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RE: Negotiations to Amend the Great Lakes Water Quality Agreement.

We thank you for the opportunity to provide written comment to the negotiations on the amendment of the Great Lakes Water Quality Agreement (GLWQA). We welcome the initiative to compile and incorporate public comments on the GLWQA. This is no small undertaking and we recognize the challenges of reflecting the plethora of views, interests and issues stemming from the Great Lakes Basin in the GLWQA.

The Council of Canadians is Canada's largest member-based advocacy organization with tens of thousands of members and over 70 community-based chapters across the country. We are a social justice organization and address environmental issues through an environmental justice perspective.

We have 12 Council chapters around the Great Lakes and have been working to protect water nationally and internationally for the last 25 years. Maude Barlow, the National Chairperson of the Council of Canadians, also served as Senior Advisor on Water to the 63rd President of the United Nations General Assembly (2008-2009).

We applaud the hard work of civil society, the different levels of governments and communities in the negotiation process as well as their work on issues affecting the Great Lakes. However, in this letter we recommend two key points. First, we recommend that the GLWQA adopt a 'Commons' framework based on the notion that the Great Lakes are to be shared, protected, carefully managed and enjoyed by all who live around them. The Commons framework is summarized below and detailed in the attached report, *Our Great Lakes Commons: A People's Plan to Protect the Great Lakes Forever*. Secondly, while we appreciate the opportunity to comment on the amendments of the GLWQA and think that the presentation on the Negotiations to Amend the Great Lakes Water Quality provided a broad overview of the changes to the GLWQA, the presentation did not provide sufficient detail and information to enable the public to provide meaningful feedback. Therefore, we request that the details of the

amendments be released to the public and that the public be provided another opportunity to comment on the substance of the amendments.

Why a Commons framework is needed

Working alongside governments to implement agreements such as the GLWQA are a number of hardworking and dedicated environmental organizations such as the National Wildlife Federation and the Canadian Wildlife Federation, Sierra Club U.S. and Sierra Club Canada, Great Lakes United, Healing Our Waters Coalition, Alliance for the Great Lakes, the Canadian Environmental Law Association, various manifestations of Waterkeepers and hundreds of state, provincial and local citizen groups fighting to protect their portion of the basin. These groups advocate for the Lakes, conduct research, lobby for better laws and serve as watchdogs to governments at all levels. Yet despite important cross-border agreements, such as the GLWQA, the many cross border-working groups tasked with their implementation and the relentless energy and commitment of these and other non-governmental organizations, and despite the successes, the threat to the Great Lakes continues to grow and the alarm bells continue to sound.

Conflicting priorities

The reason that so little real progress is being made is that there are really duelling notions about what the Great Lakes are, and whom they should serve. The story of the global water crisis sets the stage all over the world: to feed the increasing demands of a consumer-based system, modern humans have seen water as a great resource for our personal convenience and profit, not as the most essential element in a living ecosystem. So we have built our economic and development policies based on a human-centric model and assumed that nature would never fail to provide, or that, where it does fail, technology will save the day. We have polluted, diverted and mismanaged the planet's finite supplies of water to the point that they are now dangerously close to collapse in many parts of the world. We have moved water from where it is needed to protect a healthy hydrologic cycle, to where we want it. Increasingly humans see water as a commodity to be used for personal profit.

The waters of the Great Lakes are no exception to this rule. The history of the Lakes exposes deep threads of exploitation – from early settlement to the present day. From the time of European settlement, forests and wetlands were destroyed with impunity and extractive-industries such as pulp and paper dumped their effluent directly into the Lakes

A Commons and Public Trust Framework

We Need a New Narrative to Protect the Great Lakes

What might happen if the citizens living around the Great Lakes decided to collectively protect them based on some of the very principles and practices that informed the First Peoples of the region, namely that the Great Lakes must be shared equitably by all who live around them and protected for seven generations into the future? What do we mean by a Commons? What is the Public Trust Doctrine? How could we protect a Bioregion?

A Commons approach

The notion of the Commons is a very old one. A Commons narrative asserts that no one owns water. Rather it is a common heritage that belongs to the Earth, other species and future generations as well as our own. Because it is a flow resource necessary for life and ecosystem health, and because there is no substitute for it, water must be regarded as a public Commons and a public good and preserved as such for all time in law and practice. Embracing the Commons helps us to restore to the centre stage a whole range of social and ecological phenomena that market economics regards as “externalities.” A language of the Commons would restore more democratic control over the Great Lakes and establish their care and stewardship the joint responsibility of citizens and their elected governments based on the notions of social equity, ecological survival and governance by the people most impacted.

A Great Lakes Basin Commons would reject the view that the primary function of the Great Lakes is to promote the interests of industry and the powerful and give them preferential access to the Lakes’ bounties. It would embrace the belief that the Great Lakes form an integrated ecosystem with resources that are to be equitably shared and carefully managed for the good of the whole community. In a Commons framework, water is a fundamental human right that must be accessible to all. Private control of water cannot address itself to the issues of conservation, justice or democracy, the underpinnings of a solution to the crisis of the Great Lakes.

Public Trust Doctrine

The Public Trust Doctrine underpins in law the universal notion of the Commons that certain natural resources, particularly air, water and the oceans, are central to our very existence and considered to be the property of the public, which cannot be denied access. The trust resources must, therefore, be protected for the common good and not appropriated for private gain.

Under the public trust, governments, as trustee, are obliged to protect these trust resources and exercise their fiduciary responsibility to sustain them for the long-term use of the entire population, not just the privileged few who could buy inequitable access.

The Public Trust Doctrine was first codified in 529 A.D. as Codex Justinianus, after the emperor of that period who said, “By the laws of nature, these things are common to all mankind: the air, running water, the sea and consequently the shores of the sea.” This “common law” was repeated many ways and in many jurisdictions, including the Magna Carta, and has been a powerful legislative tool in many countries to provide for public access to seashores, lakeshores and fisheries. U.S. courts have referred to the Public Trust Doctrine as a “high, solemn and perpetual duty” and held that the states hold title to the lands under navigable waters “in trust for the people of the State.” The Public Trust Doctrine has been used in recent decades to protect both the right of public access to water and water itself.

Public trust is a recognition, they say, that private rights to use water are not granted in a completely unencumbered fashion, but are obtained through an appropriation system administered by government and with implicit restrictions to not unduly and irreparably harm the resource and associated values. As noted by Oliver M. Brandes and Randy Christensen in *The Public Trust and a Modern BC Water Act*, this public trust is a safeguard that prevents the monopolization of trust resources and promotes decision-making that is accountable to the public.

The Public Trust Doctrine is an important tool in the movement to fuse solutions to both the ecological and human water crises. Under a public trust regime, all competing uses of Great Lakes water should have to pass a test, not just of fairness of access, but also that they will not draw down the future capacity of the watershed. Public trust offers a body of principles that combine public good, public control and public oversight with the long-term protection of the watershed. It also sets the stage for an agreed upon “hierarchy of use,” whereby some uses of the water, such as the human right to water and water for ecosystem protection, will take precedence over others.

Protected Bioregion

As important as it is, the Public Trust Doctrine does not extend to the concept that the Commons themselves have the inherent right to protection. In the eyes of most Western law today, most of the community of life on Earth remains mere property, natural “resources” to be exploited. Where there is challenge to this exploitation, it is usually to protect a natural Commons so that it can still be of use to humans, usually for economic purposes. The main

form of environmental protection of the Great Lakes has been based on the regulatory system, legalizing the discharge of large amounts of toxins into the Basin in the name of curbing the worst practices.

South African environmental lawyer Cormac Cullinan has written extensively on the need for “wild law” to regulate human behaviour in order to protect the integrity of the Earth and all species on it. If we are members of the Earth’s community, then our rights must be balanced against those of plants, animals, rivers and ecosystems, he argues. In a world that recognizes the rights of nature, the destructive, human-centred exploitation of the natural world would be unlawful and humans would be prohibited from deliberately destroying the functioning of ecosystems or driving other species to extinction. Humans have bought into the “myth of abundance” and used, abused and moved water as if it is unlimited. The time has come to reverse this pattern and learn to live within the cycles and systems of water that give us life.

Creating a *Great Lakes Protected Bioregion* would require a change in the relationship of the humans who depend on the watershed from one of exploitation to one of respect. A Great Lakes Protected Bioregion would require legislation that recognizes the inherent rights of the ecosystem and aquatic life of the Great Lakes Basin outside of their usefulness to the humans who live around it. Law and practice would protect all the waters of the Great Lakes Basin, and the restoration of its ground and surface waters would be a priority.

We believe that while the GLWQA provides a foundation for addressing threats to the Great Lakes, negotiators need to include a principles that reflect the Great Lakes as a Commons, Public Trust and Protected Bioregion

Commons principles

To help guide this process, a group of legal experts from both Canada and the United States met to set out some draft key concepts and approaches that are needed to form the basis for the kind of Commons regime that is needed to protect the Great Lakes and can serve as a guide to groups and communities wanting to move this agenda forward. “In theory,” say the legal experts, “a Commons approach is simple – it requires only that we envision water as a shared resource and so recognize our shared responsibility to carefully steward our water resources. The goal of a Commons approach to water is to ensure that there is sufficient water to meet human and ecological and community needs for many generations to come.” The authors underline the need to identify key principles to guide the process and situate them within a good and strong governance structure.

Ten principles for the *Great Lakes Basin Commons*:

1) *The waters of the Great Lakes belong to everyone and every living being that live on or around them.* The waters are inherently a public resource, the same as the air we breathe. This principle derives from the physical nature of water, the fact that having access to water to drink is a biological imperative of all life, and because of the fact that water is critical to the water and ecosystems that sustain us.

2) *Private interests of those with claims to the Great Lakes are subordinate to public rights.* The concept of water as a Commons stands in stark contrast to the concept being advanced by some that water rights are a form of property equivalent to a permanent and exclusive entitlement that precludes any public use of the appropriated water without public compensation. Individual water rights allocations must not interfere with collective and Earth rights.

3) *The waters of the Great Lakes are a human right and must be equitably and justly shared.* Every person living around them has the right to clean drinking water and sanitation consistent with the new human right to water obligations under the United Nations, regardless of ability to pay. Every person has the right not to have the water of their local watershed contaminated by industrial, agribusiness, mining, energy or other activities.

4) *Governments have an affirmative obligation to manage and protect the water of the Great Lakes as a Commons.* Not only does the public trust provide a basis for enforcement of the rights of people in the Commons, it demands respect. Governments must protect the water and its uses for all generations in a way that ensures that clean water is available for drinking, fishing, healthy ecosystems, as well as for agriculture, transportation, industry, and power generation. Water management, regulation and pricing must be consistent with principles of the public good and respect for human rights and Earth rights.

5) *The Great Lakes Basin Commons recognizes the ecological rights of the watershed.* Water belongs where nature put it. We must recognize the ecological integrity of water itself and the need to leave it as intact as possible in watersheds. As well, water is part of a cycle; one cannot disrupt any part of the cycle of the Great Lakes without disrupting the entire cycle. Groundwater and surface water of the Basin are linked. All water allocations and water management must support a balanced hydrological cycle where water withdrawals and contamination do not exceed the water sources ability to replenish and restore.

6) ***The Great Lakes Basin Commons will require constant and careful management.*** A central characteristic of a true Commons is its careful, collaborative management by those who use it, and allocation of access based on a set of priorities set by the community. As well, those living around the Lakes have a responsibility to prevent harm and must take responsibility to care for the watersheds for future generations. Good stewardship needs good law and will require the extension of public trust law in many areas and in a consistent manner.

7) ***The Great Lakes Basin Commons must encourage and empower decision-making at the local level.*** A water Commons should empower community-based investment, but subject to strong oversight by regional, state/provincial, and national interests in making sure that local groups are not captured by economic interests, or driven to compete for economic development by lowering water resource protections in a race to the bottom.

8) ***The water systems of Great Lakes communities should remain under public management.*** Where water systems have been privatized, they should be brought back under public control. Full cost recovery should not be the goal of water services; water should be seen as a public service like health care or education. Higher service rates can be set for industry and agribusiness.

9) ***Public participation is key to the Great Lakes Basin Commons.*** The availability of good information about the local watershed is crucial to its success and governments have an obligation to collect baseline information on water quality and quantity (including “virtual water” that leaves the watershed) and disseminate it. A true Commons is based on a co-management model and requires true collaboration between community and government and ability of regulatory agencies to implement public recommendations.

10) ***All decisions about the Great Lakes should be made with the involvement of all recognized nations and people, including local First Nations/American Indian tribes.*** Indigenous peoples have lived around the Great Lakes for centuries and continue to do so today. These aboriginal communities are sovereign governments with strong traditions and cultural ties to the waters of their historic lands and must be recognized as having fundamental rights to these traditional lands and waters. They must be fully involved in the creation of a water Commons.

The Great Lakes Commons and the GLWQA

We believe that the GLWQA already encompass a few of the Commons principles outlined in *Our Great Lakes Commons: A People’s Plan to Protect the Great Lakes Forever*.

For example, Principle 9 highlights that public participation is key to the Great Lakes Basin Commons. The current annexes of the GLWQA call for public consultation in a couple of instances such as in the development and adoption of the Specific Objectives (Specific Objectives – Supplement to Annex 1) and Annex 2 – Remedial Action Plans and Lakewide Management Plans. We commend the commitment that the International Joint Commission and the governments of Canada and the US have had in creating opportunities for people to comment on the GLWQA and the negotiations.

However, as noted in *Our Great Lakes Commons*, “The availability of good information about the local watershed is crucial to its success and governments have an obligation to collect baseline information on water quality and quantity (including “virtual water” that leaves the watershed) and disseminate it. A true Commons is based on a co-management model and requires true collaboration between community and government and ability of regulatory agencies to implement public recommendations.” While the presentation on the Negotiations to Amend the Great Lakes Water Quality Agreement (GLWQA) for the Binational Public Forum provided a very good overview of the broad changes to the GLWQA, it did not provide adequate detail and information to enable the public to make meaningful comments or suggestions.

For example, one aspect of the revised Annex on Ship Source Discharges included a ballast water discharge program. However, it is unclear what the program will look like, what the requirements will be and what accountability mechanisms will be implemented, if any.

Chief Negotiators noted that the Annex on Chemical Substances will include broad groups such as endocrine disruptors rather than listing out specific chemicals to ensure that the GLWQA will be relevant over time. While this provides flexibility and makes sense to some extent, it is unclear if and how this will pose challenges to projects that threaten the Great Lakes such as hydraulic fracturing which uses toxic chemicals that are usually not disclosed by gas companies. While Chief Negotiator Susan Hedman said people could raise this under the Annex subcommittees, it is not clear if and how people will be able to have effective input in the Annexes at the subcommittee stage.

As well there was a lack of clarity on the purpose of the new notification component which deals with transfer of nuclear waste, mining, pipelines and other projects. During the webinar this component raised many questions including the context in which this was being created. It was noted by negotiators that the notification component would not require public consultation on any of the projects and the negotiators noted that would depend on the domestic laws of the country. In the report *Our Great Lakes Commons*, components of A Great

Lakes Basin Commons Watershed Plan are outlined. The plan calls for stringent laws in order to protect the Great Lakes Basin. For example, the plan would include a ban on all nuclear shipments on the Great Lakes and a moratorium on all oil and gas exploration in or near the Lakes as well clear restrictions on all mineral exploration and extraction to ensure no damage to the Basin and its waters.

Due to the lack of details on the GLWQA amendments, it is difficult to make meaningful comments on the changes at this time.

As noted on the IJC website, “The national governments of Canada and the United States will consult directly with First Nations and Tribes about the review of the Great Lakes Water Quality Agreement. Members of the First Nations and Tribes were invited to attend the meetings the IJC held in Great Lakes and St. Lawrence River cities or to participate online, by mail or by telephone.” This supports Principle 10 which calls for “all decisions about the Great Lakes to be made with the involvement of all recognized nations and people, including local First Nations/American Indian tribe.”

First Nations and Tribes should have also been included on the negotiating team. As well, in Article VIII on Joint Institutions and Regional Office, the GLWQA calls for the Great Lakes Water Quality Board to be the principle advisor to the Commission and that the board be composed of an equal number of members from Canada and the United States, including representatives from the Parties and each of the State and Provincial Governments. Article VIII also states that the Great Lakes Science Advisory Board shall provide advice on research to the Commission and to the Water Quality Board. Under the United Nations Declaration of the Rights of the Indigenous Peoples, the Canadian and US governments have the duty to obtain free, prior and informed consent on legislation, administrative measures and any projects affecting indigenous people. Therefore, we also recommend that First Nations and American Indian tribes have representatives (elected by First Nations and American Indian tribes) on both of these boards.

During the webinar, negotiators noted that some Commons principles including the human right to water and public participation would be reflected in GLWQA. We hope that the ten principles for the *Great Lakes Basin Commons* form the foundation for the GLWQA and its annexes. Please find attached a copy of *Our Great Lakes Commons: A People’s Plan to Protect the Great Lakes Forever*. We are happy to answer any questions you may have. Finally, to genuinely involve the public in the negotiation process, we request that all of the draft amendments be made public and that the public be provided another opportunity to comment.

Thank you for your consideration.

Respectfully,

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