



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

CELA Publication 523

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Kevin Wilson
Assistant Deputy Minister
Natural Resource Management Division
Room 6540 Whitney Block
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Toronto, Ontario
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Dear Kevin,

**Re: An Open Letter to the Ontario Cabinet on
The Final Draft of the Great Lakes Charter Annex**

Please see that this submission is circulated to the Ontario Cabinet for their consideration of the Great Lakes Charter Annex.

The Canadian Environmental Law Association (CELA) has been involved for decades in water management challenges facing the Great Lakes Region. CELA was involved in a campaign to strengthen the Great Lakes Charter in 1985, in publishing critical evaluations of the lack of progress on Charter implementation and in 1998 had received standing to represent basin environmental interests in the Nova Group Environmental Appeal Hearing. CELA has also consistently contributed to efforts to improve Ontario's water management and source protection regimes. We have been intensely involved in the development of the Annex since 2001 through our involvement on the Council of Great Lakes Governors Advisory Committee and on the Advisory Panel to the Ontario negotiators. Although we have not seen the full text of the latest version of the Agreement we are aware generally of the directions the negotiations have taken and the issues under discussion.

We are very grateful and proud of the leadership and integrity of Ontario during these negotiations and for the opportunity the Province gave to stakeholders to help form Ontario's positions and reactions during the past year. The decision your government has before you now is a difficult one. CELA too has struggled with the question of support for an Annex that has suffered from trade-offs and last minute campaigns from powerful US interests to weaken requirements. CELA has worked steadily to have the Annex address not only diversions out of

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the Basin but also control harmful withdrawals within the basin. This includes the potential to greatly increase the resiliency of the ecosystem through conservation.

The tenor of the negotiations this fall have reinforced our own view that now more than ever we need a regime to protect the Great Lakes from in-basin waste, over-use and short-sightedness. Despite the international origins of the Charter and Annex 2001 undertaking, protectionism and parochialism have been powerful forces in this negotiation. Sovereignty concerns continue to dominate ecological imperatives. Some powerful sectors in the US have lobbied for no controls on future water use.

To make your decision we ask you to consider several things.

- **How does this agreement compare with the status quo?**
- **Is the final draft flexible enough to allow strengthening in the future?**
- **Will Quebec and Ontario have a voice in more decisions affecting the Great Lakes?**
- **What are the risks of not being part of the Agreement?**

CELA has weighed these difficult questions and has concluded that we will support the current draft, flawed as it is, because the future risks to the ecological integrity and all water dependant uses in the region are too great. We need new tools to deal with a water-short world and the impacts climate change and other stresses may have on the region. It took 15 years after the Great Lakes Charter for the Parties to return to the task of advancing its goals. We are sure that if the Annex efforts fail now we will not see further efforts for decades. Indeed we might see the US States go it alone with a weak Compact that will not significantly advance resource protection and will exclude Quebec and Ontario from resource exploitation decisions. For the reasons that we detail below CELA urges Ontario to support the Annex Agreements.

Should Ontario agree with our recommendations we will do everything we can to publicly support this decision.

How does this agreement compare with the status quo?

WRDA and the Status Quo

The Water Resource Development Act (WRDA) has been held out as our best protection from harmful diversions from the Great Lakes. Under WRDA one veto from a state governor can now defeat a proposal.

In the past Ontario has been able to count on one or more States siding with our Province on a diversion proposal. Our most consistent ally has been Michigan. However, this dynamic has changed in the Annex negotiations because Michigan has the weakest water management system in the Basin and has the greatest distance and expense to achieve Annex directives. Their minority state legislature has opposed legislation to begin improving their water management.

WRDA has several weaknesses. All decisions that have been made under WRDA rules have been arbitrary and highly political. There are no criteria to guide decision-making.

The Annex will create a legally enforceable US Compact. This framework will require the eight Great Lakes States to work in unison on water allocation decisions. This makes it very important that the regional agreement also gives the Provinces a role in regional decision-making so our downstream interests are weighed with the US interests.

There has always been controversy on whether WRDA can be interpreted to cover groundwater since it is silent as regards groundwater. There has been concern that the veto is vulnerable when it comes to groundwater proposals. Since the Annex negotiations began a WRDA challenge has been made regarding a Nestle's water bottling proposal in the courts of Michigan. The outcome of that case could set a precedent that groundwater withdrawals are not subject to WRDA.

The Annex is stronger than WRDA because it is addressing all parts of the Great Lakes St. Lawrence River ecosystem by encompassing the lakes, their connecting channels, tributaries and groundwater.

The Boundary Waters Treaty Act (BWTA) and the Status Quo

The *Boundary Waters Treaty of 1909* and the Boundary Waters Treaty Act Amendment passed by the Canadian Federal Government in 2005 have similar weaknesses. Boundary Waters are defined as "the waters from the main shore to the main shore of the lakes and rivers and connecting waters or the portions thereof along which the international boundary between the United States and the Dominion of Canada passes, including all bays arms and inlets thereof but not including tributary waters which in their natural channels flow into such lakes, rivers, and waterways, or waters flowing from such lakes, rivers and waterways or the waters of rivers flowing across the boundary". In the case of the Great Lakes this means that Lake Michigan is excluded as it is wholly within the boundaries of the U.S. The 2000 *Boundary Water Treaty Act* passed in Canada to prohibit bulk water export only applies to the Canadian portion of boundary waters.

The Annex tries to address these loopholes by acknowledging that for its purposes Lake Michigan and Lake Huron will be treated as one hydrologic body. This definition assists Ontario to have a role in decisions on diversions and withdrawals from Lake Michigan. This along with language committing the States to represent Canadian interests in a future US Supreme Court decision on an expansion of the Chicago Diversion hold hope for provincial influence on decisions that Canadians are currently barred from. Most of the recent diversion pressures are focused on Lake Michigan as a source.

Most importantly the Annex now gives us a strong set of tools and conditions in the decision-making standards that will require ecosystem and ecological protection for the first time. Provisions of these standards, all of which must be met, are in CELA's judgement so strong that they will act as deterrents to applicants seeking Great Lakes water. A lot of the pushback this Fall to the Annex has been to add exceptions to the standards, and attempted to change and weaken their provisions as they apply to in-basin use. The strongest of the standards requires return of Basin waters after use. This requirement is likely to be unaffordable to most communities distant from the Basin.

Trade Agreements and the Status Quo

Fear of trade challenges for Great Lake water has been a driver for the Great Lakes Annex even though legal opinions diverge on the likelihood, and grounds for such a challenge. Most lawyers who opined on this question agree that equal treatment and fairness of in-basin and out of basin requests is important. Since trade agreements came into force there has been a fear that a Chapter 11 challenge on water will set a dangerous precedent in North America. Since the Annex negotiations commenced this has become more of a possibility because a group of Texas farmers have launched a Chapter 11 challenge to claim groundwater within Mexico. CELA continues to have concerns about how even-handed the requirements are for in-basin and out of basin requirements particularly as they apply to the Straddling County exceptions. Ontario has attempted to balance the political inclusion of these straddling counties in the US with an ecological requirement that there also be consideration of the hydrological connection of their groundwater to the surface waters of the Great Lakes.

The Annex and the US Government

The legally binding US Annex Compact will have to win the approval of all of the eight state legislatures and the US Congress. This will not be an easy process because many Great Lakes states have minority governments. Passage through Congress will get much more difficult as time passes. Research done by Ontario Ministry of Natural Resources staff shows that the loss of population from the Great Lakes to the US Southwest will continue and grow. Congressional seats are population based. The political power shift to the US Southwest will grow while their water supplies diminish from the depletion of the major supply for the region - the Ogallala Aquifer.

Water is an article of Commerce under the US constitution. The US Federal Government has the power to intervene in State water management and compel water sharing with other States. Should the Annex Compact pass Congress this prospect will become less likely. Compacts are routinely used throughout the US to manage shared waters. It is difficult for jurisdictions not party to those compacts to alter them. The sooner this happens the better before the situation in the Southwest reaches crisis proportions. What is the prospect of this happening? Because there are many water compacts already in use all over the US, some say it would be hard to deny the Great Lakes the right to a compact for their region.

During the Annex negotiations at least one State failed to engage at all until very late in the negotiations. This caused many difficulties, prolonged the process and resulted in tradeoffs. Negotiators had to go back time and time again to moderate extremes. Should the States fail to reach consensus on a Compact it is likely that the Federal Government could step in and take over the process. That prospect at this time would not be a favourable one given this administration's recent refusal to require a reference to the International Joint Commission to study the impacts of the Devil's Lake Diversion on Canadian waters prior to its implementation.

Hard Won Protections

Ontario can be credited with turning around the weak first draft of the Annex Agreements by insisting that the prohibition on diversions that exists for Canadian boundary waters, Ontario and Quebec be extended to the US. Minister Ramsay insisted on this as a condition of the Province's continued involvement in the negotiations because there was such overwhelming public concern. It is our belief that it would be folly to walk away from this hard won concession. It would be unlikely that conditions would ever be right for a prohibition to be won at a future point in time. This prohibition bars most out of basin withdrawals and sends a strong message to those looking to the Great Lakes for future water supplies that they need to start making alternative plans.

Throughout negotiations some jurisdiction wanted ten years before the Annex came into force. This draft has shortened that to five years.

Water Conservation requirements will become mandatory if jurisdictions fail to include them in the water management programmes required by the Agreements. These programmes so long over due have the potential to reduce water waste and bring the Great Lakes region to sustainable levels of water use comparable with use of other developed countries.

Most importantly the Agreements will require regular review of each jurisdiction's water management and conservation programs and a declaration of findings to be made public from this review. This will be a powerful tool to strengthen the regimes in the future of States that are now resisting strong programs for their own water use. Embarrassment has always been one of our best tools in the Great Lakes. Ontario has the strictest regulation in the Basin regulating all uses over 50,000 litres the size of a medium farm's use.

Moderating the extremes; ~ the exceptions from and disappointments in the Annex

It would be very hard to ever communicate the extreme directions these negotiations took at times. There was a real possibility that the States might go it alone with out the Provinces with a much weaker compact, one that might not contain a prohibition against diversions. In September an alliance between the Council of Great Lakes Industries (CGLI) and the National Wildlife Federation (NWF) bought forward a new alternative agreement without any support from their Canadian counterparts. It seemed to be impossible for their submission to be just one of 2,998 other comments received over the summer on the Great Lakes Charter Annex second draft. These powerful lobbyists had captured the attention of many states and directly entered the negotiations. The goals they put forward, often for diametrically opposite reasons, created opportunities for whole new concepts to enter the Agreement at a time when the negotiations were to have drawn to a close.

In the ensuing two months Ontario and Quebec spent weeks on the phone always volleying to moderate weak and extreme proposals.

The trigger level for in-basin water use is weak and discretionary for each jurisdiction. This means there would only be notification to all parties of huge withdrawals in the US states. There

is however the ability to review those triggers and to strengthen them. However they cannot be weakened.

First Nations and Tribes are given special access to regional decision-making.

The three exceptions to the prohibition are straddling communities, communities in straddling counties and the Chicago Diversion that is regulated by a decree of the US Supreme Court. Straddling communities are already partially within the Great Lakes watershed. Counties straddling the Basin contain many communities that are outside the surface water boundary. Ontario has tried to moderate the political decision to include straddling counties by imposing much stricter conditions on them that may well serve as deterrents. The requirement for return of Great Lakes water back into the Great Lakes will at least double the cost for the applicant. Consideration of whether the community is connected to the groundwater of the Great Lakes adds an ecological component to the decision-making.

The key component of the NWF and CGLI alternate proposal was a reasonable use standard inserting a number of other economic and restorative factors to contribute to decision-making on a proposal. That standard is not mandatory but is a further consideration and restoration has been limited to hydrological improvements to keep it within the intent of the Annex.

At the last minute, several important provisions on climate change and on the precautionary principle had to be paraphrased so the words would not trigger hostile reactions. The intent to address both remains in the Agreement but not always explicitly.

In balance the Annex is an important and necessary beginning

CELA has endeavoured to share with you our belief that the Great Lakes Charter Annex is a beginning worth supporting because it sets out a framework of ecological protection for the first time in the Great Lakes. It has provisions for improvement in the future. It makes Quebec and Ontario party to decision-making they are now excluded from. It brings new partners to the table to provide badly needed science and Tribes and First Nations are given special access.

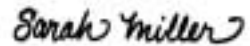
If we do not choose to begin to build on this foundation resulting from three years of hard bargaining we will suffer the chaos, uncertainty and crisis management of the status quo that largely excludes us.

It was interesting to read Peter Lougheed's description in the Globe and Mail today of the Canadian negotiator's reaction to US negotiator's suggestions that fresh water be part of the Free Trade Agreement. "It was quite a moment: I bent down to tie my shoelace, one colleague dropped his book. Another colleague dropped his pencil. The moment passed: another senator changed the subject." I contrast that moment when negotiators ducked the subject. Had they not played dumb we might have confidence now that fresh water is not to be traded or sold. In the Great Lakes Charter Annex negotiations there was no hiding under the table. Ontario and Quebec stood up for their goals again and again and won many points that could put us on the

path to water sustainability. We hope you agree that we should continue with the hard course ahead.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

A handwritten signature in black ink that reads "Sarah Miller" with a small flourish at the end.

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