CELA Submissions on the Great Lakes Annex Agreements
October 18, 2004

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

October 18, 2004

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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.

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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.

<u>Areas of Controversy</u>

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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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.

Sarah Miller
Water Policy Researcher
Canadian Environmental Law Association

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 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 usc 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.