

## **An opinion on the governors and premiers' proposed “Annex Implementing Agreements”**

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Despite needing some improvement, agreements proposed by the ten Great Lakes governors and premiers provide much better defenses against U.S. diversion proposals while leaving in place strong diversion bans recently passed by Canada, Ontario, and Québec.

A widespread myth on both sides of the international border is that the Great Lakes are already well protected from U.S. water diversions. After all, a U.S. federal law allows any one of the eight Great Lakes governors to veto diversion proposals for any reason.

The facts don't support the myth. Of the three U.S. diversions proposed since the states got their veto, two have been approved. Other diversions take place without approval because existing laws don't cover them. From Wisconsin alone, the Great Lakes basin loses 38 million litres of water every day via groundwater pumping.

Worst of all, an independent legal study by the Great Lakes states came to the disturbing conclusion that a well-financed legal challenge by water companies or other states could overturn the U.S. diversion veto as unconstitutionally discriminatory.

To their credit, the governors have responded with action rather than denial. Working with the premiers, they've proposed a new system that judges all water takings—whether intended for diversion or for use inside the basin—according to clear standards that protect the lakes.

The result is two proposed agreements that provide increased protection without being “protectionist.” That is, the agreements shield basin laws from claims of discrimination because they use similar rules to address both diversions and unwise water use here in the basin. International trade rules make this approach useful for both Canada and the United States, but it is especially valuable south of the border. The U.S. Constitution, arguably the world's original free trade agreement, makes simple diversion bans or veto powers very legally questionable.

The proposed agreements are available for public comment through October 18.

We have concerns with how well the proposed agreements protect the lakes from abusive water takings, detailed at [www.speakongreatlakes.org](http://www.speakongreatlakes.org). But we think they *do* meet the most important test: preventing U.S. diversions.

We came to this conclusion in part by looking at how the agreements would have affected diversions already approved by the governors. Take the last one, a diversion of 18 million litres per day at Akron, Ohio, approved in the late 1990s. That diversion removes water from the state's Cuyahoga River, diverts it to suburban communities across the basin line, and returns an equal amount of water via canal.

This “no net loss of water” concept has two terrible flaws at Akron. First, the return water comes from an out-of-basin source, opening yet another door to the devastating threat of invasive plants and animals. Second, the water is returned twelve miles downstream from where it is diverted, seriously damaging the long stretch of river in between.

Under the new agreements, the Akron diversion would certainly have been rejected. The agreements require new projects to cause “no significant adverse impact” to the environment, to

include significant water conservation, and to provide an “improvement” to the environment on top of any steps taken to prevent the forbidden adverse impacts. None of these expensive requirements was a consideration for the Akron proposal.

But most significantly, the agreements mandate return of the *exact same* water. This break-the-bank requirement, which would require most potential out-of-basin water recipients to construct separate water distribution and treatment facilities, was not part of the original Akron proposal and would have made it completely unprofitable.

In fact, it is hard to think of any major diversion proposal that could feasibly return the exact same water, much less go on to meet the other requirements.

Under the new agreements, every Great Lakes diversion proposal ever made, whether vetoed, abandoned, or approved, either would not have been proposed, because it would have cost too much, or would have been rejected, because it couldn’t meet the new standards.

The potential large-scale diversions worrying every citizen of the Great Lakes basin—to the Mississippi River, to the Midwest grain belt, to the U.S. South and Southwest—all become impractical or impossible under the new standards, even factoring in substantial federal or state subsidies.

And most importantly, the new rules seem likely to stand up in U.S. and international trade courts.

The agreements’ diversion provisions are strong, but the documents still need improvement to fully protect the lakes. A proposed exemption from returning water for certain small diversions must be deleted. The water conservation standards must be stronger and much more specific. And water must be returned to the source, not anywhere in the same Great Lake watershed.

But the governors and premiers got the main thing right—preventing diversions. Now they need to work on improving the rest of the agreements.

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