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A Model Act for Preserving Canada's Waters

Canadian Water Issues Council
in collaboration with the
Program On Water Issues

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M C I S B R I E F I N G S

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PROGRAM ON WATER ISSUES

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The Program On Water Issues (POWI) creates opportunities for members of the private, public, academic, and not-for-profit sectors to join in collaborative research, dialogue, and education. The Program is dedicated to giving voice to those who would bring transparency and breadth of knowledge to the understanding and protection of Canada's valuable water resources. Since 2001, the Program On Water Issues has provided the public with analysis, information, and opinion on a range of important and emerging water issues. Its location within the Munk Centre for International Studies at the University of Toronto provides access to rich analytic resources, state-of-the-art information technology, and international expertise. This paper can be found on the Program On Water Issues' website at www.powi.ca. For more information on POWI or this paper, please contact Adele M. Hurley.

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About the Canadian Water Issues Council

This paper has been prepared by the Canadian Water Issues Council (CWIC) in collaboration with the Program On Water Issues (POWI). CWIC was formed in 2007 to conduct policy research in a neutral university setting on transboundary water issues.

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A Model Act for Preserving Canada's Waters

Introduction

There are few public policy objectives that command greater consensus in Canada than the principle that Canada should not permit the bulk removal of freshwater from its natural basins. It is a principle that is agreed to by all major political parties and is supported by the great majority of ordinary Canadians. While Canadians may disagree over whether or not our water resources are adequately protected by existing laws, they do not in general disagree with the proposition that Canada's water resources should be protected. The debates on water during the negotiations for the Canada-U.S. Free Trade Agreement in 1988 and the North American Free Trade Agreement (NAFTA) in 1993, as an example, centred not on whether we should be protecting our water resources, but on whether these trade agreements did or did not increase the likelihood of bulk water removals.

While there continue to be debates about the implications of NAFTA on Canada's water resources, in a sense these distract from the real issue of whether Canada is doing all it can to protect our water resources, given the potential constraints of NAFTA and the multilateral obligations of the World Trade Organization (WTO). A number of recent reports argue strongly that this is not the case, that our freshwater is at growing risk from bulk removals and that federal action is needed on the issue.¹

This paper focuses on the real public policy question at issue: Are there options available to Canada to deter bulk water removals that are both consistent with Canada's trade obligations and desirable from

1. Frank Quinn, *Water Diversion, Export, and Canada-U.S. Relations: A Brief History* (MCIS Briefings, Munk Centre for International Studies, University of Toronto, Toronto, August 2007) and Andrew Nikiforuk, *On the Table: Water, Energy and North American Integration* (Program On Water Issues, Munk Centre for International Studies, University of Toronto, Toronto, October 2007).

other public policy perspectives? The Canadian Water Issues Council (CWIC) believes that such options exist, and moreover should command wide support from all political parties and diverse groups in civil society. We offer this paper as a starting point to help build consensus among Canadians on the matter. The paper describes a model federal statute to preserve Canada's waters from bulk removal, a statute that would be both consistent with Canada's trade obligations and respectful of the roles of different levels of government within Canada.

Need for Legislation

Why is legislation to protect Canada's waters needed now? In many parts of Canada, water resources are already under stress from urbanization, overuse, pollution and invasive species. And despite increased efforts at all levels to protect our freshwater, the situation will likely get worse. We do not know what the full effect of climate change on our water resources will be over the next few decades, but there is a widespread consensus that climate change will only serve to increase – perhaps dramatically in some regions – the stresses on our water resources.

The International Joint Commission recognized the threat of bulk removals of water from the Great Lakes Basin – Canada's largest reservoir of freshwater – in its 2000 report on *Protection of the Waters of the Great Lakes*. It concluded that "Removals of water from the Basin reduce the resilience of the system and its capacity to cope with future, unpredictable stresses...It is not possible at this time to identify with any confidence all the adverse consequences so that these consequences can be mitigated."

These comments can be equally applied to potential bulk water removals from other watersheds in Canada. So too, can the Commission's insistence on using the precautionary approach to evaluate the wisdom of removals that might irreparably damage the often fragile ecosystems of Canadian water basins. Now, not later – when it may prove too late – is the time to act on this issue of national concern.

A Water Basin Approach to Protection

There are a number of ways in which governments could structure the protection of Canada's water resources from bulk extra-basin removals. One approach is to use political boundaries – for example,

to prohibit exports of bulk water from Canada to the United States (or any other country). The most obvious drawback to such an approach is that it could represent a potential violation of our international trade obligations under both NAFTA and the WTO. Our rejection of this approach, however, is rooted even more strongly in the violation of ecosystem integrity that would almost certainly follow from significant inter-basin transfers of water, whether these take place entirely within Canada or across the international boundary.

CWIC supports the use of a water basin approach for protecting against bulk water removals. It is true that one of the benefits of an approach that focuses on water basin boundaries rather than political boundaries is that it is much more likely to be consonant with Canada's international trade obligations. This is not the only, or even primary, reason for adopting the approach, however. Again, the words of the International Joint Commission in its 2000 Reference on the Great Lakes ring true for all Canadian water basins: "The Great Lakes Basin is an integrated and fragile ecosystem. Its surface and ground-water resources are part of a single hydrologic system and should be dealt with as a unified whole in ways that take into account water quantity, water quality, and ecosystem integrity." We protect water by leaving it in and using it within its natural basin.

In the past, Canadian governments approved many bulk removals from water basins. However, only three of the approximately 60 inter-basin diversions in existence today transfer water between any of the five largest basins.² (See Figure 1 for an illustration of the major water basins). We have learned from our long experience to be wary of further bulk water removals, especially between major basins. In 1999, the federal and provincial governments recognized the need to keep water within Canada's major drainage basins for a number of reasons: to sustain natural flows, to prevent the transport of invasive pests and diseases, to protect biological diversity, and to ensure the sustainable use of water for future generations. But concrete action to achieve these public policy objectives has been limited to a 2002 federal prohibition on bulk water removals from boundary water basins (which protects less than 10 percent of Canadian territory), and an uneven patchwork of provincial laws.

2. Canada's five major drainage basins are those that drain into the Atlantic Ocean, the Pacific Ocean, the Arctic Ocean, Hudson Bay and the Gulf of Mexico.

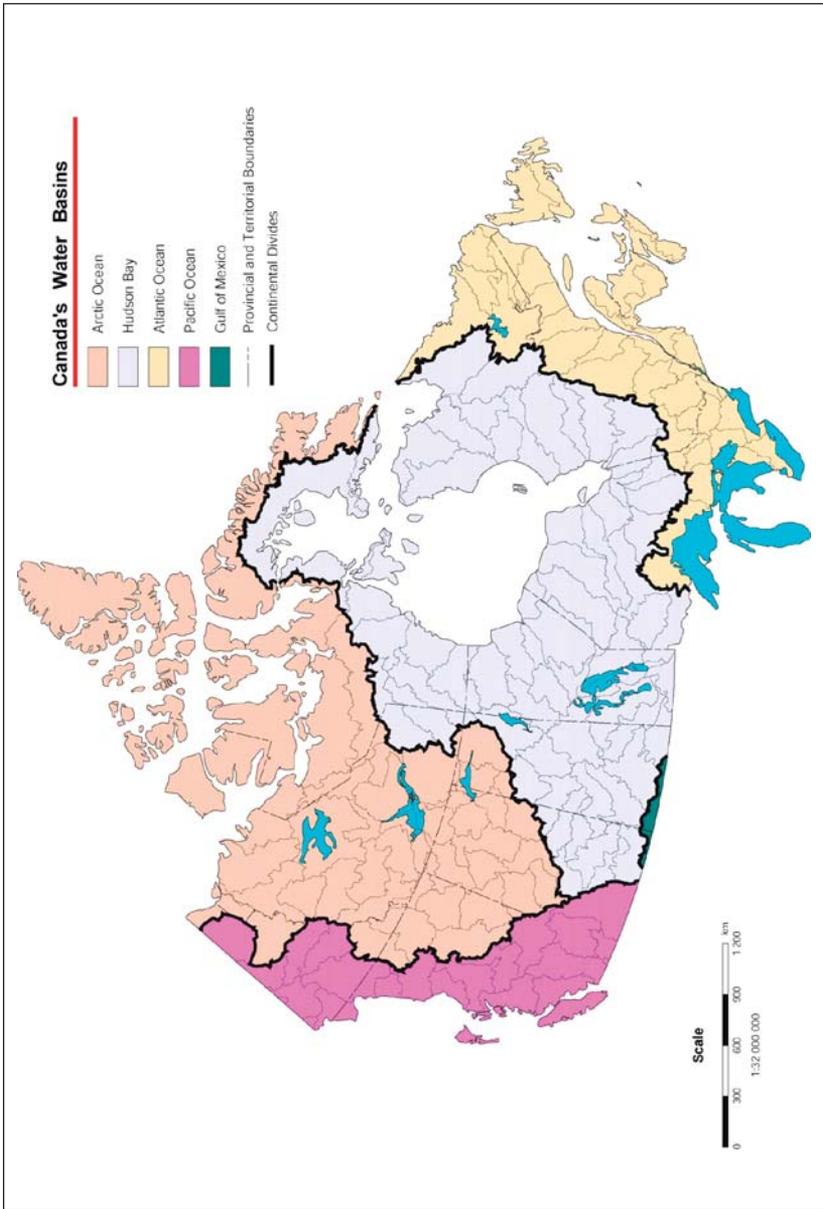


Figure 1. Canada's Major Drainage Basins

Source: Adapted from Environment Canada from Natural Resources Canada, 2003, National Scale Frameworks Hydrology - Drainage Areas, Canada, Version 5.0, <http://www.geogratis.gc.ca/> (accessed September 16, 2003). Statistics Canada, Environment Accounts and Statistics Division, Spatial Environmental Information System.

Respecting Jurisdictional Responsibilities

Canada's approach to natural resource management needs to always respect the appropriate responsibilities of different levels of government. This entails recognizing the primary role of the provinces as managers of their resource endowments. It also requires acknowledgment that the federal government has a number of important constitutional responsibilities related to freshwater, and that many contemporary water issues are of concern to all Canadians. Any federal legislation that addresses bulk water removals should therefore begin with the objective of leaving the protection of water resources as much as possible to provincial governments. Given the national concern over the issue of bulk water removals, however, and given the threats posed by climate change, environmental contaminants and invasive species – all of which extend beyond provincial boundaries – there is a clear role for the federal government to play in assuring that minimum levels of protection are provided for Canada's water resources.

The Model Act described below would reconcile both national and provincial interests. It provides for minimum national standards, yet recognizes the strong desirability of provincial action. It does so by allowing provincial governments to put in place legal regimes that provide protection against bulk water removals equivalent to that set out in the federal regime. Where federal-provincial equivalency agreements are put in place, the federal act and regulations would be inoperable and the provincial regime would have primacy. CWIC believes that most or all of the provinces would indeed choose to act as wise stewards and maintain legal regimes that are consistent with the federal legislation. The Model Act would also recognize the aboriginal and treaty rights of the aboriginal peoples of Canada, who also have a strong interest in preserving the ecological integrity of Canada's water resources.

The Model Act

The Model Act described in the following pages is offered as a contribution to the important public discussion on how to preserve Canada's water resources from bulk removals. It describes the essential elements of an Act that would accommodate both national and provincial interests in water preservation and that would also be consistent with Canada's international trade obligations. While the Model Act

suggests the basics of a possible protection regime, it is not intended to provide all the answers. For example, there is still an important need for dialogue on the precise extent of exemptions that might be allowed to the general prohibition on extra-basin removals of water, as well as the water basins to which the prohibition would apply. This dialogue would involve not only federal and provincial governments but also Canada's First Nations, stakeholders and representatives of civil society. As we have noted, the time for the dialogue to begin on this vital issue is now.

Proposed Model Canada Water Preservation Act: A Description of Basic Elements

Section 1. PURPOSE

Description

The purpose of the proposed Act is to foster the sustainable use of Canada's water resources and in particular to prevent the extra-basin removal of water, which has become a matter of national concern in Canada.

Comments

The purpose section would be further elaborated to describe the reasons for growing national concern and to buttress the need for a federal safety net, at least at the level of the five largest drainage basins. The growing concern relates to, among other things, ensuring a sustainable supply of water for the use of future generations in light of climate change and threats to water quality, recognizing the potential implications of major diversions on ocean processes and international waterways, preventing the inter-basin transfer of invasive pests and diseases, protecting biological diversity, and maintaining sufficient flows and water levels to support commercial navigation, fisheries and migratory waterfowl.

Section 2. EXEMPTIONS

Description

The Act would not apply to boundary waters as defined by the *Boundary Water Treaty*.

Comments

Removals from boundary waters are already addressed under the *International Boundary Waters Treaty Act* and its regulations.

Section 3. PROHIBITION

Description

- (1) No person shall use or divert any water in Canada by removing water from the basin in which it is located to a location outside the basin.
- (2) This section would apply to all five major water basins in Canada.

Comments

The five major water basins are those that drain into the Atlantic Ocean, the Pacific Ocean, the Arctic Ocean, Hudson Bay (which for this purpose is typically treated separately from the Arctic Ocean) and the Gulf of Mexico.

- (3) The prohibition on removal would not apply in respect of the defined exceptions.

Section 4. BINDING ON THE CROWN

Description

The Act would be binding on the federal and every provincial Crown.

Section 5. NON-APPLICATION OF THE FEDERAL PROHIBITION

Description

(1) Except with respect to Her Majesty in right of Canada, the provisions relating to prohibition of water removals would not apply within the jurisdiction of a government for which there is in force a federal order pursuant to subsection (2) of this section declaring that the provisions do not apply within that jurisdiction.

Comments

The federal prohibition would not apply in a province which has signed an equivalency agreement as defined in 5 (2) below. If, for any reason, the province is unable to implement the provisions of the agreement, the Minister with the approval of the Governor in Council would have the authority to declare the federal order inoperative, and the federal Act would provide the necessary safety net. The equivalency agreements would have to specify in detail when and how such a declaration would occur.

(2) When the responsible federal Minister and a provincial government agree in writing that there are in force under the laws applicable to the jurisdiction of that government provisions that are equivalent to those in this Act, as amplified in the regulations, the Governor in Council may, on the recommendation of the Minister declare that the Act's provisions on removal will not apply in any area under the jurisdiction of that government.

(3) The Minister may, with the approval of the Governor in Council, enter into an agreement with the government of one or more provinces respecting activities relating to removal of water, as referred to above.

Section 6. EXCEPTIONS

Description

The prohibition against the bulk removal of water does not apply to:

(a) undertakings commenced before *[date]* if the amount of water removed from water basin by the undertaking in any calendar year after *[date]* does not exceed the highest amount of water transferred out of the basin by the undertaking in any calendar year between *[date]* and *[date]*;

Comments

This is essentially a grandfathering clause, which may or may not be required. Under most legal interpretations, grandfathering would be automatic.

(b) waters used in a conveyance including a vessel, aircraft or train as ballast, for the operation of the conveyance or for people, animals or goods on or in the conveyance;

(c) water used in a manufactured product containing water, including water and other beverages in bottles or packages, that is then taken outside the water basin; and

(d) water used in a non-commercial project on a short term basis for safety, security, firefighting or humanitarian purposes;

Comments

Non-commercial project means a project involving the removal of water from a major water basin in bulk in which no one is required to pay for the waters.

Section 7. REGULATIONS

Description

The Governor in Council may, on the recommendation of the responsible federal Minister, make regulations generally for carrying out the purposes and provisions of the Act, including for example:

(a) specifying what constitutes a use, diversion or removal of water under the Act;

(b) describing the water basins to which the prohibition applies;

(c) defining the scope of the exceptions provided for in Section 6.

Section 8. ABORIGINAL AND TREATY RIGHTS

Description

Nothing in the Act shall be construed as to abrogate or derogate from the protection provided under existing aboriginal or treaty rights as recognized and affirmed in section 35 of the *Constitution Act, 1982*.

Section 9. OFFENSES AND PUNISHMENT

Description

(1) Every person contravening the prohibition on removals would be guilty of an offense and be liable to a conviction, whether by way of indictment or by summary conviction, to fines and/or imprisonment, as to be provided under the Act.

(2) Every contravention of the prohibition on removals that is committed or continued on more than one day would be deemed to constitute a separate offense for each day on which it is committed or continued.

Comments

It is expected that the precise nature of the fines and potential term of imprisonment would reflect those in the *International Boundary Waters Treaty Act*, which currently stand at \$1,000,000 and three years, respectively, for conviction on indictment, and

\$300,000 and six months, respectively, on summary conviction. The Act would also include provisions equivalent to those in the *International Boundary Waters Treaty Act* relating to offenses by corporate officers, employees, agents, mandatories, etc.

Section 10. INJUNCTIONS

Description

Where, on application by the responsible Minister, it appears to a competent court that a person has done or is about to do or is likely to do any act or thing constituting or directed towards the commission of an offense under this Act, the court would be able to issue an injunction ordering that person to refrain from doing that act or do any act that appeared to the court to prevent the commission of the offense.

Comments

This power would be subject to the same notice requirements with respect to injunction as provided for in the *International Boundary Waters Treaty Act*.