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Environmental Group Comments on the Proposed International “Great Lakes Basin Sustainable Water Resources Agreement”

October 18, 2004

The core recommendations in each section of comment are indicated by the symbol “=>”.

ALL AGREEMENT SECTIONS

The proposed provincial-state international agreement and U.S. agreement share many passages with what appear to be the same intent, yet they are often worded substantially differently. The two documents even contain different definitions for some of the same terms. Both documents declare a desire to make water management as consistent as possible across the basin.

=>Symbolically and practically, this objective would be served by rendering in identical language all those passages in the two documents that have the same intent.

PREAMBLE

As a voluntary arrangement, the provincial-state agreement is likely to suffer from legitimate public skepticism: its predecessor: the 1985 provincial-state Great Lakes Charter was also voluntary. Nearly twenty years after being signed, major portions of the agreement remain poorly or entirely unfulfilled. The agreement promised consultation for certain withdrawals and diversions, an information database of regional water withdrawals and uses, and basinwide

watershed planning. Consultation took place, information gathering was patchy and abandoned between 1993 and 2003, and basinwide planning never took place.

=>The provinces and states should address this legacy in the agreement’s preamble, recounting the successes and acknowledging the shortcomings. Coupled with a strengthening of the Article 102 promise that the provisions of the agreement will be passed into provincial and state law, this could be a basis for public faith in the possibility that the promises of the provincial-state agreement will in fact be fulfilled.

CHAPTER ONE—GENERAL PROVISIONS

Article 100—Objectives

In its subsection (g) the proposed agreement promises to “prevent or minimize significant adverse impacts of Withdrawals on the Great Lakes Basin’s ecosystems and watersheds.” In Annex 2001 the parties promised that withdrawals would cause *no* significant adverse impact, not minimal impacts.

=>The phrase “or minimize” should be struck from the objective.

Article 102—General Commitment

The proposed agreement promises that, “Each Party shall seek legislative, regulatory or other changes that may be required to give effect to this Agreement.” Although the premiers and governors cannot assure legislative approval for implementing agreement provisions, nonetheless:

=>The agreement should simply state that the parties “shall implement” rather than merely “seek” the promised changes.

Article 103—Definitions

Praise—Conservation measures

The second line of the definition of “Environmentally Sound and Economically Feasible Water Conservation Measures” reads, “Water management practices and Water efficiency measures must be economically feasible based on a cost-benefit analysis that includes avoided environmental and economic costs.” This could assure that long-term environmental benefits of water conservation are included in any determination concerning the “economically feasible” element of required water conservation. By including the value of avoided environmental damage, the definition’s of cost-benefit analysis reduces the chance that its “economically feasible” language will be used to require only water conservation practices that pay for themselves in saved water. However the terminology used could work against this intent.

Problem—Conservation measures

The second line of the definition of “Environmentally Sound and Economically Feasible Water Conservation Measures” reads, “Water management practices and Water efficiency measures must be economically feasible based on a cost-benefit analysis that includes avoided environmental and economic costs.” The intent of the language seems to be to prevent the “cost-benefit” language of the provision from undermining the “economically feasible” language, that is, to make sure that provision is not interpreted to require only water conservation practices that pay for themselves in saved water and related expenses.

However, the legal nature of the phrases “cost-benefit” and “economically feasible” are contradictory. The former is legally used to measure the costs to versus the benefits for the proposal proponent. If the result of the cost-benefit analysis is net cost, the step under consideration is not required. “Economically feasible,” on the other hand, legally measures the cost of the proposed step against a standard of reasonability or affordability for the implementing party. Here the outcome is often a net cost, but the step is nonetheless routinely required, depending on the amount of the net cost in the context of the scale of the project and the resources of the proponent.

The draft text attempts to split the difference by requiring the cost-benefit analysis to include benefits usually categorized as benefits only in the context of regulations, not in the context of an individual project. From an environmental protection point of view, this attempt is likely to come to grief. One main reason for this result is be the nature of the phrase—“avoided environmental costs.” This is a vague phrase, for which there is no guidance even in the state-provincial international agreement’s Procedures Manual.

=>We recommend striking the phrase “based on a cost-benefit analysis that includes avoided environmental and economic costs.”

=>At an absolute minimum, however, the Procedures Manual should specify that “avoided environmental costs” includes long-term societal benefits of good water conservation, including assurance of water availability for non-human life and to buffer additional, increased human uses in the face of unknown elements such as impacts to hydrology from climate change over time.

Praise—Diversions

This subsection defines diversions as between Great Lakes as well as out of the Great Lakes. This improves on the voluntary 1985 Great Lakes Charter, and would subject some projects already on the drawing board to greater scrutiny.

Problem—Diversions

=>However, the definition should be extended to include diversions between major rivers that are tributary to a Great Lake or the St. Lawrence River.

Inter-river diversion projects are more common and more likely to cause ecosystem damage than inter-lake diversions at the current scale of most projects. The stronger definition would take a

longer step toward legal durability in international trade and U.S. Commerce Clause contexts by taking protective action against more “diversions” inside the basin. The stronger definition would remove the possible future argument by aggrieved parties that, despite what the agreement states, in practice, in-basin withdrawals and out-of-basin diversions are treated completely differently. With a significant number of possible in-basin withdrawals defined as the diversions that they are, such an argument would be much harder to sustain.

Problem—Water conservation as improvement

This proposed subsection unfortunately alters the definition of improvement provided in Annex 2001. The original language defined improvement 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 is an appropriately broad general definition.

The language in the recently proposed agreement substitutes for “associated conservation measures” the phrase “associated Environmentally Sound and Economically Feasible Conservation Measures.” It may be that this change was only an attempt at greater clarity, but the effect is possibly to permit the definition to be interpreted to allow the already required water conservation measures implemented by the applicant to also count as the project’s required improvement.

=>The definition should be returned to its original language.

Problem—Preference for improving flows

Even if the intent of the change is merely to put a special emphasis on water conservation unrelated to the project, we support the thrust of the more detailed treatment of improvement found in the appendix, which says that restoring natural water flows should be the preferred focus of improvement projects.

=>Therefore, in addition to returning the definition of improvement to that found in Annex 2001, we suggest adding natural water flows to it and giving it first place in the closing list of possible improvement projects found in the Article 103 definition: “. . . such practices as restoring natural flows, 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.”

Praise—Source watershed

In this subsection “source watershed,” a term intended to define the site of return flow, is defined as major tributary to a Great Lake. While too large to protect many watersheds from the effects of complete water removals, at least this definition is an improvement over the huge lake watershed originally contemplated.

Problem—Source watershed

However, the reason for defining the term in the agreement—its use in the return flow standard—is mooted by the return flow section itself, which re-defines source watershed as individual Great Lake. See our comments under sections 8 and 9.

=>“Source watershed” should be defined as “the smallest scale of watershed as defined by the U.S. Geological Survey and the Geological Survey of Canada at the point of withdrawal.”

At the least, the last sentence of the current definition should be replaced with a definition of source watershed for withdrawals that are not directly from a Great Lake or the St. Lawrence River.

=>We recommend that for such withdrawals, the agreement declare at minimum that, “The source watershed shall be the watershed tributary to the Great Lake or St. Lawrence River from which the water is withdrawn.”

Problem—Return flow of the same water

The proposed agreement’s current definition of return flow, found in sections dealing with the conservation standard, rightly appears to require return of the actual water withdrawn. This is a critical protection against the introduction of invasive species from neighboring watersheds.

=>The agreement should explicitly define return flow in the definition section as requiring return of the same, identical water that was originally diverted.

=>The return flow standard should also specify that the return flow should further be “as close as possible to the point of withdrawal,” unless such a return that would for some reason be ecologically harmful.

CHAPTER TWO—THE STANDARD

Article 200—The Role of the Standard

Praise

This section and article incorporate the “Procedures Manual,” which provides needed detail on the implementation of the standards, into the body of the agreement. This will assure that the protective intent of the standards is substantially carried out.

Problem—Adoption

The proposed agreement promises that, “The Parties shall seek to adopt and implement measures, as appropriate in each Party’s Jurisdiction, that are no less restrictive than those described in the Standard.”

=>Although the premiers and governors cannot assure legislative approval for implementing agreement provisions, the agreement should nonetheless simply state that the parties “shall adopt and implement” the agreement rather than merely “seek” to do so.

Article 201—Standard Applicability

Problem—Trigger level

Withdrawals for using water inside the Great Lakes basin should be held to standards reasonably close to the standards for diversions outside the basin. The proposed agreement subjects diversions of 1 million gallons per day or more, averaged over 120 days, to review by all ten parties. It also requires diversion proposals of any size to provide an improvement to the Great Lakes. However, for water withdrawn for in-basin use, the agreement not only initiates regional review at a much higher level—5 million gallons per day—but also uses an entirely different form of measurement—consumptive use (water loss) rather than mere withdrawal. Also, all diversion proposals are required to carry out improvement, but for in-basin uses improvement is required only for projects above the 5 million gallon loss threshold.

While some difference in treatment between the two types of withdrawal has traditional in international water law and might withstand international trade and U.S. Constitutional scrutiny, we believe that the degree of differential treatment represented by this article is so great as to entail significant legal risk.

The proposed system could lead to very large disparities of treatment and very widely divergent end results for certain pairs of water withdrawal proposals that are in fact quite similar in their potential ecosystem impact. For example, a consumptive loss of 4.5 millions gallons per day averaged over 120 days 1) avoids Regional Review and Compact Council vote, 2) makes no improvement to the basin ecosystem, and 3) carries out mere unspecified “conservation measures.” At the same time, a diversion of 1.5 million gallons per day, which entails one-third the water loss and therefore, considered generically, one-third the ecosystem impact, must by comparison 1) undergo the scrutiny of ten jurisdictions and the executive power of eight, 2) implement a much more rigorous “conservation plan,” and 3) make an improvement. The generically much smaller ecological impact in this scenario generates much more rigorous treatment.

For another, much more problematic example, efficient municipal supply systems that lose just 10 percent and return 90 percent of withdrawn water would be treated exactly inversely to their likely ecological impact. An out-of-basin municipal applicant of this type would be subject to eight-state, two province Regional Review when proposing a diversion of 1 million gallons per day, but an in-basin applicant of the same type would be subject to Regional Review only at the level of 50 million gallons per day, because it would take that much withdrawal to lose 5 million gallons at a loss rate of 10 percent. Yet in the former case the ecological insult to the basin is a loss of 100,000 gallons per day, while in the latter, 5 million gallons per day.

This is to say, the agreement’s currently proposed system allows the possibility of a fifty-to-one disparity in potential ecological impact before finally triggering similar treatment of like proposals.

We approve the negotiators’ determination to subject diverters to high standards. But while we may be forced to live with the political necessity of applying somewhat more lenient standards to in-basin water uses, we are alarmed that the proposed disparity of treatment can be theoretically so large, perhaps justifying an eventual legal challenge to the legitimacy of the entire system. A gap of fifty to one is far too great to fall under the internationally recognized but limited leeway granted in-basin users over out-of-basin users. Such differential treatment would be prima facie evidence of discriminatory intent and seriously undermine one of the core purposes of the annex initiative as declared by the governors and premiers during the Annex 2001 negotiations—legal durability.

=>The problem can be addressed by changing the treatment of in-basin water uses proposed in article 201 by either: 1) lowering the level of water lost for in-basin uses that triggers Regional Review from 5 million gallons per day to 1 million gallons per day, or 2) changing the trigger level from 5 million gallons per day of water lost to 5 million gallons per day of simple withdrawal.

With either change, the disparity in treatment in the above municipal use example would fall from fifty to one to a more reasonable (if perhaps still legally risky) ten to one. In many proposals the disparity would be much smaller, with the aggregate disparity perhaps being entirely within legal tradition and most judges’ or tribunals’ sense of the reasonable. With less disparity of treatment, the new system would be better equipped to withstand a determined, legal challenge that might arise decades hence.

Praise—Cumulative effects assessment

Section 4 of this article for the first time commits the region to assessing all the impacts of accumulated water withdrawals on the basin ecosystem. Further, the section specifies a timeline for making such assessments that is both certain and precautionary.

Problem—Cumulative effects assessment scope and followup

Nonetheless, this section is unlikely to protect the basin from cumulative impacts except in the very long term and on the largest scale because it 1) addresses cumulative impacts only at the basinwide level, despite the fact that cumulative impacts are certain to occur first and most severely on the local watershed level, and 2) provides only for review of standards, whose revision would be the most indirect and likely ineffective means of reversing and preventing cumulative impacts.

=>We suggest that cumulative impact assessments be required at the level of major river watershed.

=>When such assessments reveal existing or reasonably predictable cumulative impacts, they should trigger the creation of watershed-specific water management plans that would provide guidance for water withdrawal permits issued in that watershed.

For ideas on how to best implement Annex 2001’s cumulative effects commitments, negotiators may find it useful to consult G. Hegmann et al., *Cumulative Effects Assessment Practitioners Guide*, February 1999, prepared for the Canadian Environmental Assessment Agency and accessible at http://www.ceaa.gc.ca/013/0001/0004/index_e.htm.

Article 202—Procedures Manual

Praise

This article incorporates the “Procedures Manual,” an appendix that details the implementation of the standards, into the body of the agreement. This will assure that the protective intent of the standards is substantially carried out.

Problem—Implementing the standards basinwide

However, without some similar language in the compact agreement, the international agreement’s incorporation of the “Procedures Manual” raises the possibility of the creation of an uneven regulatory playing field within the Great Lakes basin. All ten parties to the agreement have pledged to pass the provisions of the international agreement into law, but it is possible that the states will ultimately pass only the provisions of the compact into law, leaving the provinces with the choice of 1) passing the stronger provisions of the international agreement into law, thus creating an uneven playing field, or 2) not doing so, thereby undermining the agreement’s important progress toward basinwide, ecosystem management of the Great Lakes, the signal achievement of the proposed international agreement.

=>The parties should revise the compact to at least loosely link its implementation of the standards to the detail of the provisions of the Procedures Manual. See the recommendations in our comments for revision of the proposed compact, under the “Problem—Implementing the standards” discussion of “Joint Issues” relevant to both article 8 and article 9.

=>The core recommendation in those comments reads: “We suggest that section 3.6 (‘Rules and Regulations’) or article 5 (‘General Provisions’) contain a new subsection or section saying: ‘The Signatory Parties, individually and collectively, commit to using the Great Lakes Basin Water Resources Agreement’s Procedures Manual as a significant source of guidance in issuing rules and regulations that give effect to the standards outlined in articles 8 and 9.’ ”

Article 203—Determination of Whether the Standard Applies to Proposals to Take Water

Praise

This article includes a number of important assurances that the new system will not be circumvented by cleverly configured proposals, including provisions to assure that existing uses are not exaggerated and that multiple withdrawals feeding a single distribution system and multiple withdrawals for the same purpose spread out over years are both counted as one withdrawal for the purposes of determining the application of the standards.

Problem—Applicability of standards

However, because there is a conflict between the authority of the United States Supreme Court and the proposed compact, the draft language of the compact, mirrored in Article 203.11, throws out the baby with the bathwater by simply declaring that new agreements will not apply. The region could keep the baby by acknowledging the Supreme Court as the sole authority over the diversion while explicitly pledging to do everything possible to assure that any possible future requested increases to the diversion are subject to the standards.

=>We suggest striking the current language of Article 203.11 and replacing it with, “In any process by which the *Wisconsin et al. vs. Illinois et al.* may in the future be amended, the parties to this agreement who are also present or future parties to the decree shall make every good faith effort to assure that any proposed or retroactively realized increase over the current court-ordered level of flow out of the Great Lakes basin is compelled to be subject to any processes outlined in this agreement that would otherwise apply if no court decrees were in effect.”

=>We also suggest that the international agreement mirror the proposed compact’s commitment to inclusion of the provinces in decision-making relative to *Wisconsin et al.*: “If an application is made by any party to the Supreme Court of the United States to amend the decree, the parties to this agreement who are also parties to the decree shall seek formal input from the Canadian Provinces of Ontario and Québec with respect to the proposed amendment, use best efforts to facilitate the appropriate participation of the Provinces in the proceedings to amend the decree, and shall not unreasonably impede or restrict such participation.”

CHAPTER THREE— WATER MANAGEMENT PROGRAMS WITHIN THE JURISDICTIONS

Article 301—Information

Problem—Reporting return flow

In order to enforce permit terms and a comprehensively inventory of basin water resources, the agreement’s water withdrawal reporting system should include reporting on return flow.

=>In section 301.2, “Programs in each Jurisdiction shall require users to report their monthly Withdrawals, Consumptive Uses and Diversions on an annual basis,” we recommend replacing “and Diversions” with “, Diversions, and Return Flows.”

Problem—Reporting at the small watershed scale

=>As part of the promise to empower the public with annually updated withdrawal information, the compact should require that each withdrawal be listed not only according to geographic location, but also by watershed at the smallest scale, usually sixth-order watershed, indexed by the given province and state.

This will give permitting officials and the public one of the most important pieces of context for evaluating a proposed water withdrawal: the current total state of water withdrawal at the relevant scale—the smallest scale, where withdrawals have the most potential for impacting the ecosystem. The tracking of all return flow will aid and improve immeasurably the determination of consumptive use and successful conservation measures.

Article 302—Water Conservation Programs

Problem—Conservation program goals

The agreement’s conservation standard will be only as effective as the sector, watershed- or basinwide-specific conservation goals it aims to reach.

On the level of the individual project, even the Procedures Manual fails to do more than list potential practices without providing any guidance on the basis of which a permit-issuer—or a panel attempting to come up with consumptive use standards or coefficients—could decide which practices would be required of a given applicant and how intensively they would have to be applied.

This is a recipe for basinwide inconsistency and overall ineffectiveness in the implementation of the standard that probably has more consensus than any other among the states, provinces, advisory stakeholders and the public.

=>We suggest that the performance of economic sectors in the best-performing developed-economy nations be used as referents for conservation goals (and their consequent consumptive use standards or coefficients), and that the parties commit to reaching these goals on specific timelines.

These goals, however arrived at, would be the background for researching the consumptive use standards or coefficients (and required return flow factors) that we suggest the parties commit to determining and implementing within three years.

Problem—Rigorous consumptive use coefficients

The conservation and return flow standards are only as effective as the consumptive use standard or coefficient used to determine the amount of water that must be returned to the lake (we recommend major tributary) basin of origin. Consumptive use standards or coefficients that do not exist or are not rigorous, that is, an approval system that allows minimal water conservation measures, will result in larger requests of all kinds, may require approval of diversion proposals that could otherwise be denied, and overall result in a system that could one day be challenged as serving only commercial rather than environmental protection purposes.

The agreement should contain a provision committing the Review Body to 1) determining scientifically justifiable consumptive use standards or coefficients for varying sectors on a guaranteed timetable, and 2) basing the consumptive use standards or coefficients on strong conservation requirements, such that requested quantities are minimized for all proposed

withdrawals and their required return flows are maximized (see our recommendations under “Problem—Conservation Program Goals” immediately above).

Without rigorous, defensible, consumptive use standards or coefficients, the return flow provision of the standards could, for certain uses, be turned into a loophole that makes diversions easy to obtain under the standards. This is obviously unacceptable.

=>We recommend a new section, perhaps inserted into Article 400—Functions of the Regional Body, perhaps between subsections 2.3 and 2.4:

=> “(a) The Regional Body will determine, no later than three years from the effective date of this agreement, 1) a scientifically defensible consumptive use coefficients for major standard categories of water use, such as public drinking water supply, and 2) a scientifically valid process for determining consumptive use standards or coefficients for non-standard water uses that is rapid, fair, and environmentally protective.

=>“(b) After three years after the effective date of this agreement, the Regional Body shall issue only negative Declarations of Finding for diversions or consumptive uses unless it has fulfilled the terms of section 10.4.1.”

The international agreement must contain some form of specific commitment to determining sector-specific consumptive use coefficients for the basin environmental community to be able to support the agreement.

CHAPTER FOUR— GREAT LAKESWATER RESOURCES REGIONAL BODY

Article 400—Functions of the Regional Body

We recommend inclusion of a new subsection in this article such that the Regional Body determines consumptive use standards or coefficients for enabling the creation of water conservation program goals and conservation and return flow requirements for water withdrawal proposals. See discussion of Article 302, “Problem—Rigorous consumptive use coefficients” above.

The Regional Body should also undertake to develop a basinwide regional conservation plan for existing as well as new uses.

Article 401—Organization and Procedures of the Regional Body

Problem—Public access to meetings and minutes

=>The meetings of Regional body should be open to the public and meeting minutes should be publicly available online, not merely in an office during business hours.

Proposed Article 402—Public Participation

Problem—Public participation in the Regional Body’s non-proposal activities

Beyond participation in processes for reviewing proposed withdrawals, or which public participation processes are outlined in Chapter 5—Regional Review, under Article 503, the public should be encouraged to participate in activities by which the Regional Body carries out its other obligations.

=>We recommend the insertion of a new Article 402 that declares that,

=>“The Regional Body shall develop procedures that facilitate public comment on:

1. Development of a process for reviewing proposals that trigger Regional Review, including the development of procedures for receiving public comment
2. Development of a process for reporting whether jurisdictional water conservation programs meet the requirements of the agreement
3. Creation of reports on jurisdictional water management programs
4. Development of a process for monitoring and reporting on the jurisdictions’ implementation of the agreement, including jurisdictional data collection and reporting and jurisdictional implementation of water withdrawal management programs
5. Creation of reports on jurisdictional data collection and water withdrawal management program implementation
6. Development of a process for assessment of cumulative impacts of basin water withdrawals
7. Creation of reports on cumulative impacts assessment
8. Development of a process for determining consumptive use standards or coefficients
9. Development of a process for determining the groundwater divide, and developing water withdrawal policy based on the new groundwater divide information
10. Review and, especially, proposed revision of the standard and the Procedures Manual and their application pursuant to Article 707.”
11. Rules and procedures for the Regional Review process that address issues of what constitutes evidence, who may appear before the regional commission, how proceedings are recorded and disseminated and if voting is public. This should include an explicit statement that the regional review and the compact review of a proposal be concurrent.
12. Development of a process for fulfilling a central commitment of the Great Lakes Charter: establish a “Basin Water Resources Program.”

CHAPTER FIVE—REGIONAL REVIEW

Article 503—Public Participation

Praise—General

This section requires public notice of all proposals for new or increased withdrawals requiring Regional Review, opportunity for public comment on all such proposals, and access to “all documents relevant” to such proposals.

Problem—Comment on draft Declarations of Finding

=>This section should allow comment not only on original proposals, but also on the Declarations of Finding that result from them.

Declarations of Finding can be heavily conditioned and in that sense dramatically different from original proposals. Since the basic facts of the proposal and its potential ecosystem impacts should have been fully explored during the period for comment on the proposal, this proposed second period for comment on a draft Declaration of Finding could be very short.

Article 504—Tribes and First Nations Consultation

Praise

This section assures that Tribes and First Nations will be separately and individually notified that a water withdrawal proposal subject to regional review has been submitted, and that the Regional Body is soliciting comment by Tribes and First Nations on the proposal.

Problems—Sovereignty

The agreement should explicitly state that nothing in the agreement is intended to intrude on the existing rights and sovereignty of any basin Tribe or First Nation.

CHAPTER SEVEN—FINAL PROVISIONS

Article 707—Amendments

Praise

In this section the ability of the Agreement Council to effectively change the agreement is appropriately limited to creating and amending the regulations needed to implement the standards. This power can be exercised only unanimously, assuring collective decisionmaking by the agreement parties.

Proposed article 711

Problem—Existing laws protecting water quantities, levels, and flows

The international agreement should assure that its provisions provide minimum, not maximum, quantity, level and flow protections for the waters and the ecosystem of the Great Lakes – St. Lawrence River basin.

=>We suggest the addition of a new “Article 711—Existing Protections” to Chapter 7: “No provision of this compact shall be interpreted to diminish existing (or hereafter enacted or issued) protections afforded water quantities, levels, or flows by provincial statutes, regulations, or

administrative procedures, policies, or guidelines or doctrines such as the U.S. public trust doctrine.”

APPENDICES 1 AND 2

Problem—Boundary Waters Treaty

Those sections of the appendix that require compliance with “all applicable laws, including international agreements,”—subsections G of sections I, II, IV, and V of Appendix 1, and section 2G of Appendix 2—should be edited to replace “international agreements” with “the Boundary Waters Treaty of 1909 and all other applicable international agreements.”

APPENDIX 1—DECISION-MAKING STANDARD

Problem—No reasonable alternative

There appears to be an error in the proposed text of the standard for determining that there is no reasonable alternative to a proposal to divert water. The draft texts at sections I.A. and IV.A. state that proposed diversions must demonstrate that, “There is no reasonable Water supply alternative within the basin or the watershed of the Great Lake in which the Water is proposed for use, including the efficient use and conservation of existing water supplies.”

Some proposals will likely seek to divert water entirely out of the Great Lakes basin. In such cases the reasonable alternative source for water should be sought not in a Great Lake watershed, but in that place outside the basin to which the diverted water is proposed for shipment.

=>Since intra- or extra-Great Lakes basin diversions would both require a seeking of reasonable alternative supplies in the diversion destination watershed, we suggest that that the text of sections I.A and IV.A simply say, “There is no reasonable Water supply alternative within the watershed to which the diversion is proposed for shipment and use, including the efficient use and conservation of existing water supplies.”

=>If for some reason the possibility of an intra-Great Lakes must be specifically noted, we suggest that that the text of sections I.A and IV.A say, “There is no reasonable Water supply alternative, for intra-Great Lakes diversions, within the basin or the watershed of the Great Lake in which the Water is proposed for use; and for extra-Great Lakes diversions, within the watershed or watersheds to which the diversion is proposed for shipment and use; in both cases including the efficient use and conservation of existing water supplies.”

Problem—Permitting and reporting level

The 100,000-gallon (379,000 litre) minimum permitting and reporting level is too high.

Withdrawal amounts below this level may account for a relatively small portion of total basin withdrawals, but, when they take place from headwaters or other small water sources, they have the potential to have disproportionately significant impacts on the ecosystem.

Ontario and Minnesota permit withdrawals at the 13,800- and 10,000-gallon-per-day range (50,000 and 38,000 litre range), and the international agreement should do so as well.

Awareness of the locations and basic types of smaller withdrawals is essential to evaluating the cumulative effects of such withdrawals on sensitive ecosystems, especially in the context of larger withdrawals that may be proposed or already taking place nearby.

=>We recommend application of the standards to all new or increased withdrawals of 10,000 gallons (38,000 litres) per day or more averaged over 30 days.

Information about basin water withdrawals that is this fine-grained will give permitting officials and the public one of the most important pieces of context for evaluating a proposed water withdrawal: the current total state of water withdrawal at the smallest scale, where withdrawals have the most potential for impacting the ecosystem.

Problem—Averaging

The averaging period of 120 days for determining the trigger levels for provincial and regional review are so high as to exempt a significant percentage of basin water withdrawers.

=>As has been the practice for nearly twenty years under the Great Lakes Charter, the averaging period should be reduced to 30 days.

Problem—Improvement for jurisdictional review of consumptive uses

The standards omit improvement as a requirement for withdrawals for in-basin use under the large upper limit of 5 million gallons per day of consumptive loss. Improvement is a key commitment of the annex initiative. Annex 2001 declares in its core passage, Directive 3:

“The new set of binding agreement(s) will establish a decision making standard that the States and Provinces will utilize to review new proposals to withdrawal water from the Great Lakes Basin as well as proposals to increase existing water withdrawals or existing water withdrawal capacity. The new standard shall be based on the following principles: . . . An Improvement to the Waters and Water-Dependant Natural Resources of the Great Lakes Basin.”

As proposed in the appendix, the improvement standard will not apply to most proposed water withdrawals under the international agreement.

=>We strongly urge the parties to include the improvement standard in some form for jurisdictional review of all uses under five million gallons a day.

Problem—Improvement

The proposed agreement should require that improvement actually take place as part of any approved water withdrawal projects. Strictly interpreted, the draft agreement texts at I.F, II.F, and IV.F, require only that improvements be proposed.

APPENDIX 2—PROCEDURES MANUAL

Praise

The “Procedures Manual” provides needed detail on the implementation of the standards, into the body of the agreement. This will assure that the protective intent of the standards is substantially carried out.

Problem—Implementation in the United States

For the Great Lakes provinces to be on a level playing field with the Great Lakes states, the program regulations written to implement the provisions of the compact agreement must be at least loosely tied to the Procedures Manual. See our more detailed comment on this matter in our discussion of Article 202—Procedures Manual, and in the joint discussion of the compact’s Articles 8 and 9, where we suggest inclusion of pertinent language in the proposed compact’s section 3.6 or Article 5.