



The International Joint Commission s
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Workshop

Great Lakes Water Uses: *Annex 2001 and Beyond*

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We agree that our basin s resources need to be well managed. However, The Council of Great Lakes Industries (CGLI) has been concerned about the development of Annex 2001 since the Governors first pronouncements in 1989. The original intent of the Annex was to reinforce the Governors 1985 Great Lakes Charter and U.S. Water Resources Development Act (WRDA) section 1109 authorities to protect the resource — including from bulk water export. These authorities and the comprehensive set of environmental laws and regulations, which are already in place, provide the needed protection.

Unfortunately, the Governors received some faulty legal advice in their development of Annex 2001 as it was based on Western water law, not on riparian rights law that frames water management in the Great Lakes basin. Under this Western legal structure, the Governors were told that in-basin water users would have to be subjected to the same standards as those wishing to divert water out of the Basin. The International Water Uses Review Task Force (the Task Force) report for the IJC (8 November 2002) said this is not necessary. Their opinion is supported by an independent legal advice to our industry coalition.

The Task Force view that international law would not affect Great Lakes water is apparently consistent with the views of both the Canadian Department of Foreign and International Trade and the Deputy U.S. Trade Representative.

- The Governors actions to prevent diversions are not unconstitutional as had been alleged by their legal advisors. The Task Force correctly stated that the WRDA was intended as an express waiver of the Dormant Commerce Clause of the U.S. Constitution.

- Existing agreements are not illegal as had been alleged. The Task Force made a strong legal argument that the States can enter into agreement with Provinces under certain circumstances.

These and other important legal arguments notwithstanding, industry has tried to be an active and constructive participant in the Annex 2001 process. We serve on the Advisory Committee to the Governors Working Group and have participated in two multi-stakeholder Great Lakes Protection Fund Grant projects dealing with Annex 2001. CGLI has drawn upon an informal water users coalition in the region to get advice and guidance from industry and other key stakeholders in this issue. Industry has the following objectives for Great Lakes fresh water management:

1. Control of the Great Lakes water resource must remain with the Governors/Premiers. Control must not revert to the Federal level. We support the States and Provincial control of Great Lakes water intended by the 1985 Charter and the U.S.WRDA.
2. Any controls on water use that derive from the Annex 2001 must be able to survive legal review in an international trade context. Early legal review may be essential to make sure this part of any implementation agreement will stand up to world pressures for water in the coming years. Also, the well-established rights of riparian landowners in the Great Lakes basin must be fully recognized.
3. There must be no economic disadvantage for water users in the Great Lakes basin compared to water users in other regions.
4. The Annex 2001 implementation agreement would appropriately be limited to new or increased withdrawals over a Region based, scientifically determined and reasonable trigger level. Permitting - should it be necessary — would be more appropriately based on return flow rather than water use or withdrawal amounts.
5. The Annex 2001 implementation agreement should not impose a burdensome water withdrawal permit application process. An application process for a permit — should one be necessary — must be predictable and universally applied in all States and Provinces in the basin. The decision making process must be clear, transparent, and provide a timely response.
6. Scientifically supportable definitions must be included for such terms as diversion , export , consumptive use , ecological impact/improvement etc. It might even be necessary to define water in its potential different states.

We would suggest two definitions:

Diversion: -...means a **bulk transfer, above the applicable Annex 2001 allowable loss threshold, of water from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lakes into that of another, by any means.**

Consumptive Use: — means that portion, **above the applicable Annex 2001 allowable loss threshold or consumptive use allowance (whichever is greater), withdrawn or withheld from the Great Lakes Basin that is lost or otherwise not returned to the Great Lakes Basin due to evaporation, incorporation into products, or other processes.**

We all recognize that this is very tough policy territory. But the deliberations of the Governors /Premiers Annex 2001 Working Group leave us with growing concern over the direction of the current plans for Annex 2001 implementation. I would like to briefly outline a few of those concerns.

- A regulatory framework must not place Basin water users at a disadvantage over those operating elsewhere.
- As water is a highly reusable resource, withdrawal permit programs should be based on return flow, not water use.
- Water diversion outside the basin should remain the focal point of the decision making standard. In our planning we must remember that consumptive uses provide important in-basin benefits and satisfy many needs of in-basin residents. For example, cropland irrigation, food and beverage production, the manufacture of products such as water-based paints, paper, chemicals, pharmaceuticals, and electric utility energy generation all require what may be defined as consumptive use of water. These important uses have **not** been characterized as threats to Basin water resources and should not be depicted in the same way as large-scale bulk removals of water from the basin intended for use solely outside of the Basin.
- We continue to believe that establishing the right permit requirement threshold or trigger levels will be an important key to a successful water diversion/water withdrawal permitting program. For instance, a proposal that requires multi-jurisdictional review and permits should have regional significance. The level should be higher than the currently proposed 3 million gallons per day (MGD) level. We do not see the justification for abandoning the 1986 Great Lakes Charter threshold of 5 MGD and believe there is ample reason to support a threshold level of 10 to 15 MGD for these comprehensive and exhaustive regional reviews. The threshold above which proposals must be reviewed and permitted by a Regional authority rather than a single jurisdiction needs to reflect a non-returned or loss quantity which would have potential Regional significance rather than local, State, or single Province significance.
- It is equally important to establish a reasonable threshold level for triggering an Annex 2001 loss permit from a single jurisdiction. We believe in establishing at least a 3 MGD threshold level for single jurisdiction review and permit requirements.
- Another key concern is the application of Annex 2001 requirements of water use monitoring and application of conservation measures to existing withdrawals. Current water users must already comply with monitoring requirements associated with wastewater discharge permits. Using existing monitoring requirements and databases would simplify water use tracking for jurisdictions and water users alike. The substantial resource requirements associated with establishing and setting up new monitoring and reporting systems would be avoided.

- The draft decision-making standard framework requires application of environmentally sound and economically feasible water conservation measures to existing consumptive uses and diversions. Given the problems differentiating between which water uses will or will not be considered consumptive or a diversion under the Framework, there appears to be a potential for broad application of these conservation requirements to existing users. Existing uses are not to be covered by the decision-making framework according to the Annex language contained within the Statement of Purpose. It states the Governors and Premiers commit to develop and implement a new common, resource-based conservation standard and apply it to **new** water withdrawal proposals from the Waters of the Great Lakes Basin. Application of conservation measures to existing water withdrawals of any kind should be removed from the draft.

Our overall concern with the progress toward a binding implementation agreement is that the resulting regulatory framework, under which control is sought, **MUST NOT** place Basin water users at a disadvantage over those operating elsewhere. Exposing new withdrawal proposals to protracted, uncertain, and expensive permitting processes and existing users to new water conservation requirements cannot be supported by CGLI regardless of our desires to see Basin jurisdictions retain control of water resource decision-making authority.

The existing regulatory and legal frameworks can meet the Governors/Premiers objectives for management of the fresh water resource. We must not impair the economy of the region nor the current State/Provincial authority through a botched implementation of Annex 2001.

Thank you for the opportunity to present industry's views on this important topic.

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