

June 15, 2001

BY FACSIMILE (312-407-0038)

Margaret Grant
Executive Director
Great Lakes Council of Governors
35 East Wacker Drive
Suite 1850
Chicago, IL 60601

Dear Ms. Grant:

Thank you for forwarding a copy of the proposed Great Lakes Charter Annex 2001, which I understand is intended to supplement the Great Lakes Charter of 1985. The Department of State shares your view of the importance of conservation of Great Lakes water and supports coordinated efforts in this area. As the Great Lakes States and Canadian Provinces move forward to develop and implement a resource-based conservation standard for new water withdrawal proposals from the Great Lakes Basin, the Department would expect such efforts to be within the competence of States and Provinces within their respective federal systems, and consistent with the treaty commitments of the United States and Canada, including the Boundary Waters Treaty of 1909, as well as State, Provincial and Federal laws. In keeping with this expectation, I wish to raise with you two concerns, one with respect to the proposed Annex itself and the other with respect to the future binding agreements contemplated by the Annex.

Your cover letter indicates that, like the Great Lakes Charter, the Annex is intended to be a “non-binding good-faith agreement” among the U.S. States bordering the Great Lakes and the Canadian Provinces of Ontario and Quebec. The Department appreciates this clarification since the text might otherwise have been misunderstood as conveying an intent to conclude a binding agreement (for example, by the way the prescriptive principles in Directive #3 have been drafted). In light of your assurance and the scheduled signing, I have refrained from suggesting how the non-binding character of the Annex might have been further clarified, just as the Great Lakes Charter itself might have been worded differently to clarify its non-binding intent. However, should future non-binding arrangements be contemplated, the Treaty Office, which has extensive expertise and experience in developing language to distinguish between binding and non-binding documents, would be pleased to assist the Council, as we have many of the states, in expressing the intent of the parties with respect to the non-binding character of those arrangements.

With respect to the future “binding agreement(s)” called for by the Annex, as you know, Congress has encouraged “the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a

common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.” 42 U.S.C. §1962d-20(b)(2). At the same time, Congress indicated that it was not approving in advance any agreement reached by the Great Lakes States with Ontario and Quebec. See 105 Cong. Rec. S11406 (Oct. 31, 2000) (expressing views of Senators Baucus, Levin and Smith that 42 U.S.C. §1962d-20(b)(2) should not “be interpreted as granting pre-approval to standards which have not yet been developed and which Congress has not reviewed”). I understand that your intent would be to submit for Congressional approval any new water conservation and resource improvement standards.

You should know, however, that the Government of Canada has expressed its view that it would be contrary to “international law and the Constitution of Canada” for Quebec and Ontario on their own, without the involvement of Canadian federal authorities, to conclude such binding agreements with the Great Lakes States. See *Comments from the Government of Canada on Annex 2001 to the Council of Great Lakes Governors*, February 28, 2001, at 3. Thus, the Great Lakes States and the Canadian Provinces will need to work with the U.S. and Canadian governments on the modalities of establishing the binding arrangements envisioned by the Annex to ensure that they can properly be characterized as legally binding for both Canada and the United States at the federal, state and provincial levels.

It will also be important to ensure that the standards in such agreements are consistent with the standards and priorities found in treaties such as the Boundary Waters Treaty of 1909 and the Great Lakes Water Quality Agreement and the process by which the standards are reviewed and established is and will be consistent with existing and future processes for boundary waters issues, including the possible involvement of the International Joint Commission. These principles, we understand, are recognized in Annex Directive #3, which contemplates that any future binding agreements would comply with “applicable state, provincial, federal and international law and treaties.”

Please do not hesitate to contact me should you have any questions regarding the Department’s position as expressed in this letter. I look forward to working with you as you and your colleagues seek to develop mechanisms concerning conservation of the waters of the Great Lakes.

Sincerely,

Robert E. Dalton
Assistant Legal Adviser for Treaty Affairs
(202) 647-2044 (phone)
(202) 736-7541 (fax)