Diversions and "Annex" Water Agreements

The eight Great Lakes governors and two premiers have recently completed two proposals for changing how the ten jurisdictions manage withdrawals of water from anywhere in the Great Lakes basin. Although water shortages and conflicts between water users have begun to appear in the basin in recent years, the governors and premiers are *not* proposing the agreements primarily to improve regional water management.

The governors and premiers spent four years negotiating these wide-ranging agreements—a voluntary state-provincial international agreement, and a binding eight-state "compact" agreement—primarily because they wish to improve protections against large-scale diversions of water from the Great Lakes basin.

Perhaps the most important question citizens should ask while evaluating the proposed documents is: Do the agreements better protect the Great Lakes basin from diversions?

Of the two agreements, the eight-state compact deserves the most scrutiny on this question. Canada's federal and Ontario and Québec's provincial governments have legislated diversion bans that appear fully constitutional under Canadian law. The same cannot be said in the United States.

Although Congress in 1986 granted any single Great Lakes state a no-questions-asked veto over all proposed basin diversions, there is still a substantial question as to whether this authority would hold up in court under a determined, well-funded legal challenge from large corporations or other states. The proposed compact is an attempt to make rejection of diversion proposals legally durable in the long run.

The methods for doing this in the proposed agreements are somewhat roundabout, but **basin environmental groups monitoring the state-provincial negotiations over the years have decided that, on balance, the compact significantly improves regional protections against diversions.**

The problem with the current gubernatorial veto authority is that it is arbitrary. A governor need give no reason for wielding it and a diversion applicant has no recourse after an adverse decision. Generally speaking, U.S. law frowns upon such systems. A less legally vulnerable system would have standards by which diversion requests were evaluated. If a request failed to meet the standards, it could be denied.

The trick is to write standards that have a "rational" (legally justifiable) basis while at the same time preventing most diversions and all large ones. In the compact, the governors chose ecosystem harm as this rational basis for judging water withdrawal proposals. Under the new system, whether water is intended for use in or out of basin, proposals would be required to 1) conserve water and return it after use to the originating lake basin, 2) cause no significant ecosystem impact, and 3) improve the ecosystem.

Without overtly banning diversions, these rules make them quite difficult, mainly due to the requirement to return the water.

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First, moving water is expensive, and gets proportionally more so the further it is moved. Moving water back into the basin could be doubly expensive. This is a major disincentive for every sector of water use. Sectors such as agriculture, which use up a great deal of water and would have to return relatively less, have difficulty absorbing any additional cost at all, because they operate in a bitterly competitive world market. On the other hand, sectors such as public drinking water systems, which have some leeway to absorb extra cost, use relatively less water and would therefore have to pay enormous sums to return the large remainder.

Second, the compact appears to require return of the *same* water, a critical protection against introducing invasive species. This could require recipients to build expensive separate distribution and treatment facilities for the diverted water, making use of the water much less attractive.

Finally, the burden of returning water comes on top of the other water withdrawal requirements—conserving water, causing no damage while removing and returning it, and improving the ecosystem.

While providing significant improvement in the handling of diversions in most respects, the draft agreements do have one serious shortcoming: a limited exemption for small diversions (250,000 gallons per day or less) for destinations within twelve miles of the basin line intended for public drinking water supply. For these proposals, the return flow requirement (but not the other standards) would be suspended.

The purpose of this exemption is apparently to supply some small, needy communities near the basin line who have had long-standing requests to divert water because their existing supplies are tainted with sulphur, fluoride, or other contaminants. However, the needs of these communities could be met in other ways. Meanwhile, the exemption sets a bad precedent in principle and in practice opens the door to abusive requests intended not for existing communities but to promote new development and sprawl. The exemption should be deleted from the draft agreements.

Conclusion

The new agreements could allow some diversion proposals to go forward. However, taken as a whole, the agreements seem to empower the states to turn down most significant diversion requests in a way that will hold up in court over the long run.

For more information on the proposed agreements, connect to www.speakongreatlakes.org.