

Great Lakes Charter Annex and Future Agreements

WHAT IS THE GREAT LAKES CHARTER?

The Great Lakes Charter, an agreement signed in 1985 by the eight Great Lakes Governors and the Premiers of Ontario and Quebec, outlined principles for managing Great Lakes water resources. It also organized programs to implement these principles as well as created a notice and consultation process for reviewing Great Lakes diversions and consumptive uses. The signatories agreed that no Great Lakes State or Province would proceed with any new or increased diversion or consumptive use of Great Lakes water over five million gallons per day without notifying, consulting, and seeking the consent of all affected Great Lakes States and Provinces.

WHY DOES THE CHARTER NEED TO BE UPDATED?

The Great Lakes Charter has been an effective agreement among the Great Lakes Governors and the Premiers of Ontario and Quebec over the last sixteen years. It has provided a forum for the Governors and Premiers to discuss important Great Lakes water management issues and to discuss new individual diversion and consumptive use proposals.

However, a 1998 proposal to export bulk quantities of Lake Superior water to the Far East has caused the state, provincial, and federal governments to re-examine the strength and adequacy of the legal foundations upon which water management authorities rest. (The proposal was from the Nova Group of Sault Ste. Marie, Ontario.)

WHAT WILL THE GREAT LAKES CHARTER ANNEX DO?

The Great Lakes Charter Annex is a non-binding agreement that creates a blueprint for water management programs that will be created over the next several years.

Under the Annex, the Great Lakes Governors and the Premiers of Ontario and Quebec:

- Outline a framework for a set of binding agreements among the Great Lakes States and Provinces to be completed in three years; and
- Establish a series of principles for a new standard for reviewing proposed withdrawals of Great Lakes water under the proposed new agreements; and
- Commit to an ongoing process for involving the public in developing the agreements and standard; and
- Include the Premiers of Ontario and Quebec formally in consulting on proposed diversions of Great Lakes water from the United States; and
- Strengthen the regional water management decision support system.

WILL NEW OR INCREASED WATER WITHDRAWAL PROPOSALS HAVE TO SHOW IMPROVEMENT UNDER THE ANNEX?

No. The Annex contains a series of principles that the envisioned future agreements will incorporate. How these principles will ultimately be implemented will be determined as the Governors and Premiers work together and consult with the public and stakeholders.

WHO IS GOING TO BE INVOLVED IN DEVELOPING THE AGREEMENTS AND THE STANDARD?

The States and Provinces will take the lead in developing the agreements and standard with significant input from the public and relevant stakeholders.

WHY CAN'T WE PLACE RESTRICTIONS ON REMOVALS OF WATER OUTSIDE THE BASIN WHILE NOT RESTRICTING WATER USE INSIDE THE BASIN?

If you treat water like a commodity inside the basin, federal and international law would require you to treat it like a commodity outside the basin. Article XX of GATT (which was adopted in NAFTA) states that “subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party measures: ... (b) necessary to protect human, animal or plant life or health; ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption...”

There is little argument that the States and Provinces have the authority to control or limit water removal because it is clearly an exhaustible resource deserving of protection. However, there is also little argument that any such control must have a non-discriminatory purpose and effect. Any such restriction must be implemented to preserve the resource rather than gain an economic advantage based on location.

If we allow unfettered damage to the water resource inside the basin, but severely restrict its use outside the basin, it is extremely difficult to argue that this control is meant to preserve the resource. This would show that a government is using economic protection rather than environmental preservation as the foundation for water management. Any tribunal presented with such evidence could not find that there was either non-discriminatory purpose or effect.

WHEN WILL THE AGREEMENTS AND STANDARD BE IMPLEMENTED?

The Governors and Premiers have committed to develop the binding agreements within three years. Once completed, State and Provincial legislatures will have to approve the relevant agreements. In the U.S., the U.S. Congress will also have to approve any binding Compact among the states.

The standard will be implemented when the binding agreements are enacted by all relevant governmental authorities. How the standard will be implemented will be a focus of discourse with the stakeholders throughout the Region.

UNDER THE BINDING AGREEMENTS, WILL EVERY WATER WITHDRAWAL HAVE TO RESULT IN AN IMPROVEMENT TO THE RESOURCE?

No. The States and Provinces will determine during the course of the creation of the agreement and the development of the standard the types of withdrawals that will have to result in an improvement to the water and water dependent natural resources of the Great Lakes.

WILL THESE NEW AGREEMENTS AND THE NEW STANDARD CUT OFF ECONOMIC GROWTH?

No. To the contrary, a central goal of these agreements is to preserve the Great Lakes so that they will be available for use far into the future. By preserving, restoring, protecting, and improving the Great Lakes, we will be ensuring that there is enough water for business use, water for residential growth, and a healthy environment that encourages people to relocate to the Great Lakes Region.

WILL THE STATES AND PROVINCES BE BOUND TOGETHER THROUGH ONE AGREEMENT OR COMPACT?

No. U.S. and Canadian federal laws prevent States and Provinces from entering into binding agreements across international borders. Therefore, the States will enter into one interstate compact that will be paralleled by laws, regulations, and/or agreements approved in the Provinces and/or by the Canadian federal government. The U.S. and Canadian federal governments would likely assist in dispute resolution.

WHAT DOES IMPROVEMENT TO THE WATER AND WATER-DEPENDENT RESOURCES OF THE GREAT LAKES MEAN?

Improvement to the Waters and Water-Dependent Natural Resources of the Great Lakes Basin means “additional beneficial, restorative effects to the physical, chemical, and biological integrity of the Waters and Water-Dependent Natural Resources of the Basin, resulting from associated conservation measures, or enhancement, or restoration measures which include, but are not limited to, such practices as mitigating adverse effects of existing water withdrawals, restoring environmentally sensitive areas, implementing conservation measures in areas or facilities that are not part of the specific proposal undertaken by or on behalf of the withdrawer.”

The criteria for what will be evidence of an improvement and how the requirement for an improvement will be implemented will be detailed over the next three years by the States and Provinces with input from the general public and stakeholders.

WILL THE NEW WATER MANAGEMENT SYSTEM ENCOURAGE BETTER WATER CONSERVATION?

Yes. The new water management system created by the Annex and the still to be developed State, Provincial, and bi-national agreements will include strong provisions requiring water conservation for new or increased water use proposals.

WILL EXISTING DIVERSIONS AND CONSUMPTIVE USES HAVE TO MEET THE STANDARD?

No. The Annex envisions that the new standard will be applied to new and increased withdrawals of waters of the Great Lakes Basin.

HOW WILL DIFFERENT WITHDRAWALS BE JUDGED UNDER THE NEW STANDARD?

Withdrawals will be judged based upon their impacts on the Great Lakes ecosystem. Water withdrawals of the same quantity can have very different impacts on the ecosystem depending upon their location and the rate at which water is withdrawn. A one million gallon per day withdrawal from the middle of the open waters of a lake will have a different impact than a withdrawal of the same size from a wetland, groundwater sources, or rivers and tributaries.

Currently, these impacts are not understood as well as they should be. One of the goals of the Charter Annex is to ensure that the Governors and Premiers have adequate data so that they can better make decisions on Great Lakes water management.

HOW IS THE ANNEX DIFFERENT FROM THE GREAT LAKES CHARTER?

The Annex is an amendment to the Charter. It establishes a new standard for reviewing new diversions and major consumptive uses and the principles upon which it will be based. This standard will be more protective of the water and water-dependent natural resources of the Great Lakes Basin. It also moves beyond the Charter by committing the Governors and Premiers to work together to protect, conserve, restore, and improve the water and water-dependent natural resources of the Great Lakes.

The Annex provides a framework for a new set of binding agreements among the States and Provinces for managing Great Lakes water resources. These agreements will make many of the Charter's provisions binding upon all of the signatories in managing Great Lakes diversions and consumptive uses. The agreements will also provide a more direct mechanism for States and Provinces to formally resolve major disputes regarding proposed diversions and consumptive uses of Great Lakes water.

WHAT ARE THE CHARTER REVISIONS BASED ON?

The changes are based on state and provincial experience with water management, the findings of the March 2000 International Joint Commission report on Great Lakes water uses, and a major study the Governors commissioned on Great Lakes and International water law. It is also based upon approximately 10,000 comments that the Governors and Premiers received from the public during a review of an earlier draft Annex that was released in December of last year.

WHAT WERE THE FINDINGS OF THE REPORT COMMISSIONED BY THE GOVERNORS?

In 1998, the Governors commissioned an expert bi-national legal team to analyze the existing regime used to regulate water withdrawals and exports. The legal team reached several conclusions concerning the adequacy of the existing legal regime to effectively regulate water withdrawals. Their conclusions included:

- State, Provincial, Federal, or bi-national governments cannot ban water exports because of U.S. and Canadian constitutional law as well as and international trade law. An outright ban on water exports would likely be unconstitutional under U.S. commerce law as well as violating GATT and NAFTA.
- State and Provincial governments have broad existing authority to regulate Great Lakes water withdrawals and are the best equipped to protect the Great Lakes.
- A commonly applied, resource-based decision making standard that ensures improvement to the waters and water-dependent resources of the Great Lakes Basin would most effectively promote the goals of conservation and sustainable use of the Great Lakes.

IS THIS A CONSENSUS DOCUMENT OF THE GOVERNORS AND PREMIERS?

Yes. The Charter Annex is the product of an 18-month process to set the parameters for a new set of binding agreements that would govern the States' and Provinces' authorities over Great Lakes water management. This is a giant step forward in protecting, conserving, restoring and improving the Great Lakes and reflects the Governors' and Premiers' commitment to work together for the benefit and protection of this precious natural resource.

WHY DOES THE FINAL CHARTER ANNEX LOOK DIFFERENT FROM THE DRAFT THAT WAS CIRCULATED BETWEEN DECEMBER AND FEBRUARY FOR PUBLIC COMMENT?

The Governors and Premiers made changes to the Charter Annex in response to comments from the public. The Governors and Premiers believe that this draft is a clearer reflection of their intent with regard to protecting the Great Lakes ecosystem.

HOW WILL THE ANNEX AFFECT THE PROVINCES?

The Premiers of Ontario and Quebec have pledged to work with the Great Lakes Governors to develop a new set of agreements and create a new standard. They will also be party to consultations for any proposed new diversions subject to the WRDA, but they will not have authority to approve or not approve diversions under the WRDA.

WILL THE ANNEX PREVENT LAKE LEVELS FROM FALLING FURTHER THAN THEY HAVE OVER THE LAST TWO YEARS?

The drop in lake levels is not the result of Great Lakes water uses within or outside the Great Lakes Basin. It is caused by the decrease in rain and snowfall over the last two years as well as increased rates of evaporation. The Annex will help to ensure that water levels are protected so that any future withdrawals will not aggravate the natural levels and flows of the Great Lakes.

HOW LONG WILL IT TAKE FOR THE GOVERNORS AND PREMIERS TO NEGOTIATE THE NEW BINDING AGREEMENTS?

The new agreements will be drafted within three years of the signing of the Annex. The Governors and Premiers will then work with all relevant legislative bodies to enact them.