



**Submission to the Council of Great Lakes Governors
by the Council of Canadians
Great Lakes Annex 2001 Implementing Agreements**

August 30, 2005

Thank you for the opportunity to provide input on the second draft of the Great Lakes Annex 2001 Implementing Agreements. The Council of Canadians is a public interest organization that works to protect Canadian sovereignty by promoting progressive and independent national policies on fair trade, clean water, safe food, public health care and other issues of social and economic concern to Canadians.

While we acknowledge that the Agreements have improved somewhat from the 2004 documents, the Council of Canadians continues to be concerned with the content of the Great Lakes Annex 2001 Implementing Agreements and the implications they will have for the health of the environment and the communities in the Great Lakes Basin.

The Council of Canadians appreciates that some environmental groups regard the Compact as an opportunity to address the chronic neglect of water stewardship that still persists in several Great Lakes jurisdictions. While we sympathize with their concerns, we believe that the current Agreements are more likely to accelerate rather than reduce unsustainable water use in the Great Lakes Basin. Moreover, Canada's ability to manage water as a public trust depends, first and foremost, on preserving its sovereignty over water, not in deferring decision-making power to U.S. political and judicial authorities. For the following reasons, we cannot support the Governors' proposed Compact, nor their companion Agreement with the Premiers of Quebec and Ontario.

Canadian sovereign control over water

The Federal Government of Canada has the jurisdiction to be an equal partner in negotiating the Great Lakes Annex 2001 Implementing Agreements, but has simply acted as an observer in this process. This has resulted in Canada playing a very weak role in the shaping and implementing of these Agreements.

Cooperative "arrangements" are not the same as effective bi-national agreements if ultimate decision-making powers are not granted to all parties. As members of the good-faith Agreement, but not the Compact, neither Canada nor the provinces would be able to

veto water withdrawals or diversions regardless of their duration, scale, or impact on the waters of this shared ecosystem.

There is substantial uncertainty in the governance of these Agreements, including a lack of clarity regarding the parties that will be present on the Regional Body, which has been given wide-ranging powers in dispute resolution over these shared waters. The Boundary Waters Treaty (1909) mandates the International Joint Commission (IJC) to resolve transboundary water disputes and diversions affecting the natural flow of boundary waters, on either side of the border, can only occur with approval by the IJC. By empowering a Regional Body with parallel dispute resolution powers, existing international legal mechanisms have been marginalized and the formal and binding requirements of the Boundary Waters Treaty have been ignored.

Recommendations:

- The International Joint Commission (IJC) must be explicitly acknowledged as the final authority on all diversions of Great Lakes waters.
- The Federal Government of Canada must have an equal role with the other negotiating agencies in the shaping and implementing of the Great Lakes Annex 2001 Implementing Agreements.

Diversions from the Great Lakes are still permitted

The second draft of the Agreements states that no diversions will be permitted from the Great Lakes, but then lists a series of permissive exceptions to this ruling. The Decision-Making Standard is far too lenient and includes no rigorous scientific approach in its evaluation of proposals. Specifically, limiting quantities of water withdrawals on the basis of “reasonable” amounts is unscientific and unacceptable.

a) The Chicago Diversion: By far the largest diversion of Great Lakes water – the Chicago Diversion – is exempt under “Article 207 Sect 10-14.” Instead, new or increased withdrawals, consumptive uses and diversions of Basin water by the State of Illinois are to be governed by the terms of the United States Supreme Court decree in Wisconsin et al. v. Illinois et al. Under that decree, Illinois may divert 2.1 billion gallons of water from the Great Lakes each and every day. Even so, the State has consistently exceeded this generous entitlement for the purpose of providing water to ever sprawling urban development.

Instead of reining in these unsustainable practices, the Agreements would even allow Illinois to increase the Chicago diversion, so long as the U.S. Supreme Court concurs. But under the Boundary Waters Treaty, the ultimate arbiter of diversions from the Great Lakes should be the IJC, not the U.S. Supreme Court. However, the IJC can only be effective if the U.S. is willing to respect its role and obligations under the Treaty.

b) Straddling communities and straddling counties: Communities and counties in the Great Lakes Basin are given permission to divert water used solely for “public water supply purposes.” The language of this clause is vague and does not provide strong

guidelines on what exactly constitutes public water supply. The return flow provision that is stipulated for straddling communities and straddling counties within the Basin is ill defined and does not provide conservation incentives.

This exception is also problematic because so long as consumers live in communities or counties that “straddle” the Great Lakes basin, the Agreements would establish the same legal right to Great Lakes waters for consumers outside the Basin as is claimed by those within it. In this way, the Agreements would erase the ecological boundary that defines the Great Lakes, and substitute a political one – straddling counties. But political boundaries are relative, and entirely open to redefinition. Moreover, under NAFTA, discriminating between one investor and another because of the jurisdiction in which they reside is simply not permitted. For this reason, a NAFTA tribunal may see little difference between straddling communities, straddling states, or straddling *countries*, and find that the Compact unfairly discriminates against companies located elsewhere in the U.S. By erasing a fundamental distinction between in-basin and out-of-basin use, the consequence may well be increased NAFTA-based investor claims by interests outside of the Basin for water from Great Lakes.

c) Bottled water: “Article 207 Sect 9” defines a proposal to remove water in a container less than 5.7 gallons (20 litres) as a proposal for a “consumptive use”, rather than a “diversion”. This loophole will benefit the bottled water industry and establish it as a preferred water user. This exception will compromise the ability of jurisdictions to limit withdrawals, as the bottled water industry will continue to seek new water sources and weakened legislation to meet the needs of a rapidly expanding market. Article 207 Sect 9 violates the objective of the Agreements to ensure efficient use and conservation of existing water supplies.

Recommendations:

- The Chicago diversion must be limited and any increases allowed only if approved by the International Joint Commission.
- The exceptions given to straddling communities and counties severely limit the ability to implement conservation of a shared hydrological system and must be struck from the Agreement.
- All water withdrawals, regardless of the quantity, must be defined as a water diversion. Article 207 Sect 9 must also be struck from the Agreements.

Public consultation

The public consultation process for the second draft of the Great Lakes Annex 2001 Implementing Agreements was inadequate, especially given that public meetings were announced in the two Canadian provinces and the eight U.S. states with very little notice. Meaningful debate and informed input is necessary to shape policy that reflects public needs, but this process has effectively left citizens out.

The Agreements state that there is a role for future public participation processes, in that the Regional Body will seek comment on proposals, but there is neither a clear definition

nor provisions for public education. Without proper public awareness and education, authentic multi-stakeholder dialogue will not be effective, in essence reducing public consultation to a public relations exercise.

Recommendation:

- Meaningful public education and consultation must be implemented for all applications submitted to the Regional Body.

Public trust and the water commons

One of the most fundamental weaknesses in these Agreements is the absence of the definition of water as a *public trust*. This oversight is unacceptable in the shaping of Agreements that aim to set clear guidelines for the sustainable management of the Great Lakes Basin by the states and provinces.

By failing to define water as a resource to be managed as a public trust, issues of ownership and the absence of safeguards against the commercialization of water will have serious implications on the integrity of this shared ecosystem.

Recommendation:

- We strongly urge amendments to the Agreements to reflect the principle of the water commons and to enshrine water as a precious substance of life to be valued and managed as a public trust.

Participation of Tribes and First Nations

The negotiation process for the Great Lakes Annex 2001 Implementing Agreements has been deeply flawed, because it did not include direct participation of the governments of Tribes and First Nations of the Great Lakes Basin. International treaties and court actions recognize the rights, duties and responsibilities of Tribes and First Nations as governments, not as political subdivisions of states or provinces. By consulting with the governments of Tribes and First Nations as stakeholders, rather than as equal negotiating bodies, the legal and jurisdictional validity of the Agreements has been compromised.

Recommendation:

- The Tribes and First Nations must be recognized and treated as governments with decision-making powers equal to the other governments negotiating these Agreements.

Water conservation programs

The weakness of the language with regard to conservation, and the inability to provide adequate incentives for conservation rather than new or increased water diversions will lead to unsustainable water takings from the Great Lakes.

The Agreements will essentially support development in sprawling communities that have persistently failed to protect and conserve their own significant water endowments. In spite of vague obligations to adopt 'reasonable' conservation measures and develop conservation plans over the next decade, diverting water to such communities is likely to undermine the only real incentive they have to get serious about water conservation.

Water conservation programs are required by the signatories to come into force only five years after signing the agreement, and conservation programs are not required by an applicant for a diversion or withdrawal *prior* to the submission of the application. The Agreements also state that conservation plans must be implemented where it is "Environmentally Sound and Economically Feasible," but defining programs within the narrow confines of a cost-benefit analysis approach will undermine conservation.

Recommendation:

- Water conservation programs must be developed and implemented at all jurisdictional levels without delay, and the qualification that these programs come into force within five years must be eliminated.
- Water conservation programs must be in place prior to any application submitted to the Regional Body.

Water deprivation and scarcity is a terrible problem for almost two billion people in this world who have no meaningful access to the water they need to sustain life. But this is not the problem that communities in the Great Lakes confront. Rather, the Agreements would sanction the diversion of Great Lakes waters essentially for the purpose of supporting urban sprawl and the energy-intensive lifestyle that it requires. If implemented, the result will increase green house gas emissions and worsen already serious air quality problems. These environmental impacts will in turn impose even greater stress on the Great Lakes ecosystem. This vicious cycle can and must be stopped.

The Council of Canadians urges the Council of Great Lakes Governors to return to the negotiating table to improve the Agreements in such a way that they reflect the public interest. Furthermore, the Great Lakes Annex 2001 should be amended to integrate recommendations made by the Council of Canadians and other groups and individuals who have voiced their concerns both at public meetings and through written submissions. The Council of Great Lakes Governors should offer a third period of public consultation with an enhanced education and outreach program.

Thank you again for the opportunity to comment on these Agreements.

Sincerely,

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