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August 26, 2005

David Naftzger
Executive Director
Council of Great Lakes Governors
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Dear Mr. Naftzger:

Thank you for releasing the revised version of the Annex 2001 implementing agreements for public comment. I shared my concerns about the implementing agreements when the first draft was released a year ago. As I stated then, Michigan citizens rely on the Great Lakes for recreation, for drinking water, for environmental benefits, and for sustainable economic growth. Any agreement on water withdrawals must protect this natural resource so that future generations have the same opportunities that we have been privileged to enjoy in the Great Lakes State.

I am encouraged to see that the Council has returned to many of the principles of Annex 2001, as I called for in my comments on the first draft. The revised Great Lakes Basin Water Resources Compact and the Great Lakes Basin Sustainable Water Resources Agreement preserve more of the states' current power under federal law to prohibit diversions of Great Lakes water out of the Basin. At the same time, the revised agreements entrust the regulation of more intrastate withdrawals to the sovereign authority of the states. These changes to the agreements are to be commended.

I remain concerned, however, because the revised agreements still fall short of the promise of Annex 2001: a simple, durable, and efficient water management system for protection of the Great Lakes that retains and respects authority within the Basin. Instead of allowing each Great Lakes State to apply a clear common resource conservation standard to uses within its boundaries, the agreements continue to subject intrastate transfers between watersheds to veto by other states. In addition, the agreements continue to weaken current state authority to limit diversions by allowing individual states to divert water to "straddling communities" and exempting diversions from the State of Illinois. My concerns are discussed in greater detail below.

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First, the revised compact would still undermine Michigan's current authority to protect the Great Lakes from diversions. As I noted in my comments on the first draft, the 1986 Water Resources Development Act (WRDA) gives each Great Lakes Governor the power to veto any proposed diversion or export of Great Lakes waters.¹ While I am pleased that almost all new or increased diversions are either prohibited or subject to the approval of all Great Lakes States, the revised compact opens the door to two new categories of diversions: "straddling communities" and withdrawals from the State of Illinois. I recognize that the requirements for diversions to "straddling communities" are stringent. Nevertheless, as communities just outside of the Basin continue to grow, this exception may in time prove detrimental to the health of the Great Lakes. Even more problematic is the unacceptable loophole for all withdrawals, including diversions, from the State of Illinois as long as the withdrawals are not prohibited by the United States Supreme Court decree on the Chicago diversion. At the same time, as I noted previously, the revised compact may limit Michigan's ability under the common law to enjoin future diversions that decrease water levels and affect its riparian rights. See *Wisconsin v Illinois*, 278 US 367; 49 S Ct 163; 73 L. Ed 426 (1929).

Second, the revised compact would still infringe on Michigan's sovereignty. Transfers between watersheds are subject to stricter requirements than other withdrawals, and large transfers may be vetoed by other states. Michigan is disproportionately affected by this treatment of intrabasin transfers because it has four of the five Great Lake watersheds within its borders.² If other Council members voted to suspend the State for violating its duties under the compact, the State would not be able to veto certain diversions unless it petitioned a federal court to set aside the suspension. In addition, the proposed compact would still strip the State of its sovereign immunity by subjecting the State's actions under the compact to judicial review in state and federal courts. The actions subject to judicial review would presumably include the State's future management and regulation of new or increased withdrawals.

Third, the revised compact would still give extensive powers and immunities to the Great Lakes Basin Water Resources Council that remain out of proportion with its role of reviewing large intrabasin transfers and diversions to straddling counties. The Council may create rules and regulations by majority vote, which could effectively amend the compact provisions agreed to by all states. As I noted in my earlier comments, the Council may pursue enforcement of the compact provisions, rules and regulations, and orders in state and federal courts, and may conduct "special investigations." The Council has the "same immunity from suit and every form of judicial process as is enjoyed by the Parties." This language is very broad and is generally

¹ As I noted previously, it is clear that the proposed agreements are intended to replace the veto power given to states by WRDA. Because the compact must be approved by Congress under the Compact Clause, WRDA would be either directly repealed at that time, or its provisions would be superseded as inconsistent with the later-enacted compact.

² While the revised non-binding agreement treats the Lake Michigan and Lake Huron watersheds as one watershed, the revised compact does not have this provision. Thus, it appears the compact requirements would apply to transfers between Lake Michigan and Lake Huron.

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found in compacts involving international or foreign entities, not multi-state agencies. It is unclear which state's immunity would apply and when. The Council would also apparently be immune from searches and various other forms of government process.

In my comments on the first draft of the agreements, I recommended that you focus on developing a clear common resource conservation standard that could be applied to withdrawals by each Great Lakes State. I am encouraged to see that you have developed clearer guidelines in the appendix to the non-binding agreement, although the state legislatures may have their own opinion whether the guidelines are readily adaptable to individual circumstances. I am also encouraged to see that intrastate withdrawals, with the exception of transfers between watersheds, are no longer subject to approval by other states. The process for non-binding review of large intrastate withdrawals by the regional body remains very time-consuming, however, and may last as long as 115 days if there is no consensus among the parties. The review may be impossible to complete by state statutory deadlines. Finally, the revised compact still exempts two narrow classes of withdrawals from all compact requirements. These exemptions do not appear to be well conceived and could limit the states in their own regulation.

I continue to believe that thorough legal scrutiny is necessary to ensure that the provisions do not undermine current protections or conflict with existing law. I again suggest that the Attorneys General of each of the Great Lakes States be directly engaged in the process and provided the opportunity to conduct a thorough legal review of the draft agreements and the underlying issues, and share their legal expertise with the Water Management Working Group. Once again, I would be glad to coordinate such an effort.

Thank you for the opportunity to comment on the revised Annex 2001 implementing agreements. The changes to these agreements move the Great Lakes States and Canadian provinces one step closer to fulfilling the promise of Annex 2001. But there is more work to be done before the implementing agreements reflect a water management system that protects the Great Lakes while respecting the sovereign authority of the states. I remain willing to provide any assistance you may need.

Sincerely yours,



Mike Cox
Attorney General