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THE CASE FOR GOOD GOVERNMENT: WHY A COMPREHENSIVE REVIEW OF THE GREAT LAKES WATER QUALITY AGREEMENT IS NEEDED

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The U.S. Canada Great Lakes Water Quality Agreement (Agreement), signed in 1972 and amended in 1978 and 1987, is the centerpiece of binational efforts “to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem.”¹ For twenty-seven years, it has provided a framework and forum for discussion, debate and action resulting in remarkable improvements to Great Lakes water quality and ecosystem integrity in general.² While some may argue that the rate and extent of progress under the Agreement has been less than optimal, the fact that progress has been made is beyond dispute. The Agreement will remain the centerpiece of binational management efforts as we enter the new millennium and, of course, we as citizens want that centerpiece to be capable of meeting our current and emerging needs. An open and objective review of Agreement implementation and effectiveness, including an examination of its articles and annexes, is the only

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1. Revised Great Lakes Water Quality Agreement of 1978 (GLWQA), Nov. 18, 1987, U.S.-Can., 30 U.S.T. 1383.

2. National Research Council of the United States & The Royal Society of Canada, *The Great Lakes Water Quality Agreement: An Evolving Instrument for Ecosystem Management* (1985).

means to that end.³

Despite the fact that a comprehensive review of Agreement operation and effectiveness is *required* at this time, resistance to this process has emerged among citizen environmental interests and the business-industry community. For different reasons, the notion of an open, objective, and comprehensive review (with the prospect of renegotiation as a potential outcome) evokes reactions that range from passive resistance to outright trepidation and vocal opposition. Even the International Joint Commission (IJC), in the opening sentences of its *Ninth Biennial Report on Great Lakes Water Quality*, bluntly states, "The Commission believes that the present Agreement is sound, effective and flexible. Review and renegotiation are not necessary."⁴

Citizen environmental interests fear that a comprehensive review will distract the governments from implementation efforts and, worse yet, may result in a renegotiation process that weakens the Agreement. Business and industry interests fear the opposite: that review efforts will ultimately lead to the renegotiation of a strengthened agreement that might place additional restrictions and requirements on the private sector. Consequently, this unusual "alliance" appears to be satisfied with the status quo: the tired old adage "If it ain't broke, don't fix it," has emerged as the cornerstone of this ill-advised argument.

This argument is a spurious one and flies in the face of good government. How do we know that the Agreement (either process or provisions) "ain't broke" unless we conduct a comprehensive and objective review? Indeed, how can we make adjustments of any kind in the absence of such? Resources for Agreement implementation are limited, and it is our responsibility to direct them in an efficient and cost-effective manner. The well being of the Great Lakes Basin ecosystem and its residents is paramount. By shirking our responsibility to review the Agreement, we are compromising our ability to serve as stewards of the greatest freshwater system on the face of the earth.

An open, objective and comprehensive review of the U.S.-Canada Great Lakes Water Quality Agreement is beneficial for the Great Lakes. To demonstrate why, an overview of the Agreement is presented. It will touch upon the Agreement's origin, evolution, and pivotal role in restoring and protecting the Great Lakes. After an historical summary of past reviews is offered, the framework and process associated with the current one will be outlined. Four compelling arguments for an open, objective and comprehensive review follow. Finally, a mechanism will be presented to allay concerns that such a review may lead to an extensively revised Agreement which is either unduly restrictive or overly permissive in defining roles, responsibilities and actions that affect the integrity of the waters of the Great Lakes Basin ecosystem.

THE AGREEMENT AS A CENTERPIECE FOR

3. International Joint Commission, *Embracing the Challenges of the 21st Century, 1995-97 Priorities and Programs Under the Great Lakes Water Quality Agreement* (visited Aug. 11, 1999) <<http://www.ijc.org/comm/pr9597.html>>.

4. International Joint Commission, *Ninth Biennial Report on Great Lakes Water Quality* (1998).

BINATIONAL COMMITMENT AND COOPERATION

The U.S.-Canadian Great Lakes Water Quality Agreement of 1972 was the culmination of multiple studies conducted under the auspices of the International Joint Commission from 1964 to 1972.⁵ Investigatory boards for Lake Erie and Lake Ontario-St. Lawrence River were appointed by the Commission in late 1964. A year later, their interim reports suggested that nutrient over enrichment, particularly phosphorus, was the primary cause of eutrophication problems in the

lakes.⁶ Final reports delivered to the Commission in late 1969 confirmed earlier investigations, documented the relative contribution of U.S. and Canadian sources, and concluded that phosphorus control programs “were needed and should be implemented.”⁷

These conclusions prompted a ministerial-level binational pollution meeting in mid-1970, at which time the federal governments agreed that the pollution problem contravened obligations under the Boundary Waters Treaty of 1909.⁸ A joint working group was assigned the task of evaluating current programs and, after its report was approved by the two governments in mid-1971, formal negotiations for the U.S.-Canada Great Lakes Water Quality Agreement commenced. In recognition of Canadian constitutional reality, Canada and Ontario moved toward a parallel agreement at the same time.

Signed on April 15, 1972, by President Richard Nixon and Prime Minister Pierre Trudeau, the Agreement was immediately lauded as a landmark accomplishment. Mitchell Sharp, Canada’s Minister of External Affairs, hailed it as the most far reaching agreement of its kind “ever signed by two governments in the environmental field.” Russell Train, Administrator of the U.S. Environmental Protection Agency (U.S. EPA), further noted that the Agreement was “unprecedented in scope” and a model to be emulated at the international level.⁹

The 1972 Agreement established basin-wide water quality objectives and compatible standards, and secured a binational commitment on the design, implementation and monitoring of associated programs.¹⁰ The Agreement further granted the IJC a range of responsibilities in water quality data collection, analysis and dissemination; water quality surveillance; monitoring of program performance; coordinating U.S. and Canadian programs; and providing advice and recommendations to the two governments in the interest of attaining stated water quality objectives. To accomplish this, the 1972 Agreement established

5. C.D. Gunnerson & K. Oakley, *Binational Abatement of Boundary Water Pollution in the North American Great Lakes*, 8 WATER RESOURCES 713 (1974).

6. DONALD MUNTON, *Great Lakes Water Quality: Study in Environmental Politics and Diplomacy*, in RESOURCES AND THE ENVIRONMENT (1980).

7. International Joint Commission, *Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River* (1970).

8. Gunnerson & Oakley, *supra* note 5, at 713.

9. RICHARD B. BILDER, CONTROLLING GREAT LAKES POLLUTION: A STUDY IN U.S.-CANADA ENVIRONMENTAL COOPERATION 1 (1971).

10. GLWQA, *supra* note 1, 30 U.S.T. 1383.

Great Lakes Water Quality and Research Advisory Boards, along with a Great Lakes Regional Office to provide technical and administrative support.¹¹

The review process leading up to the 1978 Agreement benefited from six years of extensive IJC studies conducted by the Agreement institutions, the Upper Lakes Reference Group (1976-77) and the Pollution from Land Use Activities Reference Group (PLUARG) in 1978.¹² The 1978 Agreement reaffirmed the basic tenets of its predecessor and established comprehensive and stringent water quality objectives, specifically for radioactivity and toxic contaminants. The focus shifted from point source clean-up of "conventional" pollutants to a strong emphasis on nonpoint source pollution and toxic contaminants.¹³ The new Agreement established timelines for municipal and industrial pollution abatement and control programs as well as more stringent phosphorus loading targets. Further, it called for persistent toxic substance discharges to be virtually eliminated by adopting the philosophy of "zero discharge" of inputs; identified approximately 350 "hazardous polluting substances" to be banned; and established a surveillance program to monitor progress in water quality improvements. Most significantly, the 1978 Agreement defined the "Great Lakes Basin Ecosystem" and, in so doing, ushered in a new era that embraced the "ecosystem approach" to management.¹⁴ Regulatory and pollution prevention programs were applied to the entire Great Lakes Basin ecosystem, defined as "the interacting components of air, land, water and living organisms, including man, within the drainage basin of the St. Lawrence River at or upstream from the point at which this river becomes the international boundary between Canada and the United States."¹⁵ The purpose of the Agreement reflected a broadened goal, "to restore and maintain the chemical, physical, and biological integrity of the waters of the Great Lakes Basin Ecosystem."¹⁶

As with negotiation of the 1972 Agreement, the review process resulting in the 1978 amendment was limited largely to federal government officials, although some state and provincial representation was secured via subgroups formed by the lead federal negotiators.¹⁷ In addition to the IJC studies noted earlier, evidence suggests that the review and renegotiation process was substantively influenced by other initiatives that advanced the "ecosystem approach" concept. Among others, these included the multi-disciplinary focus of International Field Year of the Great Lakes studies (1972-73),¹⁸ products of the Canada-United States Interuniversity Seminar which called for watershed based, multi-objective

11. National Research Council of the United States, *supra* note 2.

12. *Id.*

13. GLWQA, *supra* note 1, 30 U.S.T. 1383.

14. MICHAEL J. DONAHUE, INSTITUTIONAL ARRANGEMENTS FOR GREAT LAKES MANAGEMENT: PAST PRACTICES AND FUTURE ALTERNATIVES (1987).

15. GLWQA, *supra* note 1, 30 U.S.T. 1383.

16. *Id.*

17. LEE BOTTS & PAUL MULDOON, THE GREAT LAKES WATER QUALITY AGREEMENT: ITS PAST SUCCESSES AND UNCERTAIN FUTURE (1996).

18. Eugene J. Albert & T. L. Richards, *The International Field Year for the Great Lakes*, (1981).

resource management (1971-73)¹⁹ and the rehabilitation of degraded “areas of concern” (1975-77),²⁰ and a report of the International Joint Commission’s Science Advisory Board that presented a framework for the ecosystem

approach.²¹

The review process culminating in the 1987 Protocol to the Agreement was decidedly more open and inclusive than the one prior.²² State and provincial consultation and representation was more pronounced and, unlike the limited public hearing process associated with the 1978 review, public consultation was extensive. Citizen environmental interests from the U.S. and Canada received “observer” status during the review process and are credited with influencing protocol discussions and decision-making.²³ Following spirited debate, the governments ultimately agreed to leave the body of the Agreement largely intact but, among others, added new annexes addressing Remedial Action Plans and Lakewide Management Plans, nonpoint source pollution, contaminated sediment, airborne toxic substances, contaminated groundwater, and research and development. A major procedural change called for the two governments to meet directly to coordinate workplans and evaluate Agreement progress, which essentially bypassed the established Commission role in coordinating, monitoring and assessing progress.²⁴ Originally intended to enhance government accountability and reduce resource requirements under the Commission structure, the efficacy of this change has been the subject of extended debate.

THE REVIEW PROCESS TO DATE

The negotiation of the 1972 Agreement, as well as the reviews culminating in the 1978 and 1987 amendments, have varied significantly in both substance and process.²⁵ This is attributable to the lack of an established review procedure, as well as the evolution of political, institutional and societal characteristics and preferences. Over time, the scope and breadth of the review process has narrowed, reflecting a desire to reaffirm and “fine-tune,” rather than fundamentally alter, Agreement provisions. Also, the process has become much more inclusive, particularly as one contrasts the secretive nature of the original

19. *A Proposal for Improving the Management of the Great Lakes of the United States and Canada Before the Subcomm. of Inter-American Affairs*, 93rd Cong. (1973) (statements by Leonard B. Dworsky & G.R. Francis).

20. Leonard B. Dworsky, *The International Joint Commission: A Critique*, Proceedings of Canada-U.S. Natural Resources and Environment Symposium, (1997).

21. Science Advisory Board & International Joint Commission, *The Ecosystem Approach: A Scope and Implications of an Ecosystem Approach to Transboundary Problems in the Great Lakes Basin, Special Report to the International Joint Commission* (1978).

22. BOTTS & MULDOON, *supra* note 17.

23. *Id.*

24. GLWQA, *supra* note 1, 30 U.S.T. 1383.

25. BOTTS & MULDOON, *supra* note 17.

negotiation with the very open process yielding the 1987 Protocol.

There are, however, fundamental similarities that characterize both the 1978 and 1987 review processes. First, both were broad in scope. The 1972 Agreement called for a "comprehensive review of the operation and effectiveness" of the Agreement during the fifth year of its existence,²⁶ while the 1978 Agreement called for a similarly comprehensive approach following every third biennial report on Great Lakes water quality.²⁷ Second, both were pursued in the spirit of objectivity. As such, political considerations notwithstanding, participants did not pre-judge the review outcome or place rigid parameters on the process before initiating it. The review process, and associated findings, shaped the ultimate amendment decisions. And third, these reviews benefited from extensive analyses, both within and outside government, relative to Agreement implementation and recommended revisions to either Agreement provisions or implementation procedures.

These three characteristics of comprehensiveness, objectivity and extensive research, served previous reviews quite well and remain fully relevant with respect to the present review of the Agreement, as amended by the 1987 Protocol. The Binational Executive Committee, led by U.S. EPA and Environment Canada and comprised of representatives from numerous Basin jurisdictions, has initiated a review process that promises to build upon the positive characteristics and learn from the negative experiences of past reviews.²⁸

THE ARGUMENT FOR AN OPEN, OBJECTIVE AND COMPREHENSIVE REVIEW

Four compelling arguments for an open, objective and comprehensive review of the Agreement can readily be made:

1) *It's a Requirement: Case Closed.*

Outright objections to Agreement review and renegotiation, such as that proffered by the International Joint Commission in its *Ninth Biennial Report on Great Lakes Water Quality*, fail to acknowledge an Agreement requirement. There is no room for debate because Article X, Paragraph 3 of the Agreement *requires* a comprehensive review. Also lacking merit is the more "veiled" opposition of various interest groups arguing that a review should proceed only within rigid parameters (e.g., that Agreement provisions will be untouched irrespective of review findings). Such a limitation biases the review process and compromises its outcome.

Some sectors of the Great Lakes community have argued that a thorough review will divert attention and resources away from Agreement

26. GLWQA, *supra* note 1, 30 U.S.T. 1383.

27. Great Lakes Water Quality Agreement of 1978, *supra* note 13.

28. U.S. Environmental Protection Agency & Environment Canada, *Draft of Great Lakes Water Quality Agreement Review: Description of the Review Process* (1999).

implementation. This argument can be summarily dismissed; much of the review is being accomplished by volunteers drawn from a multitude of agencies and organizations. Further, U.S. and Canadian officials involved in the review are generally not those directly involved in implementation.

The Great Lakes community is well advised to set aside any paranoia about the review process and any potential outcomes (e.g., renegotiation). The Agreement review process is a reality, and it is fully underway. We are far better served by Great Lakes interests who will dedicate their efforts to making the process as open, objective and comprehensive as possible.

2) *We Can't Get to Where We're Going If We Don't Know Where We Are.*

The Great Lakes Water Quality Agreement is a road map to our destination: a restored and enhanced basin ecosystem that meets the general objectives as presented in Article III.²⁹ It has been twelve years since we have examined that road map and, while the destination remains the same, we are certainly not where we were in 1987. We can not move forward unless we are first able to look back, assess progress, evaluate performance and apply lessons learned to the balance of our journey. Program evaluation, via comprehensive review, is the only means to this end.

Past reviews have benefited tremendously from thorough analyses performed within and outside government. Since the last review, a wealth of relevant information has been produced, including reports by the National Research Council and Royal Society of Canada,³⁰ Caldwell,³¹ Donahue,³² Dworsky and Allee,³³ Botts and Muldoon,³⁴ Environmental Law Institute,³⁵ Billups, et al.³⁶ and the International Joint Commission,³⁷ among others. These organizations and individuals have taken the initiative to contribute to the review process, and the federal governments should also have the opportunity to do so. Any opposition may compromise the breadth and

29. GLWQA, *supra* note 1, art. III, 30 U.S.T. 1383.

30. National Research Council of the United States, *supra* note 2.

31. LENTEN K. CALDWELL, PERSPECTIVES ON ECOSYSTEM MANAGEMENT FOR THE GREAT LAKES (1988).

32. DONAHUE, *supra* note 14.

33. Leonard B. Dworsky & D. Allee, *Seminar Report, A Critique of the Great Lakes Water Quality Agreement on Its 25th Anniversary and A Discussion of the Great Lakes Basin Ecosystem As a Management Tool* (1997).

34. Great Lakes Water Quality Agreement of 1978, *supra* note 13.

35. Environmental Law Institute, *An Evaluation of the Effectiveness of the International Joint Commission* (1995).

36. Sally T. Billups, et al., *Treading Water: A Review of Government Progress Under the Great Lakes Water Quality Agreement (A Report to the International Joint Commission)* (Part I), 1998 TOL. J. OF GREAT LAKES' L. SCI. & POL'Y 91-178 (Spring 1998).

37. International Joint Commission, *supra* note 3.

objectivity of the current review process and, in so doing, may compromise the value of these many review efforts as well.

3) *Times have Changed, and We Need to Change With Them.*

The past twelve years have seen profound, fundamental changes in virtually every aspect of Great Lakes governance. The traditional top-down, command and control, regulatory approach to governance has been augmented and/or replaced by a bottom-up, partnership-based voluntary approach.³⁸ States, localities and non-governmental organizations have assumed leadership in many aspects of Agreement implementation.

Many of the individuals responsible for conducting the last review and shaping the 1987 Protocol are not presently involved in its implementation. The physical, biological and chemical characteristics of the Great Lakes Basin ecosystem is markedly different, as is scientific process and understanding. Funding levels, policy priorities, and societal preferences have changed. New institutions have emerged, others have evolved, and still others have ceased to exist.

Therefore, we can not assume the Agreement, in terms of process and provisions, is as relevant today as it was more than a decade ago. Only an open, objective and comprehensive review can tell us such is the case.

4) *Stewardship Responsibility Demands Efficient and Cost-Effective Management.*

In an era of increasing complexity and decreasing resources, efficiency and cost effectiveness is the cornerstone of responsible management. Consequently, evaluation has assumed an integral role in the program management process.³⁹ Evaluation instills a degree of accountability into that process and offers benchmarks against which progress can be measured. It permits mid-course corrections in the interest of efficiency and effectiveness. In a broader context, it offers a means to assess the overall value of one initiative as compared to another, and provides the information needed to maintain, enhance, redirect or terminate a given effort. Most importantly, it provides the basis for educating constituents of program impacts.

Historically, evaluation of progress under the Agreement has been more qualitative than quantitative, and more subjective than objective. A

38. MICHAEL J. DONAHUE, *Policy Review: Great Lakes – St. Lawrence River Basin Assessments*, in BIOREGIONAL ASSESSMENTS: SCIENCE AT THE CROSSROADS OF MANAGEMENT AND POLICY (1999).

39. MICHAEL J. DONAHUE, ET AL., *SEEKING SIGNS OF SUCCESS: A PRACTICAL GUIDE FOR MEASURING THE SUCCESS OF YOUR WATERSHED OR ECOSYSTEM PROGRAM* (forthcoming 2000).

comprehensive review of the Agreement, as amended by the 1987 Protocol, offers an opportunity to build upon past reviews and newer initiatives (e.g., State of the Lakes Ecosystem Conference process) to provide the data and information needed for us to responsibly exercise our stewardship. Simply stated, good government demands efficient and cost-effective management.

SETTING PARAMETERS FOR AGREEMENT REVIEW

All members of the Great Lakes community, whether they represent government, business and industry or citizen groups, can certainly agree that Agreement objectives should be pursued in an efficient and cost-effective manner. Intrinsicly, these various representatives would likely agree that a thorough, objective review of Agreement language and implementation efforts is the only means to assess whether adjustments are needed. It is unfortunate that opposition to such a review process is being pursued as a means to a larger goal: the outright opposition to renegotiation of the Agreement. In some instances, the notion of a comprehensive review has been reluctantly accepted, but only with the provision that it does not lead to renegotiation. Such a position, of course, puts undue constraints on the process. What if the review *does* identify a need for certain changes that can measurably benefit ecosystem restoration and enhancement efforts?

There is, however, a middle ground whereby a comprehensive review can be diligently pursued, while allaying fears that the end result will be a renegotiated agreement fundamentally unpalatable to any sector of the Great Lakes community. This middle ground approach is characterized by seven elements:

- A clearly stated set of procedures that will guide the review process, identifying tasks, timelines, decision points, and opportunities for government, citizen group and business and industry input.
- A set of broad parameters within which the governments agree to conduct the review. This may include plans to emphasize one or more items during the review process (e.g., implementation efforts, annexes, articles). It might also include an explicit agreement that there will be no “backsliding” on objectives.
- An open and inclusive review process that provides the larger Great Lakes community with access to the review team, either as a member, observer or review contributor (via hearings, statement submittal, etc.).
- Active solicitation and consideration of studies and reports, within and outside government, that will assist with the comprehensive assessment of Agreement operations and effectiveness.
- Development and application of ecosystem indicators specific to Agreement provisions, in the interest of quantitatively assessing ecosystem health and, over time, generating longitudinal data that will permit an

assessment of progress under the Agreement.

- A reporting out of review findings and conclusions to the Great Lakes community (perhaps via public hearings) to solicit input on how operations and effectiveness issues might best be addressed.
- A process whereby review team members carefully consider all studies and viewpoints as they formulate recommendations for their respective governments. Recommended actions might range from fine-tuning Agreement implementation efforts to outright renegotiation.

The above elements incorporate the positive attributes of past reviews, while adding additional structure to the process and injecting a greater level of quantitative analysis. The open and inclusive nature of the process is fundamentally important, given that Agreement implementation has evolved into a Great Lakes community-wide responsibility over its twenty-seven year history. While the two federal governments appropriately retain the decision-making responsibility for any Agreement revision, the open and inclusive characteristics of the review process will help ensure that those decisions are well informed.

Many of these elements can be found in the review process recently initiated by the two governments under the auspices of the U.S. EPA and Environment Canada, and within the Binational Executive Committee structure. Interest groups concerned about any prospective changes to the Agreement via protocol, amendment or outright renegotiation will acknowledge the inclusive nature of the process even in its early stages.

The current process sets general parameters on the review, noting that an emphasis will be placed on minor amendments as opposed to a larger scale renegotiation of provisions.⁴⁰ A Binational Steering Committee comprised of volunteers from federal, state, provincial and other agencies, is providing direction and guidance by identifying review issues and priorities, establishing work groups, consulting with existing groups, framing issues in need of resolution, and reporting its findings to the Binational Executive Committee. Review criteria for Agreement annexes include relevancy, clarity of purpose, current science, and consistency with laws and policies. A three phase review process consists of prioritization of review elements, evaluation and assessment, and reporting of options and recommendations that would require either Agreement renegotiation or an exchange of letters.

Following the Binational Steering Committee report, the Binational Executive Committee will make formal recommendations to the governments as to desired changes to the Agreement (if any) and the likely mechanism(s) for effectuating such change(s). Throughout the review and report preparation process, input from the larger Great Lakes community will be solicited and considered.

CONCLUSION

40. Great Lakes Water Quality Agreement of 1978, *supra* note 13.

The U.S.-Canada Great Lakes Water Quality Agreement merits an open, objective and comprehensive review to ensure that ecosystem restoration and enhancement efforts proceed with efficiency and cost effectiveness. Anything less does a disservice to the ecosystem itself and all who are a part of it. Four compelling reasons for such a review are readily identified 1) a “comprehensive review” of Agreement operation and effectiveness is a requirement, 2) an assessment of current progress in ecosystem restoration/enhancement is necessary before an approach to achieving ultimate objectives can be determined, 3) fundamental changes in governance, scientific knowledge and the state of the ecosystem have occurred since the last review, and must be assessed, and 4) only a comprehensive review can ensure that we are meeting our stewardship responsibilities in an efficient and cost effective manner. Properly designed, with substantial input from the Great Lakes community, the review process can eliminate or greatly reduce concerns that any resultant amendment/renegotiation will be fundamentally objectionable to that community or any sector within it.