

# Midwest Environmental ADVOCATES

*pro bono publico*

August 29, 2005

## VIA E-MAIL

### BOARD OF DIRECTORS

**Carol Brown**, Vice President  
Partner  
Brown & LaCounte  
Madison

**Arlen Christenson**, President  
Emeritus Professor of Law  
and Environmental Studies  
University of Wisconsin Law School  
Madison

**Dennis Grzezinski**  
Law Office of Dennis Grzezinski  
Milwaukee

**Mark A. Kastel**  
Co-Founder  
The Cornucopia Institute  
La Farge

**Paula Oeler**, Secretary  
Brice Prairie

**Larry Wawronowicz**  
Deputy Administrator of  
Natural Resources  
Lac du Flambeau Band of Lake  
Superior Chippewa Indians  
Arbor Vitae

**Beth Anne Yeager**, Treasurer  
Attorney  
Madison

### STAFF

**Melissa K. Scanlan**, Attorney  
Founder & Executive Director

**Andrew C. Hanson**  
Staff Attorney

**Brent O. Denzin**, Attorney  
Equal Justice Works Fellow

**Florence A. Edwards**  
Legal Assistant

### OF COUNSEL

**Jodi Habush Sinykin**  
5630 N. Lake Drive  
Milwaukee, WI 53217  
414.961.8944  
hslaw@bizwi.rr.com

**David Naftzger**  
Executive Director  
Council of Great Lakes Governors  
35 E. Wacker Dr., Suite 1850  
Chicago, IL 60601

## Re: Public Comments on Draft Annex 2001 Implementing Agreements

Dear Mr. Naftzger:

I am an attorney who specializes in water law and the Executive Director of Midwest Environmental Advocates, Inc., a non-profit environmental law firm that provides legal representation to community groups in the Great Lakes states, with a special emphasis on Wisconsin. We appreciate the opportunity to submit public comments on the draft Annex 2001 Implementing Agreements. We submit these comments on behalf of our organization and ten individual signatories who represent just a few of the millions of public trust beneficiaries in the Great Lakes.

There are two draft Annex 2001 Implementing Agreements on which we are submitting combined public comments: the Great Lakes Basin Sustainable Water Resources Agreement between the two Canadian provinces of Ontario and Quebec and the eight Great Lakes states (hereinafter "Agreement"), and the Great Lakes Basin Water Resources Compact (hereinafter "Compact") between the eight Great Lakes states.



Organizations listed for identification purposes only.

702 E. Johnson Street, Madison, WI 53703  
Telephone 608.251.5047 Fax 608.268.0205  
advocate@midwestadvocates.org • www.midwestadvocates.org

## COMMENTS ON THE ANNEX 2001 IMPLEMENTING AGREEMENTS

### A. The Annex 2001 Implementing Agreements Fail To Protect The Great Lakes From Massive Exports Under International Trade Agreements.

With water scarcity becoming an ever increasing reality throughout the world, there are a handful of multinational corporations that are moving to amass control of water resources in what is now a \$1 trillion dollar industry.

In 2000, an article in Fortune magazine predicted that, “Water promises to be to the 21st century what oil was to the 20th century: the precious commodity that determines the wealth of nations.”<sup>1</sup>

The Great Lakes contain 20% of the world’s fresh water resources, and as such, are being looked at as a source of future wealth for a few private corporations.

Private corporations take water and privatize it for private profit in two basic ways: corporations take over delivering water through municipal water systems or they take water from the public domain and ship it in bulk export out of its basin of origin.

Although bottled water is the most common form of bulk export, water can also be exported via water bags, tankers, canals and pipelines.

There are a small group of companies that control much of the international water market. Two French-based transnational corporations, Vivendi and Suez, own or have controlling interests in water companies in over 130 countries serving more than a hundred million people.<sup>2</sup>

In 1993, British Columbia banned bulk water exports.<sup>3</sup> Prior to the ban, several companies had formed and planned to transport water by supertanker along the Pacific Coast. By one account, “Under one contract, the annual volume to be shipped to California was equivalent to the total annual water consumption of the City of Vancouver in Canada.”<sup>4</sup>

Unlike British Columbia, Alaska allows the commercial export of bulk water. Some reports indicate that Global H<sub>2</sub>O, a Canadian-based company, has a 30 year agreement with Sitka, Alaska, to export 18.2 billion gallons of water per year. It is unclear whether the company has implemented its plan, but several years ago it was working with Signet Shipping Group to supply supertankers to ship the water to China to be bottled.<sup>5</sup>

---

<sup>1</sup> Vandana Shiva, Privatization, Pollution, and Profit, (Cambridge, MA, Southend Press 2002) at 88 citing Fortune Magazine, May 2000.

<sup>2</sup> Maude Barlow and Tony Clark, Blue Gold, The Fight to Stop the Corporate Theft of the World’s Water, (New York: The New Press 2002), at 85.

<sup>3</sup> Id., at 134.

<sup>4</sup> Id., at 135.

<sup>5</sup> Id., at 135.

Although water bags are still being tested, Turkey has used water bags to ship water internationally. In 2000, Nordic Water Supply, a Norwegian corporation, used 5 million gallon bags to export water from Turkey to northern Cyprus.<sup>6</sup>

Bottled water is the most familiar of the bulk exports of water. The industry has grown tremendously since the 1970s, with unprecedented growth in the past decade:

- In the 1970s, the volume of water bottled and traded worldwide was 300 million gallons (about 1 billion liters) per year.
- In 1980, the volume increased to 650 million gallons (about 2.5 billion liters) per year.
- In 2000, the volume increased to 22.3 billion gallons (84 billion liters) per year.<sup>7</sup>

As markets for privately-supplied water grow, so do the concerns about whether we will be able to protect and conserve water in its natural state or be forced to trade it under international trade agreements. The provisions in GATT that could be problematic for preventing exports of Great Lakes water are: Article XI (prohibition against export controls) and Article XX(g) (exceptions). The provisions in NAFTA that may be problematic for preventing water exports are: Article 301 (national treatment of exports); Article 315 (trade in goods); Chapter 11 (investment) including Article 1102 (national treatment), Article 1105 (minimum standard of treatment), Article 1110 (expropriation and compensation); and Chapter 12 (services).<sup>8</sup>

As such, the governors and premiers need to ensure that the Implementing Agreements protect the Great Lakes as a public trust and not a commodity to be traded. The Implementing Agreements should be amended to prevent private corporations from arguing successfully that the Implementing Agreements are a barrier to trade.

### ***1. The Agreements Need to Be Binding.***

Directive 1 of the Annex requires the states and provinces to create “binding” agreements to implement the Charter and the Annex within three years. Yet, the Council of Great Lakes Governors has described the Agreement between the Canadian provinces and the Great Lakes states as a good faith, non-binding and legally unenforceable agreement between the eight Great Lakes states and the two Canadian provinces.<sup>9</sup> Although the draft Compact will be binding once it is approved by Congress, it will only be binding as to the Great Lakes states.

---

<sup>6</sup> [Mark Clayton](http://www.csmonitor.com/2004/1230/p13s01-sten.htm), *Forget OPEC. The next cartel may export drinking water*, The Christian Science Monitor, December 30, 2004, available at <http://www.csmonitor.com/2004/1230/p13s01-sten.htm>.

<sup>7</sup> *Id.*, at 143.

<sup>8</sup> Memorandum from West Coast Environmental Law, August 17, 1999, [www.canadians.org](http://www.canadians.org), at 20 – 24.

<sup>9</sup> Council of Great Lakes Governors, “About the Annex Implementing Agreements,” November 2004, available at [www.cglg.org/projects/water/docs/BackgroundInformation.pdf](http://www.cglg.org/projects/water/docs/BackgroundInformation.pdf), at 2.

We are concerned that the Agreement with the Canadian provinces is neither enforceable nor binding, in conflict with Directive 1 of the Annex. We need to ensure that we have bi-national binding agreements in place for the future management and protection of the Great Lakes. If the Agreement is not the vehicle to accomplish the stated Directive 1, why are we using it? It is a disservice to the Great Lakes' public to create a document that will not do the required job as, ultimately, it puts the lakes and the people who rely on them at risk.

**Suggested Improvement:** Identify a binding and enforceable legal tool and ensure that we use this for the future management and protection of the Great Lakes ecosystem.

## ***2. The Agreements Must Be Superior to International Trade Agreements.***

In addition to not carrying out Directive 1 of the Annex to create a binding bi-national agreement, the lack of legal force inherent in the Agreement does not ameliorate the risk of bulk export under international trade agreements.

International trade experts have advised that in order to carry out the goals of protecting and conserving Great Lakes water and prevent a successful challenge to state and provincial management decisions under the international trade agreements, the U.S. and Canada should negotiate both an international agreement on water that explicitly supercedes trade and investment obligations and an agreement on water conservation that explicitly recognizes sovereign authority to ban, embargo or tax water exports. These agreements should explicitly state that they are paramount to any conflicting provisions in trade agreements.<sup>10</sup>

We are concerned that the non-binding agreement between the Canadian provinces and the Great Lakes states may be an insufficiently weak vehicle to meet the Great Lakes protection goals of the Annex.

Moreover, there are at least two provisions that may weaken the Annex Agreements vis a vis international trade agreements: The Relationship Clause and the Decision Standard. These provisions do the exact opposite of what international law experts have recommended to insulate Great Lakes water and the Annex Implementing Agreements from challenges under the international trade agreements.

First, instead of containing language that explicitly supercedes the international trade agreements, the Relationship Clause provides that nothing in the Compact or Agreement provides any person “any right, claim or remedy under any international agreement or treaty.”<sup>11</sup>

---

<sup>10</sup> Memorandum from West Coast Environmental Law, August 17, 1999, [www.canadians.org](http://www.canadians.org), at 20 – 24.

<sup>11</sup> Compact, § 802(1); Agreement, Article 701.

Second, the Decision Standard requires all withdrawals, consumptive uses, and exceptions to the diversion prohibition to be implemented in compliance with all laws, including “international agreements.”<sup>12</sup>

**Suggested Improvement:** Negotiate an agreement that can effectively insulate the Great Lakes from export under international trade agreements. At a minimum, using the vehicle that has already been negotiated, include a provision or statement within the Implementing Agreements that explicitly supercedes all international trade agreements and states that water is a public trust and not a “commodity,” “good” or “product.” Secondly, amend the Decision Standard in the Agreement, Article 203(6), and the Compact to read as follows: “With the exception of international trade agreements, the Withdrawal, Consumptive Use or Exception shall be implemented so as to ensure that it is in compliance with all applicable municipal, State, Provincial and federal laws as well as regional interstate, inter-provincial and international agreements, including the Boundary Waters Treaty of 1909.”

### ***3. The Agreement Unreasonably Provides Special Treatment to Water Bottling Operations that are Privatizing Great Lakes Water.***

Of particular concern especially as it relates to the international trade issues, the Agreement creates a special exception to the diversion prohibition for one industry: bottled water.

The bottled water industry has grown tremendously in the past few decades. While sales of bottled water were about 300 million gallons (about 1 billion liters) per year in 1970, this jumped to 22.3 billion gallons (84 billion liters) per year in 2000.<sup>13</sup> Bottled water is now ubiquitous, as more and more people quench their thirst from plastic bottles rather than the tap.

The Agreement treats water bottling as a consumptive use instead of a diversion, depending on the size of the bottles, thereby allowing water bottlers to circumvent the diversion prohibition. This may prove to be a significant drain on Great Lakes Basin water resources given the tremendous growth of the bottled water industry in recent decades and its future projected growth.

An even bigger concern, however, is the effect this special exception may have on turning water into a “commodity,” “good” or “product” under international trade agreements and the inability of the Great Lakes states and provinces to turn off the tap to other hopeful industries seeking to privatize Great Lakes water.

---

<sup>12</sup> Agreement, Article 203(6), at 9.

<sup>13</sup> Maude Barlow and Tony Clark, Blue Gold, The Fight to Stop the Corporate Theft of the World’s Water, (New York: The New Press 2002), at 143.

The Agreement addresses water bottling under the title “Bulk Water Removals,” a title that belies the reality of the industry, and then goes on to create a special category to weaken rules as applied to this single industry:

A Proposal to Withdraw Water and to remove it from the Basin in any container greater than 5.7 gallons (20 litres) shall be considered to be a Proposal for a Diversion. A Proposal to Withdraw Water and to package it within the Basin for human consumption in containers 5.7 gallons (20 litres) or less shall be considered to be a Proposal for a Consumptive Use.<sup>14</sup>

Consumptive use is defined as, “that portion of Water Withdrawn or withheld from the Basin that is lost or otherwise not returned to the Basin due to evaporation, incorporation into products, or other processes.”<sup>15</sup> The bottled water industry is presumably obtaining the definition of consumptive use by arguing that it is incorporating Great Lakes water into a product, with the product being the bottled water. However, unlike all other products where water is a component that is mixed with the other ingredients necessary to create a product, bottled water is nothing more than the water itself. Bottled water should not be defined as a consumptive use because to fit the definition, the water needs to be incorporated into a product but not be the product. The water is not being “incorporated into products” as it is in the manufacturing of beer or canned vegetables.

From a legal and policy perspective, there is no difference between a water withdrawal from the Great Lakes accomplished via a pipeline to Arizona and a water withdrawal accomplished via the transport of millions of 5.7 gallon containers to Arizona. Thus, the ill-defined “consumptive use” of bottled water, in reality, amounts to a complete diversion of water from the Basin. The truth of this is underscored by the fact that the Agreement does not require water bottling companies to return water to the source watershed, unlike the other exceptions to the prohibition on diversions.<sup>16</sup>

Special treatment for the bottled water industry allows an unknown amount of water to be exported from the basin in 5.7 gallon or smaller bottles. This exception jeopardizes the Agreements and their purposes of protecting, conserving, restoring and improving the Great Lakes.<sup>17</sup> It does this by giving private corporations an argument that the Implementing Agreements treat the natural waters of the Basin as a “commodity,” “good” or “product” simply by placing them into a particular size container. If bottled water is given special treatment and not prohibited as a diversion, then it will be easier for another company intent on privatizing and diverting waters out of the Basin by means of one of the other modes of bulk transport to challenge the Agreement under

---

<sup>14</sup> Agreement, Article 207(9), Determination of Whether the Standard Applies to Proposals to Withdraw Water, Bulk Water Transfers, at 11.

<sup>15</sup> Agreement, General Definitions, Article 103, Consumptive Use, at 4.

<sup>16</sup> Compare Agreement, Article 203(3), at 9, with Agreement, Article 201, at 6-8.

<sup>17</sup> Annex, Findings, at 1.

international trade agreements. This provision could jeopardize the integrity of the Great Lakes and make them more vulnerable to international trade challenges.

**Suggested Improvement:** Article 207(9) must be modified to read without exception: “A proposal to Withdraw Great Lakes Basin Water and to remove it from the Basin in *any* size or type of container shall be considered to be a proposal for a Diversion for the purposes of the Standard.”

#### ***4. The Public Trust Doctrine Must be the Basis for Government Action.***

The Draft Compact deletes critical language about the Public Trust Doctrine from the previous 2004 draft. That language must be restored prior to acceptance to strengthen the ability of the Annex Implementing Agreements to meet the Charter and Annex goals.

From entry into the Union of all of the Great Lakes states until the present, the Public Trust Doctrine has existed to guide decisions about Great Lakes Basin water. Each of the Great Lakes states holds navigable waters in trust and should manage those waters for the benefit of the public.<sup>18</sup> By the time the Governors and Premiers signed the Charter in 1985, the Public Trust Doctrine was well developed in the common law of the United States.<sup>19</sup> The Charter clearly echoes the Public Trust Doctrine by defining the role of the Great Lakes states and provinces as trustees of the Great Lakes. This public trust orientation is key to understanding the rights and responsibilities of the governments, riparians, and the general public beneficiaries when conflicting uses of Great Lakes water emerge.

Rooting the Charter, Annex, and Agreements in the Public Trust Doctrine will help defend Great Lakes waters in future challenges under international trade agreements. If water is inherently a trust that no one can own privately, it will be harder to define it as a “commodity,” “good” or product.”

Some argue that the United States Supreme Court, in *Sporhase v. Nebraska*, already defined water as a “commodity.”<sup>20</sup> However, that dispute arose over groundwater, and thus the holding is arguably limited to groundwater, which has historically (for better and for worse) not been included as a public trust water in most jurisdictions. *Sporhase v. Nebraska* did not overrule *Hudson County Water Co. v. McCarter*, which upheld a surface water diversion prohibition based – in part - on the Public Trust Doctrine.<sup>21</sup>

In *Hudson County Water Co.*, the Supreme Court upheld a New Jersey statute that prohibited the interstate transfer of surface water. In so doing, the Court clarified that due to the Public Trust Doctrine, “the State was warranted in prohibiting the acquisition

---

<sup>18</sup> E.g., *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

<sup>19</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471(1970).

<sup>20</sup> *Sporhase v. Nebraska*, 458 U.S. 941, 945 (1982).

<sup>21</sup> *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908),

of the title to water on a larger scale.”<sup>22</sup> The Court added that “few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished . . .”<sup>23</sup>

Consistent with this longstanding legal doctrine, the very first Finding in the Great Lakes Charter declares, “The water resources of the Great Lakes Basin are precious public natural resources, shared and held in trust by the Great Lakes States and Provinces.”<sup>24</sup>

“As trustees of the Basin's natural resources, the Great Lakes States and Provinces have a shared duty to protect, conserve, and manage the renewable but finite waters of the Great Lakes Basin for the use, benefit, and enjoyment of all their citizens, including generations yet to come.”<sup>25</sup>

Like the Great Lakes Charter, the Great Lakes Annex reaffirms the Public Trust Doctrine in its first Finding: “The Great Lakes are a bi-national public treasure and are held in trust by the Great Lakes States and Provinces”<sup>26</sup>

The 2005 draft Compact strays from this course. The 2005 draft deletes important language from the 2004 draft Compact (originally taken from the Great Lakes Charter) articulating the public trust duties of the signatories. In its place, the 2005 draft uses the general statement that the parties have an, “important, continuing and abiding role in the Great Lakes.”<sup>27</sup>

Likewise, the 2005 draft states that the parties have a, “shared duty to protect, conserve, restore, improve and manage” the waters for current and future generations.<sup>28</sup> In the previous draft, the Compact started the sentence on shared duty with, “as trustees of the Great Lakes Basin's natural resources, the Great Lakes States and Provinces have a shared duty . . .”<sup>29</sup> Similarly, the July 2004 draft’s very first sentence stated: “WHEREAS, the Great Lakes Basin Water Resources are precious public natural resources, shared and held in trust by the Great Lakes States . . .”<sup>30</sup> That language is missing from the 2005 draft.

The deletion of this language could be seen as a significant departure from the intent of the Great Lakes Charter and Annex as it removes the historic and legal articulation of a primary source of the signatories’ authority and duty to protect public waters. Without this orientation, the shared duty arises out of the ether unanchored from the legal responsibilities that each state has as trustees of the Great Lakes waters.

---

<sup>22</sup> *Id.*, at 354.

<sup>23</sup> *Id.*, at 356.

<sup>24</sup> Great Lakes Charter, Findings, at 1.

<sup>25</sup> *Id.*

<sup>26</sup> Annex, Findings, at 1.

<sup>27</sup> Compact, Section 1.3(1)(a), at 3.

<sup>28</sup> Compact, Section 1.3(1)(d), at 4.

<sup>29</sup> Great Lakes Basin Water Resources Compact, July 19, 2004 draft (July 2004 Draft Compact), at 1.

<sup>30</sup> *Id.*

The Public Trust Doctrine is a foundation on which the Great Lakes states should build to protect the Great Lakes from unlimited exports under the international trade agreements. The states must ensure that nothing in these agreements feeds into an argument that the Great Lakes are a “good,” “commodity” or “product” that must be freely traded. The removal of this public trust language may provide another arrow in the quiver to those who would bring a legal challenge to the Annex 2001 Implementing Agreements as violations of international trade agreements.

**Suggested Improvement:** The way to restore the document is simple: return to 2004 draft language to clearly articulate the public trust duties of the signatories.

## **B. The Conservation Sections Should Be Strengthened to Carry Out the Annex.**

Conservation lies at the very heart of the Annex; it is a core value that is repeated within its principles and directives and reflected within the legal standard it upholds based upon “[p]rotecting, conserving, restoring, and improving the Great Lakes . . .”<sup>31</sup> Nonetheless, the draft Agreements’ treatment of water conservation could be strengthened in four ways: 1. Delete the cost-benefit requirement from the definition of “Environmentally Sound and Economically Feasible Water Conservation Measures”; 2. Require implementation of water conservation programs without a five year delay; 3. Require applicants to implement conservation prior to being allowed to use more or new water; and 4. Include reuse and reclamation of water as a conservation measure.

### ***1. The “Economically Feasible” Caveat Applied to Conservation Measures Is Limiting and Inconsistent.***

The draft Agreement and Compact provide that the Parties shall commit to the development and implementation of water conservation programs that, among other objectives, will retain the quantity of the water resources in the basin and will anticipate new demands and the potential impacts of cumulative effects and climate change.<sup>32</sup> Further, the Decision Standard is meant to convey “a strong requirement regarding water conservation” pertaining to all proposals for new or increased withdrawals of Great Lakes Basin Water.<sup>33</sup>

This clear imperative lies at risk of being compromised, however, by the draft Agreements’ definition of conservation measures and incentives that are “Economically Feasible.”<sup>34</sup> For example, the Decision Standard requires that “the Withdrawal, Consumptive Use or Exception shall be implemented so as to incorporate

---

<sup>31</sup> Annex 2001, Findings, at 1.

<sup>32</sup> Agreement, Article 203(5), at 9; Article 303(1), at 22; Compact, Section 3.5, at 7.

<sup>33</sup> Agreement, Appendix 1, Section 1.E, at 30

<sup>34</sup> Agreement, Article 303(3), at 22.

Environmentally Sound and Economically Feasible Water Conservation Measures to minimize Water Withdrawals or Consumptive Use.”<sup>35</sup>

The Annex did not define this term. However, the Annex Agreement defines “Environmentally Sound and Economically Feasible Water Conservation Measures” to mean:

any beneficial reduction in Water loss, waste, or use accomplished by the implementation of Water management practices and Water efficiency measures. *Water management practices and Water efficiency measures must be economically feasible based on a cost-benefit analysis that includes avoided environmental and economic costs.*<sup>36</sup>

At odds with the drafters’ stated intent to prioritize conservation, this definition, which introduces the requirement of a cost benefit analysis, could undermine the implementation of conservation programs.

Quantifying environmental harm or “savings” is often a difficult and speculative task, whereas the expenses that would be required by conservation program implementation, such as additional salary or infrastructure construction costs, is relatively easy to quantify.

Indeed, under the strictures of the draft Agreements’ “economically feasible” caveat, communities may try to justify not conserving water because it is too costly. How are communities to differentiate between conservation measures that are “economically infeasible” versus those that are simply cost more than doing nothing? What if conservation measures resulted in property tax increases or water bill increases, would this, too, kill the prospective initiative on the basis of “economic infeasibility”?

Moreover, as demonstrated in the Agreement’s treatment of Straddling Counties, the draft Agreement seemingly applies two different conservation standards. Whereas the conservation measures to be implemented by Straddling Counties appropriately contain no “economically feasible” caveat but, rather, only require “conservation of existing water supplies,”<sup>37</sup> the conservation measures referred within the Decision Standard and Conservation Program do. This discrepancy, coupled with the precautionary principle, will likely lead to confusion and fuel the contention that Straddling Communities are subject to a different conservation standard.

**Suggested Improvement:** Edit the definition of “Environmentally Sound and Economically Feasible Water Conservation Measures” by deleting the sentence, “Water management practices and Water efficiency measures must be economically feasible based on a cost-benefit analysis that includes avoided environmental and economic costs.” The definition would then read: “any

---

<sup>35</sup> Agreement, Article 203(5), at 9.

<sup>36</sup> Compact, Article 1.2, at 2 (emphasis added).

<sup>37</sup> Agreement, Article 201 (3) at 8.

beneficial reduction in Water loss, waste, or use accomplished by the implementation of Water management practices and Water efficiency measures.”<sup>38</sup>

## ***2. Water Conservation Should Be Initiated Without Delay.***

As set forth in Article 710(4) of the Agreement, parties need not commit to the development or implementation of the water conservation programs set forth in Article 303 until five years after Article 201 (exceptions to the diversion prohibition) has been in force.<sup>39</sup> Why is the conservation program in Article 303 staggered to be implemented five years after Article 201? The conservation program does not appear to be dependent in any way on the implementation of Article 201 and should be implemented immediately. Why delay the development of conservation programs across the region?

**Suggested Improvement:** Revise Article 710 to add Article 303 (Water Conservation Programs) to the list of Agreement sections under Article 710(1) that will come into force on the day the Agreement is signed by all Parties. Likewise, revise Compact Section 3.5.5 to require commencement of a water conservation program from the effective date of the Compact.

## ***3. The Draft Implementing Agreements Should Require the Measurably Successful Implementation of Water Conservation Measures and Programs Prior to a Community’s Application.***

The draft agreements clearly identify conservation as a high priority and identify conservation measures, incentives and planning steps for communities to look to for guidance. With regard to proposals for diversions or new/increased consumptive uses, applicants are required to provide a detailed description of the conservation measures “that have been and will be employed in the project.” And, yet, an applicant could argue that a plain reading of the decision criteria allows an application by a community with impressive conservation goals and implementation strategies, but lacking in any functioning conservation program.

Consistent with the draft agreements’ general prohibition on diversions and commitment that “[t]he Decision Making Standard includes a strong requirement regarding water conservation,”<sup>40</sup> the only applications that should be considered include those submitted by communities who have already successfully implemented conservation measures and who already have an operative conservation program that can demonstrate measurable water savings. If, in fact, “[w]ater conservation and efficient use of existing water supplies *must* be an alternative that is pursued *first*”<sup>41</sup> then communities must, first, prior to any application, identify conservation goals, develop a water-use profile and forecast,

---

<sup>38</sup> Compact, Article 1.2, at 2.

<sup>39</sup> Agreement, Article 710 (4), at 22.

<sup>40</sup> Agreement, Appendix 1, 1 E, at 30.

<sup>41</sup> Agreement, Appendix 1.1 A, at 26.

identify and evaluate water conservation measures and incentives, select a conservation program, refine its future water use/demand forecasts in accordance with the measures selected, implement the conservation plan, and, once sufficient time has passed, evaluate the conservation program's effectiveness by assessing and quantifying actual water savings.

While it is easy to set ambitious goals, it is far more challenging to actualize them. Similarly, practical experience may lead us to doubt the motivation and commitment of a community to follow through on its conservation program once it has successfully obtained a diversion or withdrawal. Only by requiring communities to implement conservation measures and programs, demonstrating measurable savings, *prior* to their application can we be assured that the conservation goals of the Annex will be realized.

**Suggested Improvement:** Revise the Compact, Section 4.9.1, and the draft Agreement's Decision Standard, Article 203(1) to read: "1. After implementing conservation measures, the need for all or part of the proposed Consumptive Use, Withdrawal, or Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies."

Revise the Agreement's Application Requirements, Appendix 1:1(A) & (E), to require that "All Proposals will be evaluated on the *effectiveness* of the Water Conservation and Efficiency Measures *already* implemented."

#### ***4. The Agreements' Examination of Water Conservation Measures and Programs Is Too Narrow.***

The Agreement's discussion of water conservation measures is limited to water demand management strategies, which encompass behavioral incentives and hardware devices that aim to reduce human consumption and demand for water.<sup>42</sup> However, another important component of water conservation that has been overlooked regards the re-use and reclamation of water for such uses as groundwater recharge, irrigation and wetlands restoration. As numerous states, including Florida and California, have successfully developed water recycling systems, the draft Agreement should include information concerning water reclamation programs within its conservation guidelines section.

**Suggested Improvement:** Include information pertaining to water recycling systems and water reclamation programs within the examination of available water conservation measures in the Agreement's Appendix at 1:1 E.

### **C. The Provisions Concerning Consumptive Use Do Not Carry Out the Charter and Annex and Must Be Amended.**

There are three primary problems with the Agreements' lack of regulation of consumptive uses.

---

<sup>42</sup> Agreement, Appendix 1.1 E, at 30-34.

***1. The 90 Day Averaging Period is Inconsistent with the Charter's 30 Day Averaging Period.***

First, Regional Review is required for *new or increased* consumptive uses of five million or more gallons per day averaged over 90 days.<sup>43</sup> This is inconsistent with the Charter and the Annex. The Charter required notice, consultation, and consent from each of the Great Lakes governors and premiers for new or increased consumptive uses of five million gallons per day averaged over 30 days – not the 90 days allowed by the Agreements.<sup>44</sup> This expansion from 30 to 90 days will effect irrigated agriculture to allow more irrigation to escape environmental review. The draft Agreements weaken the review trigger that has been in place for the past 20 years and is a step in the wrong direction.

***2. Removal of Council Review of Large Consumptive Uses is Inconsistent with the Charter.***

Second, the Council reviews two categories of proposals: intra-basin transfers of new or increased consumptive uses of five million gallons per day or greater average over 90 days and straddling county proposals.<sup>45</sup> However, the Compact is devoid of any mention of Council review and the required unanimous or even supermajority consent (found in the July 2004 draft Compact) of new or increased consumptive uses of 5 million gallons per day or more. This is a glaring deficiency in the Compact that rolls back the standard established by the Great Lakes Charter 20 years ago.<sup>46</sup>

***3. Timing of Decision Standard for Large Consumptive Uses Is Unreasonably Loose.***

Third, it appears that new or increased consumptive uses of five million gallons a day will not have to meet the Decision Standard for at least ten years. The Compact requires new or increased withdrawals of 100,000 gallons per day or more average in a 90 day period to be subject to “management and regulation.”<sup>47</sup> Section 4.9 declares that proposals subject to “management and regulation” must meet the Decision Standard.

However, the only reference to new or increased consumptive uses of five million gallons per day or more (besides those involving intra-basin transfers) is in section 4.4 (Regional Review), and is limited to a statement that these withdrawals are subject to Regional Review.<sup>48</sup> Presumably, the new or increased consumptive use of five million gallons would need to meet the Decision Standard under the section relating to withdrawals of more than 100,000 gallons per day. However, since signatories have ten years from the effective date of the Compact to implement this section, it does not seem possible that the

---

<sup>43</sup> Agreement, Article 204(1), at 9.

<sup>44</sup> Great Lakes Charter, Principle IV & Implementation of Principles, Consultation Procedure, at 2 & 4.

<sup>45</sup> Compact, Sections 4.5(2) & 4.7(2)(c)(iv), at 10 & 11.

<sup>46</sup> Great Lakes Charter, Implementation of Principles, Consultation Procedure, at 4.

<sup>47</sup> Compact, Section 4.8, at 12.

<sup>48</sup> Compact, Section 4.4(2)(b), at 10.

drafters intended for large withdrawals of five million or more gallons per day for consumptive use would fall into this regulatory void for the next decade.<sup>49</sup> After all, this category of major consumptive use has been regulated to varying degrees since the 1985 Charter.<sup>50</sup>

**Suggested Improvement:** Article 204(1) of the Agreement should be modified to require Regional Review for new or increased consumptive uses of five million gallons per day average over 30 days to be consistent with the Charter. The Compact should create a separate section for major consumptive uses of five million gallons per day or more average over 30 days, require the Decision Standard to apply when the Compact is approved by Congress, and require Council unanimous approval for these withdrawals.

#### **D. The Provisions Concerning Straddling Communities Need Clarification.**

In the Agreement, it appears that regardless of the size of the diversion by a “straddling community,” it must meet the standards and undergo a Regional Review.<sup>51</sup> Although the Compact appears to require regional review for straddling communities in section 4.7(1), it does not require Regional or Council review for this exception in the section describing Regional Review.<sup>52</sup>

**Suggested Improvement:** The conflicting terms of the Agreement and the Compact appear to be a drafting error. We urge you to edit the Compact, section 4.4(2)(a), to clearly require Regional Review for any straddling community’s proposals to withdraw Great Lakes water.

#### **E. The Straddling Counties Exception Should be Revised.**

##### ***1. Drawing Lines Based on Political Boundaries***

The draft Annex Implementing Agreements allow counties that share a political boundary with the Great Lakes Basin surface water divide to apply for an exception to the diversion prohibition. This substitutes the concept of political boundaries to define which communities are eligible to apply for diversions, rather than maintaining the defining geographic boundaries of the Great Lakes Basin that currently govern the Charter.

**Suggested Improvement:** Delete straddling county exception.

##### ***2. Conservation Requirements Need Clarification.***

The Agreement requires a proposal for Straddling Counties to demonstrate that there is

---

<sup>49</sup> Compact, Section 4.8, at 12.

<sup>50</sup> § 281.35, Wis. Stats.; Wis. Admin. Code Ch. NR 142.

<sup>51</sup> Agreement, Article 201(1), Exceptions to the Prohibition of Diversions, Straddling Communities, at 6-7.

<sup>52</sup> Compact, Section 4.4(2)(a) (specifying Regional Review for Intra-Basin Transfers and Straddling Counties only), at 10.

“no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies.”<sup>53</sup> Further, the Decision Standard requires that the proposal show that the water “need” cannot be “reasonably avoided through the efficient use and conservation of existing water supplies.”<sup>54</sup> This language does not include the caveat that the conservation be “economically feasible.”

[It appears that the straddling county needs to already be implementing water conservation practices as a condition precedent to applying for an exception to the diversion prohibition. And that these conservation practices do not have to be “economically feasible.” If this is the case, we wholly support this requirement as a reasonable means to ensure that the diversion is truly needed. However, as the wording of this section makes this requirement somewhat obscure, additional clarification would prove beneficial.

**Suggested Improvement:** In the Compact and in the Appendix to the Agreement, clarify that a straddling county must be implementing conservation practices as a condition precedent to showing a need for a diversion. Clarification of this matter would reduce potential litigation about the meaning of this requirement.

### *3. Adequacy of Water Supply*

The straddling county seeking water for public water supply needs to demonstrate that it lacks an “adequate” supply of potable water. What will be deemed an “adequate” supply? Does the supply need to be “adequate” for a sprawling, water-intensive jurisdiction with a higher than average per capita use of water or will adequacy be judged by a different standard, e.g., that which is adequate for a per capita supply of water equivalent to Waterloo, Chicago, Denmark, or Mexico?

**Suggested Improvement:** In the Appendix to the Agreement, clarify what per capita consumption of water will be deemed adequate.

#### **F. Return Flow Needs to Go Back to the Point of Withdrawal.**

The Agreements require straddling communities and straddling counties to return water to the “source watershed” from which the water was originally withdrawn.<sup>55</sup> The requirement that the return flow go to the “source watershed” but not to the point of withdrawal could interfere with riparian and public rights in the source watershed. For example, if the return flow is 10 miles downstream from the point of withdrawal, this could leave a rather dry riverbed or stream for those ten miles. This also appears to allow return flow into groundwater despite the fact that the point of origin was a surface water or vice versa. Moreover, for intra-basin withdrawals, the standard is significantly worse.

---

<sup>53</sup> Agreement, Article 201(3)(d), at 8.

<sup>54</sup> Agreement, Article 203(1), at 8.

<sup>55</sup> Agreement, Article 201(1)(b) & (3)(b), at 7 & 8.

It allows the return flow to go into any Great Lakes watershed instead of the source watershed.<sup>56</sup>

Depending on the impact on the source watershed, these scenarios may violate the public trust under *Omernik v. State* as well as give rise to causes of action by riparian property owners along the source water body.

**Suggested Improvement:** Article 201 of the Agreement and Section 4.7 of the Compact should be amended to require water withdrawn for straddling communities, straddling counties, and intra-basin transfers, to be returned to the point of withdrawal within the watershed of origin. Likewise, the Decision Standard in Section 4.9(3) of the Compact should also be amended to require water to be returned to the point of withdrawal. The current requirement may violate existing state common law in Wisconsin, and could be inconsistent with the common law of other Great Lakes states and provinces as well.

### **G. The Enforcement Provisions Need to be Strengthened.**

When using the courts to compel compliance with the Compact, “The available remedies shall include equitable relief and the prevailing party may recover the costs of litigation, including reasonable attorney and expert witness fees.”<sup>57</sup> There are two problems with the relief available that will undermine the deterrent threat of these enforcement provisions.

First, the relief specified does not include penalties or damages. If this is construed as prohibiting the ability to recover penalties and/or damages, the Compact is removing a significant incentive for compliance. In the absence of the monetary threat of damages and/or penalties, the risk of litigation may not outweigh the risk of violating the law. Most major federal and state environmental statutes include explicit penalty provisions designed to serve as a deterrent to violating the law. The Compact should follow this well trod path. The current approach of not specifying a daily penalty amount or allowing the plaintiff to seek damages does not provide a sufficient deterrent.

Second, the allowance of any prevailing party, without limitation, to recover the costs of litigation breaks from traditional U.S. environmental law meant to encourage citizen suits as a supplement to state enforcement. This provision could be interpreted against a citizen enforcer. If that is the case, it would pose such a financial risk to would be citizen plaintiffs lacking substantial resources that it could actually be worse than failing to include a fee recovery provision. Major U.S. environmental statutes provide examples of language that has been used to encourage citizen enforcement, and it only differs slightly from the draft Compact. The Clean Water Act allows a court to “award costs of litigation (including reasonable attorney and expert witness fees) to any party, *whenever the court*

---

<sup>56</sup> Agreement, Article 201(2)(b), at 7.

<sup>57</sup> Compact, Section 7.3(4), at 16.

*determines such award is appropriate.*<sup>58</sup> The appropriateness language is missing from the Compact.

Courts have used the appropriateness standard to routinely justify awarding attorneys' fees to prevailing public interest plaintiffs, while only awarding fees to better financed corporate defendants when a suit is deemed frivolous, harassing, or without merit.<sup>59</sup> The Compact would be strengthened by adding this key phrase.

**Suggested Improvement:** Section 7.3(4) of the Compact should be redrafted to include penalties and/or damages in the relief available. Further the provision awarding attorneys and experts fees and costs should be modified to read "The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, wherever the court determines such award is appropriate."

#### **H. The Confidentiality Exceptions to Public Disclosure Need to Be Tightened.**

The Agreement allows a party to protect "any confidential, proprietary or commercially sensitive information" when distributing information to the other parties and to the Regional Body.<sup>60</sup> This language appears overly broad. The U.S. statutory language in the Freedom of Information Act (hereinafter "FOIA") provides that: "[E]ach agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."<sup>61</sup> For a statute to specifically exempt disclosure, FOIA: "(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."<sup>62</sup> Confidential matters that are specifically exempted from FOIA are: "trade secrets and commercial or financial information obtained from a person and privileged or confidential."<sup>63</sup>

The Agreement does not meet the requirements of FOIA §552(b)(3)(A), to exempt a party from disclosure, because the provision is overly broad. The Agreement does not describe the matter as to leave no discretion to the issue and the Agreement does not establish the particular criteria for withholding and the Agreement does not refer to particular matters to be withheld.

---

<sup>58</sup> Clean Water Act, 42 U.S.C. § 1365(d) (emphasis added); *see, e.g.*, Clean Air Act, § 304(d), 42 U.S.C. § 7604(d); Endangered Species Act of 1973, § 11(g)(4), 16 U.S.C. § 1540(g)(4); Resource Conservation and Recovery Act of 1976, § 7002(e), 42 U.S.C. § 6972(e); Safe Drinking Water Act, § 1449(d), 42 U.S.C. § 300j-8(d); Emergency Planning and Community Right-To-Know Act, § 326(f), 42 U.S.C. § 11046(f).

<sup>59</sup> Kerry D. Florio, *Attorneys' Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENVTL. AFF. L. REV. 707, 707 (2000).

<sup>60</sup> Agreement, Article 704, at 21.

<sup>61</sup> Freedom of Information Act (FOIA), 5 USCS § 552(a)(3)(A) (2005).

<sup>62</sup> FOIA, 5 USCS §552(b)(3)(A).

<sup>63</sup> FOIA, 5 USCS §552(b)(4).

**Suggested Improvement:** The non-disclosure provision in the Agreement and Section 8.3(2) of the Compact should be amended to limit its scope consistent with FOIA. The language should include a provision that specifically describes the confidential materials as "matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential" to meet the FOIA exemption of confidential materials.

**I. The Council or Regional Body Should be Explicitly Required to Produce the Cumulative Impacts Assessment.**

The Compact requires a cumulative impacts assessment of all withdrawals, diversions and consumptive uses every five years or every time the water losses reach 50 million gallons per day average over 90 days.<sup>64</sup> The assessment should take into account climate change and a precautionary approach. The Compact fails to provide clear directive as to who is responsible for producing this cumulative impacts assessment. The states and provinces are to "collectively conduct" the assessment.<sup>65</sup>

**Suggested Improvement:** An approach that instead explicitly requires the Regional Body or the Council to produce this report would create greater accountability and increase the likelihood of compliance.

**J. Public Participation Needs to Be Clarified and Uniform.**

Although the parties to the Compact "recognize the importance and necessity of public participation in promoting management" of the Great Lakes,<sup>66</sup> the process prescribed by the Compact falls short of meaningful participation. The language is so weak and general as to render it meaningless. For instance, although there is a required public notice, the Compact does not require notice within a certain time frame and in specific publications (such as the Federal Register, State Administrative Registers, and newspapers of record in the locale of the proposed project).<sup>67</sup>

Further, the Compact envisions a state or the Council providing "guidance on standards for determining whether to conduct a public meeting or hearing" on a proposal, but does not require a public hearing on all proposals.<sup>68</sup>

**Suggested Improvement:** To promote uniformity across the states, the Agreements should specify that any proposal that is reviewed by the Council or Regional Body requires a public hearing and the opportunity of the public to present evidence and testimony. Without specific uniform requirements for when a state must provide the opportunity for a public hearing, there will be a lack of

---

<sup>64</sup> Compact, Section 4.13, at 14.

<sup>65</sup> *Id.*

<sup>66</sup> Compact, Section 6.1(1), at 15.

<sup>67</sup> Compact, Section 6.2(1), at 15.

<sup>68</sup> Compact, Section 6.2(3), at 15.

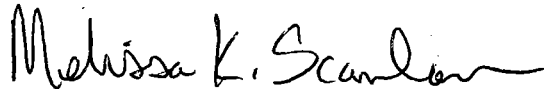
uniformity across the states, defeating one of the purposes of the Compact to “facilitate consistent approaches” across the Basin.<sup>69</sup>

## CONCLUSION

Thank you for the opportunity to provide public comments. We urge you to carefully consider our points and suggested improvements.

Sincerely,

**MIDWEST ENVIRONMENTAL ADVOCATES, INC.**



Melissa K. Scanlan  
Executive Director

On Behalf of the Following Individuals:

Peter McAvoy  
[Peter.McAvoy@SSCHC.ORG](mailto:Peter.McAvoy@SSCHC.ORG)  
Vice President  
Department of Environmental Health  
16<sup>th</sup> Street Community Health Center  
1337 S. Cesar E. Chavez Dr.  
Milwaukee WI 53204

James Robillard  
[jrobillard@ameritech.net](mailto:jrobillard@ameritech.net)

Paul Lauer  
[paullauer@aol.com](mailto:paullauer@aol.com)

Lisa Miotke  
[lmiotke@oneidanation.org](mailto:lmiotke@oneidanation.org)

Jerry Farrell  
[gaffer28@centurytel.net](mailto:gaffer28@centurytel.net)  
jerry farrell [[gaffer28@centurytel.net](mailto:gaffer28@centurytel.net)]

Barb Andersen  
[barbkha@athenet.net](mailto:barbkha@athenet.net)  
1023 Redwood Drive  
Green Bay, WI 54304

---

<sup>69</sup> Compact, Section 1.3(2)(d), at 4.

J. David and Julianne F. Rowland  
[Rowlandracine@aol.com](mailto:Rowlandracine@aol.com)  
6411 Charles Street  
Racine, WI 53402

Anthony Allard  
[olahot@sbcglobal.net](mailto:olahot@sbcglobal.net)  
2831 Otto Court  
Green Bay, WI 54313

David Menke  
[dmenke@wi.rr.com](mailto:dmenke@wi.rr.com)

Hilary Desotell  
[hdeztel@aol.com](mailto:hdeztel@aol.com)  
Green Bay, WI

Susan Haffeman  
[Susan.Haffeman@GlobalCrossing.com](mailto:Susan.Haffeman@GlobalCrossing.com)  
2737 South Ridge Road suite 200  
Green Bay WI 54304