

# THE GREAT LAKES PRIMER

The next 60 days offer residents of the Great Lakes Basin, and people concerned with water issues throughout Canada and the United States, a significant opportunity to protect the Great Lakes, its tributaries, and groundwater for the next century and beyond.

## A CITIZEN'S PRIMER TO PROTECT THE GREAT LAKES AND THE ST-LAWRENCE RIVER



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## Introduction:

**The Great Lakes contain 20% of all the surface fresh water on Earth, providing essential services and drinking water to the forty million residents of the United States and Canada who live in the Great Lakes Basin.** Human numbers in the Great Lakes Basin are projected to increase to fifty million people in the next three decades, creating increasing stresses on the Great Lakes. The wide variations and uncertain weather changes due to global warming threatens to compound this stress. **Only about 1% of the total water is renewable annually and thus available for sustainable use.**

The Great Lakes and the St. Lawrence River have been the subject of extensive efforts to protect and restore water quality. As well, jointly agreed regulation plans have been developed to control the levels and outflows of Lakes Superior and Ontario, and agreements have been reached regarding water takings and diversions.

Many parts of the United States may face water shortages in the coming years. The population drift toward arid regions of the Southwest worries many in the Basin.

## How can the waters of the Great Lakes be protected from diversions?

The Council of Great Lakes Governors and two Canadian provinces, Ontario and Quebec, have been grappling with this issue. Many environmental groups, agricultural user groups, utilities and aboriginal peoples and First Nations have provided the Governors and Premiers with advice. The jurisdictions have been developing two kinds of agreements: a Compact among the US jurisdictions and an Agreement among the States and the two Provinces. A previous draft approach, released July 19, 2004 for public consultation, aroused a great deal of public comment.

On June 30, 2005, a revised, substantially different, version of both the draft Compact and the draft Agreement was released. The June 30 draft documents are not a consensus position from all the states and provinces.

The failure of all jurisdictions to support the drafts makes it difficult for the public to engage. Despite the uncertainty, environmental groups urge the public to engage vigorously. The public has only 60 days during the summer months to provide comment.

*The goal of this primer is to assist you, a citizen of the Great Lakes Basin, in making your voice heard. The agreements are complicated, but the basic issue is simple: the waters of the Great Lakes Basin must be protected -- both in quality and quantity -- for future generations and all species that depend upon the Great Lakes.*

## Send your comments to:

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## or by email to:

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**COMMENTS DUE BY AUGUST 29<sup>th</sup>, 2005**



## PRIMER TABLE OF CONTENTS:

Introduction	<b>pg. 2</b>
A brief history of agreements protecting the Great Lakes from diversions	<b>pg. 5</b>
With all these laws, why are we worrying about diversions?	<b>pg. 6</b>
The July 2004 Draft Agreement and Compact	<b>pg. 7</b>
Strengths and Weaknesses of the 2005 draft Compact and Agreement	<b>pg. 8</b>
The 2005 draft Compact and Annex: General approach	<b>pg. 10</b>
Key concerns to be addressed	<b>pg. 11</b>
Conclusion	<b>pg. 13</b>
Endnotes	<b>pg. 14</b>
Appendix I	<b>pg. 15</b>
Appendix II	<b>pg. 17</b>

## DEFINITIONS:

**Great Lakes Basin:** The watershed of the Great Lakes and the St. Lawrence River, upstream from Trois Rivieres, Quebec.

**Consumptive Use:** That portion of a water-taking that is not returned to the watershed through evaporation, or through incorporation into other processes and products

**Diversion:** When water is transferred from the Great Lakes Basin to another watershed, or from one Great Lakes watershed to a different Great Lakes watershed, i.e. from Huron to Erie, that is called a “diversion.”

**Intra-Basin Transfer:** When water is transferred from the watershed of one of the Great Lakes into the watershed of another of the Great Lakes.

**Withdrawal:** Taking the water from surface or groundwater sources.

**Return Flow:** Whatever water remains after use, returning naturally or by other means usually to the watershed from which it came, thus being available for further use in the Basin.

**Resource Improvement Standard:** This term refers to a concept put forward in the 2004 draft compact and agreement, but which is no longer contemplated by the Governors and Premiers. It would have required those who withdrew water to pay for “improvements” to the Great Lakes resource. Many supported the concept in order to advance ecological restoration (resource improvements.) Others opposed it as creating a potential “slippery slope” to selling Great Lakes Water and increasing risks of NAFTA challenges to jurisdictions that rejected diversions. It was and remains one of the most contentious aspects of the 2004 proposals. Groups on both sides of that argument have contributed to this primer.

**Straddling Community:** Means any incorporated city or town that is, at the effective date of the Compact and Agreement coming into force, partly in and partly outside the Great Lakes Basin, or partly in and out of any Great Lake watershed but wholly in the Basin.

**Community within a Straddling County:** Means any incorporated city or town that is outside the Basin, but which is entirely inside a county that is partly in and partly outside the Basin. This provision does not apply to the province of Ontario. The Ontario government has no interest in pursuing any diversions for communities in counties that straddle the Basin boundaries, so the negotiators defined “county” as a jurisdiction in the US Great Lakes states or in Quebec. The county boundaries are those that exist when the agreement is signed.

## Decision Making

**a) Regional Review:** A review required in the Compact and Agreement, requiring collective review by all Great Lakes States and Provinces and Tribes and First Nations (Illinois, Michigan, Wisconsin, Indiana, Ohio, New York, Pennsylvania, and Minnesota, plus Ontario and Quebec). The Regional Review includes the opportunity for public comment. The Regional Review makes its findings public, including findings where a consensus was not achieved. In the case of differing views, all those views and positions will be presented. The Regional Review is essentially advisory only. The “originating party” (the jurisdiction requesting an exception to divert water) is required to consider the “Declaration of Finding” from the Regional Review, but is not bound by that decision.

**b) Compact Council:** In cases of the proposed exception for “straddling counties,” approval requires, in addition to the Regional Review, approval by the Council (meaning the US States in the Basin that have brought the Compact into effect). The Council votes are normally by simple majority, but in the case of approving a diversion to a community in a straddling county, the approval can be blocked by any one state. This is consistent with US law under the Water Resource Development Act 1986.

## A BRIEF HISTORY OF AGREEMENTS CONCERNING WATER QUANTITY IN THE GREAT LAKES:

**1909:** One of the oldest water and environmental treaties in the world was executed in 1909 as an empire treaty between the United States and Great Britain (acting for Canada) to deal with all shared waters either lying along or flowing across the Canada-U.S. boundary. The 1909 Boundary Waters Treaty established the International Joint Commission (IJC) to oversee disputes. The Boundary Waters Treaty applies to water levels and flows, as well as to water quality. The Treaty requires review and approval by IJC of diversions that would “affect the natural flow or level” of the Lakes, or would interfere with domestic uses, boating and navigation. However, the “Chicago Diversion,” a large diversion of water from Lake Michigan to the Mississippi River system pre-dated the Treaty. Water has been diverted at Chicago since completion of the Illinois and Michigan Canal in 1848, thus the Chicago Diversion is not covered by the 1909 Treaty.

**1985:** The Great Lakes Charter was agreed upon by the relevant states and provinces. The Charter declared that “the water resources of the Great Lakes Basin are precious public resources, shared and held in trust.” The Charter is a non-binding agreement to consult and seek consent. Such is required for diversions and consumptive uses greater than 5 million gallons/day. It extended the scope of water management to all water resources, including tributaries and groundwater, and commitment to the sharing of water use information, science and conservation.

**1986:** The U.S. Omnibus Water Resources Development Act of 1986 stated that “No water shall be diverted or exported from any portion of the Great Lakes, for use outside the Great Lakes Basin unless such a diversion or export is approved by the Governor of each of the Great Lakes states.” WRDA 1986 essentially gave a veto to each governor of a Great Lakes state to block any export or diversion. WRDA 1986 also prohibits U.S. federal agencies from studying diversion proposals. WRDA is unclear as to whether it applies to the groundwater and it does not apply to the consumptive use. WRDA 2000 reinforced the conclusion that Congress intended the legislation as a waiver to the Dormant Commerce Clause. It also encouraged the states to work together with the provinces on a mechanism to deal with withdrawals and use of Great Lakes water (U.S. federal authority for Annex 2001).

**2001:** Canadian government “Act to Amend the International Boundary Waters Treaty Act” prohibits bulk removal of water from boundary waters “and taking it outside the water basin in which the boundary waters are located.” Like the Treaty on which it is based, it applies only to boundary waters and not groundwater or all surface waters. It does include some specific exceptions similar to some of those found in the draft annex agreements, for example, water in manufactured products, bottled water, ballast water, and water for short term fire-fighting and humanitarian purposes. There is no similar law on the U.S. side.

## WITH ALL THESE LAWS, WHY ARE WE WORRYING ABOUT DIVERSIONS?:

Following an ill-conceived 1999 permit from the Ontario government to allow bulk water shipments from the Great Lakes, (the Nova case), many were concerned that the existing protections against diversions might not be effective. In short order, and in the face of massive public outrage, the Ontario government withdrew the Nova permit and passed tough laws in Ontario to ban diversions. Nevertheless, many on the US side of the border looked to assure themselves that the existing prohibitions on diversions were adequate.

In 1999, the Council of Great Lakes Governors received a legal opinion about the constitutionality and enforceability of WRDA. A Denver law firm, with advice from a Houston and Toronto one as well, wrote an opinion that cast doubts on the status quo. In fact, it argued that the Great Lakes states did not have the power to “just say no” to diversions. Regardless of the legalities, many feared that WRDA, as an appropriations act voted every other year, was vulnerable to change. The legal opinion, however, had a powerful impact.

In essence, it argued that in order to prevent diversions, the Governors and Premiers needed to permit them, but put in place ecological rules to govern them.

In June 2001, the Council of Great Lakes Governors with Ontario and Quebec agreed upon Annex 2001. Its goal, largely reflecting the Denver legal opinion, was to implement a decision-making standard for water withdrawals. It came about as a result of doubts as to the enforceability of WRDA. Yet many legal experts disagreed with the Denver law firm’s opinion. There is no court decision that suggests the current prohibitions are vulnerable.

Several leading experts have suggested it was an extreme legal interpretation leading to bad policy, and the International Joint Commission concluded there are no legal impediments to protecting the water resources and preserving the integrity of the Great Lakes ecosystem



## THE JULY 2004 DRAFT AGREEMENT AND COMPACT:

For the past several years, the Council of Great Lakes Governors with Ontario and Quebec have been negotiating a set of standards and rules to permit diversions, while at the same time making it difficult to do so. New concepts were developed, such as requiring environmentally based permits for most water withdrawals, a first for many of the U.S. states, as well as a “resource improvement standard,” allowing water withdrawals, with conditions, if the water user paid for ecological improvement.

When the draft Compact and Agreement among the Governors and Premiers was released for public comment, many commentators and members of the public were highly critical. The federal governments of Canada and the United States, not parties to the agreement, pointed out that the agreement needed tougher language to ensure that the role of the 1909 Boundary Waters Treaty, the International Joint Commission and public trust law in the Great Lakes states were not implicitly weakened.

On the other hand, many pointed out that the agreement had some significant improvements over the status quo. Diversions from groundwater or tributaries are not dealt with explicitly in the 1909 Treaty, although the IJC has often been asked to deal with groundwater matters and the Great Lakes Charter (non-binding) does include groundwater. The explicit inclusion of groundwater and tributaries and requirements, although weak, for conservation measures represented progress. In addition, the agreements for the first time in many jurisdictions required environmentally based permits for most withdrawals within the Basin.

Concern over tapping of aquifers in the Basin has been steadily increasing. In 2004 a scientific study by the US Geological Survey (USGS) showed that, for the first time, groundwater pumping had reversed the direction of flow away from Lake Michigan, one of the Great Lakes that represents the largest concentration of unfrozen fresh surface water in the western hemisphere. Groundwater pumping is affecting an entire water basin, one of the largest in the world and one that lies at the center of Canada’s two most populous provinces, Ontario and Quebec.

The 2004 draft included management of in-basin water and consumptive uses, which many states have never required.

After the 90 day consultation period closed on October 18, 2004, the Governors and Premiers went back into negotiations. As of June 30, the negotiators from the states and provinces were unable to agree on all elements of the new proposals. For the remainder of this primer, the draft text now under review for the Agreement and Compact for Annex 2001 will be called simply “the 2005 draft.”

**You have a chance to decide: Does this draft capture the best of the last draft while avoiding its pitfalls? Will the 2005 draft better protect the Great Lakes than does the status quo? Were your voices heard in the last round?**

**On balance, there are many elements of this agreement that should be supported, but there are some areas that need to be carefully tightened against potential misuse.**

**The following groups are jointly distributing this primer and hope it is of assistance:**

**Great Lakes United  
Sierra Club  
Sierra Club of Canada  
National Wildlife Federation  
Lake Ontario Waterkeeper  
Union québécoise pour la conservation de la nature (UQCN)  
Georgian Bay Association  
Georgian Baykeeper**

## STRENGTHS AND WEAKNESSES OF THE 2005 DRAFT COMPACT AND AGREEMENT:

The following is a “quickie” approach to the highs and lows of the new 2005 draft. On balance, the strengths outweigh the weaknesses. However, there are significant risks to approving the draft 2005 agreement without changes.

### STRENGTHS OF 2005 DRAFT

1. The last draft (July 2004) was basically a system to permit diversions, with exceptions. The 2005 draft is primarily a system to prohibit diversions, with limited exceptions.
2. The 2005 draft requires that, for the first time in many of the states, most water withdrawals within the basin be subject to a permit. The permit must be based on environmental protection, including that the water withdrawal cause no “significant adverse impact” to the environment, and the withdrawal include significant water conservation.
3. The 2005 draft Preamble and sections of both Compact and Agreement reference the precautionary principle as significant guidance in decision-making.
4. The 2005 draft agreement explicitly recognizes “these waters (of the Great Lakes Basin) are interconnected and form a single hydrological system.” As Lake Michigan is entirely within the United States, and its axis does not lie along the Canada-U.S border, some had argued it does not meet the definition of a boundary water, and that it might not be governed by the diversion provisions of the 1909 Boundary Waters Treaty. This acknowledgement weakens that argument.
5. The 2005 draft has strong language, both in the Preamble and in Article 701, that the 1909 Boundary Waters Treaty continues to apply and nothing in these agreements weaken its role. On the other hand, as noted below, the appellate procedures could erode the IJC.
6. The 2005 draft agreement includes surface and ground water. Although ground water is referenced in other agreements, such as the Great Lakes Charter, the approval of the current draft would create a more robust legal regime governing the withdrawals of water from aquifers.
7. The voting procedure under the 2005 draft to Compact permit any diversion to a community outside the Basin, but found in a straddling county, requires unanimity among the states. Any one governor can veto a diversion, consistent with WRDA. However, Canadian provinces have only a consultative role, through the regional review process under the Agreement.
8. The 2005 draft includes recognition that the Great Lakes will be facing stresses from climate change and that these factors be taken into account consistent with the precautionary principle. For the first time, a Council of Great Lakes Governors document has recognized that fact.
9. The 2005 draft does not include the resource improvement standard, thus avoiding the potential for trade disputes under NAFTA, leading to water for sale.
10. The 2005 draft requires all jurisdictions to have water conservation plans in place.
11. The 2005 draft is not based on the principle from the 2004 draft that a user outside the basin has the same rights to water as a user in the basin or in straddling counties.
12. The 2005 draft removes what was effectively an exemption in the 2004 draft for diversions smaller than 1 million gallons per day. This is, perhaps, the very most significant improvement between the 2004 and 2005 drafts.

## WEAKNESSES OF 2005 DRAFT:

1. The water conservation plans do not have to come into effect until five years after the prohibitions on diversions and the standards are in full force.
2. There is no requirement for ecological restoration of hydrologic regimes damaged by consumptive, in-Basin use of Great Lakes water. While ecological restoration is addressed under the Great Lakes Water Quality Agreement, many environmental groups engaged in the Annex debates argue that the new legal framework being developed through the Compact and Agreement must add funds and impetus to this priority.
3. It could violate the 2001 Canadian Amendments to the Boundary Waters Treaty Act, although this is a quite unlikely eventuality.<sup>9</sup>
4. The system to allow exemptions to the prohibition on diversions will potentially allow a large population base outside the Basin to have access to Great Lakes water. The concept of straddling communities, those with part of their border within the basin is further enlarged with straddling counties. This is a significant concern. On the other hand, others suggest that the realities of consolidated utilities across the basin divide, and the withdrawal of Great Lakes water by over-pumping groundwater just outside the basin divide make it advisable to bring both straddling and nearby communities into the management regime. Even if the system of permitting access, by unanimous agreement of all Great Lakes Governors for communities within straddling counties was not offensive in principle, there are serious problems with this proposed approach. There is a significant risk in stating the rationale for access to water on political, rather than ecological boundaries. It is this aspect of the 2005 draft that, once again, has trade and environment experts losing sleep.
5. The Chicago Diversion, constructed in 1907, is outside of this agreement. Any potential increase in the removal of water from Lake Michigan through the Chicago Diversion is governed by a ruling of the U.S. Supreme Court<sup>10</sup>, and stays there. While the 2005 draft agreement is based on a prohibition on diversions, by not including the Chicago Diversion, there is a very large horse already out the barn door. (Note: this also means that none of the straddling communities, or communities within straddling counties in Illinois can apply for water taking permits.)
6. The public trust doctrine and common law standards that limit diversions and privatization of water for sale out of watersheds and the Great Lakes Basin have been ignored.
7. Bottled or containerized water in containers less than 20 litres has been exempted not only from the definition of “diversion,” but specifically made a “consumptive use.” This provision is controversial. Some believe it will accelerate the tapping of water systems for private use by water bottlers.
8. The amount of water that could be withdrawn under the various exceptions is not set to any particular time limit or volume cap.
9. The Agreement and Compact both contain dispute resolution procedures that could undermine the role of the IJC. From the viewpoint of Canadians, the vote at the IJC, with three members from each country, compared to procedures under the Agreement with Canada’s interests being in a minority position (8-2), is a concern that survived the re-negotiation process to the current draft. For both nations, the parallel and disconnected functioning of appeal procedures within the new framework at the state and province level, could weaken the role of both federal governments and of the IJC.

## THE 2005 DRAFT COMPACT AND ANNEX—GENERAL APPROACH:

The general approach of the new Compact and Agreement within Annex 2001 is a **Prohibition** on Diversions (Agreement, Art. 200; Compact section 4.6), with **exceptions**.

The approach is a 180 degree turn from the 2004 draft. Nevertheless, it does permit diversions under certain circumstances.

The exceptions fall in the following categories:

- 1) the Chicago Diversion;
- 2) Straddling Communities;
- 3) Intra-basin Transfers;
- 4) Straddling Counties;
- 5) A previous “exemption” from diversion (which, at least, acknowledged the diversion) concerning bottled water has been removed, and bottled or containerized water is now defined as a “consumptive use.” This is contrary to legislative and court decisions that provide this is as much as a diversion as a pipeline or tanker truck of water.

The exceptions are not automatic. Depending on the type of exception, there are different hurdles to overcome before a diversion would be allowed. (see Annex for detailed descriptions of the hurdles to be cleared before the exceptions can be permitted.)

The difficulty of making the case for an exception increases steadily as the community wanting the Great Lakes water gets further from the Basin. In other words, it will be easier to obtain water if the application is for a community that is itself partly in and partly outside the Great Lakes Basin (i.e. a “straddling community”). It will be most difficult to discharge the tests and overcome a unanimous compact vote among the eight Great Lakes States to allow diversions to a community that is entirely outside the Basin, but in a county that straddles the line. The realities of consolidated utilities across the Basin divide and the withdrawal of Great Lakes water by over-pumping groundwater just outside the Basin divide make it advisable, from a conservation standpoint, to bring both straddling and nearby communities into the management regime. The large risk in the 2005 draft is the compromise decision to use county boundary lines as a demarcation for out of Basin rights to apply for a diversion. The boundaries must be ecologically based, not politically, if the exception is to withstand legal or trade regime challenges.

**The Approval Process:** *Once the public comment period is over, the eight governors and two premiers go back to meet and review public feedback from this consultation period. If all ten jurisdictions can agree on a Compact (between U.S. states) and an Agreement (between U.S. states and Canadian provinces), then they will all sign the new Agreement. For the Compact to come into effect, the state legislatures in all eight Great Lakes States will have to pass legislation making the Compact state law. It then will be sent to the U.S. Congress to give its consent.*

## KEY CONCERNS TO BE ADDRESSED:

For any of this to work to protect the environment, citizens on both sides of the border must be vigilant. Key areas on which to concentrate comments in the 60 day review period include:

### 1) **Conservation:**

Water withdrawals and consumption are likely to increase as a result of economic growth and global warming, while net Basin supply is likely to decrease. Therefore efficient use of water and conservation are essential to ensure that exceptions are kept to an absolute minimum. Any ecologist or sewer and water engineer can make a pretty strong case that better and more efficient conservation, use and management of water, will frequently make it possible to avoid a diversion or withdrawal. Communities inside the Basin have very water wasteful habits. The conservation regime promised in the Agreement and Compact is required urgently. Demand that the Governors and Premiers take water conservation seriously, by strengthening the Water Conservation Programs described in Article 303 of the draft 2005 Agreement and section 3.5 of the draft 2005 Compact. Not later than 5 years from the signing of these documents, (or within one year of the coming into force if it takes four years or more for the agreements to come into force), each party to the Compact and Agreement should develop, in consultation with the public, a comprehensive water efficiency program that would include the adoption of metering for all water users and other demand-side policies, and the adoption of the best water efficient technology.

### 2) **Science:**

There is an urgent need to have a better understanding of the amount of Great Lakes water resources that are currently available. Before any increased uses are permitted all of the jurisdictions need to begin immediately to track all water withdrawals and return amounts. In addition there needs to be a commitment of all jurisdictions to provide the resources needed to better monitor the Great Lakes quantities especially considering future threats such as climate change. The recommended standard for net basin supply determination should be the method used by the US National Oceanic and Air Administration. Any withdrawal proposal should have to state the amount of return and the ultimate destination of the return supply.

### 3) **Chicago Diversion:**

It is recognized that the longstanding U.S. Supreme Court Decree already offers considerable protection to Great Lakes interests and the Great Lakes ecosystem. Nevertheless, another clause or clauses should be added requiring Illinois to fully respect the agreement rules and processes in any future application to have the Decree altered.

### 4) **Straddling Counties:**

There is merit in including straddling and nearby communities in the Annex but the use of political boundaries could create a dangerous legal situation.<sup>11</sup>

An alternative would be to maintain the current natural hydrologic basin divide as defined by the height of land (sub continental divide) and to accept applications, for a period of [5] years, for exemptions from communities that are prepared to meet the following criteria.

- a. Communities that can demonstrate that they currently access Great Lakes water via groundwater or by way of utilities that straddle the divide, and;
- b. Communities that agree to meet all other criteria as currently described in the conditions that would have applied to straddling counties in the current draft Annex text.

## 5) **Intra-Basin Transfers:**

Diversions of water from one Great Lake to another (called “intra-basin transfers” in the agreements) that are greater than 100,000 gallons per day and lose less than 5 million gallons per day should not be exempted from the requirement to return the remaining water to the original lake watershed.

Water “loss” in this context means water lost to evaporation and other processes. Withdrawal that results in nearly 5 million gallons per day (or 19 million litres per day) in water loss could be as large as 35 million gallons per day or 133 million litres per day, respectively. Even on a lake scale, several such withdrawals would be significant and should be allowed only if the remaining water is returned to the original lake basin.

## 6) **Bottled Water:**

While the exceptions for near-by communities in straddling counties and in straddling communities limit any application for a diversion to water “solely for public use,” the risk remains that bottling plants will access water from municipal supplies. This risk requires a serious discussion. Even though the export of bottled water has a negligible impact on the Great Lakes themselves, it can be important locally, and it could also set a dangerous precedent for larger private sector diversions if permitted without appropriate state or provincial approvals in each individual case. While some jurisdictions, such as Michigan, have a moratorium on approving water takings beyond the Great Lakes Basin for bottling plants, others do not. A coordinated and consistent approach to water privatization and water bottling needs to be developed by the parties to this agreement. Further work on the language under the exceptions must be developed to reduce the threat of public water diverted for purely private, and unsustainable, purposes.

## 7) **Ecological Restoration:**

More work is required to ensure an emphasis on ecological restoration. While much work is to take place within the Great Lakes Water Quality Agreement, there is also support for requiring ecological restoration through the draft Compact and Agreement. The following proposal from the US National Wildlife Federation is included to assist you in preparing briefs in support of this principle.

- Refer to “ecological restoration” rather than “improvement,” to make clear that restoration of natural systems (not improvement on nature) is intended;
- Only require ecological restoration for large in-basin consumptive uses, subject exclusively to state/provincial authority, eliminating the uncertainty of regional approval of a new standard and limiting the initial application to large projects;
- Continue to prohibit diversions, and not allow ecological restoration to justify approval of an exemption from the prohibition on diversions; and
- Allow compliance with the ecological restoration requirement by either incorporating the ecological restoration into the proposed project (perhaps at no cost to the water users, depending on project design) or by assisting local communities within the project watershed with hydrological restoration efforts identified by relevant restoration plans.

## 8) **Limits:**

The limited exceptions could be further limited by reference to a cumulative total for all diversions that should not be exceeded.

## 9) **Relationship to the International Joint Commission:**

A major concern with the 2004 draft was its potential to undermine the Boundary Waters Treaty and the International Joint Commission. While the 2005 draft clearly has attempted to deal with these concerns through language acknowledging that the agreement should not denigrate from either the Treaty or the IJC, the effect of the separate and disconnected appellate procedures in the 2005 draft, could weaken the role of the IJC. Comments to the Governors and Premiers should stress that where the states and provinces cannot agree, the States and Provinces should request a reference from their respective federal governments to the IJC. Such a provision can readily replace the dispute resolution sections in the 2005 draft.

## CONCLUSION:

**The next 60 days offer residents of the Great Lakes Basin, and people concerned with water issues throughout Canada and the United States, a significant opportunity to protect the Great Lakes, its tributaries, and groundwater for the next century and beyond.**

This primer is not intended to answer all your questions. Please go to the websites listed in the appendix to find other critiques from environmental groups. Go to the Council of Great Lakes Governors site to access the proposed 2005 draft. To find out where and when the public session nearest you will be held, please email [greatlakes@sierraclub.ca](mailto:greatlakes@sierraclub.ca).

Please make your voice heard. Individual letters count. Briefs from organizations count. Whether received by fax, mail or electronically, let the negotiators from the eight Great Lakes States, Ontario and Quebec know that you care!

Be prepared for a long effort following the review of the draft to ensure passage of the Compact and Agreement through your state or provincial legislature. We will need to continue to work together.



## ENDNOTES:

- <sup>1</sup> Great Lakes Water Quality Agreements of 1972, 1978 and 1987.
- <sup>2</sup> The Great Lakes states are Illinois, Michigan, Wisconsin, Indiana, Ohio, New York, Pennsylvania, and Minnesota.
- <sup>3</sup> Note that the concept of “public trust” has significant application in protecting common property resources, such as the Great Lakes. While many agreements refer to the Lakes as being “held in trust,” the principles of the public trust doctrine are rarely applied. An exception is the recent case of Michigan Citizens v. Nestle Waters North America Inc. See important analysis by lawyer James M. Olson at [www.wilsoncentre.org](http://www.wilsoncentre.org).
- <sup>4</sup> The Omnibus Water Resources Development Act of 1986
- <sup>5</sup> The word “export” was added in an amendment to WRDA in 2000.
- <sup>6</sup> James Lochhead, “Report to the Council of Great Lakes Governors: Governing the Withdrawal of water from the Great Lakes,” (Brownstein, Hyatt and Farber, Denver, Colorado) May 18, 1999.
- <sup>7</sup> See opinion of Dr. Dan Tarlock, Professor at Chicago Kent School of Law at [www.sierraclub.ca](http://www.sierraclub.ca). However, to be fair, Lochhead was not asked to provide an opinion that accounted for common law limitations on diversions out of a *watershed* or contrary to the public trust doctrine. Maintaining these limitations may well prevent successful commerce clause or trade agreement challenges.
- <sup>8</sup> “Groundwater in the Great Lakes Basin - the Case of Southeastern Wisconsin” (USGS), <http://wi.water.usgs.gov/glpf/> from Linda Nowlan, BURIED TREASURE GROUNDWATER PERMITTING AND PRICING IN CANADA , 2005 Walter and Duncan Gordon Foundation.
- <sup>9</sup> For this to occur, it would require either Ontario or Quebec to pass new laws less stringent than the federal act (they now both have laws more stringent), and both have indicated to the federal government that they do not intend to do that.
- <sup>10</sup> U.S. Supreme Court Decree in the case of Wisconsin et al. v. Illinois et al.
- <sup>11</sup> The realities of consolidated utilities across the basin divide, and the withdrawal of Great Lakes water by over-pumping groundwater just outside the basin divide make it advisable to bring both straddling and nearby communities into the management regime.
- <sup>12</sup> See article 207, sections 10-14 in draft 2005 Agreement and section 4.12 in the draft 2005 compact.
- <sup>13</sup> See Article 201 in the draft 2005 Agreement and section 4.7 in the draft 2005 Compact.
- <sup>14</sup> See Article 201 in the draft 2005 Agreement and section 4.7 in the draft 2005 Compact.
- <sup>15</sup> See Article 201 in the draft 2005 Agreement and section 4.7 in the draft 2005 Compact.
- <sup>16</sup> This condition is part of the “Decision-Making Standard” found in Article 203 of the draft 2005 Agreement and section 4.9 of the draft 2005 Compact.
- <sup>17</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>18</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>19</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>20</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>21</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>22</sup> See Article 201 in the draft 2005 Agreement and section 4.7 in the draft 2005 Compact.
- <sup>23</sup> This condition is part of the “Decision-Making Standard” found in Article 203 of the draft 2005 Agreement and section 4.9 of the draft 2005 Compact.
- <sup>24</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>25</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>26</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>27</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>28</sup> See Article 201 in the draft 2005 Agreement and section 4.7 in the draft 2005 Compact.
- <sup>29</sup> See Article 201 in the draft 2005 Agreement and section 4.7 in the draft 2005 Compact.
- <sup>30</sup> This condition is part of the “Decision-Making Standard” found in Article 203 of the draft 2005 Agreement and section 4.9 of the draft 2005 Compact.
- <sup>31</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>32</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>33</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>34</sup> This condition is also part of the “Decision-Making Standard.”
- <sup>35</sup> This condition is also part of the “Decision-Making Standard.”

## APPENDIX I:

Detailed explanation of Application Exemptions:

1. **For the Chicago Diversion**, any application to vary the amount of water currently allowed would have to proceed to the U.S. Supreme Court under the Decree issued in Wisconsin v. Illinois et al<sup>12</sup>. As a result of the Compact and Agreement, the states would support Canadian provinces in any application to appear at the U.S. Supreme Court to argue against any increased diversion. This section of the 2005 draft Compact and Agreement is essentially the same as the current state of affairs with the one change that states are obliged to support Ontario and Quebec having status before the court. The fact that the Supreme Court Decree covers matters in Illinois means that the communities and counties in the State of Illinois, that might have met the definition of “straddling” are also excluded from the compact and agreement. Illinois is bound by provisions of the Agreement that do not relate to the approval of proposals re: conservation, information, sharing and other parts of the agreement.
2. **Straddling Communities**<sup>13</sup> are those that are part in and part out of the Great Lakes Basin, or partly in the watersheds of two of the Great Lakes. The boundary lines of the community in question are those that exist at the time the whole agreement comes into force, as much as five years from now. If a community is partly in and partly out of the basin (or Great Lakes watershed) it can apply as if its proposal were for a water withdrawal and consumptive use under the terms of the Agreement. It must demonstrate it can meet the following requirements:
  - The water is to be used solely for public water supply purposes;<sup>14</sup>
  - The return flow will be to the Source watershed and will meet all applicable water quality standards;<sup>15</sup>
  - The need for the proposed withdrawal and consumptive use cannot be met through better and more efficient use and conservation of existing water supplies;<sup>16</sup>
  - The application is for a reasonable amount of water considering the proposed intended purpose;<sup>17</sup>
  - All water withdrawn from the Basin must be returned to the same watershed from which it came -- minus however much water was lost in the consumptive use. The return flow shall not include ANY water from out of the Basin or watershed of origin;<sup>18</sup>
  - The water withdrawal and consumptive use shall not be allowed if it results in any significant individual or cumulative adverse impacts to the quantity and quality of the waters, or on other ecological features dependent on those waters. As well, this condition requires an examination of whether the withdrawal could set any dangerous precedents leading to damaging cumulative impacts;<sup>19</sup>
  - The withdrawal or consumptive use shall be implemented to ensure environmentally sound and economically feasible water conservation is part and parcel of the water management regime. This condition exists to try to have water withdrawals kept to a minimum by reducing demand for water through wasteful practices;<sup>20</sup>
  - The withdrawal or consumptive use must meet all relevant state or provincial laws, as well as any federal laws and the terms of the Boundary Waters Treaty;<sup>21</sup> and,
  - The proposal undergoes Regional Review, requiring a consultation with all eight Great Lakes states and the two provinces, the public, Tribes and First Nations.
- 5) **Intra-Basin Transfers:**

Some intra-basin transfers are actually treated as diversions, some are not:

  - If the water withdrawal is less than 100,000 gallons per day (379,000 litres/day) on average over any 90 day period, the proposal is subject to management at the discretion of the state or province from which the application is made;<sup>22</sup>
  - If the proposal is for more than 100,000 gallons a day (averaged over 90 days), but loses less than 5 million gallons a day (19 million litres/day) averaged over a 90 day period, (Note: The amount withdrawn could be up to seven times greater than the loss – up to 35 million gallons per day or 133 million litres a day), the Originating state or province is required

to notify the other parties and the proposal is required to meet all the following requirements, to be managed and regulated by the state or province within which the intra-basin transfer is requested:

- I. There is no reasonable alternative in the watershed in which the water is needed.
  - II. The need for the proposed withdrawal and consumptive use cannot be met through better and more efficient use and conservation of existing water supplies;<sup>23</sup>
  - III. The application is for a reasonable amount of water considering the proposed intended purpose;<sup>24</sup>
  - IV. All water withdrawn from the Basin must be returned to the Great Lakes Basin (but not necessarily to the same basin) -- minus however much water was lost in the consumptive use. The return flow shall not include ANY water from out of the Basin, but may come from another of the Great Lakes watersheds;<sup>25</sup>
  - V. The water withdrawal and consumptive use shall not be allowed if it results in any significant individual or cumulative adverse impacts to the quantity and quality of the waters, or on other ecological features dependent on those waters. As well, this condition requires an examination of whether the withdrawal could set any dangerous precedents leading to damaging cumulative impacts;<sup>26</sup>
  - VI. The withdrawal or consumptive use shall be implemented to ensure environmentally sound and economically feasible water conservation is part and parcel of the water management regime. This condition exists to try to have water withdrawals kept to a minimum by reducing demand for water through wasteful practices;<sup>27</sup>
  - VII. The withdrawal or consumptive use must meet all relevant state or provincial laws, as well as any federal laws and the terms of the Boundary Waters Treaty;
- If the amount of water requested loses 5 million gallons/day or more (averaged over the 90 day period), all of the above requirements apply, but the used water must return to the same lake watershed whence it came. In addition, such proposals must go to Regional Review and if the transfer is in the US, it will also need to be approved through the Compact, subject to veto by any one Governor.

6) **Straddling Counties** deal with what used to be called “near Basin communities.” The community lies completely outside the Basin, but is close enough to have been demanding access to Great Lakes water, creating political problems. The community is within a county that is partly in and partly out of the Basin. The county boundaries are those that exist at time of the signing of these agreements -- not their entry into force many years from now. From an ecological stand point, it can be argued that communities that are very near the Basin should be within the limited exceptions to diversions.<sup>28</sup> As this exception covers the largest potential geographical area, its tests are the most rigorous. In order to gain an exemption, a community within a straddling county must meet all the following tests regardless of the volume of water:

- The water is to be used solely for public water supply purposes<sup>29</sup> for a community that does not have an adequate supply of potable water;
- The return flow will be to the Source watershed and will meet all applicable water quality standards;<sup>30</sup>
- The need for the proposed withdrawal and consumptive use cannot be met through better and more efficient use and conservation of existing water supplies;<sup>31</sup>
- The application is for a reasonable amount of water considering the proposed intended purpose;<sup>32</sup>
- All water withdrawn from the Basin must be returned to the same watershed from which it came -- minus however much water was lost in the consumptive use. The loss of water for all consumptive uses must be justified in the application and minimized through conservation. The return flow shall not include ANY water from out of the Basin or watershed of origin;<sup>33</sup>
- The water withdrawal and consumptive use shall not be allowed if it results in any significant individual or cumulative adverse impacts to the quantity and quality of the waters, or on other ecological features dependent on those waters. As well, this condition requires an examination of whether the withdrawal could set any dangerous precedents leading to damaging cumulative impacts;<sup>34</sup>

- The withdrawal or consumptive use shall be implemented to ensure environmentally sound and economically feasible water conservation is part and parcel of the water management regime. This condition exists to try to have water withdrawals kept to a minimum by reducing demand for water through wasteful practices;<sup>35</sup>
- The withdrawal or consumptive use must meet all relevant state or provincial laws, as well as any federal laws and the terms of the Boundary Waters Treaty;<sup>36</sup>
- There is no reasonable alternative in the Basin in which the community is located;
- A precautionary approach must be taken to determining whether or not the conditions for this exception have been met. No exception should be authorized if it is not shown convincingly that the water withdrawal to a community in a straddling county will not endanger the integrity of the Great Lakes Basin Ecosystem,
- The proposal undergoes Regional Review; and
- If the proposed withdrawal is from a US jurisdiction, the proposal must also be approved by all eight Great Lakes State governments under the Compact Council.

## APPENDIX II:

### For more information:

**Sierra Club of Canada:** [www.sierraclub.ca](http://www.sierraclub.ca)

**Great Lakes United:** [www.glu.org](http://www.glu.org)

**The Council of Canadians:** [www.canadians.org](http://www.canadians.org)

**National Wildlife Federation:** [www.nwf.org](http://www.nwf.org)

**Pollution Probe:** [www.pollutionprobe.org](http://www.pollutionprobe.org)

**Lake Ontario Waterkeeper:** [www.waterkeeper.ca](http://www.waterkeeper.ca)

**Union québécoise pour la conservation de la nature:** [uqcn.qc.ca](http://uqcn.qc.ca)

**Georgian Bay Association:** [www.georgianbay.ca](http://www.georgianbay.ca)

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