

**SUBMISSION BY THE
CANADIAN ENVIRONMENTAL LAW ASSOCIATION
TO THE INTERNATIONAL JOINT COMMISSION
RE: WATER USES REFERENCE**

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I. INTRODUCTION

The Canadian Environmental Law Association (CELA) is a public interest group founded in 1970 to use and improve laws to protect the environment and conserve natural resources. Funded as a community legal clinic specializing in environmental law, CELA represents individuals and citizens' groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization, and law reform activities.

Great Lakes citizens and other residents of Canada and the United States are in a unique and enviable position in the world. We are stewards of an enormous amount of the planet's fresh water and fresh water ecosystems. However, situated in the northern hemisphere, North America's water resources are predicted to be seriously affected by climate change. Furthermore, only a tiny fraction of the Great Lakes fresh water is renewable. As a resource rich country, much of Canadian industry is water intensive and water dependent. These industries significantly contribute to the fact that Canadian per capita water use is among the highest in the world.

We are now at an historic threshold. Will we take a path toward ecosystem unsustainability and loss of our ability to protect the ecosystems of our natural waters? Or, will we choose differently? Will we insist that water is a basic human right and that in North America we will work towards ensuring that water will no longer be wasted and polluted nor ecosystems degraded and destroyed by removing water or diverting it?

Public opinion at the International Joint Commission Reference hearings was clear. The overwhelming majority were opposed to the large scale removal of Great Lakes waters. The following comments provide CELA's submissions to the I.J.C. regarding the Water Uses Reference, in response to the Interim Report and recent developments in Canada.

CELA's submission will first address the need for a conservation approach and avoidance of wasteful consumptive uses to all water management issues in the basin. The rationale for that approach in both environmental and trade terms will be outlined, and specific suggestions as to the nature and content of a sustainable water strategy will be discussed. The impacts of water removals on aboriginal peoples and the need to respect their constitutional and legal rights will

¹This submission was prepared by CELA staff Paul Muldoon, Sarah Miller, Theresa McClenaghan, and Kathleen Cooper. Portions of this submission are based on previous briefs and presentations prepared by CELA in 1998 and 1999 including the above CELA staff, as well as former CELA articling student Paul McCulloch. A partial listing of these briefs is provided in the Appendix.

be briefly stated. CELA then comments on the recent Canadian federal government announcement to amend the *Boundary Water Treaty Act* (Canada), as well as the recent Canadian federal-provincial attempt to negotiate an accord for the prohibition of bulk water removal from drainage basins. CELA then provides specific comment and response to the IJC's Interim Report to the Governments of Canada and the United States, Protection of the Waters of the Great Lakes and makes suggestions as to the IJC's final report on the Reference.

II. NEED FOR A CONSERVATION APPROACH: AVOIDANCE OF WASTEFUL CONSUMPTIVE USES

The first component of any water policy for Canada must start with conservation. This section outlines both the rational and elements of such a policy.

A. RATIONALE

1. Environmental Reasons

Canadians are among the most wasteful users of water in the world. The average citizen uses more than 300 litres per day, more than any country other than the U.S.² In addition to withdrawals from major bodies of water, it is estimated that there are over 500,000 wells in Ontario alone drawing water, with 14,000 new wells being added each year.³ One reason for the extravagant use of water is that it is cheap. Typically, Canadians are charged \$0.36 per 1000 litres of water. In comparison, Australians are charged \$1.47 per 1000 litres of water.⁴ As a result, Canadians use freshwater lavishly, do not recirculate water effectively, and do not invest significantly in developing efficient municipal water and treatment technologies.⁵ Furthermore, water has become a commodity to trade and sell like any other good. Bottled water is drawn mainly from groundwater aquifers throughout the country and much of this product is exported abroad.⁶

While Canada is by no means in danger of exhausting its immense water supplies, there are still good reasons to practice water conservation. First, water quantity is inextricably linked to water

²John Swaigen and Mark Winfield, "Water" in Swaigen and Estrin eds., Environment on Trial, p. 572.

³Ministry of Environment and Energy, 1992 Status Report, p. 70.

⁴John Swaigen and Mark Winfield, "Water" in Swaigen and Estrin eds., Environment on Trial, p. 572.

⁵*Ibid.*

⁶Ministry of Natural Resources, Water Management Business Plan (Toronto: MNR, 1996)

quality. The more water used, the more that becomes degraded or contaminated. Second, water must be transported. Whether it is piped or trucked, the transport of water requires energy and substantial investment in infrastructure. The more water used, the greater the cost of energy and of building and maintaining this infrastructure. For example, it has been estimated that Ontario's municipalities have invested over \$50 billion in water and sewage treatment infrastructure, and spend \$1.7 billion in annual maintenance costs.⁷ Third, local water shortages do occur, especially in areas that rely on groundwater. Local water shortages often have severe impacts on local ecosystems that also rely on water to sustain its life cycles. Local water shortages increase the demand to ship water greater and greater distances, even across entire watersheds. These proposals involve great amounts of money to build and maintain. Moreover, the long-term impacts on ecosystems of large-scale water diversions are not understood. For these reasons, water conservation is an important component of an environmentally sustainable way of life.

2. International Trade Ramifications

While environmental grounds dominate the rationale for a nation-wide conservation strategy, there is another reason. By mandating a national sustainable water and conservation strategy, the federal government will be better equipped to defend trade challenges aimed at accessing Canadian waters. In many of the trade challenges under the various trade regimes, there is always a dispute as to whether environmental exceptions to trade rules are justified (since some have been found to be aimed as restrictive trade practices while ostensibly labelled as conservation measures). While the trade implications should not be a prime motivating factor to further a sustainable water strategy, it does bring with it a positive side benefit.

III. NATURE AND CONTENT OF SUSTAINABLE WATER STRATEGY

As an example of a provincial effort, in early 1992, the Ministry of Natural Resources launched a "Water Efficiency Strategy for Ontario."⁸ The strategy was laudable. It promoted the principle that the users of water resources should pay the full cost for the water and wastewater treatment. It also provided for educating the consumer on water conservation matters. Despite the fact that the strategy underwent extensive consultation during its development, the strategy has not been implemented. The province does not have an operative programme to promote and achieve water conservation.

Nevertheless, the notion of a conservation strategy involving both the federal and provincial governments should be promoted.

⁷MISA Advisory Committee, Water Conservation in Ontario: Technical Report (Toronto: MoE, 1991), p.1.

⁸Ministry of Natural Resources, Water Efficiency Strategy Working Document Summary (Toronto: MNR, 1992).

A. Need for a Sustainable Water Policy for Canada

Canada should continue its efforts to further develop an effective conservation strategy and ensure that it is implemented by the year 2002.

B. Overarching Principles

All levels of government should take the following steps:

(a) make a clear public commitment to the principle that there must always be adequate quantities of clean water to support a variety of uses in the province, the uppermost being the ecological function of water;

(b) establish a hierarchy of uses of water to ensure that the most important uses are given priority over less important uses. The order of uses should be as follows: preservation of ecosystem function, provision of potable water, provision of water for irrigation, recreational, industrial and commercial uses on a proportional basis, and lastly, waste disposal;

(c) incorporate the precautionary principle as a basis for decision-making and place the onus on the party proposing to use water to demonstrate that there will be no negative impacts on the ecological function of water from that use; and

(d) develop a means of coordinating water management initiatives and decision-making among provincial bodies and with other jurisdictions.

C. Interrelated Initiatives

This approach to water policy should be supported by the following government initiatives that must be maintained on an ongoing basis:

(a) development of an ecosystem approach to water management by identifying links between water quality and quantity with land use patterns and economic activity, links between transboundary and domestic air pollution and water quality, and considering synergistic and cumulative impacts of water uses;

(b) maintenance of a monitoring network governing both water use and water quality with the information being publicly accessible;

(c) promotion of research into water quality and quantity issues, including new innovative solutions, whether they be technological, demand management or public education;

(d) publication of annual reports that outline progress in implementing the policy and those reports should be assessed by an arm's length agency such as the Environmental Commissioner's Office; and

(e) provision of adequate funding and resources to carry out these and existing programmes effectively.

D. Components of Strategy

Any sustainable water strategy must be undertaken by all levels of government. Some proposals for these components include:

1. Areas for Federal Government Action:

- (a) pass nation-wide legislation to conserve water, an exhaustible natural resource, in order to protect the life and health of humans, animals and plants, as well as to protect fisheries, migratory birds and navigation interests.
- (b) work with trading partners to explicitly exclude bulk trade in water from the World Trade Organization (GATT), NAFTA and all future international trade and investment agreements because of conservation of water resources and sustainability of ecosystem concerns.
- (c) prevent the privatization of water and wastewater services by providing municipalities with grants for infrastructure maintenance and repair with the goal of upgrading to state of the art treatment systems across the country; these grants should be tied to water conservation and efficiency targets.
- (d) fund research and appropriate technologies that promote water self-sufficiency for people living in water-scarce regions of the world.
- (e) prevent, as far as is possible, future climate change impacts on water systems, by moving immediately to uphold Canada's commitments to the Kyoto Protocol.
- (f) work with Provinces, Territories, aboriginal governments and municipalities in

furtherance of the items below in order to ensure common minimum standards across Canada.

2. Areas for Provincial and Territorial Government Action:

- (a) ensure that all citizens have equitable access to clean water in quantities to meet basic needs for drinking, food preparation and sanitation regardless of ability to pay; and thereafter establish or require the establishment of regulated fee structures for additional water usage with revenues directed to the maintenance, improvement, and where necessary, expansion of water and wastewater systems.
- (b) apply a comprehensive sector-by-sector approach to ensure that industry and agriculture apply water conservation and ecosystem protection strategies. These should include: 1) tying approvals for wastewater effluent to the achievement of water efficiency, recycling and pre-treatment targets for wastewater quality; 2) tying approvals for logging, mining, energy, land development, etc., activities to legal requirements that protect fresh water ecosystems; and 3) measures to reduce water use in irrigation.
- (c) develop and enforce sustainable groundwater management policies that: 1) require ongoing research, data collection, analysis and mapping; 2) determine the renewability of groundwater deposits; 3) limit land uses which can adversely affect ground or surface water use and function; 4) track vulnerability to contamination; 5) regulate, inspect and enforce groundwater use; 6) mandate the use of permits that are short-term and revokable if adverse effects are determined; and 7) impose a fee structure for water taken by profit-making enterprises.
- (d) require and promote the use of water efficient technologies by: 1) passing or amending relevant legislation to require manufacturers of toilets, faucets and showerheads to meet specified standards of water use efficiency; 2) amending provincial plumbing standards and building codes to require the installation of these technologies; 3) supporting research into these technologies; 4) providing funding and loan programs to enable retrofitting of homes and industry with water efficient technologies; 5) including water efficiency issues in the educational curriculum; and 6) requiring water and wastewater operators to complete training courses regarding water efficiency.
- (e) explore and facilitate the adoption of energy conservation and renewable energy sources which will not perpetuate the negative effects of climate change on freshwater ecosystems.

- (f) require, where relevant, that municipalities ensure that: 1) the provision of new water and wastewater services for land development be tied to water conservation and efficiency measures; 2) revenues collected from ratepayers for the provision of water and wastewater services be used exclusively for the operation and maintenance of these services; 3) all storm water flows be disconnected from sanitary sewer systems; 4) land development approvals be conditional on maintaining protection of ecological function and sustainable water management; and 5) land development be approved only if it can be supported by local water resources.

3. Areas for Municipal Government Action:

- (a) implement the provincially-mandated measures noted above.
- (b) adopt water rates that promote conservation while ensuring that all citizens have equitable access to clean water in quantities to meet basic needs for drinking, food preparation and sanitation regardless of ability to pay.
- (c) adopt pricing for wastewater treatment that encourages water conservation.
- (d) develop and disseminate public educational programs and materials, including information regarding water pricing.
- (e) institute water and wastewater facility leak detection and repair initiatives.
- (g) encourage the use of landscaping species and methods that consume little water.

RECOMMENDATION:

CELA therefore recommends that all levels of government in Canada take steps to initiate a sustainable water strategy based on a conservation approach, and on avoidance of wasteful consumptive uses, on the terms outlined in this brief. Similarly in the U.S., state, federal and municipal levels of government should pursue similar specific approaches.

IV. IMPACTS ON ABORIGINAL PEOPLES

Three Hundred and Fifty Thousand descendants of First Nations live in 110 nations in the Great Lakes Basin; 60% of them along shorelines. Aboriginal peoples' rights and claims are

made in both domestic and international fora, and the law surrounding the basis for those claims is still developing, both under Canadian and American domestic law and international decisions.

Canadian constitutional law provides that Canada and the provinces owe fiduciary obligations to First Nations peoples, in part because the Crown has benefited from massive land surrenders during treaty processes. Aboriginal peoples in Canada also have constitutional protection for their existing aboriginal and Treaty rights since the 1982 Constitutional amendments. This requires that the Canadian and provincial governments consider the impact of any international agreement on those First Nations' rights before making an international commitments. Similarly when enacting domestic legislation to implement international obligations, the Canadian government is constrained by the requirement to act consistently with those rights.

Many argue that aboriginal peoples in Canada have governance rights to accompany the effective exercise of their aboriginal and treaty rights. Furthermore, even where "infringement" is allowed by Canada's Supreme Court, it must be justified and one of the mandatory requirements is meaningful consultation with the aboriginal peoples affected. Many now argue that aboriginal peoples in Canada are the third level of government, with exclusive authority within their spheres of jurisdiction. Accordingly, all water negotiations among the U.S., Canada, states and provinces should give the first nations living in the basin a place at the table in order to avoid future international or domestic constitutional challenges that might arise if aboriginal peoples' interests are not reflected.

For example aboriginal peoples have told the IJC that large water transfers will adversely affect the ecosystems from which they are taken and accordingly will affect their ability to practice, enjoy and benefit from the aboriginal and treaty rights recognized in section 35 of Canada's Constitution Act, 1982.⁹

In his brief to the IJC, Chief Akiwenzie of Chippewas of Nawash stated the essential principle that we must take account of the consequences of our actions for seven generations¹⁰.

⁹Nawash Brief to IJC on Bulk Water Transfers, copy available at:
<http://www.bmts.com/~dibaudjimoh/page71.html>

¹⁰See also submission of Mike Ripley, Chippewa/Ottawa Treaty Fishery Management Authority to the Water Uses Reference Public Hearing, Sault Ste. Marie, March 22, 1999; of Rick LaLiberte, MP, Churchill River, Windsor, March 23, 1999; of Judy Pratt-Shelley, Red Cliff Band of Lake Superior Chippewas, Duluth, March 24, 1999; of Ann McCammon Soltis, Great Lakes Indian Fish and Wildlife Commission, Odanah, Wisconsin, at the Duluth Hearings, March 24, 1999 and of Anne Barnes Miller, Bad river Tribe, Odanah, Wisconsin, at the Duluth Hearings, all of whom opposed large diversions, and most of whom recited the seven generations principle.

RECOMMENDATION:

The IJC's report should stress the necessity of governments to fulfil all aboriginal and treaty obligations, to fully involve First Nations and aboriginal peoples in water management and policy decisions, to ensure adequate provision of water and wastewater services to First Nations communities in any approaches taken and to ensure the protection and restoration of aquatic ecosystems to maintain First Nations fisheries and cultural heritage.

V. COMMENTS AS TO CANADIAN FEDERAL GOVERNMENT ANNOUNCEMENT TO AMEND THE *BOUNDARY WATERS TREATY ACT* (CANADA) (NOVEMBER 1999)

The Canadian federal government in November, 1999 announced draft legislation to prohibit bulk water removals from Canadian boundary waters. It proposes to amend the *Boundary Waters Treaty Act* which covers all rivers, streams and lakes that cross Canada's international boundary with the U.S.

We would suggest that the Canadian federal government's action is a step in the right direction. On the positive side, the proposed new law is probably adequately insulated from trade challenges because it focuses on the protection of ecosystems and the integrity of water basins. It takes the approach that water in its natural state is not a "good" under international trade agreements, a position with which we agree. The draft legislation also includes tough enforcement provisions including steep daily fines, liability of officers and directors, and the ability to fine companies for the amount of any monetary benefit that they obtain from breaking the new law. However, until regulations accompanying the revised law are passed, the role of the public and of federal environmental assessment law is inappropriately unclear. It is crucial that these regulations require federal environmental assessment of decisions made under the new law to ensure both adequate environmental review and public participation and scrutiny.

We support the basic federal approach in this initiative in that it prohibits bulk water removals, wherever they may occur, inside Canada as well as on the border. This is a conservation approach; not a trade export ban approach. We agree with the Canadian federal government that the latter approach could be problematic from the perspective of trade challenges. Furthermore, a prohibition on bulk water removals deals with the true conservation issue, which is removals from the basin; no matter who is removing the water nor for what purpose.

However, the federal announcement deals only with boundary waters. It remains essential to deal with interior waters, a fact that the federal government acknowledged. The federal

proposal highlighted the need and importance for coordinated and complimentary action by provincial governments. A unified cross-Canada approach is essential and must give top priority to water conservation for the sake of ecosystem protection. This issue was on the table at federal-provincial meetings of the Canadian Council of Ministers of the Environment scheduled in Kananaskis, Alberta this week but no Accord was reached. (Further comments on the sufficiency of the proposed Accord are provided below in section IV).

The lack of a federal provincial Accord means that it is now essential that the Canadian federal government act to ensure cross-Canada protection of both boundary waters and interior waters. Another key weakness of the Canadian federal announcement is the lack of a concerted water conservation strategy for Canada. The imposition of national water conservation goals, with measures such as water efficiency standards and other conservation measures as we outline in section II and III above would assist in reducing water consumption rates in Canada. At present, individual Canadians and especially Canadian industries are the second most wasteful users of water in the world. If the Canadian federal government is serious about protecting Canada's water resources, a water conservation strategy must be a top priority.

RECOMMENDATION:

CELA recommends that the Canadian Federal Government proceed with enactment of the announced amendments to the Boundary Waters Treaty Act. However, CELA recommends that this legislation define “basin” at the individual Great Lakes basin or river watershed scale. CELA also recommends that the federal government include interior waters in this legislation and that it add a conservation component to the Act.

VI. COMMENTS AS TO THE DRAFT CANADIAN FEDERAL-PROVINCIAL ACCORD FOR THE PROHIBITION OF BULK WATER REMOVAL FROM DRAINAGE BASINS

The Draft Canadian Federal Provincial Accord for the Prohibition of Bulk Water Removal from Drainage Basins was discussed by the Canadian Council of Ministers of the Environment at their meeting in November 1999. No Accord was reached. We nevertheless provide these comments as to that Draft Accord. However, we also note that the lack of a consensus as to a Federal Provincial approach highlights the importance of additional strong action by Canada's federal government, a point we addressed above in section V.

The Draft Accord stated as its objective, to:

“Establish a Canada-wide approach for the protection of Canadian waters, by prohibiting bulk removal of surface and ground water from major drainage basins in Canada, including for the purposes of export.”

CELA recommends that this objective should be expanded to achieve the protection of Canada's water not only through prohibition of bulk removal, but also by development and implementation of conservation strategies.

CELA agrees with the preamble provisions of the Accord, portions of which are worth repeating:

- “Water is fundamental to life itself and is a precious natural resource. Wise and sustainable use is critical to protecting the security of [Canada's] freshwater resources, while promoting social, economic and environmental benefits for present and future generations”.
- “Effective water resource management must be based on sound science, a precautionary approach and an integrated response across disciplines and jurisdictions, regionally, nationally and internationally.”
- “Water flows across jurisdictional boundaries and cooperation is crucial for the conservation and protection of water and drainage basins.”
- Single and cumulative bulk removals of water, including interbasin transfers, reduce the resiliency of a system and its capacity to cope with future, unpredictable stresses,

including potential introduction of non-native species and diseases.”¹¹

CELA does have a concern about the uncertainty of the definition of “major drainage basins” in the proposed Accord. The scale of drainage basins must be appropriate for ecosystem protection. Each of the Great Lakes and each major river watershed should be treated as a drainage basin for the purposes of the Accord. Similarly, the IJC should recommend an approach that respects the integrity of drainage basins on that scale in its final report.

RECOMMENDATION:

CELA recommends that the Canadian federal and provincial governments reach immediate agreement on a federal-provincial Accord for the Prohibition of Bulk Water Removal from Drainage Basins. CELA recommends definition of “basin” at the individual Great Lake or river watershed scale in the Accord. CELA recommends inclusion of an explicit conservation strategy in the Accord, including quantified consumptive use reduction targets.

IX. “WHERE TO FROM HERE” - COMMENTS AS TO THE INTERNATIONAL JOINT COMMISSION’S INTERIM REPORT

There is much to be recommended from the Interim Reference report. Other aspects of the report need to be taken further. CELA provides its comments as to those aspects of the report that it particularly wants to commend for inclusion in the final report and for action by the relevant governments. CELA also notes those aspects of the report that should be expanded or made more specific and submits that the IJC include these in its final report.

Comments as to IJC Reference Interim Report Section 3: Water Uses in the Great Lakes Basin

- Because the Report notes that consumptive data for groundwater use are not available, and because of the importance of groundwater to the Basin population, the IJC should in its final report recommend the immediate commencement of collecting, tracking and disseminating consumptive groundwater use data. Federal, provincial and state governments should cooperate in the information gathering and should share data bases. Furthermore, the information should be made easily available to the public.

¹¹Draft November 10, 1999, “Accord For the Prohibition of Bulk Water Removal From Drainage Basins”, prepared discussion by Canadian federal and provincial Ministers of the Environment at meeting of the CCME Nov. 29, 1999. The Accord was not signed at that meeting as agreement was not reached with all of the parties.

- The IJC should in its final report recommend that governments immediately adopt specific, quantified consumption reduction targets, with specified target dates. For example, CELA recommends that water consumption be reduced by 25% compared to 1999 usage by the year 2010. Explicit responsibility for monitoring and reporting achievement of targets should be undertaken by the federal governments of both the U.S. and Canada. Commitments to take action if targets are not being achieved should be given by both federal governments up front. Specific actions must be identified immediately to achieve the targets given the possible increase of 20% over the next 20 years based on current trends in the basin as was predicted in the interim report. Actions must begin immediately to reach reduction targets as recommended by CELA by 2010.
- In light of diversions from one Great Lakes Basin to another for municipal purposes that have already occurred in both the U.S. and Canada, the IJC should recommend that federal, provincial and state governments immediately pass legislation or regulations prohibiting removals, diversions or transfers (by pipeline, tanker or otherwise) from one Great Lakes Basin to another. Although in Canada a similar approach to prohibition of bulk water removal has been announced recently by the federal government, it deals only with Boundary Waters and does not define the scale of Basins, watersheds and subwatersheds required to deal with this issue.
- The IJC's interim report notes that Canada is a net exporter of bottled water, and the United States a net importer of bottled water. Contrary to the Interim Report's suggestion that bottled water need not be treated any differently than other products that use water in their production, CELA submits that the IJC should recommend immediate commitment by state, provincial and federal governments to monitor and track bottled water consumption data. In particular, the IJC should recommend that a data base of total licenced water taking permits, geographically based, showing individual and cumulative takings for bottled water and beverages be immediately initiated by state and provincial or federal governments. Furthermore the IJC should recommend immediate implementation of an ecosystem approach by all governments to water taking permits in general. (For example such an approach was recently promised and even mandated by regulation by the Ontario government, but implementation of an ecosystem approach has not yet occurred in practice in Ontario).
- The Commission should strongly reiterate its conclusion that major diversion projects are not economically, environmentally or socially feasible. The IJC should recommend a prohibition on such projects by both Canadian and U.S. governments and should recommend that governments negotiate binding commitments to each other in that regard. (The Great Lakes Charter contains non-binding commitments in some respects on this issue, but these commitments should be extended to include federal levels of government, and should be made binding.)

Comments as to IJC Reference Interim Report Section 4: Cumulative Effects

- CELA commends the Interim Report's note that cumulative impacts are generally unforeseeable, and seldom the simple "sum" of the changes. CELA agrees with the report in that there is "a need for extreme caution in dealing with those water use factors that are within the control of Basin managers". CELA suggests that this point should be reinforced and reiterated in the final report.

Comments as to IJC Reference Interim Report Section 5: Climate Change

- CELA submits that the IJC final report should recommend that all levels of government act on the basis of an assumption that climate change will in fact occur and that the result will be diminished natural water resources in both Canada and the U.S. Accordingly all water management decisions should be made on the assumption that available water resources will decrease and appropriate margins of safety and margins of error ought to be automatically included in all such water management decisions. This includes everything from location of development to permissible quantities of consumptive uses.
- Climate change assumptions should also include a standard assumption that variability in climate will be far greater than the recent historic averages. Accordingly all decision should assume greater periods of drought; greater severity of storm and precipitation events; much greater quantities of water in flash floods and storms and faster rates of change in weather (such as occurred in the 1998 ice storm).

Comments as to IJC Reference Interim Report Section 6: Groundwater

- CELA agrees with the Interim Reports comments about the interrelationship between groundwater and surface waters, the lack of mapping of hydrogeological units, and many other deficiencies in the current state of our overall understanding of our groundwater resources. CELA also agrees that policy formation is not hampered by these research needs.
- Nevertheless, CELA also suggests, based on the identified gaps, that the IJC recommend that governments immediately act to map hydrogeological units; to support research as to the role of groundwater in supporting ecological systems; to collect information of consumptive uses; to develop methods for the identification of large ground water withdrawals near boundaries of hydrologic basins; to gather data as to the effects of land use changes on groundwater; to collect information as to direct groundwater discharge to surface water streams and to the Great Lakes; and to systematically identify natural

recharge areas.

Comments as to IJC Reference Interim Report Section 7: Conservation

- CELA strongly supports the Interim Report's note that the first step in sound management of our water resources and application of the precautionary principle is conservation. A number of our submissions have already identified these priorities. CELA agrees with the recommendation to implement the Basin Water Resources Management Program. Other specific suggestions as to a sustainable water strategy and specific actions to be taken are outlined above in section II and III to these submissions.

Comments as to IJC Reference Interim Report Section 8: Legal and Policy Considerations

- CELA submits that the IJC should recommend that the 1985 Great Lakes Charter be made binding among the signatories. Consideration should also be given to including the federal levels of government as parties.
- The federal U.S. and Canadian governments should consider modifications to NAFTA and other international agreements to formally specify that water in its natural state is excluded from the relevant trade agreements; in other words to confirm that governments may act to conserve and regulate water resources without fear of challenge under trade agreements.
- Given recent developments in Canada, (namely the lack of an Accord between the federal and provincial governments on this issue) the Canadian federal government will have to take additional strong measures, in addition to their recently announced intention to amend the *Canadian Boundary Waters Treaty Act*, so as to provide for nation-wide conservation and protection measures.
- Ontario will have to speed up its review of its long term water sustainability policies. In the meantime, it must implement its recent regulatory changes applicable to water transfers and groundwater withdrawals in ensuring that decisions are made on an ecosystem basis.
- Aboriginal peoples' constitutional and other legal rights must be accommodated and respected. Submissions made by representatives of Great Lakes First Nations to the Reference hearings universally supported prohibition on water removals from the Great Lakes basin.

Comments as to IJC Reference Interim Report Section 9: Interim Report Conclusions

- CELA agrees with conclusions 1 through 9; 12, 13, 15 through 21; and the Principles outlined in paragraph 22 of the IJC Reference Interim Report.
- As to paragraphs 10, 11, and 14, CELA's concerns are that groundwater removals are poorly tracked; diversion projects may be introduced at any time and that the legal and policy regime must be equipped to deal with such proposals; and that bottled water removals are a significant concern in that there is no systematic and sustainable regulatory approach to this industry.

Comments as to IJC Reference Interim Report Section 10: Interim Report

RECOMMENDATION:

- **CELA supports Recommendations I, III, IV, V, VI, VII, and VIII, of the Interim Report in addition to the specific recommendations and measures provided by CELA in these submissions.**
- **CELA has concerns as to Recommendation II in that the issues of ballast water, and water removal in small containers (bottled water) both bring unique and serious concerns. Bottled water has been discussed previously. Ballast water is a major concern to ecosystem health of the Great Lakes and should be strictly investigated, controlled and regulated by the Great Lakes governments, based on a common approach.**
- **CELA also has concerns that the suggested deeming provision in Recommendation II as to when removals are considered not to endanger the integrity of the ecosystem are too broad and indeterminate. Specifically, CELA submits that the preferred approach is an outright ban on all bulk removals from the basin, subject to a regulatory approach for bottled water and beverages; a regulatory approach for ballast water; and appropriate provision for humanitarian measures. Care will have to be taken with the determination and definition of humanitarian measures. For example CELA would not support use of the humanitarian exception when the beneficiaries would only be those in recipient locations who are wealthy. In any event, any humanitarian approach will have to be carefully structured to avoid treating these humanitarian removals as a "good" under international trade agreements.**

RECOMMENDATIONS:

CELA submits that the IJC reiterate most of the findings, conclusions and recommendations contained in the interim report, in its Final Report on the Reference. CELA submits that the IJC also take into account the concerns noted by CELA as to some portions of the Interim Report.

CELA submits that the IJC take into account CELA's submissions herein with a conservation approach as the cornerstone to all water management; including specific components of a sustainable water strategy, rights of and impacts upon First Nations peoples, and an effective ecosystem approach to natural waters protection.

VII. CONCLUSION

Legal issues affecting Great Lakes Waters protection have attracted an unprecedented level of public and political attention in Canada. The legal challenges are daunting and the political and public debates as to the way forward must be conducted in a well-informed and open forum. With bona fide environmental protection as the paramount consideration, and with full appreciation for the respective jurisdictional interests of all of the governments in the basin, national, provincial, state and aboriginal, it should be possible to provide good legal solutions. In Canada, the Canadian public will not countenance governments who fail to act and aboriginal peoples cannot be expected to sit by while their interests are affected without their involvement. At the same time, possible trade challenges by third party countries or by private corporations can be expected and this places even greater importance on good faith and good science as the Great Lakes players negotiate solutions.

All of which is respectfully submitted, this 3rd day of December, 1999.

Canadian Environmental Law Association Staff

Appendix -- Partial Bibliography of Prior CELA Submissions and Briefs

November 26, 1999, CELA Media Release, "Federal Government Ban on Bulk Water Removals Only Partially Closes Off Exports Threat Says CELA", copy available at www.cela.ca

November 25, 1999, CELA letter to Office of the Ontario Minister of the Environment Re: Briefing Notes on the Federal/Provincial Accord on Water

September 19, 1999, "The Water Watch Summit Declaration", copy available at www.cela.ca

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