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# **Environmental Group Comments on the Proposed State-Provincial “Great Lakes Basin Sustainable Water Resources Agreement”**

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## **Summary comments**

The proposed international agreement among the two provinces and eight states of the Great Lakes – St. Lawrence River ecosystem is an important step forward in protecting Great Lakes basin waters from bulk water exports, diversions, and abuse. However, the proposed agreement needs a significant number of improvements to achieve its aims of fully protecting the basin ecosystem from damage caused by water withdrawals. In particular, the agreement needs changes to assure that 1) future vetoes of harmful diversion proposals are able to withstand possible court challenges, and 2) greater consideration is given ten-party decisions on diversions and other withdrawals of basinwide concern when those decisions are ultimately implemented by the provinces, the states, or the eight states acting collectively in the form of the proposed Agreement Council.

It should be noted that, while the proposed agreement makes important advances, the provinces and states regrettably decided in 2001 that both the provincial-state international agreement and accompanying eight-state agreement would not address a number of important issues related to Great Lakes – St. Lawrence River basin water withdrawals.

Most importantly, the agreements deal only with “new or increased” water withdrawals, mostly ignoring the ecosystem damage caused by existing withdrawals. And as primarily systems for reviewing individual water withdrawal projects, the agreements also provide no overall basin water planning—or even significant incentives for individual communities to undertake such planning—that would reduce overall human water consumption in the basin and therefore also reduce the number and size of new water withdrawal proposals.

## Summary of benefits of the proposed agreement

1. **Environmental standards.** The proposed international agreement provides, for the first time, environmental standards for judging new water withdrawal proposals.
2. **Covering all basin waters.** The proposed agreement protects all the waters of the Great Lakes surface water basin, including streams and groundwater.
3. **Improved diversion protection.** Taken as a whole, the proposed agreement appears to increase the region’s ability to prevent harmful diversions.
4. **Fairly extensive application.** The proposed agreement requires most water withdrawals to be registered and many larger withdrawals to be managed. This would assure both better knowledge of how the region is using its waters and a way to prevent the worst environmental damage caused by withdrawals.
5. **Substantial detail on implementing standards.** The proposed agreement’s appendix is stated to have the full force of the rest of the agreement, and provides substantial guidance on how the standards should be implemented to assure that they are truly protective.
6. **Consistency across the basin.** The agreement’s detail provides a reasonable assurance that implementation of the standards would be relatively consistent across the basin.
7. **Greater protection allowed.** The proposed agreement properly establishes the new environmental standards as a minimum, not a maximum system of protection, so individual states are free to expand their protections.
8. **Public participation.** The agreement provides public notice of water withdrawal proposals and significant avenues for public participation in permitting decisions.

## Summary of problems with the proposed agreement

1. **Lack of enforceability.** The proposed international agreement is voluntary. Recognizing the difficulty of creating a truly enforceable agreement across the international border—this would require a binational federal treaty, the seeking of which would carry its own risks—the agreement could nonetheless provide greater assurance that it will be carried out. The preamble should acknowledge that, nearly twenty years after the fact, the ten parties have failed to carry out significant sections of the 1985 Great Lakes Charter. The body of the agreement should contain strong promise to pass the agreement into provincial and state law.
2. **“Transparency” of “regional review.”** The agreement says very little about how diversions and withdrawals large enough to require a vote by the ten jurisdictions will be judged. Will the applicants and their lawyers be allowed to make a case in person? Will the public be able to do the same? Will deliberations be transcribed and released publicly, or only a final “yes” or “no” decision issued? The agreement should assure openness in regional decisionmaking.
3. **Insufficient conservation provisions.** The agreement provides good water conservation requirements for individual proposals, but no system for reducing basin water use, currently twice the average for developed-world countries, overall. The agreement’s conservation provisions should establish a goal of significantly reducing water loss due to basin water uses.

In the long run the region cannot persuade the world to forego access to Great Lakes waters if we are obviously wasting it.

4. **Inconsistency with the eight-state “compact” agreement.** Technically this is not a problem with the state-provincial agreement, but with the compact. The state-provincial agreement provides good definition and detail as to how the standards will be implemented. The compact does not. In signing this agreement, the Canadian provinces need to be assured that U.S. state treatment of withdrawal proposals is at least as strong as Canadian provincial treatment. Therefore, Canadians should insist that the compact refer in some way to the detail provided in the state-provincial agreement as guidance when the states issue rules implementing the standards.
5. **Some uses are treated more leniently.** The proposed agreement effectively exempts many proposed intermittent and seasonal uses from oversight by averaging the size of the daily withdrawal at which they are subject to standards over 120 days—four long months. For smaller source watersheds, this is a license to cause ecosystem damage. The averaging period should be 30 days.
6. **Dangerously unequal treatment of diversions and in-basin uses.** The proposed agreement appropriately subjects even the smaller out-of-basin diversions to extra requirements and tougher eight-state and two-province review, but for in-basin water uses the agreement reserves those extra hoops only for the very largest proposals. In some scenarios, this disparity of treatment could require a fifty-times higher amount of in-basin use to trigger the tougher review than it would for diversions intended for the same purpose, such as drinking water supply. This difference in treatment would be possible evidence for a lawsuit challenging some future state diversion veto as discriminatory.

The solution is simple: toughen the standards for in-basin uses by 1) lowering the level at which they are subject to regional review and 2) requiring that they include an improvement. Political realities may make it impossible for in-basin uses to be treated as toughly as diversions, but the gap must be significantly reduced.
7. **Limited “improvement.”** The proposed agreement’s “improvement” standard should apply to all withdrawals, not just to diversions and the largest withdrawals. Subjecting new and increased withdrawals to the standards of conservation, no harm, and improvement was the core commitment of Annex 2001.
8. **The ten-year phase-in of in-basin standards is too long.** The phase-in of standards for in-basin water withdrawals reviewed by the individual provinces and states should be five years rather than ten. The longer phase-in, by permitting such a wide gap between the jurisdictions’ commitment to reform and their implementation of that commitment, invites discord among the jurisdictions and risks the failure of the agreement in the medium term.
9. **Protect the public trust.** The proposed agreement must explicitly protect public trust rights and obligations with respect to water. These are one of the few already-existing foundations for the protective purposes of the agreement, and must not be accidentally harmed or limited by it.
10. **Return the exact same water.** The current definition of return flow in the agreement 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 as requiring return of the same water.

11. **Return water to its local source.** Rather than requiring return flow only to the watershed of the same lake from which it was taken, the agreement should require return as near as possible to point where the water was withdrawn. The most extensive ecological damage caused by withdrawals occurs not on a lakewide basis, but usually at the point of removal, especially on smaller rivers or smaller-scale surface waters supported by groundwater.
12. **Delete the diversion exemption.** There is no justification for exempting near-basin diversions under 250,000 gallons per day from the requirement to return the diverted water. The provision should be deleted.
13. **Permit time limits are needed.** Permits should be explicitly granted for no more than ten years, to allow alteration of permit terms if climate change impacts and the cumulative effects to the ecosystem of increased water withdrawals become apparent.
14. **Assess cumulative effect locally.** The proposed agreement would assess the effect of multiple withdrawals approved over years only for the Great Lakes basin as a whole. But these “cumulative effects” should be assessed on the scale at which they are most likely to first occur—that of the local watershed. The agreement should also require, rather than merely allow, amending the rules for judging water withdrawals based on assessments of cumulative effects.