Dakota and Manitoba has demonstrated this. For years the Canadian Government has written diplomatic notes about the regulation of the Chicago Diversion, the most likely site for future increased diversions out of the Great Lakes. However the volume of this diversion has been regulated by decree of the U.S. Supreme Court. It is unlikely Canadians would be given standing in the U.S. Supreme Court.

Recommendations to Strengthen the Annex Agreements

In the spirit of taking an ecosystem approach, CELA and GLU have worked over the past three years with a coalition of 10 other environmental groups across the Great Lakes-St. Lawrence River Basin to submit hundreds of pages of commentary on questions arising from Annex negotiations. We will be submitting two further documents to you that include detailed

recommendations we are making to strengthen the two drafts before us. These are consistent with the input we have submitted to date. We are very concerned that there have been other sectors involved in this process that would like to see any progress on entrenching further water protections in the Basin fail. These interests have benefited from unfettered access to cheap Great Lakes water and sometimes have returned their wastewater in a degraded and altered state.

We regret that much of the debate in Canada on the Annex seems to have caught many by surprise even though the Governors and Premiers announced the intent and scope of the Annex undertaking three years ago. Since the comment period on the Annex has closed, the Council of Great Lakes Governors has received 10,000 submissions. In Canada, we may have lost a huge opportunity to take positive steps toward sustainability because the debate here took on a different character.

The debate in Canada has predominately questioned the feasibility of the existence of the Annex and any cooperative water management with the U.S. It is as if the public has been unaware of the diversions that already have gone ahead since the 1985 Charter and the routine water allocations made with no limits or conditions in the Great Lakes Basin. The jurisdictional confusion over who is responsible is emblematic of the breakdown in communications between the provincial and federal agencies responsible for the Great Lakes.

In the time left to us we will try to summarize the most important changes we have requested to strengthen these two draft Agreements. They include:

- Trigger levels need to be lowered to be in line with best practices in the basin;

- Language between the Great Lakes Water Resources Compact and the Great Lakes Basin Sustainable Water Agreement needs to be made consistent;

- The ten-year implementation timeline is not acceptable. Five years or less is more realistic;

- On-going conservation commitments for the Great Lakes jurisdictions need to be strengthened;

- The 12-mile exemption provision should be excluded;

- The jurisdiction of origin for a diversion or large withdrawal proposal **shall** consider the outcome of the international review;

- First Nations and Tribes must be included in the consensus building framework of the two agreements;

- Averaging periods should revert to 30 days set out in the Great Lakes Charter from the 120 days proposed in the current drafts; and

- Proposals for future increases of the Chicago Diversion should be subject to review under these Agreements.

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Submitted November 18, 2004

Sarah Miller
Water Researcher
Canadian Environmental Law Association
130 Spadina Avenue Suite 301
Toronto, Ontario
M5V 2L4
416) 960-2283 ex 213
millers@lao.on.ca

Derek Stack
Executive Director
Great Lakes United
Buffalo State College
Cassety Hall
1300 Elmwood Avenue
Buffalo, NY, 14222
716) 886-0142
drstack@glu.org
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