Canadian Environmental Law Association Submissions on the Great Lakes Basin 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, coordinated 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 utilization 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.

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