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January 2010

## United States Congressional Approaches to the Great Lakes and North American Trade

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### Recommended Citation

Dennis Kuchinich, *United States Congressional Approaches to the Great Lakes and North American Trade*, 34 Can.-U.S. L.J. 467 (2008)

Available at: <https://scholarlycommons.law.case.edu/cuslj/vol34/iss2/21>

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# UNITED STATES CONGRESSIONAL APPROACHES TO THE GREAT LAKES AND NORTH AMERICAN TRADE

*Speaker – Dennis Kucinich*

## INTRODUCTION

*Daniel D. Ujcz*

MR. UJCZO: It is my great pleasure and high privilege to introduce this evening's keynote speaker, the Honorable Dennis Kucinich. Congressman Kucinich is a lifelong public servant who started in the 1970s through City Council,<sup>1</sup> a clerk of the Municipal Court,<sup>2</sup> and then in 1996 became the Congressional Representative to the Westside of Cleveland, Ohio.<sup>3</sup>

So without further ado, I know the Congressman has many things to do, this evening is the Rock and Roll Hall of Fame Induction Concert,<sup>4</sup> but it is my great privilege and high pleasure to introduce you to Congressman Dennis Kucinich.

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<sup>1</sup> See Congressman Dennis Kucinich, About Dennis, <http://kucinich.house.gov/Biography> (last visited Sept. 14, 2009).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See News Release, Rock and Roll Hall of Fame + Museum, The Rock and Roll Hall of Fame Announces its Inductees for 2009 (Jan. 14, 2009), available at <http://www.rockhall.com/pressroom/inductees-for-2009>.

## SPEAKER

*Dennis Kucinich*<sup>\*</sup>

MR. KUCINICH: Thank you. Welcome to Cleveland, and indeed this is a big weekend in Cleveland. Certainly your conference is very important to our community, our state, and both of our nations. We also have the Rock and Roll Hall of Fame Induction, and I am one of the hosts,<sup>5</sup> so I have to be rather brief. But I think I can be succinct in talking to you about some of the concerns that I've had, as someone who has participated in a number of meetings over the years of the Joint Commission, and who understands the importance of the work that we all do in terms of protecting Lake Erie and the Great Lakes as a common resource for both of our nations.<sup>6</sup>

I have been very involved in the issues relating to the Great Lakes over many years,<sup>7</sup> and I just wanted to cover a couple points with you here that relate to some of the concerns that I have that may be things you have not really heard because, unlike some of my colleagues, I actually read the legislation that is brought before us for considerations.<sup>8</sup> This is one of the reasons I voted against the Patriot Act.<sup>9</sup>

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<sup>\*</sup> Dennis Kucinich was elected to Cleveland's City Council at age 23, and Cleveland mayor in 1977 at the age of 31. At the time, Mr. Kucinich was the youngest person ever elected to lead a major American city. In addition to being Mayor of Cleveland, Mr. Kucinich has served as the Clerk of Courts for the Cleveland Municipal Court (1976–77); been an Ohio State Senator (1994–96); and in November 2008, was elected to his seventh term as a Member of the United States House of Representatives (1997–present). Mr. Kucinich has been honored by Public Citizen, the Sierra Club, Friends of the Earth and the League of Conservation Voters as a champion of clean air, clean water and an unspoiled earth. Mr. Kucinich has twice been an official United States delegate to the United Nations Convention on Climate Change (1998, 2004) and attended the 2002 World Summit on Sustainable Development in Johannesburg, South Africa. Mr. Kucinich graduated with a Bachelor of Arts and a Masters in Speech Communications from Case Western Reserve University.

<sup>5</sup> See John Soeder, Plain Dealer Pop Music Critic, Cleveland Earns Raves as Rock Hall Induction Host (Apr. 5, 2009), available at [http://www.cleveland.com/rockhall/index.ssf/2009/04/cleveland\\_earns\\_raves\\_as\\_rock.html](http://www.cleveland.com/rockhall/index.ssf/2009/04/cleveland_earns_raves_as_rock.html).

<sup>6</sup> See International Joint Committee, Water Uses Reference, Hearing Summaries 2nd Round (Oct. 14, 1999), available at <http://www.ijc.org/rel/boards/cde/summaries2ndround.html>.

<sup>7</sup> See Congressman Dennis Kucinich, Issues, Protecting the Great Lakes, <http://kucinich.house.gov/Issues/Issue/?IssueID=1560#Protecting%20the%20Great%20Lakes> (last visited Sept. 14, 2009).

<sup>8</sup> See generally Dennis Kucinich, *Remarks at Democratic Presidential Debate in Las Vegas*, N.Y. TIMES, Nov. 15, 2007.

<sup>9</sup> See *id.*

As we know, a few years ago, the eight governors of the Great Lakes states finished negotiating an agreement called “The Annex.”<sup>10</sup> This would govern the conditions under which water withdrawals from the Great Lakes were permissible.<sup>11</sup> It would have provided the strongest possible protections for the Great Lakes, but the bottled water industry left themselves a loophole.<sup>12</sup> A loophole that courts and the World Trade Organization could make even bigger, potentially making the agreement even worse than the status quo.<sup>13</sup> Now there are many people that are not saying that, but I can submit to you and offer for your consideration the opportunity that if you take another look at the agreement,<sup>14</sup> you may see what I am concerned about.

Maintaining the quality and the quantity of water in the Great Lakes is a well-established problem.<sup>15</sup> There are several major water diversions<sup>16</sup> and withdrawals<sup>17</sup> already allowed under law, including a diversion for the city of Chicago,<sup>18</sup> which is already getting about two billion gallons per day.<sup>19</sup> Urban sprawl has created new demands for water while robbing aquifers of a chance of being replenished by painting over previously permeable ground.<sup>20</sup> Water supplies that are contaminated or depleted need to be replaced. In 2004, the United States Geological Survey, which tracks drinking water use in the United States, found that ground water is now flowing away from Lake Michigan instead of replenishing it.<sup>21</sup> Our own Lake Erie is the shallowest,<sup>22</sup>

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<sup>10</sup> See THE GREAT LAKES CHARTER ANNEX: A SUPPLEMENTARY AGREEMENT TO THE GREAT LAKES CHARTER (2001), available at <http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf>.

<sup>11</sup> See generally *id.*

<sup>12</sup> See Kari Lydersen, *Bottled Water at Issue in Great Lakes: Conservation and Commerce Clash*, WASH. POST, Sept. 29, 2008, at A07.

<sup>13</sup> See *id.*

<sup>14</sup> See GREAT LAKES CHARTER ANNEX, *supra* note 10.

<sup>15</sup> See Council of Great Lakes Governors, Projects, <http://www.cglg.org/projects/priorities/index.asp> (last visited Sept. 15, 2009).

<sup>16</sup> See UNIV. OF WIS.-MILWAUKEE & GREAT LAKES WATER INSTITUTE, OUR WATERS: DIVERSIONS OF GREAT LAKES WATER 2 (2008), available at <http://www.glwu.uwm.edu/ourwaters/documents/DiversionsCWeb.pdf>

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See generally BETSY OTTO, ET AL. AM. RIVERS & NAT'L RES. DEF. COUNCIL & SMART GROWTH AM. (2001), available at <http://www.mrsc.org/artdocmisc/pavingwatershortages.pdf>.

<sup>21</sup> See U.S. GEOLOGICAL SURVEY, THE IMPORTANCE OF GROUND WATER IN THE GREAT LAKES REGION: WATER RESOURCES INVESTIGATION REPORT 00-4008 (2009), available at <http://water.usgs.gov/ogw/pubs/WRI004008/gw2.htm#bm6>.

<sup>22</sup> See Department of Natural Resources, Lake Erie Facts, <http://www.dnr.state.oh.us/geosurvey/lakeerie/lefact/tabid/7828/Default.aspx> (last visited Sept. 15, 2009).

warmest,<sup>23</sup> most vulnerable of all the Great Lakes,<sup>24</sup> and it is the only one above sea level.<sup>25</sup>

There are good reasons to think the demand for this already strained water source will increase significantly.<sup>26</sup> Now, keep in mind that in the Great Lakes, we have the largest supply of fresh water in the world,<sup>27</sup> yet most educated guesses say that evaporation resulting from increased temperatures associated with climate change will result in significant water losses.<sup>28</sup> The population in the basin is expected to grow from thirty-four million to fifty million people in the next thirty years.<sup>29</sup> Many experts fear the thirsty and rapidly growing southwestern United States will need water so desperately that it will soon become financially viable for them to try to divert it from the Great Lakes.<sup>30</sup> As a result of climate change, that region is expected to experience more frequent, prolonged, and more severe droughts.<sup>31</sup>

What I see as the biggest water level issue is what I call the "bottled water provision."<sup>32</sup> Attempts to privatize Great Lakes water pose an unprecedented threat.<sup>33</sup> Before the Great Lakes Compact was enacted, the only way anyone could withdraw, even divert water, from the lakes in significant quantities was to get approval from every governor of all eight states in the Great Lakes Basin.<sup>34</sup> Acknowledging that some of the diversions of water for the public good may be necessary, the eight Great Lakes governors and two Canadian premiers in the Great Lakes Basin decided there should be guidelines created to specify the conditions under which an entity can be expected to get

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<sup>23</sup> See *id.*

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See generally Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 VT. J. ENVTL. L. 189, 190-204 (2008).

<sup>27</sup> See Lauren Petrash, *Great Lakes, Weak Policy*, 39 U. MIAMI INTER-AM. L. REV. 145, 147 (2007).

<sup>28</sup> See Brian J. Shutter, *Changing Climate and Its Impact on the Great Lakes*, in EXPERT CONSULTATION ON EMERGING ISSUES OF THE GREAT LAKES IN THE 21ST CENTURY 20, 20 (Peter Boyer, Allan Jones, & Deborah Swackhamer eds., 2006).

<sup>29</sup> See Great Lakes Information Network, *Populations of the Great Lakes Basin (2000-2001)*, <http://www.great-lakes.net/envt/flora-fauna/people.html> (last visited Sept. 22, 2009) (includes current population numbers).

<sup>30</sup> See Noah D. Hall & Bret B. Stuntz, *Climate Change and Great Lakes Water Resources*, 31 HAMLINE L. REV. 639, 653-57 (2008).

<sup>31</sup> See *id.*

<sup>32</sup> See Morgan B. Bianco, *The Battle Against Bottled Water: How the Michigan Supreme Court Failed to Protect the Great Lakes and Impaired the Effectiveness of the Great Lakes Compact in Michigan Citizens for Water Conservation v. Nestle Waters North America, Inc.*, 31 HAMLINE L. REV. 833, 837-839 (2008).

<sup>33</sup> See *id.*

<sup>34</sup> See Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 COLO. L. REV. 405, 424-425 (2006).

approval for a new or an increased withdrawal.<sup>35</sup> The negotiations between the Great Lakes governors and premiers, which concluded in December of 2005, resulted in ground breaking levels of protection that were written into a document called “The Annex Implementing Agreements.”<sup>36</sup> Unfortunately, bottled water companies managed to leave themselves a loophole that could pave the way for massive privatization and export of Great Lakes water.<sup>37</sup>

The bottled water language in The Annex, now known as the Great Lakes Compact, was cleverly written. The Compact needed to respond to the widespread desire for a ban on water diversions from the Great Lakes.<sup>38</sup> Public outcry squashed two recent efforts by companies to privatize Great Lakes water in bulk.<sup>39</sup> The phrase “in bulk” is the key. The language redefines water that is in containers of 5.7 gallons or less as a product, not a natural resource managed by the public for the benefit of the public.<sup>40</sup> It exempts, therefore, bottled water from the ban on bulk water withdrawals.<sup>41</sup> In other words, in order to export a seemingly endless amount of water and make a handsome profit from it, these companies need only to put it in bottles instead of trucks or enormous tankers.<sup>42</sup> It is a loophole big enough to float a tanker through.

Once Great Lakes water is legally defined as a commodity instead of a public resource, the door to private gain at the expense of public benefit is pried open more than a few inches. After that comes the effort to swing the door of exportation wide open. Laws or regulations that may be designed to protect an essential natural resource like the Great Lakes can be challenged in court by businesses because they are restricting trade.<sup>43</sup> For example, if Ohio decided that excessive withdrawals down the road by a bottled water company was irreparably damaging the Great Lakes and decided to reduce or stop the withdrawals. The company, knowing that water was a product and not a public resource, would be able to use the North American Free Trade Agreement (NAFTA) to challenge Ohio's efforts to protect the lakes.<sup>44</sup> In

<sup>35</sup> See Austen L. Parrish, *Mixed Blessings: The Great Lakes Compact and Agreement, the IJC, and International Dispute Resolution*, 2006 MICH. ST. L. REV. 1299, 1303-1305 (2006).

<sup>36</sup> *Id.* at 1303.

<sup>37</sup> Bianco, *supra*, note 32.

<sup>38</sup> See generally Dan Tarlock, *Five Views of the Great Lakes and Why They Might Matter*, 15 MINN. J. INTL. L. 21, 22 (2006).

<sup>39</sup> See Christine A. Klein, *The Environmental Commerce Clause*, 27 HARV. ENVTL. L. REV. 1, 20-22 (2003).

<sup>40</sup> See Lauren Petrush, *Great Lakes, Weak Policy: The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement and Compact and Non-Regulation of Water “Products” Industry*, 39 U. MIAMI INTER-AM. L. REV. 145, 159 (2007).

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> *See id.* at 164.

<sup>44</sup> *See id.* at 164-165.

fact, NAFTA gives companies the right to view governments in situations like this for future profits they might lose,<sup>45</sup> which would have a chilling effect of discouraging all governments from trying to protect the Great Lakes. Indeed, once water is a legal product, even the part in The Compact that provides worthwhile protection from the lakes could be challenged.<sup>46</sup> We would be left without private control over much of a life-giving resource.

There are people who say, "this could never happen."<sup>47</sup> Let me tell you, all of the United States over the last two decades has become a vehicle for accelerating the wealth of our nation upwards and auctioning off or privatizing public resources.<sup>48</sup> I do not think we can just take it for granted, or just say this is just some kind of a wild idea that this could happen, without re-reading the law and looking at the legislative underpinnings that open a door for this kind of privatization. Privatization of a commons is often destabilizing and regressive.<sup>49</sup> The resource becomes less reliably accessible, and its quality can decline because public oversight is absent.<sup>50</sup> A formerly free resource can become too expensive for the most vulnerable to afford.<sup>51</sup> In fact, it is the primary reason that a myriad of communities in the United States, and all over the world, have fought efforts to privatize water systems.<sup>52</sup> Further, contrary to what free marketers often say, privatization frequently decreases efficiency.<sup>53</sup> For example, added cost, profits, CEO salaries, and marketing administration can be strong drivers of increased costs.<sup>54</sup> By encouraging Great Lakes water to be shipped in smaller bottling, the privatization loophole in The Annex creates incentives for tremendous waste. The plastic in water bottles is made from petroleum, which brings all social, political, and environmental problems with it.<sup>55</sup> The manufacturing process creates hazardous and toxic waste like vinyl chloride.<sup>56</sup>

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<sup>45</sup> See *id.* at 164.

<sup>46</sup> See *id.* at 166.

<sup>47</sup> See Melissa Kwaterski Scanlan, *Protecting The Public Trust and Human Rights in the Great Lakes*, 2006 MICH. ST. L. REV. 1333, 1333 (2006).

<sup>48</sup> See generally Joseph W. Dellapenna, *Climate Disruption, the Washington Consensus, and Water Law Reform*, 81 TEMP. L. REV. 383, 390-401 (2008).

<sup>49</sup> See generally Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 562-565 (2007).

<sup>50</sup> See Violeta Petrova, *At the Frontiers of the Rush for Blue Gold: Water Privatization and the Human Right to Water*, 31 BROOK. J. INT'L 577, 589-593 (2006).

<sup>51</sup> See Scanlan, *supra* note 47, at 1343-44.

<sup>52</sup> See Joseph W. Dellapenna, *Climate Disruption, the Washington Consensus, and Water Law Reform*, 81 TEMP. L. REV. 383, 404-406 (2008).

<sup>53</sup> See generally Giovanni De Fraja, *Efficiency and Privatization in Imperfectly Competitive Industries*, 39 J. INDUST. ECON., Mar. 1991, at 311, 311.

<sup>54</sup> See generally Richard A. Posner, *Are American CEOs Overpaid, And, If So, What if Anything Should Be Done About It?*, 58 DUKE L. J. 1013, 1042 (2009).

<sup>55</sup> See Plan B Updates, Earth Policy Institute, Emily Arnold & Janet Larson, *Bottled Water: Pouring Resources Down the Drain* (Feb. 2, 2006), available at <http://www.earth->

Plastic bottles require hundreds of years or more to degrade in a landfill with no light or water to aid in their breakdown.<sup>57</sup> Furthermore, whenever trash is burned, these plastics create highly toxic dioxins that are released into the air falling in our backyards and our crops.<sup>58</sup> Now thanks to countless studies, we now know that the toxic waste manufacturing and disposal process is disproportionately borne by people of color.<sup>59</sup>

I also want to digress for a second and say that for years I have been leading the efforts in the United States in trying to challenge the pollution that comes from our coal burning power plants here that drifts over further east and creates eutrophication in lakes in New York and on the Canadian border further north.<sup>60</sup> We have an obligation to each other to try to protect each other's interest in this area, and I take that very seriously. I take the position without regard to the interest groups that may exist in this country in particular.

There is another equity component to consider with respect to privatization. The Annex rightly contains requirements for the public to reduce its water usage in recognition of the fact that we are already withdrawing more than what is sustainable.<sup>61</sup> We will be asked to take shorter showers, install water saving fixtures, load our dishwashers more fully, and water our lawns more judiciously.<sup>62</sup> The water agencies in the Great Lakes Basin will likely be charged with implementing these measures.<sup>63</sup> These are low-effort, high-return changes that we as citizens can do to help take care of the rest of the natural world on which we are dependent for life.<sup>64</sup>

The Annex, unfortunately, puts the water saved by the collective actions of conscientious Great Lakes residents into millions of bottles and will ship

[policy.org/index.php?/plan\\_b\\_updates/2006/update51](http://policy.org/index.php?/plan_b_updates/2006/update51).

<sup>56</sup> See Bulletin, Iowa State University Extension, Elizabeth Schafer, Ph.D, et al., Bottled Water: To Drink or Not to Drink?, <http://www.extension.iastate.edu/Publications/PM1813.pdf> (last visited Sept. 19, 2009).

<sup>57</sup> See Earth Policy Institute, *supra* note 55.

<sup>58</sup> *Id.*

<sup>59</sup> See ROBERT D. BULLARD ET AL., TOXIC WASTES AND RACE AT TWENTY: 1987-2007 1 (2007), available at <http://www.ucc.org/assets/pdfs/toxic20.pdf>.

<sup>60</sup> See, e.g., Congressman Dennis Kucinich, News, Statement of Congressman Dennis J. Kucinich on Mercury from Coal-Fired Power Plants, <http://kucinich.house.gov/News/DocumentSingle.aspx?DocumentID=28578> (last visited Sept. 19, 2009).

<sup>61</sup> See GREAT LAKES CHARTER ANNEX, *supra* note 10 at Directive # 2, 3.

<sup>62</sup> See generally GREAT LAKES COMM'N, SELECTED GUIDELINES OF WATER CONSERVATION MEASURES APPLICABLE TO THE GREAT LAKES-ST. LAWRENCE REGION (2002), [http://www.glc.org/wateruse/wrmdss/finalreport/pdf/water\\_conservation\\_guidelines.pdf](http://www.glc.org/wateruse/wrmdss/finalreport/pdf/water_conservation_guidelines.pdf).

<sup>63</sup> See generally *id.* at 2.

<sup>64</sup> See News Release, EPA, New York City Teams up with EPA to Promote Water Efficiency (Aug. 3, 2009), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/6BECD92220BA7534852576070056D721>.

them out of the Great Lakes Basin.<sup>65</sup> Where conservation efforts would normally go to enhancing the public good in a form of restoring flows to the Great Lakes, they would now go to profits of bottled watered companies and their parent companies. It sets in the international law the untenable idea that people's personal sacrifices benefit corporations rather than the common good. It is a direct threat to environmental altruism. It is a dangerous precedent that is set.

So what is next? The heart of the problem is that the Great Lakes water is now a product and is not a public good or public trust.<sup>66</sup> Out of the Public Trust Doctrine,<sup>67</sup> the waters of the Great Lakes Basin cannot be diverted, exported, or transferred for primarily private purposes or gain.<sup>68</sup> Congress must make clear that it intends the waters of the Great Lakes to be a public trust as they were before the compact was ratified.

I introduced H.R. 6814<sup>69</sup> in the last Congress that uses the Water Resources Development Act to make it clear that the waters of the Great Lakes are public trust.<sup>70</sup> By clarifying or adding the public trust principles, along with the current conservation standard as H.R. 6814 does, any transfer of water, including water exported as a product, would be subject to the Public Trust Doctrine along with standards contained in the compact.<sup>71</sup>

So I believe, clearly, the fight is far from over. I wrote an article about this issue in 2006,<sup>72</sup> and I am going to continue to work inside the Congress to challenge any type of privatization of public goods starting by reintroducing this bill I just mentioned to strengthen the Public Trust Doctrine.<sup>73</sup>

I thank you very much for your time and attention. And again, I would urge you to look at that Compact again, and I think when you study it, you will see that the points that I raise are valid matters for your consideration. I thank you for the chance to be here. I look forward to joining some of you

<sup>65</sup> See generally Bianco, *supra*, note 32 at 837-839.

<sup>66</sup> See Petrash, *supra* note 27, at 159.

<sup>67</sup> See generally Craig Anthony Arnold, *Water Privatization Trends in The United States: Human Rights, National Security, and Public Stewardship*, 33 WM. & MARY ENVTL. L. & POL'Y REV. 785, 805 (2009).

<sup>68</sup> See generally Kenton M. Bednarz, *Should the Public Trust Doctrine Interplay with the Bottling of Michigan Groundwater? Now is the Appropriate Time for the Michigan Supreme Court to Decide*, 53 WAYNE L. REV. 733, 746 (Summer 2007).

<sup>69</sup> See Library of Congress, H.R. 6814, <http://www.thomas.gov/cgi-bin/bdquery/z?d110:h.r.06814>: (last visited Dec. 20, 2009); see also Congressman Dennis Kucinich, *Environment, The Great Lakes and Water Privatization*, <http://kucinich.house.gov/Issues/Issue/?IssueID=1560#Protecting%20the%20Great%20Lakes> (last visited Sept. 28, 2009).

<sup>70</sup> *Id.*

<sup>71</sup> See generally Bednarz, *supra* note 65, at 748-750.

<sup>72</sup> See Congressman Dennis Kucinich, *supra* note 69.

<sup>73</sup> See *id.*

again at our future meetings. And this is a great weekend to be in Cleveland, enjoy your selves. Thank you.

MR. UJCZO: On behalf of the Canada-United States Law Institute, thank you, Congressman Kucinich. We are going to invite our students to drop the flags and you are all invited to the IMAX movie, "The Mysteries of the Great Lakes."

