

**Submission to the Ontario Ministry of Natural Resources
On the subject of the Draft Implementing Agreement for Annex 1 of the Great Lakes
Charter currently under consideration by the Council of Great Lakes Governors**

**From
The Sierra Club of Canada
September 20, 2004**

The Sierra Club of Canada urges the government of Ontario to reject the existing draft and renegotiate the agreement to better meet its stated goals. All leaders of jurisdictions in the great Lakes Basin must exercise extreme caution in considering any new regime dealing with diversions and other forms of bulk removal of water from the Great Lakes. Reduced groundwater levels of 150 feet or more in the Ogallala Aquifer in the southwestern part of the United States, and offshore examples like Lake Chad with a sharp decline in lake surface area of over 80 % and the Aral Sea with its surface area reduced by two-thirds are but a few examples of many recent “water follies” all around the world. These kinds of disasters always start out quite innocently. But, even very small political, economic or legal errors can lead to virtually irreversible trends. We often hear the expression “the devil is in the detail”. That is true, but in these kinds of cases the devil is also in the precedent.

If the proposed compact and state-province agreement were consummated tomorrow, the most significant immediate change would be a few additional “trickles” of water out of the Great Lakes Basin to meet requests from several nearby communities. But that precedent, combined with a fundamentally flawed decision-making regime could very well result in those short-term “trickles” turning into mid-term “cascades”, and then into long-term “torrents” of water travelling well beyond the borders of the ten Great Lakes jurisdictions, and perhaps even beyond the boundaries of the two countries. I would like to stress that we do not view this as a Canada - U.S. issue. The consequences could be disastrous for the ecology, the economy and the social fabric of the entire region in both countries.

The Sierra Club of Canada would like to register concerns about a) the process, b) the concepts and c) the details of this initiative. We will summarize those concerns in the following three subsections, and before offering a few concluding remarks and suggestions.

a) Concerns about the Public Process

The draft agreements represent what could turn out to be one of the most far-reaching natural resource and environmental policy initiatives in the history of North America. In spite of that, the draft agreements were passively released on the internet in the middle of the summer holiday period, with a request for comments within 90 days. To our knowledge, there has been no

attempt at all to inform the general public about the risks inherent in the proposed decision process. We also understand no specific effort was made to consult First Nations.

This not “just another water agreement.” The proposals would very fundamentally change the Great Lakes diversions and consumptive use issue from an environmental one to a resource trading issue. It could also conceivably lead to the commercialization of water and related natural resources in an unprecedented way. The public has a right to know what is being contemplated for their resources. The public has a right to become fully informed all the possible consequences. And the public has a right, once fully informed, to express its views on whether or not they think such a fundamental change in direction is in the public interest. Those rights cannot be adequately exercised in the abbreviated and superficial review process that is now underway.

The Sierra Club of Canada urges the government of Ontario to press for an extension of the consultation period until at least March 2005.

b) Concerns about the Concepts

The proposed decision-making regime appears to be based on two largely illusory “have your cake and eat it too” notions. The first is the so-called “resource improvement standard.” Under this standard, the price to be paid for removing water from the Great Lakes Basin would be an improvement to some water related resource within the basin. On the surface, this has obvious political appeal. Constituents outside the basin would get access to Great Lakes water, and those inside would somehow be convinced their ecosystem was being improved even as the water disappears.

There could in fact be local environmental improvements in the short run. But, if we look a little deeper and broader, and assume accelerating removals over time, very serious social, economic and environmental issues begin to arise. For example, look ahead to the time when lake levels are permanently lowered by several feet, which is a very likely due to the combined effects of accelerating diversions, uncertain future consumptive use patterns, climate change, and probable changes to the connecting channels for navigation purposes. Local environmental improvements such as the protection and enhancement of fish and wildlife habitat will become meaningless as the wetlands become drylands. And local water quality improvements will be more than offset on a system-wide basis, as the amount of water flowing through the system is diminished, and as significant amounts of toxic substances that are now trapped in sediments become re-suspended.

There are other problems with the resource improvement standard as well. First, as a matter of ecological principle, it is never a good idea to encourage the trading off of one ecosystem component against another. Ecosystem health depends on a number of very sensitive interrelationships that need to be preserved. Secondly, those trade-offs will have to be largely arbitrary, because one cannot logically equate quantities of water with environmental protection

measures. That arbitrariness will inevitably lead to all kinds of political rancour and unpredictable legal problems further down the road.

The second illusory “have your cake and eat it too” concept is return flow. Proponents will claim that nobody should worry about “selling” water because that will be offset by waters returned to the basin by the diverters. The problem here is that there seems to be an attempt to achieve a delicate “balancing act” in the agreements. That balancing act seems to be designed to allow just enough permanent water loss to satisfy out-of-basin constituents within the agreement jurisdictions, but not enough to satisfy demands from other North American or offshore jurisdictions.

There are a few things wrong with that scenario. First, the return flow regime itself may turn out to have more loopholes than anticipated. Just as with the resource improvement standard, sometimes imprecise language in the draft agreement would suggest that return flow decisions may also turn out to be largely arbitrary. But just as importantly, the very fact that the return flow provisions at least appear to be designed with inter-jurisdictional discrimination in mind suggests that they would be unlikely to withstand legal challenges related to interstate commerce and international trade. What we are suggesting is that the arbitrary nature of both “have your cake and eat it too” concepts may turn the “trickles” of water losses into “cascades”, and subsequent legal challenges may turn them into “torrents”.

But, some will argue that they have yet another safeguard against that eventuality, namely provisions related to “significant” cumulative impact. However, we know the science needed to identify “significant” impacts in this context is ill-defined. Is it possible to define “the straw that breaks the camel’s back?” And even if it were possible, would anybody actually allow proposals to proceed until some threshold level of harm is reached, and then suddenly prohibit any additional water-dependent development in the region? In any event, if inter-jurisdictional discrimination is demonstrated in any one of the many inevitable legal challenges, this safeguard may also be struck down.

We would question whether demands from outside the basin are really legitimate. All of eastern North America is blessed with a vast abundance of freshwater. Those immediately outside the basin receive the same three feet of precipitation and one foot of runoff as those inside. We can fully understand that there are several situations where the least cost short term solution would entail siphoning water out of the Great Lakes. But, that is only because in the short run bad water and environmental management is nearly always cheaper than good water and environmental management. Even without looking at the individual cases, we would hazard a guess that each and every one of them would be better off both economically and environmentally in the long run if they were to find a more local solution. Every drop of Great Lakes water is already serving some useful purpose where it is, so as a matter of principle one should think long and hard before sacrificing those uses to meet outside demands that may not be

fully legitimate.

We would also like to challenge those that argue the agreements will “unleash market forces in favour of the environment.” The primary market force that will be unleashed is water for sale to the highest bidder. And what will the revenues be used for? They will be used to meet the responsibilities of some “environmental bad guy” within the basin - what economists refer to as a perverse incentive. And, application of the resource improvement standard within the basin is tantamount to a new tax on the wrong people for the wrong reason. It is important to get water prices right, and there is a well defined science to do that. In many cases that would result in a higher price, but at least those paying it would receive the local benefits. But, to raise additional revenue through a new tax on local water bills for the purpose of meeting the responsibilities of “environmental bad guys,” perhaps hundreds of miles away would be entirely inappropriate.

Last, but not least, we would like to raise a conceptual concern about the extent to which the proposed agreements may shift property rights in favour of claims of private ownership of water. We would like to quote a paragraph from a recent essay by U.S. environmental lawyer James Olson to illustrate this point.

“Beyond impacts, this Great Lakes Basin water issue goes to the heart of citizens’ liberty and freedom as members of communities that have evolved for centuries, all of them interdependent but dependent on water as a secure public commons. The agreement must be carefully evaluated for any risk of any unintended subordination or privatization of this commons. When the commons is not respected or citizens fundamental right to water is alienated or at the mercy of private interests, people rebel. Citizens revolted in Bolivia, and they organized in Plachimada, India to stop Coca Cola from capturing a century old common water supply for bottles of soda pop. Citizens in Michigan and around the Great Lakes have successfully resisted efforts by Nestle to remove or divert water that would shift property rights in favour of claims of private ownership of water. These agreements could allow others to turn communities into vast water farms to serve a global economy in which citizens have little say.”

c) Concerns about the Details

There are some good things about the draft agreements, for example, the information sharing provisions and the procedures for citizen participation, as well as the consent process itself. We also agree with many of the specific suggestions being in comments being offered by Great Lakes United regarding trigger levels, phase-in periods, etc.

However, we would like to register additional concerns at a more fundamental level:

- i) The most immediate threat to the Great Lakes ecosystem is a possible increase to the Chicago Diversion, because it could take place without significant new works. We

understand a request may already be on the table from Illinois to do just that, and all jurisdictions may have agreed to keep that request “under wraps” until after the 90 day review period. If that turns out to be the case, we would consider that to be hugely disrespectful of the public’s “right to know”. What is even more disconcerting is that at least some reviewers have interpreted the agreement as exempting increases to the Chicago Diversion from most provisions in the agreement. We will give negotiators the benefit of the doubt on that question for now, but would request that it be made very clear in any agreements that all increases to existing diversions will be treated the same as new diversions.

- ii) The International Joint Commission concluded that there should be a bias in favour of retaining water within the basin and using it more efficiently and effectively, and in its recommendations followed through on that conclusion. They also made it clear that different treatment of in-basin and out-of-basin withdrawals would be quite consistent with national and international traditions and legal requirements. The draft agreements, on the other hand, require exactly the same tests to be applied to in-basin and out-of-basin withdrawals, even though they would in some circumstances be applied by different people. That identical treatment is entirely inconsistent with water management and environmental principles and practices as they are applied all around the world. The result would be that either in-basin withdrawals would be treated too stringently or out-of-basin withdrawals would be treated too leniently.
- iii) Resource improvement as defined is very clearly tantamount to offering water in its natural state for sale, and would therefore support the position of those who would argue that Great Lakes waters have effectively become a “good” under the terms of international trade agreements. That could in turn lead to pressures from both foreign public and private interests for offshore exports, pressures that may very well be supported by international trade tribunals.
- iv) The agreements use a number of terms that are ambiguous and undefined. These include, for example, “reasonable use”, “significant impact” and “evolving tools”. Because these notions include no clear or objective tests, they would seriously weaken any attempts to ward off challenges under international trade or interstate commerce rules. As suggested by the IJC, it is critical that water management policies be clearly articulated and consistently implemented so that undue expectations are not created.
- v) The IJC recommended a clear and unambiguous return flow requirement, that is “no net loss from the area from which the water is taken and, in any event...no greater than a 5% loss” (the average loss of all consumptive uses within the basin). The draft agreements, by speaking about but not defining water use sectors open up a number of loopholes regarding the amount of return flow, and are at times confusing and seemingly inconsistent

about where the return flow will come from and where it will be returned. This level of ambiguity could lead to all kinds of acrimony and legal problems.

- vi) The IJC recommended that all return flow should meet the objectives specified in the Great Lakes Water Quality Agreement. The draft agreements requirements with respect to the quality of return flows are much less specific, and depending on how they are ultimately interpreted, could even end up being quite inconsistent with Water Quality Agreement requirements.
- vii) The draft agreements make no mention at all about preventing the introduction of alien invasive species by way of return flow, as recommended by the IJC. This is a very serious omission.
- viii) The draft agreements exempt diversions for straddling communities and smaller diversions of less than 12 kilometres from most requirements. This could lead to serious problems, especially with respect to both water quality requirements and preventing the introduction of alien invasive species.
- ix) Regarding withdrawals and consumptive uses within the basin, there is a clear emphasis on new and expanded uses. We understand the agreements also call for broader conservation measures, but that seems to be an afterthought much as it was in the 1986 Great Lakes Charter, with the result that many uses are still not even metered nineteen years later. There is a lot of potential for water saving within the basin, but those savings will only be achieved by dealing seriously with 100% of the uses 100% of the time.
- x) The Great Lakes Charter of 1986 required that an inventory be prepared of water uses and conservation plans within the basin. This has not yet been done. Clearly, creating a scheme for diversions without such an inventory is reckless.
- xi) There are several problems of potential “incrementalism” that are not dealt with adequately in the agreements. For example, what would prevent a proponent from diverting in several small increments over time rather than all at once, thereby avoiding certain requirements? What would prevent a proponent from diverting for one use with little or no return flow, and then changing that use later? What would prevent a proponent from diverting a short distance to avoid the agreement requirements, and then selling that water to some more distant location later?

Concluding Remarks

In a recent commentary, the former co-chair of the International Joint Commission panel on Great Lakes diversions, Ralph Pentland, raised an interesting point about the existing veto power.

Great Lakes governors, individually and collectively, presently have the legal right to veto interbasin diversions under the U.S. Water Resources Development Act. It is entirely possible that, once the agreements are signed, the courts will force states to exercise that veto power in strict accordance with the provisions of the agreements. Unfortunately, the way the draft agreements are worded, many decisions will still be largely arbitrary. Ultimately the interpretations themselves may end up in the hands of courts and trade tribunals. Do the basin jurisdictions really want to give up their existing veto power, and leave diversion decisions to the vagaries of national and international judicial systems? It is also possible that if this agreement goes forward it would replace WRDA with a much weaker approach.

The Sierra Club of Canada urges the Government of Ontario to re-negotiate the draft implementation plan for Annex 1. The option of just saying no (or at least insisting on the principle of “no net loss” of water) to all out-of-basin diversion proposals is still open and should underpin any agreement. Failure to do so could actually place the Annex in opposition to the 1909 Boundary Waters Treaty. It would be in the best long term interest of the regional environment, and likely even in the best long term interest of the regional economy. It is our view that such a restriction, as long as it is related to legitimate local concerns such as preservation of the water resources of the basin, and is grounded in scientific analysis, would be valid even if it may have an incidental effect on interstate commerce and international trade. On the other hand, it seems to us that the agreements as drafted would be ripe for dispute and litigation as the demand for and stakes over water rise.

Are current leaders in the Great Lakes region really prepared to jeopardize the long-term future of one of the most valuable ecosystems in the world for what would appear to be, at best, very small, short term and illusory political and economic gains?