

# Great Lakes Charter Annex Implementing Agreements background, basics, and next steps

July 21, 2004

## Current contexts

---

### ► Major existing diversions out of and into the Great Lakes basin

- Chicago, 2 billion gallons per day OUT of basin
- Ogoki, Ontario, 2.6 billion gallons per day INTO the basin
- Long Lac, Ontario, 1 billion gallons per day INTO the basin
- Small diversions in and out of the basin, netting out at virtually NO CHANGE (they are: Akron, Ohio; Pleasant Prairie Wisconsin; Forestport, New York; Portage Canal, Michigan; Ohio and Erie Canal, Ohio; Lorain County, Ohio; and Ravenna, Ohio)
- Net flow change is IN not out.

### ► “Intrabasin” diversions, from one part of the Great Lakes basin to another

- Welland, Ontario, 5.8 billion gallons per day from Lake Erie into Lake Ontario, bypassing the Niagara River and Falls
- Erie Canal, New York, 0.47 billion gallons per day, from the Niagara River to Lake Ontario
- Small interbasin diversions (London, Ontario, from Lake Huron to Lake St. Clair; Detroit, Michigan, from Lake Huron to the Detroit River; and Haldimand, Ontario, from Lake Ontario to Lake Erie)

### ► In-basin water withdrawals

- 55 billion gallons per day withdrawn from the Great Lakes basin
- 2.7 billion gallons per day consumed / lost to the system
- Consumed / lost water by sector: irrigation, 29%; municipal water supply, 28% (much of which may actually return through groundwater); industry, 24%; power, 6%
- Often extensive local ecological damage

### ► Water shortages within the Great Lakes basin

- Spot droughts throughout the basin
- Competing water withdrawers in certain areas of the basin, particularly in Wisconsin and Michigan
- See fact sheets produced by the National Wildlife Federation and the Michigan Land Use Institute at [www.speakongreatlakes.org](http://www.speakongreatlakes.org)

### ► Trade rules / agreements

- Current rules may restrict ability to prevent diversions: 1) U.S. Constitution’s “Commerce Clause” governing trade between states, 2) unexplored inclusion of water written into NAFTA,

3) unexplored GATT / WTO definitions of what constitutes restraint of trade. There have been no directly applicable cases, so the degree of threat / intrusion is not known.

## **Future contexts**

---

### ▶ **Water shortages elsewhere / possible diversion requests**

- Mississippi River (supplementing its flow when it gets low)
- U.S. South (municipal uses)
- U.S. Midwest (agricultural uses)
- Wisconsin and Ohio basin lines (near-basin municipal uses)

### ▶ **Climate change**

- Possibilities: Lakes levels permanently lowered as much as three feet by 2090, reduced streamflow, lower groundwater table

### ▶ **Trade agreements**

- Future agreements may be more inclusive (FTAA will have many more countries than NAFTA; water services may be in the next round of GATT / WTO)
- Future agreements may be more powerful (possibly enhanced investor suit provision in FTAA; introduction of investor suit in GATT / WTO; possible restrictions on the minimal environmental components currently in both trade agreements)

## **Predecessor water quantity initiatives**

---

### ▶ **1909 U.S.-Canada Boundary Waters Treaty**

- Requirement to take no action that affects water levels and flows on the other side of the international boundary

### ▶ **1985 Great Lakes Charter**

- Signed by the eight Great Lakes states, Ontario, and Québec
- Consult on diversions over 5 million gallons per day (effectively carried out)
- Collect water data for regional database (intermittently carried out)
- Create basinwide management plan (never carried out)

### ▶ **1986 U.S. Water Resources Development Act (WRDA) amendment**

- All eight governors must consent to proposed diversions of any size
- No reasons or process for decision-making required
- Prestigious 1999 study concluded that the veto power might be vulnerable to constitutional challenge

- In 2001 the eight governors signed a resolution pledging to use Annex 2001 principles in any WRDA-based decision-making

► **1998 Nova Group proposal**

- Ontario permit to export water to Asia
- Public uproar on both sides of the border: opposition to “exporting the lakes”
- Difficulty legally canceling that permit after public uproar, also implying potential legal difficulty in refusing to grant such a permit in the future

► **1999 governors’ legal study of diversion / export issues**

- U.S. governors’ consent requirement possibly vulnerable to U.S. constitutional (“Commerce Clause”) and other kinds of challenge
- Regional bans / restrictions might conflict with trade agreement commitments
- Recommends creation of standards for judging all proposed withdrawal: conservation, no environmental harm, and precedent-setting “benefit” (improvement) standards

► **2000 U.S. Water Resources Development Act (WRDA) amendment**

- Exports also subject to governors’ consent
- Congressional invitation to states to create system of common standards – an invitation to submit the annex as a binding compact

► **2000–2003 Canada diversion bans**

- Canada federal
- Ontario
- Québec

## **Great Lakes Charter Annex (“Annex 2001”)**

---

► **Agreement in principle**

- General description of the basic elements that a final agreement will contain
- Signed by the eight Great Lakes states, Ontario, and Québec
- Public comment transformed unacceptable draft into the much better final document
- Significant, successful input by basin ENGOs throughout the process

► **Basic provisions**

- State-provincial binding agreement to be agreed on by 2004
- Some degree of evenhanded treatment of diversions and in-basin withdrawals
- To apply only to new and increased withdrawal proposals. Existing water withdrawals will not be affected
- Standards for all new and increased withdrawals
  - No harm
  - Conservation
  - “Improvement” (beyond measures to prevent harm)

► **Possible resulting positives**

- Required water conservation for all withdrawal projects
- Significant attention to neglected area of hydrological impacts
- Potentially significant habitat protection
- Some new, privately funded activities improving the ecosystem
- Region shows up on international trade agreement radar (best-case scenario: annex agreement could be listed in trade agreements as superseding them)
- Agreement unprecedented in the world

► **Possible resulting negatives**

- Could make smaller diversions somewhat easier to obtain
- Could set diversion precedents
- Could end up containing loopholes so that the agreements effectively apply to very few withdrawals
- Could end up containing loopholes so that the agreements are effectively not enforced

## **Annex 2001's standards**

---

*Promised to be applied to all new or increased water withdrawal proposals*

► **Environmental harm**

“No significant adverse individual or cumulative impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Great Lakes Basin”

- “Significant”: a key word describing how much impact (theoretically very little) is too much
- “Cumulative”: as interpreted by the negotiators, requires the agreement to assure regular study of the cumulative impact of withdrawals on the Great Lakes as a whole; however, no action is promised if studies show that cumulative impacts are occurring
- “Water Dependent Natural Resources”: all the habitats and living things that depend on water, mandating a broad reach in the definition of possible adverse impacts
- Defining “significant” is difficult to do succinctly; currently considered by the negotiators as not appropriate to do in great detail in the proposed compact (see below). “Significant” may end up defined by implication, as meaning the same as “significant” and equivalent terms in other environmental laws and ultimately defined through court cases. “Significant” is defined in detail in the proposed state-provincial agreement (see below).

► **Conservation and return flow**

“Preventing or minimizing Basin water loss through return flow and implementation of environmentally sound and economically feasible water conservation measures”

- “Return flow”: requirement to return to the basin all the water that is not consumed for the given use. This can be a means for limiting diversions, since most diversions are financially advantageous only if the water does not have to be returned.

- “Economically feasible” conservation: a key term potentially allowing relatively less conservation to be carried out
- “Environmentally sound”: another key term, possibly assuring a limit to the application of the “economically feasible” loophole

► **Improvement**

“Improvement to the Waters and Water-Dependent Natural Resources of the Great Lakes Basin”

- Least clear standard, generating greatest disputes and least resolution among negotiators
- Defined elsewhere in the annex as “additional beneficial, restorative effects to the physical, chemical, and biological integrity of the Waters and Water-Dependent Natural Resources of the Basin, resulting from associated conservation measures, enhancement or restoration measures which include, but are not limited to, such practices as mitigating adverse effects of existing water withdrawals, restoring environmentally sensitive areas or implementing conservation measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer.” This definition was somewhat changed in the proposed agreements to focus more on water conservation.

## Proposed agreements structure

---

*The following bullets are based on an initial reading of two proposed agreements, one among the U.S. states, the other among the states and the provinces of Ontario and Quebec, released by the ten governments on July 19, 2004.*

► **Dual agreements**

- One agreement among the eight U.S. states that would be binding if approved by Congress
- Another agreement among all ten jurisdictions that would be nonbinding, but signed on the promise that it would be passed into law by all the signatories
- The documents are related by a provision of the compact that its state members will “consider” the results of decisions on larger proposals arrived at by a ten-member decisionmaking body established in the international agreement
- The state-provincial, ten-jurisdiction agreement contains considerably more detail than the compact on the definitions of the standards and their key terms; this detail could be a basis for fleshing out the state regulations and Compact Council regulations that will be needed to implement the provisions of the compact
- No separate agreement between the provinces

► **Two-tier assessment of proposals**

- Tier one: diversions of 1 million gallons per day or more and withdrawals that consume (lose) 5 million gallons per day or more would be assessed by all the states and provinces together, and officially approved by a body of all the states (in the United States) or the individual province (in Canada) (note: all diversions out of the Great Lakes basin are already banned in Canada)

- Tier two: all withdrawals over 100,000 gallons per day not in the above categories would be assessed and approved only by the individual jurisdiction where it is proposed
- Decisions on both tiers would have to be based on the standards

### ► **Enforcement**

Under the compact:

- States could sue each other in federal court for failing to implement the terms of the compact
- A state’s citizens could avail themselves of administrative and court actions to contest decisions they deem contrary to the terms of the compact
- State citizens could directly sue entities who withdraw water without obtaining a required permit, with the possibility of receiving reimbursement for legal costs if they are successful
- Provincial governments may have standing to sue state governments over decisions contrary to the terms of the compact that damage their interests

Under the international agreement:

- The agreement is nonbinding, and will be enforceable only if the jurisdictions (especially the provinces, who will have no equivalent to the U.S. state compact) live up to their promises to pass the international agreements’ provisions into law
- To fully live up to the agreements when dealing with the larger proposals subject to review by the ten jurisdictions collectively, the U.S. Compact Council and the provinces would have to agree to implement the decisions of the ten-jurisdiction body. There may be no way to legally require that in the compact or in provincial law, as it would be a grant of sovereignty to parties from another country. So this could be one part of the international agreement that cannot be passed into law and must be adhered to voluntarily.

### ► **Current U.S. “WRDA” governors’ authority to veto diversions**

- Not superseded or repealed by the new agreement
- However, the approval by Congress of a new system for judging diversions could imply that the new system supersedes the older WRDA system, and there is no explicit language in the compact that says the WRDA veto authority will remain in place

### ► **Public involvement**

- Public notice of all applications for withdrawal permits and “reasonable opportunity for the public to submit comments before applications are acted upon”
- Public access to all documents “relevant to a proposal application, including public comment received”
- Establish standards for “determining whether to conduct a public meeting or hearing for a proposal application . . . and procedures for conducting of the same”

### ► **Exceptions**

As promised, the agreements contain the standards listed in the Annex 2001 agreement-in-principle described above. The standards are explicitly said to be minimums—jurisdictions remain free to implement more protective standards. However:

- The standards do not apply to existing withdrawals

- The standards do not apply to withdrawals under 100,000 gallons per day unless they are diversions
- The water conservation standard will be applied more rigorously to larger projects, less rigorously to smaller projects
- The return flow standard does not apply to diversions of 250,000 gallons or less if they a) meet the other standards, b) are intended for public drinking water supply, and c) are used within 12 miles of the Great Lakes basin line
- The improvement standard does not apply to withdrawals that consume (lose) less than 5 million gallons per day
- Except for diversions, the standards are not required to be in place in the states until ten years after the compact is approved by Congress and all eight state legislatures

## Followup

---

### ► Next steps

- Ninety-day comment period, ending October 18, 2004
- Official basinwide, state, and provincial hearings during the comment period (see [www.speakongreatlakes.org](http://www.speakongreatlakes.org) for comprehensive listings)
- Further state / provincial negotiations based on public comment will follow the comment period
- Agreements projected to be finalized in early 2005
- Passage of agreement into law in states and provinces thereafter
- Compact submitted to Congress thereafter

### ► More information

- [www.speakongreatlakes.org](http://www.speakongreatlakes.org), a joint Web site contributed to by several Great Lakes environmental groups and updated regularly. Includes links to relevant government sites
- Council of Great Lakes Governors, [www.cglg.org](http://www.cglg.org), which provides staff for the annex negotiators, released the official agreement texts, and will hold two hearings on the agreements
- International Joint Commission, which wrote a report on Great Lakes water quantities in 2000: [www.ijc.org/php/publications/html/finalreport.html](http://www.ijc.org/php/publications/html/finalreport.html). An update of the report, originally scheduled for release in early 2003, is said to be imminent
- Great Lakes United Web site, [www.glu.org](http://www.glu.org), click “Sustainable Waters,” site of some documents on earlier phases of the negotiation process not found at [www.speakongreatlakes.org](http://www.speakongreatlakes.org)
- “The Natural Flow Regime,” *Bioscience*, 1997, [www.snre.umich.edu/riverflows/flow\\_regime/](http://www.snre.umich.edu/riverflows/flow_regime/), a foundational article on the ecosystem services provided by water in its natural states. Environmental groups involved in the development of the annex agreements have attempted to shift the focus of the negotiations from water quantity alone to the full suite of water flow characteristics that underpin all ecosystems
- Great Lakes Protection Fund, an endowment of seven of the eight Great Lakes states, has funded research projects on annex-related concepts: [www.glpf.org/interest/flow-projects.html](http://www.glpf.org/interest/flow-projects.html)