

## MEMORANDUM

To: Great Lakes Environmental and Conservation Organizations

From: National Wildlife Federation

Date: October 10, 2005

Re: Council of Great Lakes Industries and National Wildlife Federation Proposed Great Lakes Basin Water Resources Compact

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After four years of negotiating to make the principles of the Great Lakes Charter Annex 2001 binding in law, the states and provinces have nearly given up. Their deadline (extended several times) is December of 2005. Although self-imposed, external events make that deadline realistic; many of the states' governors may turn over in 2006, and if the process is not complete by then, it is likely that it will be dissolved. At the last meeting of the government negotiators in September 2005, several key state delegations announced that in the absence of an agreement, they would only attend one more meeting in October. If substantial progress is not made towards an agreement at their meeting this week (October 11-14, 2005), it is likely that negotiations will fall apart and there will be no agreement at all.

In a last act of desperation, the government negotiators notified NWF and the Council of Great Lakes Industries (CGLI) that if they could compromise and negotiate a detailed agreement on how to make the Annex principles binding, then the governments might be able to make it work. Based on that request, NWF and CGLI began discussions with each other a few weeks ago, and last week began informing others in our respective coalitions of some of the details of our efforts. Throughout our discussions with industry, NWF kept this summer's public comment results in mind, and in the later stages of discussion we consulted frequently with leading environmental groups, attempting to address ENGO concerns while finding a viable compromise with industry.

Late yesterday, NWF and CGLI reached agreement on all outstanding issues in the Compact. The Annex government negotiators received the proposed Compact yesterday evening. We do not know what their reaction will be to our proposed changes. It is unlikely that they will accept our proposal wholesale, and it remains possible that they will ignore it completely.

In our negotiations, NWF tried to 1) remain true to the principles of Annex 2001, 2) not weaken existing laws, and 3) improve protections for the Great Lakes. While we are not enthusiastic about every provision in the proposal, on balance we believe the proposal secures significant improvements over the extremely limited protections provided by existing law. However, we are aware that it is not as substantial an improvement as we originally hoped for and thought it was possible to achieve.

For your convenience, we have prepared a list of the major issues addressed through our negotiations, what the current law provides, what the proposed negotiated Draft Compact would provide.

### **General Framework:**

- (a) This negotiated agreement is for the Compact only, not the Regional Agreement. After an initial exploration, NWF decided that we were the wrong organization to be leading negotiations on the Agreement, and so have left that unchanged from the official June 30, 2005 draft. We pulled in certain concepts from the Regional Agreement (like Regional Review) so the Compact can stand alone. There is no agreement pending on the Regional Agreement; that still needs to be negotiated.
- (b) While this proposal looks different in a number of respects from the official June 30, 2005, Draft Great Lakes Basin Water Resources Compact, we worked to 1) remain true to the principles of Annex 2001, 2) not weaken existing laws, and 3) improve protections for the Great Lakes. While we are not enthusiastic about every provision in the proposal, on balance we believe the proposal secures significant improvements over the extremely limited protections provided by existing law. Our proposal includes:
- The same prohibition on diversions with exceptions laid out in the official June 30, 2005 Draft Compact
  - In-basin management of new or increased withdrawals that may have significant impacts on the Great Lakes basin, but using different means than those found in the official June 30, 2005 release
  - Increased flexibility for jurisdictions to implement their water management programs. In particular, establishing the quantity at which water withdrawals must be permitted is left up to the jurisdictions, but with the court-enforceable requirement that the levels that are established protect basin ecosystems
  - Very carefully crafted definitions of “diversion,” “consumptive use,” “product,” and “new or increased withdrawal or consumptive use”
  - The definition of “product” implicitly includes bottled water and therefore does not define it as a diversion under the compact, but the proposal explicitly retains jurisdictional authority to pass more stringent protections, such as banning bottled water exports
  - Retention of Regional Review for 1) proposals to divert water to a “straddling counties,” 2) movement of water between Great Lake basins (“intra-basin transfers”) that result in new or increased consumptive uses of 5 million gallons per day or greater averaged over any 90-day period, and 3) proposals for new or increased consumptive uses of 5 million gallons per day or greater averaged in any 90-day period. “Declaration of Finding” replaced with public statement of each jurisdiction’s assessment of a proposal
  - Recognition that water resources of the Great Lakes Basin are precious natural resources, shared and held in trust by the States
  - More specific requirements that jurisdictions create conservation programs designed to protect the hydrologic integrity of the basin

- Enforcement mechanisms (including citizen suits with attorneys fees) that ensure the objectives of the Compact will be met in each jurisdiction

(c) Below is a more-detailed summary of the major issues and changes. We encourage you to carefully read through the enclosed, marked-up version of the Compact, which shows all original, deleted, and new text as compared to the official June 30, 2005 release, in order to fully assess all the changes in the negotiated Draft Compact.

## **Specifics:**

### **1. Prohibition on diversions**

**Current Law:** Some jurisdictions currently have prohibition on diversions, but many others do not. There is no federal or regional ban on diversions in the United States. The Great Lakes Governors do have the authority to veto diversions under the Water Resources Development Act (WRDA). WRDA is currently being challenged by Nestle Waters in Michigan court. Without WRDA, the states do not have the ability to stop diversions of water out of the Great Lakes.

**NWF-CGLI Compromise: Same as June 30 official draft**—prohibition on diversions with exceptions: “straddling counties,” “straddling communities,” and “intra-basin transfer.” all the exceptions must meet the Standard of Review and some have to meet even more stringent requirements. The compromise retains U.S. WRDA veto.

### **2. Regulation of in-basin withdrawals and consumptive uses – Decision Making Standard**

**Current Law:** For most US jurisdictions, there are very limited regulation of in-basin withdrawals. Where these regulations do occur, there are no protective standards and decisions are not based on the proposals’ impact to the ecosystem. There are currently no region-wide standards for reviewing in-basin water withdrawals.

**NWF-CGLI Compromise:** Official June 30, 2005 draft requires permitting that meets the standards for any withdrawal over 100,000 gallons per day averaged over 90 days. The NWF-CGLU proposal sets that level as a default, but also allows states to avoid that default level by developing their own trigger levels, so long as they are based on preventing significant harm to the environment. The resulting trigger levels are subject to court challenge on the basis of their effectiveness in protecting the environment.

There are obvious pluses and minuses to this proposed change. On the minus side, 1) a simply stated level is clear and at 100,000 gallons per day relatively protective, and 2) establishing protective levels will require environmental groups to expend resources in court in some of the jurisdictions. On the plus side, 1) the jurisdictions need not expend resources permitting withdrawals that are unlikely to cause harm to the environment, such as small withdrawals directly from the lakes, and 2) the jurisdictions will be required to engage in a scientific process for determining what size of withdrawals in what kinds of ecosystems will cause harm. This science will in turn provide ammunition for challenges to both the trigger levels and subsequent individual proposals.

As in this summer's official draft, the proposal maintains a decision-making standard that includes no significant harm, return flow, efficiency/conservation (which would also apply to the applicant's existing withdrawal), and a limited restoration requirement (formerly the "improvement" requirement). The proposal includes an additional decision making standard, called in the proposal a "reasonable use" requirement that supplements, but does not replace or undermine the other free-standing standards. Return flow is required to be in-basin surface water and groundwater that meets water quality standards and does not contain invasive species.

### **3. Definitions: Consumptive Use, Product, Diversion, Treatment of Bottled Water**

**Current Law:** Jurisdictions have differed on whether they treat the export of bottled water outside the basin as a diversion or a consumptive use. Michigan has banned the export of bottled water outside the basin.

**NWF-CGLI Compromise:** The definition of "product" implicitly includes bottled water because it is defined as a food product under the Federal Food Drug and Cosmetic Act. Therefore, NWF-CGLI proposal does not define bottled water as a diversion. However, the proposal explicitly affirms jurisdictional authority to pass more stringent protections, such as banning bottled water exports. Michigan's Executive Order imposing a moratorium on the export of bottled water outside the basin is not affected by the Compact.

### **4. Regional Review**

**Current Law:** The Charter provides for notice and consultation among all the jurisdictions for large withdrawals and diversions, but this process is rarely followed and not enforceable. WRDA requires US jurisdictions to agree on diversions before they occur, but no process or standards for making decisions are provided.

**NWF-CGLI Compromise:** Similar to official June 30, 2005 draft, applying to diversions and large consumptive uses and requiring technical review, public participation, consultation with Tribes and First Nations, and meetings of the jurisdictions to discuss proposals. Regional Review has been altered so that the original nonbinding "Declaration of Finding," potentially with majority and minority opinions, is changed to a statement of opinion by each jurisdiction as to whether a proposal meets the annex standards

### **5. Intra-basin Transfers**

**Current Law:** No binding laws.

**NWF-CGLI Compromise:** As in the official draft June 20, 2005 Compact, for transfers over 100,000 gpd, must meet standards, plus show need. For transfers over 5 MGD consumptive use averaged over 90 days, Regional Review and Compact Council approval required in addition to above. Different from the official draft June 20, 2005 compact, the Compact Council can approve an intra-basin transfer based on majority vote (the original required a unanimous vote), but all transfers over 100,000 gallons must return the water to the original lake watershed (the official draft required this only for withdrawals over 5 million gallons per day consumptive use).

NWF viewed the requirement to return water as much more of a disincentive to intra-basin transfer proposals than the Compact Council voting procedure, and so consider this an improvement.

## **6. Enforcement of Standards**

**Current Law:** Both the Great Lakes Charter and the original Annex Agreement signed in 2001 are non-binding agreements and are not enforceable. Jurisdictions' enforcement of their already limited protection laws varies, but in most cases is weak.

**NWF-CGLI Compromise:** Citizens have authority to bring enforcement actions and obtain injunctions, 1) against jurisdictions for lack of or unlawful implementation of Compact and standards, and 2) against water withdrawers for failure to obtain a permit or for operation in noncompliance with one. Attorneys' fees and expert witness fees are available for suits against unlawful water withdrawers. Jurisdictions may also bring suit against each other if state programs are not being appropriately implemented. Jurisdictions may authorize civil penalties.

## **7. Jurisdiction Conservation Programs**

**Current Law:** No binding conservation programs.

**NWF-CGLI Compromise:** The official draft June 30, 2005 compact requires jurisdictions to have conservation programs but does not specify what they must achieve or by what means. In the NWF-CGLI proposed compact, jurisdictions are required to set water use goals based on protecting the environment and establish conservation programs to meet the goals. Conservation programs start out voluntary, but if no reasonable progress is made towards achieving their water use goals, then the states must implement mandatory conservation programs.

## **8. Public Trust**

**Current Law:** Common law in the states varies. Nothing binding regionally. Public trust statements appear in the Annex and Charter.

**NWF-CGLI Compromise:** A statement recognizing that the water resources of the Great Lakes Basin are held in trust by the States and Provinces. The document also recognizes that citizens of the Basin hold or share rights in basin waters and that the parties are trustees of the Great Lakes and have a duty to recognize and protect such rights in the management of these natural resources.