

**DENNIS J. KUCINICH**  
10TH DISTRICT, OHIO

2445 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, D.C. 20515  
(202) 225-5871

14400 DETROIT AVENUE  
LAKEWOOD, OHIO 44107  
(216) 228-8850

PARMATOWN MALL  
7904 DAY DRIVE  
PARMA, OH 44129  
(440) 845-2707



**Congress of the United States**  
**House of Representatives**  
[www.kucinich.house.gov](http://www.kucinich.house.gov)

CHAIRMAN,  
SUBCOMMITTEE ON DOMESTIC POLICY  
COMMITTEE ON OVERSIGHT AND  
GOVERNMENT REFORM  
COMMITTEE ON EDUCATION AND LABOR

August 20, 2008

The Honorable John Conyers, Jr.  
Chairman  
House Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, D.C. 20515-0001

Dear Chairman Conyers,

I write with concern about the strength of the Great Lakes Compact. The protection of the Great Lakes from diversions and exports is a laudable and critical goal. However, the Compact contains major loopholes that could allow water to be transferred outside of the Basin and could result in the privatization of Great Lakes waters for commercial sale, thus undermining the intent of the agreement.

Congress can close the loopholes without sending the Compact back to the States to be ratified again by taking two necessary and complementary actions. The first is to include language in the Committee Report for the Compact as described below. The second is to adopt H.R. 6814, which strengthens the public trust doctrine provisions in the Water Resources Development Act of 1986 in ways that Compact Report language alone cannot.

### **Product Exception and Definitions in the Compact**

Section 4.8 of the Compact bans diversions of the waters of the Basin. However, the definition of "diversion" in Section 1.2 states that it "does not apply to water that is used in the Basin or a Great Lake watershed to produce a product that is then transferred out of the Basin or watershed." Based on the plain meaning of this language, water extracted (produced) as a Product can be sold and transferred out of the Basin in any size container without limitation as to the amount of water removed.

This meaning of the "water as product" exception is supported by the definition of "product" in Section 1.2. The definition of "product" includes "*something produced in the Basin by human or mechanical effort through agricultural processes and used in manufacturing ... or intended for intermediate or end use consumers.*" In other words,

water that is “produced” and labeled a product intended for intermediate or end use consumers is a “product” and exempt from the diversion ban.

Perhaps in order to dampen the precedent setting effect of the “product,” the “bulk water” provisions in Section 4.12.10 were adopted. Under the bulk water provision, water in containers that hold more than 5.7 gallons of water “shall be treated under this Compact in the same manner as a proposal for diversion.” On the surface, it would seem that the water as product exempted from the diversion ban is still subject to the ban, so that the transfer of any container of water out of the Basin with more than 5.7 gallons of water is prohibited. However, applying the plain meaning of these provisions in conjunction with the provisions of NAFTA or other trade agreements or laws leads to a different result; a likely indefensible distinction and erosion of the diversion ban itself.

### **Water as Product Subject to NAFTA or International Trade Rules**

Under the Statement of Governments to NAFTA, water is not covered by trade laws “unless water, in any form, has *entered into commerce* or is *produced*.” Under the Harmonizing Code System for GATT a “good” (product) includes “water, and all water other than the sea, whether or not clarified or purified.” The “product” definition or “product” exception to the diversion ban in the Compact is relevant to water “produced” or “intended for an intermediate or end use consumer.” Hence, it appears that the product exception and product definitions fit the provisions of NAFTA and GATT that protect those who want to claim water as a good, product or as having entered into commerce.

Once water is a “product” and subject to NAFTA or GATT, the validity of the 5.7 gallon limit is based on an analysis of the limit as a regulation of a product. As such, it must be based on the substantial environmental or health, safety and general welfare standards in NAFTA and GATT. If a state cannot justify the need for the 5.7 gallon limit, it is not defensible and would collapse. For example, under this heavier standard, it would be difficult for a state to defend the prohibition of a transfer of 100 million gallons a year in 1000 10,000-gallon containers when a transfer of 200,000 5- gallon containers would be allowed under the 5.7 gallon limit, particularly if the water was removed from a water source that would result in the same or lesser impacts.

Accordingly, it is critical that Congress, in approving the Great Lakes Compact, clarify in the Committee Report that the product exception to definition of diversion in Section 1.2 is not intended to apply to water that is transferred in a package or container intended for an intermediate or end use consumer, regardless of whether it has been treated “by human or mechanical effort.” In addition, the 5.7 gallon bulk water provision should be clarified in the Report to note that the term “treated” does not imply that water in any size container is a product or is subject to NAFTA and/or GATT or other international trade agreements or laws. In addition, Congress should clarify that the Compact does not expressly authorize bottled water or water as a product in containers or packages less than 5.7 gallons, but leaves that up to each sovereign state and whether or not each state

decides in accordance with its own constitution and laws that water transferred in any containers or package has been properly authorized, licensed, and permitted.

### **The Public Trust Doctrine**

Finally, the Great Lakes Compact in Section 1.3.1, Findings and Purposes, declares that “[T]he waters of the Basin are precious public resources held in trust by the States.” However, the Compact does not use the term “public trust” as that term applies to the Great Lakes, all connecting waters, or the tributary waters in the inland lakes and streams or groundwater of each state. Moreover, the Compact does not use the standard or criteria of the public trust doctrine in any of its standards or exceptions for allowing the diversion, export or sale of water from the Great Lakes or these tributary waters.

Under the public trust doctrine, water is owned, in so far as it is capable of ownership, by each sovereign state and held as a public trust, subject to a navigational servitude of the federal government, for the purposes of boating, fishing, hunting, swimming, and other recreation or other uses essential to its citizens. Based on the decision in *Illinois Central Railroad v Illinois* (U.S. Sup. Ct. 1892) and the courts of several states, a state cannot subordinate the title or state ownership or public trust for citizens to a private purpose for private gain. Rather, any use or transfer of public trust waters must be for a public purpose; it must not materially impair, directly or over time, the public trust waters, fish, or related natural resources; and not interfere with the protected public trust uses. Further, in those narrow instances where these standards have been met, a transfer of public trust waters must not be made unless fair consideration has been assured; this is to prevent private subsidies or appropriation by transfer or sale of public trust waters.

Accordingly, I request that the Committee Report to the Compact expressly state that Section 1.3.1 of the Compact is intended to refer to the public trust doctrine and principles as part of the Compact, and that no transfer, diversion, exception, or exemption is authorized or can be approved if it does not comply and is not consistent with the public trust in the waters of the Great Lakes Basin.

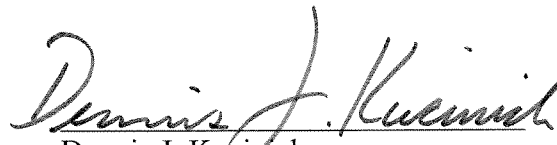
### **Recommended Language in Committee Report**

1. The definitions of “diversion” and “product” in Section 1.2 of the Compact are not intended to establish or recognize that water itself in any size container or package is a Product, and therefore excepted or exempt from the ban on diversions out of the Basin or a watershed within the Basin.
2. Nothing in the Compact is intended to establish or recognize water as a “product,” “good,” or “entered into commerce” under NAFTA, GATT, or international trade laws or agreements.

3. Section 1.3.1, which states that “waters of the Basin are precious public natural resources shared and held in trust by the States,” refers to the public trust as that term is defined by the courts, legislature, and constitution of each state, and means that the waters of the Basin must be managed and protected consistent with the public trust in its waters, including navigable and tributary waters that form such navigable waters.

Thank you for consideration of this request. Please do not hesitate to contact my staff or me if you have any questions.

Sincerely,



Dennis J. Kucinich  
Member of Congress