

## Sustainable Use of Great Lakes Water: The Diversion Threat's Silver-Lining?

by Allegra Cangelosi

In the not-too-distant future, profit-making industry and water-needy regions will aggressively seek to tap Great Lakes water in order to satisfy consumption demands outside the basin. This prospect is causing serious concern throughout the Great Lakes region, both in the United States and Canada. Several recent events -- including a permit issued by Ontario last year to a venture capital firm (later revoked) allowing overseas sale of Lake Superior water, record low water levels, climate change projections, and proposals to export bulk water elsewhere in North America -- are reminders that the integrity of the Great Lakes hydrologic system is only as safe as we make it.

### **Do today's Great Lakes diversion policies hold water?**

Three policy devices govern U.S. diversions of Great Lakes water. 1) The Water Resources Development Act (WRDA) of 1986 requires the approval of all Great Lakes governors on any proposed diversion of water from the U.S. Great Lakes system outside of the basin. 2) The Great Lakes Charter of 1985, a non-binding agreement between the Canadian premiers and the state governors, urges the premiers and governors to seek each others' approval prior to granting diversion requests above a certain threshold volume. 3) The Boundary Waters Treaty of 1909 commits Canada and the U.S. to refraining from any water resource uses that would harm the waters of the other country. (Canada does not have a domestic policy equivalent to WRDA. A province may issue permits without other provincial approvals, unless the volume triggers the non-binding Great Lakes Charter or action under the Boundary Waters Treaty.)

This list of policy instruments reflects the Great Lakes community's long-standing efforts to steward its natural wealth. Yet, many are beginning to question whether the current legal and policy structures governing Great Lakes water withdrawals are robust enough to protect the lakes in the face of increasing pressure for exports and diversions. This concern is fueling active discourse in the Great Lakes region -- and legislation on Capitol Hill. Congressman Bart Stupak (D-MI) and several other delegation members jointly introduced legislation (H.R. 2595) in August to create a moratorium on water exports, pending evaluation and possibly revision of the current legal framework in order to protect the lakes and other U.S. waters. Congressman Dave Camp (R-MI) and Senator Spencer Abraham (R-MI) followed suit with a bill (H.R. 2973 and S. 1667) requiring a moratorium until the governors of the Great Lakes states develop a joint standard for approving any new diversions.

Fortunately, the discourse has been informed by a detailed legal analysis requested by the Council of Great Lakes Governors, as well as a year-long International Joint Commission reference study, still underway. These efforts raised several issues with the existing regime. For example, there is general agreement that the international charter between states and provinces governing Great Lakes water diversions must be strengthened. Many within the Great Lakes states felt that Ontario should not have been able to issue its permit without first consulting and gaining the approval of the region's other states and provinces. Simply lowering the threshold volume within the Great Lakes Charter would help, but that action alone would not suffice. The Charter, or something like it, also would need to become a legally binding instrument in order to assure adequate state and provincial input into proposed new uses of Great Lakes water. Another concern is that the WRDA provisions could be reversed by future Congresses. Thus, even the U.S. system for restricting domestic water diversions is less than a sure thing.

Both studies addressed the potential implications of international trade law on Great Lakes water management. The General Agreement on Tariffs and Trade (GATT), in particular, could prohibit a simplistic policy of "just say no to water exports" from the Great Lakes, unless it could be shown that exports harm the resource more than in-basin and domestic uses. While provisions in the GATT allow trade limitations based on equitable and credible conservation of exhaustible natural systems, jurisprudence over the matter may reflect less acceptance. Moreover, it may be virtually impossible for the Great Lakes region to design a water management system that is equitable enough to meet strict trade

requirement.

### **How should the process respond to the complexity of the Great Lakes biohydrological system?**

The biohydrological system of the Great Lakes is extremely complex. As noted above, a common standard may be developed to provide the basis for gubernatorial decisions on proposed diversions and bulk removals. Some analysts are proposing to develop an accompanying decision-support system based on a data base of biohydrologic information about the lakes. A common standard indeed would help to organize and systematize the states' decisions to approve or disapprove proposed diversions. Efforts to better chart the extent and dynamics of the system also are to be lauded and are far-overdue. However, policymakers should not design a decision-making process that is overly dependent upon the availability of a predictive model for potential economic and environmental outcomes from proposed new uses of Great Lakes water. The complexity of nature, and its dynamism, still surpasses our ability to make accurate predictions, and, I fear, it always will. Judgments about water-use outcomes ultimately will be subjective. The multiple cross-checks established in the 1996 Water Resources Development Act are the best policy response to this complexity and uncertainty. WRDA wisely requires that all eight states approve any proposed diversion outside the basin from the U.S. Great Lakes, minimizing the potential for bad judgment.

### **Who should make the decisions?**

The political subtext of "who should make the decisions" accompanies (if not dominates) any and all debate on the topic of Great Lakes water diversions. Region-based (i.e. state-level) decision-making is favored by the states, and would be required under the Camp and Abraham legislation. The International Joint Commission and the Stupak legislation do not prescribe the level of government that should be involved. Advocates of region-based decision making argue that water use is a preexisting state authority, and that local decision making will be sensitive to the sustainability needs of the resource. In fact, there are many examples of local interests sullyng their own nest; the contaminated sediments in Great Lakes Areas of Concern stand out as an example that is all too close to home. Yet, region-based decision making has to be better than that of a distant decision-maker. Moreover, the system of multiple state-level cross-checks established in the 1996 Water Resources Development Act maximizes the interest of policymakers in making water use decisions that protect the resource. Unlike decisions affecting contamination, judgments in this case are delivered through joint action by region-based officials who are elected and account able. If anything, the final scheme should comprise more rather than fewer cross-checks. Possible additions to the cross-check step would be Great Lakes provinces, and, in the context of international proposals, the Canadian and U.S. federal governments. However, if added to the mix, federal entities should never have the authority to override state or provincial decisions to prevent a diversion (except pursuant to existing authorities such as national security).

### **What are the political and what are the physical realities?**

Political and biohydrological realities can be equally intransigent. Both create parameters which policymakers must accept and work around. However, it is important to accurately differentiate between the two so that overall understanding of any water conservation strategy and its dynamics is elevated. One physical reality that may conflict with political expediency is that the enemy is not always "them," sometimes "the enemy is us." Water use management policies geared at protecting the resource must encompass both in-basin and out-of-basin uses, as both can harm the system. Decisions that seem to endow in-basin uses or domestic diversions with automatic innocuousness, while demonizing lesser out-of-basin uses, seem to mix political and physical realities and should be reexamined and restated accordingly.

### **What about the need for mid-course corrections?**

Especially in light of the unpredictability of the changing global climate and environment, approved bulk water removals and other uses will need to be subject to retrospective evaluation, review, and revisions. At a minimum, a retrospective evaluation process will be necessary to promote ever more accurate predictions of an approved diversion's impacts, as well as to promote accountability. However, it is also true that external conditions may change and make even the best predictions moot. In particular, as mentioned above, global climate change, unforeseen collective and cumulative impacts of water uses, and emerging humanitarian needs could transform over time once innocuous uses into serious threats to the sustainability