Clearing the way for Action on Sustainability of the Waters of the Great Lakes-St. Lawrence River Ecosystem: Myths verses Possibilities

It is now the last lap in a 23-year effort to protect the Great Lakes and St. Lawrence River Basin from the cumulative impacts of water overuse, and large diversions and withdrawals. Congress will soon consider approval of the Great Lakes-St. Lawrence River Basin Compact. This last step follows on the passage of Compact laws in all eight Great Lakes States and in Ontario and Quebec binding the Provinces to the companion Agreement the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement signed by the eight governors and two premiers. These two Agreements cement protections that environmental and conservation groups have worked long and extremely hard for since 1985.

Why then are there still so many misleading interpretations of the intent and content of these agreements in the media? We would like to address some of these myths in the hopes that energy now being directed to painting dark scenarios can be channelled toward seeing these new Agreements strongly implemented. Panic over misplaced water threats leads to a paralysis that obscures real accomplishments and opportunities. These Agreements have given us new tools to achieve sustainability in a region that up until now has been a profligate water wasting region.

Water Ownership

In our increasingly water-short world, concerns abound about who "owns" water. Few would argue with the ideology that water should belong to everyone but to no one and that there should be equitable access to this basic necessity of life. The riparian system in the east in North America has always reflected and protected this.

What does this mean on a day-to-day basis for the practical challenges of water allocation to businesses that fuel our economy, farmers that grow our food, and cities that need water to function? These stakeholders all request water for their well being. It means that we now have had to seriously examine how we go about allocating the waters of the Great Lakes and set some rules about how much is too much for individual withdrawals and weigh the impacts of cumulative and consumptive uses of these waters more carefully. This is what these two historic agreements set out to do.

Bottling and Privatisation

Myth #1 These Agreements are a slippery slope and the pact(s) will set a precedent by allowing for the commercialization of water by privatizing it.

Myth #2 Critics have focused on an exemption in the Agreement that allows water to be removed for bottling by private industry as long as it is not "Bulk Diversion" and restricts it to containers no more than 20 litres in Canada or 5.7 gallons in the US and perpetuate the myth that there are no limits on the amount of containers a business can take and sell.

Much of the concern about privatisation of water has centered on bottled water as the bête noir. Users sharing groundwater in the Great Lakes have well founded concerns about its renewability and sustainability and their own future access when bottlers extract and take water permanently out of the watershed. Governments because of previous trade agreements cannot discriminate between one commercial venture over another. Other water bottlers such as manufacturers of beer, fruit juices and soft drinks are regulated on a level playing field with other users who incorporate water into their beverages and in virtually all products made in the Basin. These new agreements have responded to the public's particular concerns about water bottling by encouraging each jurisdiction to limit withdrawals for all uses by volume. The Agreement clauses that has received criticism limiting volumes to five US gallons and the twenty litre limit in Canada for bottled water operations in the Great Lakes is actually very restrictive and is based on extending the most protective standards in use in Quebec and Ontario to the rest of the Great Lakes.

These Agreements require each jurisdiction to have implementing systems that limit the amount of water bottled or otherwise withdrawn based on environmental and supply concerns. The job ahead will be to make sure each state and province restricts withdrawals based on ecological imperatives.

Ironically, despite the concerns expressed by some, residents of the Great Lakes Basin are net importers of bottled water. A study commissioned by the International Joint Commission found in November 1999 that.

"Analysis of the bottled water industry indicates that when intrabasin trade in bottled water is subtracted from the total trade, the Basin imports about 14 times more bottled water than it exports— 141 million liters (37 million gallons) in 1998 imported vs. 10 million liters (2.6 million gallons) exported. At this time, bottled water appears to have no effect on water levels in the Great Lakes Basin as a whole, although there could be local effects in and around the withdrawal sites[19]."

The greatest tool to limit bottling of Great Lakes water is to decrease dependency and demand for that water.

Myth #3 These Agreements lead to water being exploited for profit and not protected in the public trust.

Exploitation is a loaded term. Humans have settled by water to have access to and use of that water and there is no activity in the Great Lakes that is not somehow dependant on water. Many feel that the true value of the resource should be charged for water. Our needs for improved water management and protection come with a huge price tag. Governments endeavour to protect water from private ownership by not charging for water but for the services inherent in providing clean water to users. For instance Ontario's water permitting system charges fees based on use of water but not for the water itself. Those of us in cities pay for the high cost of treating and distributing water while rural residents with wells are expected to pay for testing and maintenance of well water protection.

Clauses of the Compact have several provisions that explicitly uphold the public trust doctrine that has been used to protect water resources in the US courts. Article 8.2 states:

"Nothing contained in this Compact shall be construed as affecting or intending to affect or in any way to interfere with the law of the respective Parties relating to common law Water rights."

"An approval by a Party or the Council under this Compact does not give any property rights, nor any exclusive privileges, nor shall it be construed to grant or confer any right, title, easement, or interest in, to or over any land belonging to or held in trust by a Party; neither does it authorize any injury to private property or invasion of private rights, nor infringement of federal, State or local laws or regulations; nor does it obviate the necessity of obtaining federal assent when necessary."

The implementing legislation passed in each Great Lake State and province offers many new improved tools to enhance the public trust doctrine in practice.

Myth #4 These Agreements erode the responsibility of the Federal Government and the IJC to safeguard water. These agencies are gradually being eroded, along with Canadian sovereignty.

Article 8 of the Compact has a number of provisions making it explicit that existing water rights and authorities are protected.

1. Nothing in this Compact shall be construed to affect, limit, diminish or impair any rights validly established and existing as of the effective date of this Compact under State or federal law governing the Withdrawal of Waters of the Basin.

2. Nothing in this Compact is intended to infringe nor shall be construed to infringe upon the treaty power of the United States of America, nor shall any term hereof be construed to alter or amend any treaty or term thereof that has been or may hereafter be executed by the United States of America.

3. Nothing in this Compact is intended to affect nor shall be construed to affect the application of the Boundary Waters Treaty of 1909 whose requirements with respect to boundary waters continue to apply in addition to the requirements of this Compact.

The Agreement in Article 700 has similar clauses regarding Canada which protect the rights of the Federal Government to act to protect the Great Lakes.

1. Nothing in this Agreement alters the legislative or other authority of Parliament or of the Provincial legislatures or of the federal Government of Canada or of the Provincial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada.

These protections include the Boundary Waters Treaty of 1909 protecting all shared waters between the countries which set up and gave the International Joint Commission its authorities to protect the Great Lakes. This includes the Canadian Government authorities in the *Boundary Waters Treaty Act* that give Canada the mechanisms to also ban bulk water exports.

Slippery or Not? It will be up to us.

Ignoring the new regime in the Great Lakes created by these Agreements would create a slide into unsustainable use that would be irreversible. With climate change experts in the Great Lakes telling us we must adapt now to prepare for future water shortages, we need to make up for lost time. In these two Agreements we have a way ahead to increase the resiliency of the Great Lakes through conservation, new tools to prevent bulk water exports and control large withdrawals from within the region. In these two Agreements, we have new commitments to improving our understanding of the impacts of our cumulative withdrawals, and opportunities to diminish consumptive uses. The proof of the power of these Agreements will be in how much attention is given to them rather than in crying wolf each time we try to entrench water protection.