



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

February 19, 2001

Council of Great Lakes Governors:
35 East Wacker Drive, Suite 1850
Chicago, IL 60601
U.S.A.

By fax 1-312-407-0038
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Dear Governors,

Re: Draft Great Lakes Charter Annex 2001

The Canadian Environmental Law Association (CELA) writes to provide our comments regarding the December 14, 2000 draft of the proposed Annex 2001, A Supplementary Agreement to the Great Lakes Charter.

The framework for our comments is the "Ecosystem Agenda for Great Lakes and St. Lawrence River Water Use Management", (a copy of which is enclosed). This document was developed by CELA along with Great Lakes United, the National Wildlife Federation, the Lake Michigan Federation and Strategies Saint-Laurent in the summer of 2000, in part, as our collective position as to the principles that must guide the Annex to the Great Lakes Charter. Accordingly, our comments herein are intended to evaluate the language of the Draft Annex as against the principles that we set forth in the Ecosystem Agenda.

Need for an Annex:

Let us firstly state that we agree that an Annex to the Great Lakes Charter to deal with conservation and ecosystem protection and restoration is necessary and desirable. We also agree that the Annex, and the further agreement that it directs be ultimately reached by the states and provinces under the Charter, must deal with diversions, but also with consumptive uses in the Great Lakes Basin. We would also advocate that the Annex and the agreement must commit the signatory jurisdictions to enacting consistent and complimentary regimes within their respective boundaries that deal with parallel intra-basin conservation, protection and restoration issues.

We note that the approach which emphasizes, not only ensuring that projects do not cause harm, but that they furthermore improve the waters and water-dependant natural resources is long overdue.

We will make more specific submissions on these matters below.

Ontario Government's Position:

CELA supports the position stated by Ontario's Minister of Natural Resources, John Snobelen, in Ontario's December 14, 2000 press release, that "We need to make sure that the cumulative results of small-scale diversions are considered . . . to ensure no net loss of water from the basin." CELA also supports Minister Snobelen's statement that it agrees with the International Joint Commission recommendation that the provinces and states in the Great Lakes basin not "permit any removal of water from the Great Lakes Basin that would endanger the integrity of the basin ecosystem."

Agreement Must be Binding:

The proposed Annex and agreement to be thereafter negotiated must be binding on the signatories. Only a binding agreement will ensure the protection for the Great Lakes that the parties will negotiate. Similarly, the parties' enabling legislation, administrative agreements and other tools to put the agreement into effect must be in binding form within each domestic jurisdiction. The fact that the Great Lakes Charter is not presently binding has been an unfortunate weakness of the Charter.

Clause III – the U.S. Water Resources Development Act

Clause III A. is necessary and useful to the Annex. However, Clause III B. is very troubling. At present, each governor has a veto over any diversion proposal on the U.S. side of the basin. The proposed "de minimus" exemption will allow for cumulative, damaging, and possibly irreversible impacts to occur during the three year time frame for negotiating a binding agreement. Clause IIIB. is unnecessary to the Annex and its purposes. Presumably some thresholds or exemptions as to which activities are to be dealt with under the new agreement will be negotiated over the next three years. We would like to have continued public involvement as to what those potential thresholds and exemptions should be, both from a practical perspective, but also from a basin – protection perspective. The "de minimus" exemption would be a new provision under the Charter and we strenuously advocate that it be removed from the Annex, and the issues of exemptions and thresholds be left to the longer term negotiations.

Resources

We laud the commitment to develop a decision support system that ensures the best information is available for decision making. We also agree that the information must be accessible to Basin citizens. We would advocate that the parties commit immediately to making additional resources systematically available for the improvement of the data collection system, since at present these resources are not adequately employed for data collection and analysis in any of the basin jurisdictions and have been reduced over the past few years in several Great Lakes jurisdictions.

The Standard

We suggest that the language of Clause IIA. be strengthened to require development of specific, targeted and measurable water conservation measures, instead of “reasonable and appropriate” conservation measures.

We support targets that reduce our water use by at least one-third to bring us into line with other industrialized nations such as Scandinavian countries. There is no lack of wisdom on effective water conservation measures and efficiencies to draw on for immediate results. Parties should begin immediately to develop consistent, parallel measures within each of their jurisdictions.

We agree that the issue of adverse impact must be assessed cumulatively as well as individually and suggest that this is a much-needed improvement to the current situation. There will have to be discussion and agreement about the definition of “significant adverse impact”.

Although the definition of Improvement is preferable to earlier drafts, we suggest that there be further discussion as to the definition of Improvement. However, we strongly agree that the definition incorporate the words “additional beneficial, restorative effects to the physical, chemical, and biological integrity of the Waters and Water-Dependent Natural Resources of the Basin”. We emphasize that improvement must be tangible, enhance the area of withdrawal, and be measurable in accordance with specified criteria.

We also advocate that the precautionary principles must be explicitly articulated in the Annex for water basin management decisions.

Scope of the Annex / Agreement

The new agreement should include a much broader range of activities that can cause harm to the Great Lakes basin ecosystem, and not be limited only to “withdrawals” of water. We agree that it must encompass consumptive uses as well as diversions.

Restoration Strategy

The time taken to negotiate a binding agreement must also be used to develop a basin-wide water use management strategy that emphasizes restoration.

Parties

We advocate that the negotiations must include First Nation and tribal governments, as well as federal governments on both sides of the international border. Only a strategy co-ordinated among all of the governments can ensure future success. Furthermore, we are very concerned that no agreement proceed that is limited only to the U.S. state governors. Ontario and Quebec are critical to basin management, and a consistent approach must be taken across the basin. Although some jurisdictions may choose to exceed the standard, no jurisdiction should be operating in a regime that does not meet the standard.

Public Trust

The parties must commit to safeguard basin waters as a public trust on behalf of their citizens. This should be explicitly provided in the Annex and subsequent agreement. We make specific suggestions in support of this principle in our “Ecosystem Agenda” and would advocate that an opportunity to negotiate these issues must be included in the process for reaching an agreement under an Annex.

Trade Considerations

Conservation is the primary imperative for the Annex and our comments are provided in that context. At the same time, we are cognizant of the possibility of trade challenges for approaches that are not proven to be truly for conservation purposes. These concerns add to our suggestions that conservation measures must begin immediately, both within each jurisdiction and on a basin-wide consistent approach; that scrupulous, well-founded and well-funded data collection must commence immediately, and that our collective position as profligate users of water relative to other areas of the world be immediately improved across the basin.

Conclusion

We ask that Clause IIIB be eliminated from the Annex and that further negotiation with Ontario, Quebec and First Nations secure their agreement to the Annex. We call for continued and transparent public involvement in the subsequent negotiation of a binding agreement, with the opportunity to address the issues addressed in this letter, in our “Ecosystem Agenda”, and in the separate submission you will be receiving from Great Lakes United.

As the ecological protection and conservation measures of the Annex are the most urgent and need to be addressed immediately, we strongly suggest that the parties not await the three year time frame for conclusion of the final agreement before commencing this work. Much of the planning and implementation needed for such measures can and should begin immediately.

Thank you for the opportunity to make these comments.

Yours very truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

per
Theresa A. McClenaghan
Counsel

per
Sarah Miller
Coordinator

cc: Premier M. Harris, Premier of Ontario
cc: Minister J. Snobelen, Ontario Minister of Natural Resources
cc: Minister E. Witmer, Ontario Minister of Environment