

**Preliminary Comments and Recommendations
on Governance Issues for Consideration
During the 2010 Renegotiation
of the Great Lakes Water Quality Agreement**

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Introduction

Increasingly those involved in Great Lakes Water Quality Agreement (GLWQA) matters assert that one of the prime reasons for our failure to achieve more under the GLWQA is the flawed nature and functioning of government institutions and processes around the Agreement. For example, the review carried out in 2006 and 2007 by the governments, with substantial public input, emphasized the following problems with governance in the Great Lakes and St. Lawrence River basin:

- “The Agreement lacks a clear and strong management and implementation framework which has hindered implementation for some binational activities.”
- “There was widespread concern amongst Reviewers that inadequate and inconsistent funding has hampered the overall success of the current Agreement.”
- “The community that coalesced around the existing Agreement has fragmented, undermining concerted action.”
- There is “a sense that governance functions as now being carried out by the Parties have weaker links and accountability to the Agreement, decreasing its effectiveness.”

It is because of our recognition of the central importance of governance reforms that the 32 citizens’ groups who have signed this submission worked together to create the following comments and recommendations on governance issues for submission to the negotiators of the GLWQA.

If substantial reform is not made to governance in the Great Lakes-St. Lawrence River basin, the potential of the changes that are made to the Agreement during these negotiations around issue-specific matters, such as toxics, invasives, and climate change, will fail to achieve their hoped for positive impacts on the basin.

The following are our preliminary comments and recommendations on governance matters. Within the one-month time frame that the governments provided for input on this crucial aspect of the GLWQA, we did not have time to develop all the detail in some of our recommendations. Also, until we have feedback from the governments on our proposals, we cannot address the questions and concerns that the negotiators may have with some of our recommendations.

We look forward to having the opportunity to dialogue with the GLWQA negotiators on governance matters before a renewed Agreement is finalized.

Vision, Principles, and Management Approaches

A Vision for the Agreement

We believe a new binational vision for the Agreement is important to ensure multi-sectoral engagement, ownership, and hence, better implementation.

Recommendation: amend Article II of the GLWQA to add the following vision statement:

The GLWQA is a catalyst for water quality protection, improvement where needed, and proactive elimination of existing and emerging threats to the physical, chemical, and biological integrity of the waters of the Great Lakes and St. Lawrence River ecosystem.

Principles in the Agreement

In order to build on the emerging successes of the Agreement's call for "zero discharge" and "virtual elimination," principles and practices must be embedded in the Agreement that embrace and implement a more proactive approach to existing and emerging water quality threats.

Recommendation: amend Article II of the GLWQA to add the following principle:

Be Preventive in its Ecosystem Approach through the following practices:

- **Preemptively identifying threats;**
- **Taking preventive action in the face of uncertainty;**
- **Shifting the burden of proof to demonstrate lack of harm on the proponents of an activity;**
- **Exploring a wide range of alternatives to possibly harmful actions;**
- **Increasing public participation in decision-making and providing more effective means of participation; and**
- **Employing the principles of green chemistry to drive pollution prevention and reduce harm.**

The prevention of new problems must occur in conjunction with recovery from existing problems that jeopardize water quality. Every action taken should be aimed at improvement of the situation – not just minimization or elimination of further deterioration. Recovery is more than just 'clean up'; for example, it involves rehabilitating habitat alongside remediating contamination.

Recommendation: amend Article II of the GLWQA to add the following principle:

Strive for Ecological Protection & Recovery in its Ecosystem Approach

This includes, for example:

- **Protection and rehabilitating habitat, such as wetlands, to aid in the reduction of pollution runoff and to improve the Great Lakes physical and biological attributes; and**
- **Remediating contaminants by way of elimination strategies rather than after-the-fact storage solutions such as warehousing contaminated sediments on the near shore or in the water.**

Implementation of Agreement goals and objectives should be delegated to specific institutions or agencies and include reasonably frequent public reporting and multiple opportunities for the public to comment and review progress. These accountability mechanisms should be spelled out in the body of the agreement - who reports to whom, when, and on what. The Agreement's emphasis should be on achieving end goals; however, watershed planning, materials use policies, and toxic use reduction policies should be encouraged for adoption by the Parties to ensure that responsible agencies are making progress. All of these should include timeframes for implementation and clear routes of accountability. Flexibility for such planning and milestones is important for the Parties to achieve end goals and objectives in the manner most fitting for their own jurisdictions. To aid in this process, we strongly recommend that the next generation of the Agreement be "outcome based". Using existing reports and data, the Agreement should articulate quantifiable, measurable ecosystem outcomes and identify specific Parties accountable for that work. For example:

- Number of wetland acres restored with precise functions measured and monitored to improve water quality and biological health;
- Reductions in specific toxic chemicals to help allow restoration of sustained natural reproduction of lake trout in Lake Michigan by a certain date.

Remedial Action Plans, Lakewide Management Plans, etc. are beneficial to the system only to the extent that they achieve quantifiable ecosystem outcomes. Since 1987, too much attention has been spent developing and refining plans and progress reports without sufficient attention on ensuring the reports and plans are carried out.

Recommendation: amend Article II of the GLWQA to add the following principle:

Provide for Implementation with Public Accountability

- **The Parties' will provide an Implementation Action Plan that:**
 - **Sets goals and objectives with timeframes;**

- Delegates Agreement goals and objectives to specific institutions or agencies;
 - Includes a budget for this plan;
 - Includes frequent public reporting and opportunities for public comment; and
 - Provides milestones and benchmarks to ensure that ultimate goals and objectives are met within established timeframes.
- The IJC should then evaluate progress

Watershed Approach

To achieve our goals concerning the condition of the Great Lakes and St. Lawrence River, it is essential that a watershed approach be taken throughout the basin.

The watershed approach should be given much more emphasis in the Agreement than it has in the present Annex 13. A watershed approach focused on the major tributaries to the Great Lakes should be the core organizing mechanism for protecting the waters of the Great Lakes because it is through these tributaries that many of the stressors enter the Great Lakes and St. Lawrence River.

Recommendation: The GLWQA should be amended to make watershed planning and implementation a core organizing mechanism for action in the Great Lakes and St. Lawrence River basin.

One of the major goals of the watershed approach should be to ensure that the tributaries to the Great Lakes do not contaminate the open waters of the Great Lakes and St. Lawrence River. Following a watershed approach can ensure that all sources of pollutants (both point and nonpoint) are addressed so that the open waters can be restored and protected.

Recommendation: The GLWQA should contain a provision on the watershed approach indicating the governments should work jointly on large watersheds to ensure that pollutant loadings do not result in exceedance of water quality standards in the open waters of the Great Lakes ecosystem. This should include a commitment not to discharge waters from the Great Lakes into the St. Lawrence River that may pollute or degrade waters downstream of Lake Ontario.

Recommendation: Annex 13 of the Agreement should be amended to detail the watershed approach.

The watershed approach should not replace the need to finish the pollutant-related aspects of the AOC's program. Regarding AOCs, a major emphasis should be put in the GLWQA on cleaning up these toxic hotspots at a much more rapid pace. The

AOCs should be focused on dealing with historic pollutants rather than being broadened into whole watershed plans.

Combining the watershed approach with the AOC program has had two negative aspects: 1) it diverts attention from rapidly addressing the most severe contamination problems in the AOCs, and 2) watersheds that do not have designated AOCs in them receive virtually no attention under the GLWQA. The broader watershed approach should be applied throughout the basin to include both preventive actions and restoration actions.

The Lakewide Management Plans (LaMPs) should continue to be a component of the GLWQA. The watershed plans that we have recommended earlier should be integrated with the LaMP program for each Lake and their connecting channel(s).

Recommendation:

1) Annex 2 of the GLWQA should be amended to ensure that the AOC program is focused on the most severe existing contamination problems and upon cleaning up these areas rapidly.

2) The watershed approach recommended should be applied in watersheds that include AOCs, but should be much broader in their work and not draw focus away from the core AOC problems until those AOC problems have been corrected.

3) The watershed planning exercise should be integrated with the LaMP programs.

The Role of Adaptive Management

The preventive principle and the ecological recovery principle should be the guiding management strategies for Great Lakes water quality, coupled with an assumption that achieving ecological health and resilience should be the fundamental goal for management decisions.

Adaptive management, when used to its best purpose, can be a useful tool for incorporating experience, new data, and unforeseen influences into management strategies. It is a “reflect, learn and apply” approach. It would logically be part of the range of implementation strategies we expect the Parties might consider to meet the goals and objectives of the GLWQA. It complements the setting of high goals and aggressive objectives, against which implementation successes (regardless of their level of adaptability) should be measured and uncertainty reduced.

At its worst, adaptive management can be misrepresented as a reactive excuse not to continue some programs or actions. This creates an “eddy” in management approaches where challenges may be repeatedly revisited, but where reflection fails

to lead to action that addresses original objectives and becomes postponed indefinitely.

Complex challenges such as climate change illustrate what the many stakeholders need from management strategies: leadership and development of action plans that informs and tells them what to do to prepare in advance to minimize the impacts and protect the resilience of the ecosystem. This preparatory approach is sound anticipatory management, and experimentation on adaptive processes in the face of uncertainty means that agencies are enabled to adapt programs and policies to better address matters with greater knowledge based on learning. In the case of climate disruption, we will need precautionary and anticipatory approaches for potential reduced flows, more intense precipitation and winter rain, possible increased algal blooms resulting in health and odor concerns in water systems, and we may have to change distribution, timing, permitting, and address water allocations in parts of the Great Lakes and St-Lawrence River system. To mainstream climate change adaptation into decision-making management requires planning, informed scenarios and monitoring. These approaches will build resilience and informed constituencies.

Recommendation: Adaptive management should have a role in the implementation of programs to meet Agreement objectives and could be noted as one approach the Parties should consider (in addition to aiming towards robust decisions, as recommended to the Science Advisory Board in Findings of an Expert Consultation on Strengthening Science Under A Renewed Great Lakes Water Quality Agreement 2006). But, the Agreement should have a markedly greater emphasis on the precautionary principle and ancillary efforts to avoid creating major problems in the first place than on adaptive management.

The Scope of the Agreement

Issues Included in Agreement

There is considerable discussion as to whether the scope of the Agreement should be changed and on the extent of any such changes.

Some have proposed that it become a Great Lakes Sustainability Agreement, which would balance social, economic and environmental considerations. We believe that this is inappropriate since this balancing inevitably understates the primary importance of clean water for the health of the ecosystem, basin residents and all activities dependent on clean water. Other efforts are underway to revive the economy of the Region.

Others have proposed that it become a Great Lakes Ecosystem Agreement, which would address all environmental issues in the basin. We believe that the GLWQA should not become the only or even the primary agreement for addressing Great Lakes issues. We are concerned that an agreement that tries to address a complex of environmental issues would become an agreement that in practice would be unable to address anything. There is a risk that it would be so dense and expansive that it would be impossible to fund and implement, or, it would be so general in nature it would have no strategic focus on priorities. In addition, there are many other existing agreements, such as the Convention on Great Lakes Fisheries and the Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement, and binational bodies, such as the Great Lakes Fishery Commission, and the Great Lakes Panel on Aquatic Nuisance Species, that have valuable roles to play. We believe that communication among those responsible for each of these agreements and bodies is critical, and that the maximum effort should be made to ensure that these agreements work in concert to assure an integrated holistic approach. At the same time, we believe it is more efficient and effective to keep the agreements separate so as to assure maximum focus by those agencies responsible for the challenges at issue.

Therefore, we concur with the International Joint Commission (IJC), that the GLWQA should retain its focus on water quality, but with a broader view of human activities that impact water quality.

The understanding by scientists and policy makers of the factors affecting water quality has increased since the Agreement was last revised. Consequently, we recommend that the GLWQA be revised to add new stressors and reflect a better understanding of stressors already in the Agreement. The stressors that we believe should be added or given a greater emphasis include: invasive species, chemicals of emerging concern (such as endocrine disruptors, carcinogens, neuro-developmental toxicants, flame retardants, pharmaceuticals, phthalates, perfluorinated compounds,

perfluorooctane sulfonate, bisphenol A, nanoparticles), air pollution from sources beyond the Great Lakes basin, radionuclides, copper and nickel sulfide mining sources, groundwater pollution, fish farms, intensive agricultural operations, urban development, water levels insofar as they affect water quality, and climate change.

We also recommend that in addition to new problem areas, new approaches to preventing water quality degradation be included in the Agreement, particularly those consistent with precautionary, preventive and ecosystem-based approaches. They should include approaches that have been successful elsewhere, especially in the European Union, including life cycle analysis and management, extended producer responsibility, reverse onus, zero discharge of persistent toxic pollutants, pollution prevention and regulating classes of compounds, particularly chlorinated, brominated and fluorinated organics, based on common chemical structures and activity.

Recommendation: We recommend that the GLWQA retain its focus on water quality, but that it include a broader consideration of stressors that impact water quality than is in the current Agreement. Therefore, we recommend that the Agreement be expanded to include the issues listed two paragraph before this.

Recommendation: Provisions should be put into the GLWQA committing to cooperation with bodies responsible for implementing other Great Lakes agreements.

Understandably, work under the GLWQA has focused on restoring and improving water quality. We also believe, however, that more emphasis should be put on protecting those areas where water is already of high quality and a zero degradation approach should be taken. This is consistent with the prevention approach that we recommend elsewhere as a guiding principle for the GLWQA, and some efforts that have been pursued in the Basin, including the Lake Superior Zero Discharge Demonstration Zone.

Recommendation: We recommend that the GLWQA place higher emphasis on protecting and maintaining high quality waters and those mechanisms critical to protecting water quality, such as wetlands, than it currently does in addition to maintaining its present focus on restoring water quality, and that it include a zero degradation provision.

Geographic Scope of Agreement

Currently the GLWQA includes the St. Lawrence River only up to the point where it ceases to be the border between Canada and the U.S., which is near Cornwall and Massena. This is inconsistent with the ecosystem approach in the GLWQA. Therefore, we urge that the entire St. Lawrence River, including the gulf and estuary, be included in the Agreement.

The Agreement is based on the *Boundary Waters Treaty* of 1909. As a result, some argue that the Agreement can apply only to boundary waters, which means that the St. Lawrence River cannot be included once it passes Cornwall-Massena and is wholly located within Canada. However, Lake Michigan, which is wholly within the United States, is already included in the Agreement as it is part of the Great Lakes Basin ecosystem. Therefore, it is inconsistent to artificially chop off the ecosystem part way down the St. Lawrence River.

Recommendation: Revise Article 1, sections (g) and (h) of the GLWQA to include the entire St. Lawrence River. In addition, section (s) should be revised to include the Province of Quebec.

Water Scope of Agreement

Most of the work under the GLWQA until recently has focused on the off-shore areas of the lakes. The major exception to this, of course, is the work on AOCs. Recently there has been considerable discussion of including nearshore, groundwater, and surface waters flowing into the Great Lakes and the St. Lawrence River. It is clear that the Lakes cannot be protected so long as the waters that flow into them are not cleaned up and protected.

Recommendation: The GLWQA should be revised to make sure that monitoring, protection, and clean-up plans for nearshore waters, groundwater and surface waters flowing into the Great Lakes and St. Lawrence River are emphasized.

Annex 16 “Pollution from Contaminated Groundwater” was added to the Agreement in 1987. However, this annex has had limited effect since it lacks goals and commitments to specific actions.

Recommendation: Annex 16 of the Agreement should be developed in much more detail, including goals and action plans, to strengthen the groundwater protection component of the GLWQA. Definitions in the agreement should be changed to add groundwater. This is important not only to accurately include all geographical portions of the Basin ecosystem, but also to ensure that groundwater is covered by all of the protections in the Agreement that are extended to all of the surface waters of the Basin.

Partners in the Agreement

Provincial, State and Municipal Governments

Although the Agreement is a commitment made by the Canadian and U.S. governments, these governments cannot achieve the goals of the Agreement without considerable work by the provincial, state and municipal governments, who

play a critical role in implementation of the Agreement. For example, cities in the Great Lakes and St. Lawrence River basin invest an estimated \$15 billion each year on programs essential for achieving the goals of the GLWQA.

Recommendation: The provincial, state, and municipal governments should be recognized in the Agreement as essential partners and should be included in deliberations around GLWQA activities.

Tribal, First Nation and Métis Governments

Approximately 350,000 descendants of the first peoples of the Great Lakes basin live in 110 nations on approximately three million hectares of federally recognized reserve land and sovereign territory in the Great Lakes-St. Lawrence River basin. Many more of their descendants live off the reserves and territories, most of them in urban centres. These aboriginal peoples have rights as sovereign independent governments.

The unique role of the Tribes, First Nations and Métis in protecting and restoring the Great Lakes should be recognized in the GLWQA. The specific provisions related to the Tribes, First Nations and Métis should be worked out through extensive discussions with these peoples. This unique role should be recognized as distinct from “public participation” in GLWQA matters.

Recommendation: The GLWQA should include mechanisms for government-to-government consultations between the US and Canada, and First Nations and Tribal and Métis Governments. This should include recognition that prior and informed consent be required for actions that may threaten the quality and availability of clean water on the reserves and territories. It also should require that the First Nations and Tribal and Métis governments be part of any renegotiation of the Agreement.

Citizens of the Great Lakes-St. Lawrence River basin

A substantial community of citizens has developed engaged in activities directly related to GLWQA activities. For example, thousands of citizens have given countless volunteer hours to the Areas of Concern program. This is only one of many such examples that could be listed.

In Evolution of the Great Lakes Water Quality Agreement, Lee Botts and Paul Muldoon list “development of community” as one of the prime reasons for the success of the Agreement: “The success of the Great Lakes regime depends on the shared commitment to the goals of a community that includes governments, the scientific community, and nongovernmental participants.”

It is essential that the public be recognized as partners in the development and implementation of the Agreement.

Recommendation: The GLWQA should recognize the importance of the role of the public and specify mechanisms for their engagement. Detailed recommendations on this follow later.

Reviewing & Amending the GLWQA

One of the recurring obstacles to full implementation of the 1987 GLWQA has been the impression that it cannot be updated without an overwhelming lengthy process. In the past this led to calls for a reopening and renegotiation of the Agreement even to address relatively minor issues. This is unnecessary since the mechanism, Article 13, already exists in the Agreement to review and update each of the annexes:

1. This Agreement, the Annexes, and the Terms of Reference may be amended by agreement of the Parties. The Annexes may also be amended as provided therein, subject to the requirement that such amendments shall be within the scope of this Agreement. All such amendments to the Annexes shall be confirmed by an exchange of notes or letters between the Parties through diplomatic channels which shall specify the effective date or dates of such amendments.
2. All amendments to this Agreement, the Annexes, and the Terms of Reference shall be communicated promptly to the International Joint Commission.

Therefore, we support the present structure of the Agreement, where the goals, objectives, processes including public involvement, institutional arrangements, reporting and accountability mechanisms, review process, etc., are in the body of the Agreement, and the more detailed commitments and plans around specific stressors are attached in Annexes. As the Agreement currently states, these Annexes can relatively easily be amended to keep the Agreement up to date.

Recommendation: In the new Agreement, a regular schedule of review and amendment should be explicitly included and acted upon so that the Agreement stays timely. We recommend that the governments review and consider updating the Annexes at least every three years, starting immediately after the IJC's triennial report on Great Lakes water quality. These changes can be made through an exchange of letters.

Accountability, Enforcement, Compliance & the Citizens' Role

The GLWQA inspires people in the United States and Canada to remember that the Great Lakes are shared by two countries, as well as first nations, tribal and Métis governments, and has driven important public health and water quality improvements for Great Lakes residents. Historically, the GLWQA has been a key mechanism for shared coordination and activities for ecosystem restoration. Unfortunately, over the years, the Agreement has become increasingly irrelevant and ineffective due to the failure of the Parties to meet their obligations to achieve objectives and goals.

Effective implementation and accountability are fundamental to a successful GLWQA and real water quality improvement in the Great Lakes. The public has been clear that they want more accountability and this is a critical issue in any renegotiation. Since its establishment in 1972, with changes in 1978 and 1987, in the United States the GLWQA has been considered by some to be an unenforceable “executive agreement.” To help correct this situation, Congress amended the Clean Water Act in 1990 to require the federal government, in partnership with the states, to “achieve the goals embodied in the Great Lakes Water Quality Agreement.”

Even grounding the GLWQA in the Clean Water Act has proven insufficient to compel action. In 1995, the U.S. Environmental Protection Agency (EPA) promulgated water quality standards under the Great Lakes Water Quality Initiative for toxic pollutants. In ensuing litigation before the U.S. Court of Appeals for the District of Columbia Circuit, EPA argued against using the GLWQA as a rationale for phasing out toxic pollutants, arguing that the GLWQA was voluntary. The Court of Appeals agreed, although EPA eventually issued final standards under the Initiative, which has led to more restrictive permitting requirements.

In preparing for the renegotiation of the current agreement, the Canadian and U.S. governments have stated that they intend to draw heavily from their 2006 and 2007 GLWQA review in crafting the new GLWQA. During the 2007 review, as stated in *Synthesis of Public Comment*, accountability was a “major theme.” A key recommendation included the following statement:

“The IJC should do everything possible to ensure that any future version of the Great Lakes Water Quality Agreement includes enforcement measures that allow outside entities to hold governments accountable, in court if they fail to meet the specific goals, action and timelines that should be part of the new Agreement. This increase in meaningful accountability might help rebuild public trust in the institutions charged with protection of the Great Lakes... (p.34)

However, the IJC is not the enforcing body. The domestic agencies of the two nations are. Failure of the parties to achieve accountability within these agencies to date compels us to recommend that the Parties, as part of the renewal of the GLWQA, develop a comprehensive program and plan to implement the new agreement, designed with full public engagement. This plan should:

- publicly delineate priorities, stated actions and associated funding needs;
- improve access to information by requiring regular reporting on the implementation of action items and delivered funding; and
- have this information open to the public through a frequently updated Web site designed to track progress on objectives, open records to the citizens of both nations, and reported on at IJC biennial or triennial meetings.

Recommendations: We urge that, through the Agreement process, the Parties publicly commit to establishing a legislative and regulatory framework (on a specified timeline) for achieving and monitoring progress towards Agreement goals and objectives. This framework should include:

1. A comprehensive review of domestic law as it relates to protecting and restoring water quality and the chemical, physical and biological integrity of the Great Lakes ecosystem, and specific recommendations for revisions to domestic law that will support compliance and enforcement with Agreement objectives.

2. Specific requests to Parliament and Congress to undertake the process of enacting legislation to achieve Agreement compliance within the timelines of appropriate reauthorization schedules and other legislative processes.

3. Development of commensurate regulatory programs within appropriate federal agencies, and agreements with implementing enforcement agencies in state, provincial, first nation and tribal governments that clarify roles and responsibilities for meeting Agreement objectives, public review processes, and reporting to the Parties, the IJC and the public.

4. Funding strategies and sufficient appropriations to support enforcement capacity at the federal, state and provincial levels.

5. Periodic public review by administrative agencies, and legislative bodies.

6. Independent review by agencies such as the Auditor General of Canada, the Government Accountability Office in the U.S., and by independent scientific bodies such as the U.S. National Academy of Sciences and the Royal Society of Canada.

7. Each Party should specifically identify and make publicly known the domestic public official who carries the responsibility for domestic compliance with the GLWQA. This responsibility should be articulated in the official governmental job description for this public servant.

Recommendation: Article XI Section 2 of the GLWQA should be amended to state that the Parties commit themselves to:

- 1. Appropriate funds required to implement this Agreement, including the funds needed to develop and implement the programs and other measures provided for in Article VI of this Agreement, and the funds required by the International Joint Commission to carry out its responsibilities effectively;**
- 2. Enact any additional legislation that may be necessary in order to implement the programs and other measures provided for in Article VI of this Agreement; and**
- 3. Coordinate with the State, Provincial, tribal, first nation and Métis Governments, and stakeholders in all matters relating to this Agreement.**

The possibility for accountability is dramatically weakened by words that do not specifically say “commit.”

Recommendation: All phrases that grant governments generic flexibility in implementing the GLWQA, such as “shall seek to” and “will make their best efforts to,” should be removed from the GLWQA and replaced with clear commitments.

Citizen Roles and Rights

The success of the GLWQA has depended on strong citizen participation to stimulate the political will of the governments. All forms of public involvement have declined in recent years. The trend away from public engagement is inconsistent with other international agreements, which aim toward increased public engagement, accountability and access to justice.¹

Recommendation: The GLWQA should contain specific provisions to guarantee transparent public access to GLWQA processes and decision-making.

¹ Two examples are: the North American Agreement on Environmental Co-operation (NAAEC) under the North American Free Trade Agreement and the United Nations Economic Commission for Europe (UN/ECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The NAAEC contains both a citizen petition process and a government-to-government dispute resolution process. The petition process can trigger an independent review of claims that one of the governments is “failing to effectively enforce its environmental laws”. The dispute resolution process can lead to “monetary enforcement sanctions” for persistent patterns of weak environmental enforcement. The Aarhus Convention (which came into force in 2009 and to which Canada/United States are not signatories) contains provisions relating to the “three pillars” of access to information, participation in the environmental decision-making process, and access to justice through an independent review process. The latter includes provision for both direct and indirect enforcement of national environmental laws.

Access to Information

Access to information is essential to effective participation in environmental decision-making. Full, timely access to information should include both passive and active mechanisms for information disclosure. Passive mechanisms provide that information be made available on request. Active mechanisms provide that information be collected and disseminated in the public interest. Both types of mechanisms should be reflected in the GLWQA.

Recommendation: Provisions should be added to the GLWQA that include, but are not limited to, the following:

- **Commitments to providing access to information affecting policies and decisions in a timely fashion, allowing for meaningful citizen and local government participation in decision-making;**
- **Regular government reporting on progress toward achieving specific goals and objectives; and,**
- **Clear government reporting on budget allocations and actual expenditures.**

Advisory board participation

The public also should be assured of more meaningful participation in IJC activities. Citizen experts in the appropriate fields and representatives of the basin's environmental groups, at least one from each country, should be appointed to the IJC's existing boards, that is, the Water Quality Board, the Science Advisory Board, and the Council of Great Lakes Research Managers. Nominations for environmental group representation on the boards should be solicited from a body of all environmental groups in the basin reasonably characterized as being regional in nature. As specified for other representatives in the IJC's Mission Statement and Guiding Principles, environmental group representatives would be expected to perform as advisors in their personal and professional capacities rather than in their organizational capacities.

In addition, a new Citizens Advisory Board should be instituted by the IJC. This board should advise the IJC commissioners on the adequacy of government programs and the partnerships enabled through government facilitation to achieve the goals of the GLWQA and make recommendations on how these programs could be improved.

Recommendations: The GLWQA should be revised to require environmental citizen representatives on all existing IJC boards. In addition, the Agreement should require the IJC to set up a Citizens Advisory Board to advise the IJC on the adequacy of government programs and to make recommendations to the IJC on these matters.

Public participation in reporting

The IJC and, perhaps more importantly, the governments should assure ample opportunity for public participation in all reporting and information exchange processes, and in particular the IJC biennial or triennial meetings. The GLWQA

should specify that the IJC biennial or triennial and board reports will be completed substantially in advance of the biennial or triennial meeting, and that commissioners, report authors, and government officials will all be present to accept comment and to answer questions from the public about the reports.

Recommendation: The GLWQA should specify that the IJC should provide for public participation in its biennial or triennial meetings in a matter that facilitates meaningful involvement, for example, through a process such as that outlined in the previous paragraph.

Public Petitions

The Agreement should specify a public petition process by which any resident of either country can claim a failure to implement the Agreement. Such petitions would be required to meet screening criteria, as judged by the IJC to ensure that they are not frivolous or duplicative of existing litigation, and that alternative domestic procedures applicable to the petition topic have been tried. If a petition is valid, the Agreement should require an investigation of the petition topic by the IJC, a public response from the relevant governments, recommendations by the IJC for action, and a commitment by the governments to be bound by the IJC's recommendations as a result of a public petition process.

Recommendation: The GLWQA should be amended to require the IJC to set up a citizen public petition process. The IJC should consult with the public as it develops this petition process.

Binational Institutions

As threats to the ecosystem grow, binational responsibilities have been blurred and unbalanced between the two countries. Rather than strengthening Great Lakes binational institutions, which are essential for a true cooperative ecosystem approach, the shifts in power in the Great Lakes-St. Lawrence River basin since 1987 have resulted in confusion. For example, the oversight powers of the IJC have substantially lessened in the past twenty years. Government accountability for their commitments in the Agreement has waned at the same time.

Since the 1987 revisions to the GLWQA, there has been incomplete implementation of a number of the provisions of the Agreement. Some of these can be attributed to inadequate efforts at the binational level. The Governments created several new implementation mechanisms not in the Agreement such as the Binational Toxics Strategy (BTS) established in 1997, the State of the Lakes Ecosystem Conferences (SOLEC) started in 1994 and, in 2004, the U.S. government established a Great Lakes Regional Collaborative (GLRC). The BTS does not have binding commitments and has few mechanisms to deal with new pollutants or synergistic effects. The Governments created their State of the Lakes Ecosystem conference as a binational opportunity to update and review data and report on indicators, but there is insufficient linkage between state of the lakes indicators and government commitments under the GLWQA. In the U.S. the GLRC strategy identified goals and objectives for a Great Lakes restoration in eight issue areas; however, there was only very limited involvement of Canada, threatening to undermine the binational cooperation needed for an ecosystem approach.

Leading up to the 1987 renegotiation of the GLWQA, environmental groups sought to increase the accountability of governments for progress toward achieving the objectives of the agreement. They did this by advocating for more specific actions on issues and calling for more public involvement in binational decision-making.

The renegotiated 1987 GLWQA contained many new obligations for action and for reporting to the public on critical pollutants, point source impact zones and the RAPs and LAMPS [Annex 2], contaminated sediments [Annex 13], non point-source pollution [Annex 13], airborne toxic substances [Annex 15] and contaminated groundwater [Annex 16].

Despite these new focuses, in the past twenty-three years, there has been a serious weakening and confusion of the accountability mechanisms and responsibilities for Great Lakes water quality and a lack of coordinated strategic bi-national programs to address the long-existing crises in the Great Lakes as well as failure to keep up with the growing threats to the ecosystem.

Binational Executive Committee (BEC)

The 1987 Agreement added a new requirement for the Parties to meet twice a year “to co-ordinate their respective work plans with regard to the implementation of this Agreement and to evaluate progress.” The BEC was set up to fulfill this new commitment.

Over the past twenty years BEC has failed to adequately fulfill this task. Their meetings, based on our observations and assessment, have primarily become opportunities for information exchange between the two countries – not times at which problems are worked through and new solutions developed.

In a few cases, BEC has developed and/or overseen joint programs to address matters in the GLWQA. One of these is the BTS. This was created to fulfill a commitment in the 1987 GLWQA for such a program – a commitment that the IJC had to repeatedly remind them of before they created it in 1997. The problem, however, is that if one country or the other becomes stubborn on a matter, the joint programs falter. Increasingly we have seen these programs stalled by national head offices that fail to recognize the importance of jointly developing and overseeing the implementation of programs at the Great Lakes-St Lawrence River basin level - programs that may need to differ from national programs to suit regional needs and goals.

The danger in such a situation is that the needs of the shared Great Lakes and St. Lawrence River ecosystem are not necessarily reflected in national programs and financing. BEC has failed to be much more than a place where the two governments inform each other of what they are doing rather than assessing whether the programs are adequate to address shared needs and determining additional actions needed to address these needs. As a result, even though the BEC’s name implies that it operates “binationally”, for the most part BEC operates “bilaterally,” i.e., not working jointly.

Another problem with the BEC is that it is not a very open process; it fully includes only federal, state and provincial agencies. The tribal, first nation, ENGO, industrial, and municipal attendees have the status of “official observers.” They get to comment on items BEC is discussing. When BEC makes decisions on items, e.g., the recent changes in reporting procedures and timing in the LaMPs, they do not put the proposals out for public consultation before making decisions. In the case of the recent changes to LaMPs, for example, not even the lakewide public forums were consulted.

Recommendation: Article X, 3 of the GLWQA should be amended in the following ways:

- 1. Revise description of role of BEC to include development of a comprehensive binational Great Lakes-St. Lawrence River basin work plan by a specified date using an open and transparent process. This work plan should be based on the commitments in the GLWQA. The section should also state a frequency with which the workplan will be updated.**
- 2. The Agreement should specify that the binational work plan will identify prescriptive programs for both present and emerging needs and will include timetables for regular review and reporting on progress on the work plan.**
- 3. The Agreement should state that the provincial, state, first nation, tribal, Métis and municipal governments shall be members of the BEC. Representatives of the public, including industry, ENGOs, etc, should also be fully included as members of BEC for discussion purposes, but they should not be part of the final decision voting.**
- 4. All BEC activities should be conducted in an open and transparent manner. This should include having all meetings public and the conduct of a formal consultation process on the binational plans as well as on all matters that would change existing programs or processes.**
- 5. BEC should utilize the SOLEC process to develop and report on indicators that measure progress toward meeting the specific objectives of the GLWQA. The SOLEC process should be more active at including public participants in its processes.**

The International Joint Commission

The IJC is seen as a critical institution for the success of the GLWQA. Unfortunately, there is currently a strong and near unanimous opinion that the IJC is not adequately fulfilling its responsibilities.

According to the Agreement, the roles of the IJC are:

- Collation, analysis, and dissemination of data and information on the condition of the boundary waters and on pollution;
- Collection, analysis, and dissemination of data and information concerning the General and Specific Objectives and the operation and effectiveness of the programs and other measures established pursuant to this Agreement;
- Tendering advice and recommendations to the Parties and State and Provincial governments on matters in the Agreement and its annexes;
- Assisting in the coordination of joint activities under the Agreement;
- Assisting and advising on research in the Great Lakes basin; and,
- Investigation of matters referred to it by the two federal governments.

A prime part of the recent criticism of the IJC in regards to its activities under the GLWQA is that it is failing to evaluate and to provide leadership as an independent voice for the Great Lakes. The roles currently listed certainly allow for and encourage the IJC to play those roles, but they need to be more explicit to make the parties' and public's expectations of the IJC and the roles and responsibilities of the Great Lakes regional office clearer.

Recommendation: Revise Article VII on the role of the IJC to add the following role at the beginning of the list: Evaluation of the condition of the Great Lakes and St. Lawrence river ecosystem and of the government programs affecting the basin, and leadership in finding solutions to Great Lakes-St. Lawrence River problems. The main purpose of SOLEC should be to provide the IJC with an assessment of the condition of the Great Lakes and St. Lawrence ecosystem. The SOLEC process should be designed to provide the IJC with the evaluation of conditions and progress towards meeting the purpose of the Agreement, through the development of and reporting on established endpoints.

The previous valuable role of the IJC's Water Quality Board (WQB) has lessened over the past twenty-three years. It used to put out excellent evaluations of the state of Great Lakes programs. With its regional office substructure seriously weakened by the parties, it now focuses more on specific issues instead of giving such a thorough analysis of the whole range of programs. The IJC's Water Quality Board needs to have its mandate and membership re-expanded and more explicitly described in the GLWQA.

When the WQB was conducting assessments of government programs, it sometimes came under criticism because the WQB was solely made up of federal, provincial and state government people. This was seen by some as a conflict of interest, making it difficult for them to provide an honest evaluation of the programs. To give more credibility to the work of the WQB, its membership should be expanded beyond the federal, provincial and state governments.

Recommendations: The WQB's mandate in the GLWQA should be amended to specifically say that it will assess the state of the government programs in protecting and restoring the Great Lakes and St. Lawrence River basin. The GLWQA should be amended to specifically state that the membership of the WQB will include members of the federal, provincial, state, first nation, tribal, Métis, and municipal governments, as well as the public.

One of the valuable roles that the IJC plays is to hold a biennial meeting in the Great Lakes to draw together people from throughout the basin. This meeting should focus on the state of the lakes' and their response to protection and restoration initiatives and on the state of the government programs to carry out the commitments they made in the GLWQA. The prime roles of this meeting should be to provide the public with the opportunity to assess, comment on and make recommendations on the IJC board's reports and the State of the Lakes report on

these matters. This meeting is not now required in the GLWQA, but has been happening as a matter of established practice.

The IJC's biennial meetings currently include a session where the governments report on their activities since the last IJC biennial meeting. These sessions have proven frustrating for the public since the public is not given adequate time to ask questions of or make comments directly to the governments. These sessions would be more meaningful if the public's concerns about government action were directly addressed to the governments with an opportunity for the governments to respond. These would in effect become accountability sessions. The session where the IJC Commissioners were hearing directly from the public would then focus on the public's suggestions for recommendations that they would like the IJC to make in their next report.

Considerable concern has also been raised about whether reporting in this detail every two years is necessary. We believe it makes more sense to set this on a three-year cycle for the SOLEC and IJC meetings in order to focus government attention on the implementation of programs rather than merely reporting. However, the cycle should not be less frequent than three years because assessment and reporting are critical components of good governance, providing essential information for making course corrections and improvements, and providing accountability to the public.

Recommendation: Article VII 3 of the GLWQA should be changed so as to require a full report from the IJC to Parliament and Congress as well as to the public every three years, instead of every two years. In addition, this article should be amended to require the IJC to hold a public meeting prior to writing that report to obtain input on the work the IJC has done over the previous three years and to obtain input on the condition of the lakes and of the adequacy of government programs. This should include a government accountability session.

Government Response to IJC Reports

Article X of the GLWQA requires the two federal governments to "consult on the [IJC's] recommendations." The governments interpret this "consult" to mean consult with each other - not with the public.

Recommendation: Article X of the GLWQA should be amended to require the two federal governments to hold public hearings in each of their countries within 3 months of the release of a report by the IJC and to forward the report from those hearings to their respective legislatures. The federal agencies responsible for implementation of the GLWQA should appear at these hearings. In addition, representatives of the public should be invited to speak at the hearings.

The Agreement currently does not require the governments to respond to the IJC on their recommendations or to the public. As a matter of practice both governments have been publishing responses to each of the IJC's recommendations. However, it frequently has been a year or more after the IJC made the recommendations that the responses are released.

Recommendation: Article X of the GLWQA should be further revised to require the governments to publicly respond to the IJC's recommendations and to do so within 6 months of the release of the IJC report.

Some of the reasons analysts have given for the failure of the IJC to more adequately fulfill its mandate include matters such as the processes by which commissioners are appointed, and funding control by the two federal governments. These matters cannot be addressed through the GLWQA.

Science and Binational Decision-Making

A strong science underpinning to bi-national decision-making in the Great Lakes-St. Lawrence River basin has always been a critical foundation to the implementation of the GLWQA. A state of the science needs assessment and gap analysis should be done for the Great Lakes so a strategic, integrated and informative science agenda can be framed for the Basin.

The BEC set up the biennial SOLEC process as a mechanism to pull together diverse scientific information. BEC holds biennial conferences on the state of the lakes. A State of the Great Lakes Ecosystem Report is then produced based on information presented at the conference and on indicators of ecosystem health.

In the last decade, the State of the Great Lakes ecosystem reports have used a report card style assessment, and consistently reported that the status of the ecosystem is "mixed", although what this means is vague and value laden. Some conditions are reported "good" and "poor" but the majority of conditions in the 2008 report such as human health, biotic, land use-land cover, climate change, resource utilization, coastal zones and aquatic habitats were reported to be of **unknown status**. This is a clear acknowledgement that insufficient science is being brought to bear on these issues, due to limited funding within each country. Furthermore, while the reporting approach may be more intuitive for many readers in showing a qualitative assessments of particular indicators, the absence of targets and trend data make it challenging to assess how much closer we are to a healthier ecosystem. Coupled with incomplete data for many indicators, this situation limits the ability to make informed decisions. This points to the need to strengthen Annex 17 of the GLWQA.

Recommendation: Annex 17 of the GLWQA should be strengthened, including with specific recommendations on reporting approach, to ensure that we have an adequate and constantly updated understanding of the state of the Great Lakes and St. Lawrence River.