



NATURAL RESOURCES DEFENSE COUNCIL

February 14, 2010

VIA BINATIONAL.NET AND REGULAR MAIL

U.S. Environmental Protection Agency
Great Lakes National Program Office
77 W. Jackson Boulevard (G-17J)
Chicago, Illinois 60604-3511

Great Lakes Environment Office
Environment Canada – Ontario
4905 Dufferin Street
Toronto, Ontario
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RE: Comments on Governance Issues under the Great Lakes Water Quality Agreement

Dear U.S. Environmental Protection Agency and Environment Canada,

Please accept these comments on behalf of the Natural Resources Defense Council, Inc. (“NRDC”) on the issue of Governance under the Great Lakes Water Quality Agreement (“GLWQA”), as it relates to the forthcoming renegotiation of the GLWQA by the United States and Canada. NRDC is a U.S.-based environmental action group with over 1.3 million members and online activists. The future of the Great Lakes, 20% of the world’s fresh water, is a priority for our many members and our mission to protect the resources and systems upon which all life depends.

At the outset, we must raise serious concerns with the way that this initial round of public comment on the renegotiation of the GLWQA is being conducted. NRDC shares the concerns raised by Great Lakes United and other Great Lakes NGOs in their letter dated January 26, 2010, that the renegotiation process outlined by the two governments in their January 14, 2010 webinar does not allow for adequate public comment on, and participation in, the renegotiation process. The current public comment opportunity is illustrative of this. The governments allowed only four weeks for the public to submit comments on the Governance issue. The deadline for commenting falls on a U.S. Federal holiday weekend. No draft or proposal has been made available to the public to comment upon, so it is impossible for the public to know which specific options the governments are considering, let alone favor, as the process of renegotiation begins.

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Given such a short time to comment and such little information to evaluate before commenting, the public cannot be expected to make fully-informed comments that will actually prove helpful during the renegotiation process. The overall quality of the process will likely suffer as a result.

The following are some general comments on issues related to Great Lakes governance and the GLWQA. We request that you provide the public with further opportunities to comment once specific proposals to modify the GLWQA are announced, so that any future comments we submit can address those proposed changes specifically.

Governance over the Great Lakes is a complex series of international, national, regional, state, provincial and local treaties, charters, regulations, programs, policies and practices with various degrees of commitment, legitimacy and resources. There is currently no coherent structure or recognized overarching strategy that aligns the multiple efforts and institutions into a coherent approach to the Great Lakes. Bluntly, no one is really in charge of the Great Lakes, though many people, institutions and programs are engaged in various aspects of Great Lakes policies, programs and management, in both broad and minute dimensions.

This fragmentation and lack of clarity is not unique to the Great Lakes, but reflects the general state of water policy worldwide that can be characterized as “hydrological chaos.” The Western Governors Association describes federal water policy in the United States as follows:

A principle characteristic of federal water policy is that policies are made in an ad hoc, decentralized manner. No agency of the executive branch or committee of Congress is responsible for keeping an eye on the ‘big picture.’ Thus, federal water policy lacks a unifying vision or even a set of guiding principles. This state of events is not appropriate in an era in which supplies are threatened by chronic drought, likely aggravated by global warming, while demand continues to grow. A host of on-the-ground problems are created by, or at least related to, the absence of a unifying vision, including redundancy of functions across programs, protracted disputes, interagency turf battles, absence of policies, and lack of finality of many water disputes.

Western Governors Association, *White Paper on Federal Water Policy Coordination*, p. 8, Denver, Western Governors Association (May 11, 1989).

The key to effective governance of the Great Lakes is to approach the Basin as a single, unified ecosystem. The ecosystem approach to the Great Lakes has been embraced in principle, but often not in fact. The institutional structure of the Great Lakes divides the Basin into discrete jurisdictions, issues and programs. The approach of targeting specific problems with specific dedicated programs has had some significant successes. For instance, targeting point sources has resulted in an improvement of ambient water quality in the open lakes and prevented recurrences of events like the Cuyahoga River catching on fire as the result of unrestricted dumping of wastes into surface waters tributary to the Lakes. Targeting phosphorous releases into the Lakes has reversed serious eutrophication, most dramatically in Lake Erie. The focused efforts to

control the Sea Lamprey have successfully brought this invasive predator under control within the Lakes.

Perhaps most notably, the recent adoption of the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (with its U.S. domestic component, the Great Lakes-St. Lawrence River Basin Water Resources Compact), sets a strong precedent for the region, showing that we can come together around common values and interests to create a legally robust structure for facing the multi-jurisdictional challenges inherent in governance of a resource shared across two countries, eight states, and two provinces. We urge the two governments to consider the lessons learned from the process of negotiating this Agreement governing water diversions and conservation to the GLWQA process governing water quality.

In addition to having identifiable successes, the current state of Great Lakes governance reflects in part the complex nature of the resources gathered under the label “Great Lakes” as well as the multiple activities that affect the Lakes by mirroring the complexity with multiple governmental entities, programs and jurisdictions. As issues of progressively greater scientific and legal complexity emerge in the Great Lakes, the critical question to be addressed is how the Great Lakes community, and its institutions that have been responsible for past successes, can provide a framework for new approaches and policies to better manage the Lakes. The following realities and challenges help frame the discussion of how to better manage and govern the Great Lakes:

- a) **Successes in governance of the Lakes have depended upon significant scientific understanding of the Lakes and the environmental impact of human activities.** While existing institutions promote and advance scientific agendas within the Basin, there are and will continue to be significant gaps in fundamental scientific knowledge, data and analysis of the Lakes and their ecology. In moving forward with the GLWQA process, the two governments should be attentive to these gaps and look for ways to support implementation of the GLWQA through scientific research. Dedicated funding sources are critical to the success of such research programs.
- b) **Science-based policy is greatly complicated by the significant time lags involved in translating complex scientific information into facts and formats usable by policy makers and front-line program implementers.** “Early warning” monitoring and research programs are thus critical to effective implementation, to provide adequate information to policy makers with sufficient lead time to allow for meaningful problem solving opportunities. The current crisis situation involving the rapid advance of Asian carp from the Illinois River toward Lake Michigan is an example of this. Although policymakers have known for years that the Chicago waterway system was an open highway for invasive species to transfer between the Great Lakes and Mississippi River Basins, only through recent application of advanced monitoring techniques, such as environmental DNA testing, has the urgency of the Asian carp’s advance become

apparent. If such advanced monitoring techniques had been in place earlier, policy makers would have had better information with which to diagnose the urgency of the problem more quickly.

- c) **Successes in governance of the Basin have generally occurred where there is a relatively linear relationship drawn between a problem and its solution.** For example, point source water pollution has been directly addressed through regulation of point source outflows.
- d) **The political will of communities and their governments to cede authority over the Basin to either external or competing authorities is limited.** Any successful renegotiation of the GLWQA will thus likely depend on full recognition of all the concerns and authorities of all stakeholders, including States and Provinces, Tribes and First Nations, cities and other local governmental entities, as well as private industries and the public.
- e) **The creation of an “ecosystem governance” of the Great Lakes is hampered by the lack of a robust, publicly shared vision of the “ecosystem” and the coherent understanding of the goals to be pursued, the means of reaching them, and metrics to measure progress and determine when they are achieved.** Development of a shared vision and metrics is vital to the success of a renegotiated GLWQA. The recent successful adoption of the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement (with its U.S. domestic component, the Great Lakes-St. Lawrence River Basin Water Resources Compact) provides a model for this. One thing that is clear, however, is that broad public engagement is critical to achieving this vision.
- f) **The controversial issues surrounding whether and how to place economic value on the water and resources of the Great Lakes, coupled with resistance from both environmental *and* commercial interests to valuing the water and resources, continues to divide economic and environmental policy and authority.** Environmental interests often see economic valuation of environmental resources as ethically corrupt or as instrumentally threatening; hence the resistance of environmental groups to the notion of commodifying the waters of the Great Lakes on both moral and practical grounds. Commercial interests within the Basin have expressed reluctance to placing a price on the water of the Great Lakes on the grounds that this would increase costs of usage. This division impedes formation of an ecosystem governance of the Lakes, which depends upon anchoring the value of resources within the economic interests and future of the Great Lakes community.¹

¹ “The real world of interlocked economic and ecological systems will not change; the politics and institutions concerned must.” World Commission on Environment and Development, *Our Common Future* (Oxford: World Commission on Environment and Development, 1987).

The GLWQA of 1972 grew out of a International Joint Commission (“IJC”) report on pollution in Lakes Erie and Ontario and was an important recognition that ongoing pollution of the Great Lakes was threatening their viability. The main focus of the GLWQA was to respond to recommendations of the IJC’s report and control the phosphorous loading to the Lakes. The governments of Canada and the U.S. made a “standing reference” to the IJC for ongoing study of water quality issues, thereby expanding the responsibility of the IJC for important scientific investigation of the Basin in the area of water quality. Supporting boards, staff and resources were expanded for the IJC to meet this responsibility. The GLWQA was amended in 1978 to strengthen the IJC as an independent investigator and evaluator of programs and policies under the agreement.

The Great Lakes Water Quality Agreement was further amended by the Protocol adopted in 1987. The Protocol developed two new programs to address contamination to the Lakes on local and region scales. Remedial Action Plans (“RAPs”) were developed to focus on localized, severely contaminated Areas of Concern (“AOCs”), and Lakewide Management Plans (“LaMPs”) were developed to address large-scale, “whole lake” problems.

The Protocol effected changes in the institutional structure of bi-national governance, supplanting IJC functions with the explicitly national agencies of the U.S. Environmental Protection Agency and Environment Canada. While proposed AOCs are submitted to the IJC by any agency or jurisdiction for the IJC to review to determine whether a submission meets the AOC guidelines listing process, the RAP and LaMP processes are primarily the concern of EPA and Environment Canada, not the IJC. This had a sidelining effect on the IJC as a center for policy and science within the Lakes, potentially undercutting the independence in scientific consensus building afforded by the IJC as a genuinely bi-national institution.

While Canada ratified the GLWQA as law, the Agreement has never been submitted to the United States Senate for ratification. Accordingly, the GLWQA remains a consensual agreement within the bi-national regime of the Great Lakes, rather than a binding bi-national treaty. This illustrates a critical gap between political rhetoric that asserts a commitment to bi-national “ecosystem governance” of the Lakes and the real state of enforceable law that characterizes much of Great Lakes governance. Historically, the willingness to entertain such a commitment in a legally robust and enforceable fashion seems to depend upon the presence of a credible threat to parochial control over the resources of the Basin. When the threat appears to subside, the commitment to shared governance also subsides.

Thus the question of “political will” emerges as a significant aspect of the current governance structure over the Great Lakes. Reluctance among both governmental and non-governmental entities to fundamentally amend current laws and authorities that would involve ceding powers they perceive themselves to hold now, and bind themselves to new standards and procedures for managing the Great Lakes, remains a challenge to effective governance of the Great Lakes.

Ultimately, the effectiveness of any renegotiated Agreement will depend on each government's willingness and ability to make it legally robust and enforceable under its own domestic law. Such implementation efforts must include specific, enforceable commitments to timeframes and metrics, against which each government's efforts to implement any new bi-national environmental standards developed through the renegotiation process can be judged. Any implementation mechanism under domestic law must allow for citizen participation in enforcement efforts, such as through citizen suits under the U.S. Clean Water Act, 33 U.S.C. § 1365, in order to be fully effective. The history of environmental law in the United States has demonstrated that providing a direct role for citizens to take legal action to hold both government and private entities accountable to implementation of, and compliance with, environmental standards is essential to ensuring that environmental laws and policies are adequately enforced.

At the same time, the two governments should also work to strengthen the authority of the IJC to act as a research and advisory body to the two governments. The exercise of this responsibility has been of critical importance to the Great Lakes and both the U.S. and Canada. In its capacity as a research and advisory body, the IJC has become one of the most significant and valuable governance institutions in the Great Lakes. A wide variety of matters have been referred to the IJC, including questions of water levels, pollution and water quality, and adequacy of governance arrangements to protect the integrity of the Great Lakes. From the exercise of this responsibility, a well-regarded, non-partisan, science-based body of research and recommendations has evolved.

Even as the IJC's role as a bi-national institution needs to be strengthened, it should also be made more transparent. One important way to do this would be for the American section of the IJC to recognize that it is an "agency" as defined by the U.S. Freedom of Information Act, 5 U.S.C. § 552, and begin disclosure of agency records and information to the public as provided in that statute. The Canadian section of the IJC should begin equivalent practices under Canadian law.

Thank you for the opportunity to comment. Please feel free to contact Thomas Cmar at (312) 651-7906 or tcmar@nrdc.org if you have any questions.

Sincerely,

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Midwest Regional Director
Natural Resources Defense Council
BY:



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Attorney
Natural Resources Defense Council

U.S. Environmental Protection Agency
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CC (via electronic mail):

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