

**LEGAL DIVERSIONS OR LEGAL SOLUTIONS:
The DRAFT Annex 2001 Agreements
And
the Future of the Great Lakes Basin**

A Bilateral Workshop sponsored by Chicago-Kent College of Law and the Munk Centre for International Studies, Program on Water Issues, University of Toronto. Presentations at Chicago Kent College of Law with teleconferenced participation from the Toronto audience at Munk Centre for International Studies

DATE: February 17, 2005
TIME: Chicago: Registration at 8:30 AM
Start time 9 AM
Toronto: Registration at 9:30 AM
Start time 10 AM
LOCATIONS: Chicago and Toronto

**Chicago-Kent College of Law (Room 520)
565 West Adams Street
Chicago, IL 60616**

**The Vivian and David Campbell Conference Facility
Munk Centre for International Studies University of Toronto
1 Devonshire Place
Toronto, ON, M5S 3K7**

A structured workshop on the legal and environmental definitions, risks, and status of out-of-basin diversions under the proposed Great Lakes Basin Sustainable Water Resources Agreement and the associated interstate compact.

For more information about this workshop and to register, please contact Chicago--Sharon Jacker at 312-906-5134 or sjacker@kentlaw.edu or Toronto - events.munk@utoronto.ca

**Suggested Chicago Hotel Information:
W Chicago City Center
172 West Adams Street
Chicago, IL 60603
Group reservations: 1-888-627-8280 (For \$139 rate, just say you are with Chicago-Kent College of Law)**

Agenda Follows:

**LEGAL DIVERSIONS OR LEGAL SOLUTIONS:
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Agenda**

**NOTE: TORONTO TIMES ARE ONE HOUR LATER.
TORONTO REGISTRATION 9:30AM for 10:00 AM start**

Thursday Feb 17th, 2005

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|----------------------|---|
| 8:30 - 9:00 | Registration, coffee |
| 9:00 - 10:30 | Participants convene in Room 520 for presentations by
Professor Dan Tarlock, Chicago-Kent College of Law and
Professor Owen Saunders, Canadian Inst of Resources Law |
| 10:30 - 10:45 | Break |
| 10:45 - 12:00 | Moderated Discussion led by
Noah Hall, National Wildlife Federation
Henry Henderson, Principal, Policy Solutions Inc
Ralph Pentland, President, Ralbet Enterprises Inc |
| 12:00 - 2:00 | Luncheon – 10th floor event room or on your own |
| 2:00 - 3:00 | Re-Convene in Room 520 for presentations by
James Olson, Principal, Olson, Bzdok, P.C
Mark Squillace, University of Toledo |
| 3:00 - 3:15 | Break |
| 3:15 - 4:45 | Moderated Discussion led by
R. Timothy Weston, Kirkpatrick & Lockhart
TBD |
| 4:45 - 5:00 | Wrap up - Lydia Lazar, Assistant Dean, Chicago-Kent |

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Purpose of the Workshop

The primary purpose of this Workshop is to provide a complete and transparent comparison and examination of the legal and technical underpinnings of the draft Annex agreements and of other policy options such as “no diversion”, “no net loss,” as well as the International Joint Commission (IJC) recommendations. In so doing, both legal risks, and risks more generally will be defined. A further objective is to promote discussion and definition of a strong and unambiguous approach for dealing with diversion proposals, and to make the results of this examination available to the public and to policy makers in advance of the Draft Annex Agreement final public comment period in April/May 2005.

This workshop will provide policy makers and regional stakeholders with an opportunity to discuss the following propositions:

- The “resource improvement standard” that appears in the draft Agreements will not necessarily preserve ecosystem integrity, a central feature of the International Joint Commission’s recommendations² because this standard opens “the possibility of trading off unrelated aspects of (ecological) integrity in geographically distinct areas.”³ If a “no net loss” policy is adopted as the primary line of defense against potentially harmful diversions, it should be backed up by a requirement to demonstrate that the diversion will not endanger ecosystem integrity.
- While “no diversion” or at least “no net loss” is the most appropriate primary defense against potentially harmful diversions, this is clearly not possible with respect to in-basin uses. The in-basin regime should instead focus primarily on conservation, not just for new and expanded uses, but for all existing uses as well. It should be emphasized that the IJC, in its most recent report dated August, 2004⁴ reaffirmed its year 2000 conclusion that “water use standards that treat in-basin and out-of-basin uses differently are reasonable.”
- The return flow provisions in the Draft Annex Agreements are considerably weaker than those recommended by the International Joint Commission (IJC). They should be removed and replaced with a simple “no diversion” provision, or at least require “no net loss from the area from which the water is taken”. It should be noted that the only two inter-basin diversions that have been approved over the past 30 years have included a 100% return flow requirement, so this requirement would be consistent with the de facto status quo.

BACKGROUND

- Great Lakes net water supplies and water levels now face major uncertainties related to climate change, unpredictable future consumptive use patterns, potential diversions and other forms of bulk removal, and possible modifications to their connecting channels.
- Each of these factors is likely to diminish supplies and/or water levels in a cumulative way over the next several decades. For that reason, the International Joint Commission, in its year 2000 report on Protection of the Waters of the Great Lakes concluded that there should be a bias in favor of retaining water in the system and using it more efficiently and effectively. The IJC also concluded that no water should be removed from the basin unless it can be demonstrated, with certainty, that the integrity of the Great Lakes ecosystem would be preserved.
- The draft Great Lakes Basin Water Resources Compact [19 July, 2004] and associated state-provincial arrangements originated with concepts recommended by a Denver law firm in mid 1999⁵ Essentially, that firm suggested that decisions regarding new or increased withdrawals of water, either for use within the basin or for removals from the basin should be based on a "common benefits" standard. There is an underlying assumption in the draft Compact that a common standard is needed to satisfy trade and commerce laws. Several critics have challenged this assumption and have said it is an exaggerated legal interpretation that is driving poor policy.
- The text of the draft Annex Agreements makes reference to a "resource improvement" standard which would be applied in an equivalent manner to both in-basin and out-of-basin withdrawals. Some critics have suggested that this is the most critical flaw in the proposed regime because it would a) open the door very wide to diversions; b) result in trading off one component of the ecosystem against another; and c) be impossible to apply in a rational way because it compares "apples and oranges". Other critics suggest that, by placing a "price" on diversions, and thus endorsing a market (or utilitarian) standard rather than a standard based on riparian or public trust regimes, the current proposals would meaningfully shift power to out-of-basin users, and thus increase the probability of international and interstate trade and commerce laws being successfully marshaled by these non-local interests at the expense of in-basin users.
- Before the Council of Great Lakes Governors chose a specific way forward in the Great Lakes Charter Annex⁶ in 2001, they had not only the advice of the Denver law firm, but also the advice of the International Joint Commission. In its year 2000 report, the IJC recommended different approaches for out-of-basin and in-basin withdrawals: a diversions regime for out-of-basin withdrawals centered on preserving "ecosystem integrity", combined with a very strong and

unambiguous return flow regime; and an in-basin regime focussed on effective conservation practices and sound planning.

WHY THIS WORKSHOP IN FEBRUARY 2005?

- A 90 day public comment period concerning the Draft Annex Agreements ended on October 18, 2004. The Governors and Premiers will consider the comments received in their next round of negotiations.
- The Province of Ontario has recently said that it will not sign the agreements unless several changes are incorporated. Their press release ⁷ states “Ontario remains committed to its provincial law that bans diversion. For the purposes of the Annex agreements, Ontarians, and the McGuinty Government, clearly want a “no diversion” agreement, or a position of “no net loss” as proposed by the International Joint Commission.” The Attorney General of Michigan has also indicated that that state would not sign the agreements without a much more stringent approach to diversions.
- In November 2004, a Canadian Parliamentary Committee heard testimony from several experts, and made a number of constructive suggestions which generally endorse the “no net loss” and “ecosystem integrity” concepts. The U.S. Government has recommended changes related specifically to consistency with the Boundary Waters Treaty.
- Following the next set of negotiations, a second public review period is planned over a 60-day period, likely in April and May of 2005.
- A significant number of Great Lakes Basin residents have never heard of the Annex 2001 Agreements. By the time that many are asked to comment during the final 60 day period in the spring of 2005, it is likely that public opinion will have coalesced around several widely divergent concepts.
- The intent of this Workshop is to bring about to an improved understanding of the legal and other risks associated with various approaches, and to help build a consensus around a strong and unambiguous approach for dealing with diversion.

¹ Draft Great Lakes Basin Water Resources Compact and Draft Great Lakes Basin Sustainable Water Resources Agreement, released for public comment on July 19, 2004 by the Council of Great Lakes Governors and Premiers

² International Joint Commission, Protection of the Waters of the Great Lakes: Final Report to the Governments of Canada and the United States, February 22, 2000.

³ Standing Committee on Environment and Sustainable Development, Canadian Parliamentary Committee Report on the Great Lakes Charter Annex 2001 Implementing Agreements, November, 2004

⁴ International Joint Commission, Protection of the Waters of the Great Lakes: Review of the Recommendations in the February 2000 Report, August, 2004

⁵ Lochhead, Asarch et al, Report to the Council of Great Lakes Governors: Governing Withdrawals of Water from the Great Lakes, May, 1999

⁶ Council of Great Lakes Governors and Premiers, Annex 2001: a Supplementary Agreement to the 1985 Great Lakes Charter, June, 2001

⁷ Government of Ontario, Press Release entitled "Level of Protection in Draft Great Lakes Charter Annex Agreements Not High Enough: Changes Needed Before Ontario Will Sign, November 15, 2004