



The Council of Canadians Opposes Latest Plan to Divert Great Lakes Water

On June 30, 2005 the Governors and Premiers of the Great Lakes Basin states and provinces released their latest proposals to regulate the use, inter-basin transfer, and diversion of Great Lakes waters.ⁱ While the proposals deal with some of the concerns we have previously raisedⁱⁱ, they fail to address our most fundamental objections to a scheme that will still, if it is implemented, deplete Great Lakes waters, challenge Canadian sovereignty, and open the door to NAFTA-based investor claims to force further diversions.

The scheme devised by the Governors and Premiers is comprised of two elements. The first is a non-binding **Agreement** among the 10 Great Lakes states and provinces. The second is a binding and legally enforceable **Compact** among those US States. Because of its legal force and effect, the Compact is far more problematic particularly because pressure to divert Great Lakes water is being predominantly driven by US interests.

We appreciate that some environmental groups regard the Compact as an opportunity to address the chronic neglect of water stewardship that still persists in several Great Lakes jurisdictions. We sympathize with their concern, but believe that present proposals are more likely to accelerate than reduce unsustainable water use in the Great Lakes Basin. Moreover, Canada's ability to manage water as public trust depends, first and foremost, on preserving its sovereignty over water, not in deferring to US political and judicial authorities. For the following reasons we cannot support the Governors' proposed Compact, or their companion agreement with the Premiers of Quebec and Ontario.

Unilateral US Approval for Great Lakes Diversions

While the proposed Compact purports to ban water diversions from the Great Lakes, in truth it would provide legal authority for US states to license the diversion of unlimited quantities of water to communities that are partially or entirely outside the Basin. Neither Canada nor the provinces would be able to veto such diversions regardless of their duration, scale, or impact on the waters of this shared ecosystem. Nor does the scheme require diversions to be approved by the IJC even if Canada objects. While the Compact requires that some diverted water be returned to the Basin after use, these requirements are ill-defined and may be revised or even suspended without requiring the consent of Canadian governments.

Opening the Door to NAFTA Investor Claims

So long as they live in communities or counties that "straddle" the Great Lakes basin, the Compact would establish the same legal right to Great Lakes waters for consumers outside the

Basin as is claimed by those within it. In this way, the scheme would erase the ecological boundary that defines the Great Lakes, and substitute a political one – straddling counties. But political boundaries are relative, and entirely open to redefinition. Moreover, under NAFTA, discriminating between one investor and another because of the jurisdiction in which they reside is simply not permitted.ⁱⁱⁱ For this reason, a NAFTA tribunal may see little difference between straddling communities, straddling states, or straddling *countries*, and find that the Compact unfairly discriminates against companies located elsewhere in the US. The result of such a ruling may cause as much dismay to the Governors as it would to us, because we suspect they have no interest in seeing Great Lakes waters diverted to the US southwest. Nevertheless, by erasing a fundamental distinction between in-basin and out-of-basin use, this may be precisely the consequence of their ill-devised scheme.

Ignoring the Elephant in the Room

By far the largest diversion of Great Lakes water – the Chicago Diversion – is exempt under the Governors’ proposal. Instead, new or increased withdrawals, consumptive uses and diversions of Basin water by the State of Illinois are to be governed by the terms of the United States Supreme Court decree in *Wisconsin et al. v. Illinois et al.* Under that decree, Illinois may divert 2.1 billion gallons of water from the Great Lakes each and every day. Even so, the State has consistently exceeded this generous entitlement for the purpose of providing water to ever sprawling urban development. Instead of reining in these unsustainable practices, the Compact would even allow Illinois to increase the Chicago diversion, so long as the US Supreme Court concurs.

But under the *Boundary Waters Treaty*, the ultimate arbiter of diversions from the Great Lakes is supposed to be the IJC, not the US Supreme Court. However, the IJC can only be effective if the US is willing to respect its role and US obligations under the Treaty. Unfortunately there is little evidence that it is so inclined, and its persistent refusal to refer the Devils Lake imbroglio to the IJC^{iv} is only the most recent reminder of the current US Administration’s disregard for its obligations under international law.

Unsustainable Development

In blunt terms, the Compact is essentially a scheme for diverting water to sprawling communities that have persistently failed to protect and conserve their own significant water endowments.^v In spite of vague obligations to adopt ‘reasonable’ conservation measures and develop conservation plans over the next decade, diverting water to such communities is likely to undermine the only real incentive they have to get serious about water conservation.

Water deprivation and scarcity is a terrible problem for almost two billion people in this world who have no meaningful access to the water they need to sustain life. But this is not the problem that communities in the Great Lakes confront. Rather, the Compact and Agreement would sanction the diversion of Great Lakes waters essentially for the purpose of supporting urban sprawl and the energy-intensive lifestyle that it requires. If implemented, the result will increase green house gas emissions and worsen already serious air quality problems. These environmental impacts will in turn impose even greater stress on the Great Lakes ecosystem. This is a vicious cycle that can and must be arrested.

Canada's Obligations

Much of this critique has focused on the authority US states would arrogate to themselves to determine the fate of Great Lakes waters. But this is not to ignore the role of our own governments, and in particular the federal governments' failure to develop a much needed water policy for Canada, or to address the weaknesses and gaps in the framework of international law that now applies to the Great Lakes. Instead of addressing these deficiencies, our federal government has been content to sit on the sidelines offering muted criticism of the Governors and Premiers efforts to fill the vacuum created by federal inaction.

It is crucial for the federal government to defend Canadian sovereignty and live up to its constitutional obligations to protect the Great Lakes. This either means strengthening the *Boundary Waters Treaty* or negotiating a new treaty to augment it. Whatever form it may take, such an international and binding agreement must:

- encompass all waters in the Great Lakes Basin, including groundwater and tributaries to the five Great Lakes;
- strengthen bi-national control over use and diversion of Great Lakes waters by prohibiting all Great Lakes diversions unless approved by both nations;
- adopt ecological integrity and the precautionary principle as the cornerstones of the Treaty; and
- establish the priority of that agreement in the event of conflicts with NAFTA or other international trade agreements.

Unfortunately the Governors' and Premiers' proposed scheme would achieve none of these goals.

ⁱ This assessment is based on the May 20, 2005 drafts of the GREAT LAKES BASIN SUSTAINABLE WATER RESOURCES AGREEMENT and the GREAT LAKES BASIN WATER RESOURCES COMPACT.

ⁱⁱ Among the significant improvements engendered by the latest draft Agreement and Compact is their adoption of the *precautionary principle*, the abandonment of the concept of a *resource improvement standard*, and the stipulation that diverted waters may be used solely for "public water supply purposes".

ⁱⁱⁱ This prohibition is set out in the National Treatment obligation for US States and Canadian provinces in Chapter Eleven of NAFTA [Art. 1102].

^{iv} North Dakota's plan to divert waters from Devils Lake into Manitoba represents a clear violation of the Boundary Waters Treaty according to Canada and Manitoba, yet the US has refused to refer the matter to the IJC.

^v Communities outside the Basin receive the same three feet of precipitation every year as those within it.