

Why the Canadian Environmental Law Association (CELA) is supporting new drafts of the Great Lakes Charter Annex



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This continent is blessed with over 20% of the world's fresh water. One out of every three Canadians and one out of every ten U.S. residents depend on the Great Lakes for their drinking water. Many more depend on them for their recreation, livelihood, culture and solace. We share these waters with our neighbors to the south and their fate is in all of our hands. Why then is it so hard for us to consider entering into Agreements to manage and protect the Great Lakes and St Lawrence River ecosystem?

Every time we approach these issues national rallying cries of sovereignty garner headlines that paralyze and lead to inaction. Is this chronic response preventing responsible stewardship? We now know that water will be in shorter supply for future generations of Great Lakes residents because of climate change and for an already stressed and fragile ecosystem and the web of life it supports. These Agreements give us the tools to prevent unnecessary over use and wastage that could deepen future water crises.

The Canadian Environmental Law Association (CELA) will be doing all we can to see that the latest draft Annex Agreements, released by all eight of the Great Lakes States and the two Provinces on June 30, 2005, move forward to a Fall commitment. This will allow the jurisdictions to start the hard job of adopting them into legislation. This process could take up to ten years for approvals from all eight State Legislatures and Congress. Then other Annex provisions will take a further five years to come into force. We cannot afford to go into the approaching water-short decades without Agreements that will give us tools to deal with scarcity and climate change. This is our last chance. Annex fatigue is a very real threat to these negotiations. Other important Great Lake issues demanding governments' time are already taking their attention away from these efforts.

Is CELA completely in support of all aspects of the Agreements? No, but we think they are vastly improved from the first drafts released in June of 2004. We believe that these Agreements contain enough tools to allow us to move ahead with enshrining protections from diversions and prevent our own harmful uses within the Basin. The Agreements have provisions for reevaluation of the exceptions that many find troubling and additional conditions which will act as deterrents to many of those exceptions going ahead. As well, we are confident that the Agreements are flexible enough that they could be strengthened as our knowledge of the consequences of our actions grow.

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Since the last drafts of the Agreements CELA has worked on a document to guide its evaluation of the Annex. This report *A Clear Vision for the Great Lakes Annex: Requirements for Successful Agreements* is a chronicle of our thinking on most issues that arose from the first draft, the public consultation that followed and the continuing negotiations between the jurisdictions. This report is available on our web site www.cela.ca. We hope it will assist others in considering the issues. However since negotiations among the jurisdictions are still continuing, this report has not necessarily kept pace with all of the changes.

We are very grateful to the Ontario Ministry of Natural Resources (MNR) for taking Ontarian's concerns about the first drafts seriously. MNR invited CELA to participate with others on a broadly representative Advisory Panel of 50 organizations. This panel was consulted regularly during the last seven months of negotiations to inform Ontario's position. The Panel's recommendations were repeatedly taken back to the negotiating table. Ontarians have transformed the Agreements from an evaluation system for diversions, to a prohibition on diversions. Few other Basin residents have had this level of involvement and transparency. A special parallel consultation was also set up with First Nations.

Improvements over the first drafts of the Annex and the Status Quo

The prohibition on diversions that already exists in Quebec and Ontario will be extended to the States. This is a huge gain that was hard won by the Canadian negotiators and is a direct response to the Canadian public's response during the last consultation. It would be folly to dismiss this opportunity for a ban for most diversions from the Great Lakes.

This draft has strengthened language recognizing the authority of the Boundary Waters Treaty conforming to requests made by the Federal Government in their submissions on the first Drafts. CELA does not agree with groups that hold that the Annex is a threat to the Boundary Waters Treaty (BWT). They are complimentary to the BWT. The BWT does not cover or protect the tributaries into the Great Lakes or the ground water of the watershed. These Annex Agreements plug those leaks by covering the whole watershed including tributaries, connecting channels and groundwater. The Agreements explicitly state that the authority of the BWT, the Federal Government and the International Joint Commission (IJC) are protected.

Most importantly these Agreements extend environmental - based regulation for water management to all basin Provinces and States. These standards examine the need for and alternatives to the proposed withdrawal. They ensure that:

- reasonable volumes for the activity proposed are being requested,
- they require that all water is returned to the source watershed from which it is

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taken and will not result in significant individual or cumulative harm to the quantity or quality of the ecosystem and,

- must include conservation components.

As well, when jurisdictions have stronger water management laws as Ontario and Minnesota do, these standards cannot erode those existing laws or prevent others from creating stronger laws in the future. This is a huge improvement over the status quo that has allowed diversion proposals to be approved without conditions.

Weakness in voting requirements in the U.S. compact in the first draft that required a simple majority vote have been strengthened by requiring consent by all States. Regional Review has a goal of consensus and a dispute resolution process to aid in achieving this goal.

The U.S. Compact will be legally binding on the States. Ontario and Quebec will bind themselves to the Annex by adopting its provisions within their domestic legislation. This avoids any loss of sovereignty for the Provinces.

For the first time, the States and Provinces are required to have conservation programs to minimize **existing** and future withdrawals, consumptive uses and diversions from the Great Lakes.

Yearly reports on progress are required and there are mechanisms for regular review of the water management programs of each single jurisdiction by the other jurisdictions to ensure that progress toward full Annex implementation is achieved.

The Annex Agreements commit parties to public participation and to mechanisms to allow a state or province to seek judicial review of another state or provincial decision on a withdrawal that is subject to the Standard.

The Political Reality

Although all Parties have agreed to send this agreement out for public consultation this summer, this draft is still vulnerable. It does not have the support of all the U.S. governors. This means that the parties are still struggling for consensus on some issues. In the last several months States such as Indiana that have very small slivers of the watershed within their boundaries have raised concerns about the additional ways the Annex Agreements would limit their access. While the terms of the Annex Agreements certainly should not be a surprise to them, they are likely hearing from municipalities near to or straddling the Great Lakes Basin that have just become aware of the long-term implications of the Annex on their future sources of water supply. Some of these communities have very real problems of with pollution of their

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groundwater sources of drinking water that puts them out of compliance with new drinking water standards.

This makes this public consultation period very crucial to the success of these Agreements. Do we throw out all rules because of the water problems of a few? Or do we use the new Annex tools to solve future problems while protecting sustainability? The public will need to convince the reluctant Parties that this Annex draft needs to work. With a U.S. election looming in a little over a year, we have been told it will be imperative to have the fate of the Annex settled by this fall.

Dealing with Disappointment

a. Straddling Counties and Communities

The exceptions to the agreements suggested late in the negotiations for straddling counties are troubling because they indicate that not all States espouse the need to curb water use within the Basin and their jurisdictions. CELA is concerned that these exceptions be very limited and subject to additional conditions. These additional conditions collectively need to be strong enough to have a deterrent effect and limit the number of proposals to divert water that would be approved to those with humanitarian need for drinking water.

These exceptions **will not** apply in Ontario because our laws ban diversions from the Great Lakes to other watersheds. In the other jurisdictions additional conditions are added to the environmental standard for these exceptions. The water must be for municipal potable use. There are **no** exemptions from costly return flow provisions that require applicants distant from the Great Lakes to build infrastructure to return water back to the Lakes. These costs could be prohibitive to most applicant communities. Additionally, applicants must prove there is no reasonable alternative in the watershed they are currently in - including conservation, that the return flow is only Great Lakes water and meets all water quality standards and that they have taken a precautionary approach by demonstrating their diversion will not endanger ecosystem integrity. Collectively these requirements would be prohibitively costly and difficult to meet. CELA will be asking for one additional requirement, that applicants provide scientific evidence that they are connected by groundwater to the Great Lakes watershed.

b. The Chicago Diversion

It was always understood that the Supreme Court Decree on the Chicago Diversion set up rights in law to divert Great Lakes waters that predate the Annex Agreements and the Boundary Waters Treaty. At issue is what approvals would be required if that decree needs to be altered to increase the amounts currently allowed of 3200 cubic feet per second. The Agreements state that formal input of Ontario and Quebec will

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be sought on such a modification and that Lake Michigan and Lake Huron will be treated as one hydrological body by the Agreements.

In this draft Illinois has asked for a formal exception to the prohibition on diversions and to instead manage all their Great Lakes withdrawals under the limits set by the Supreme Court decree. They would still commit to other provisions of the Agreement such as water management and conservation, data gathering, cumulative impact evaluations and provision of information. While our hands have always been tied when it comes to the Chicago Diversion, the Provinces can now be included in consideration of requests to alter that Agreement in the future. Requests from applicants other than Illinois outside the Great Lakes still would be subject to the provisions of the Annex. This would prevent the Army Corps from attempting to increase the Chicago Diversion to increase flows to the Mississippi River as they have in the past.

c. Intra-basin transfers

CELA has always been concerned about intra-basin transfers from one Great Lake to another Great Lake. Such transfers have potential to harm the areas in between by reducing their water flows and supplies. This draft of the Annex sets out a graduated set of conditions that includes more conditions for larger transfers of 19 million litres per day, fewer conditions for between 379,000 litres up to 19 million and exempts smaller transfers by leaving their approval up to the individual State or Province.

This will have implications for many landlocked communities in Ontario considering Great Lake water for future water supplies. For large transfer requests the environmental standard will apply and a regional review will be required. Applicants will have to prove that there is no reasonable alternative including conservation in the watershed where the water will be transferred. Return flow will be required of the same water withdrawn to the source lake watershed and this water must meet all water quality standards.

Medium range transfers have all the additional conditions as larger transfers except that while other Great Lake jurisdictions will be notified, regional review will not be requisite and they may elect to return their flow to another Great Lake basin.

CELA will be looking into ways that our domestic water legislation can address in-basin transfer in a manner that is more uniform and consistently protective than this staged approach.

When we weight these new agreements against the status quo, CELA concludes that they tip the scales significantly towards water sustainability. Rejection of these

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Agreements now would send us down a certain path where decisions on water use in the Great Lakes would be unilateral excluding the Provinces. Diversions would continue to be made on the grounds of political expediency not on environmental and resource protection. The Great Lakes Region would continue to lag far behind the rest of the world that treats their water as a precious and finite resource by reducing wastage and inefficiencies. Is this the legacy we choose?

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