

**BRIEFING NOTE ON GOVERNANCE ISSUES RELATED TO THE RENEWAL
OF THE CANADA-UNITED STATES GREAT LAKES WATER QUALITY
AGREEMENT**

Prepared by the

CANADIAN ENVIRONMENTAL LAW ASSOCIATION - FEBRUARY 2010

This briefing note has been prepared by the Canadian Environmental Law Association on selected governance issues related to renewal of the Canada – United States Great Lakes Water Quality Agreement (“GLWQA” or “Agreement”). We also are contributing to a binational ENGO submission on the Agreement. Therefore, we are concentrating here on improvements from a Canadian government perspective because there are specific domestic problems that require remedy. New measures are necessary for routine engagement of Parliament to ensure consideration and accountability regarding protection of the Great Lakes-St. Lawrence River ecosystem. There already is a well-established Congressional infrastructure in the U.S. that has been in place for decades.

The briefing note addresses the following issues:

1. scope and purpose of the Agreement
2. geography
3. role of other government levels
4. structure of Agreement
5. review and revision of Agreement
6. institutional arrangements
7. accountability
8. participation and engagement in Agreement
9. role of the public

Should you have any questions, please do not hesitate to contact us.

Yours truly,
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<p>1. Scope and purpose of Agreement</p>	<p>Problem: The GLWQA commits Canada and the United States to restoring and maintaining the “chemical, physical and biological integrity of the Great Lakes Basin Ecosystem.” Some have proposed that the Agreement be expanded to consider all environmental issues in the basin, or to balance social, economic, and environmental considerations. However, such an approach jeopardizes a focus on protecting water quality. Scientific and policy understanding of the factors that influence water quality has expanded since the Agreement was last revised. Stressors that should be given greater emphasis in a future GLWQA include: invasive species, pollutants of emerging concern (e.g. pharmaceuticals, nanomaterials, pesticides and other toxic chemicals), near shore development, water levels as they impact water quality, and climate change.</p> <p>The governments and the International Joint Commission (“IJC”) are proposing to limit the body of the Agreement to goals, objectives, and principles so it can be more enduring and will not need revision as often. They have not yet proposed how they will be addressing the substantive issues now in the Agreement or the addition of new issues to modernize it. It is paramount to the effectiveness of a renewed Agreement that substantial discussions on these matters be undertaken in the as part of the negotiating process.</p> <p>The scope and purpose of the Agreement do not mention explicitly the need to protect human health in the Great Lakes Basin. The current implementation efforts , such as</p>	<p>CELA Response: The GLWQA should retain its focus on water quality, but within a broader vision of what stressors impact water quality.</p> <p>A new Agreement that focuses on principles, goals and objectives should not be stand alone. It must:</p> <ul style="list-style-type: none"> • include a new section with explicit accountability mechanisms (see part 7 below); • be accompanied by annexes that detail prescriptive actions on all current ecosystem stressors; • include recognition of the need for protection of the Great Lakes ecosystem, including human health; • reaffirm commitments by the parties towards protection and
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	the recent report of the Work Group of the IJC on chemicals of emerging concern in the Great Lakes, fails to include an investigation on the human health impacts of toxic pollution entering Great Lakes waters.	restoration of the Great Lakes, based on prevention and precaution.
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<p>2. Geography</p>	<p>Problem: 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 not consistent with the ecosystem approach in the GLWQA. The Agreement is based on the 1909 Boundary Waters Treaty and some argue, therefore, that the Agreement can apply only to boundary waters. This would mean that the St. Lawrence River cannot be included once it passes Cornwall-Massena and is located wholly within Canada. However, Lake Michigan, which is wholly within the United States, is already included in the Agreement because 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. Freshwater nutrients and pollutants from the Great Lakes are known to impact ocean mammals and their food web and the Great Lakes are also impacted by the waters of the St. Lawrence River Basin. Expansion of the boundaries considered in the Agreement is necessary to account for these relationships.</p> <p>Additionally, the definitions included in Art. 1 of the Agreement for “Boundary Waters of the Great Lakes”, “Great Lakes Basin Ecosystem”, “Great Lakes System” and “Tributary waters of the Great Lakes System” do not explicitly include groundwater, which is essential to the hydrological functioning of the system. Many Great Lakes tributary flows are influenced by groundwater, that groundwater and surface water are connected in the Great</p>	<p>CELA Response: The Agreement should cover all of the hydrological boundaries of the ecosystem rather than political boundaries. The entire St. Lawrence River should be included as part of the Great Lakes Ecosystem and referenced in the Agreement.</p> <p>The definitions of the Great Lakes should not be limited to the Boundary Waters Treaty definition but should be expanded to include groundwater. This would result in beneficial integration of groundwater in the purpose, general and specific objectives, regulatory, research programs and related protections extended to other components of the ecosystem by the Agreement.</p>
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	Lakes and groundwater aquifers within the Basin may be as large as Lake Michigan.	
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<p>3. Other government levels</p>	<p>Problem: The roles of the provinces and states are, at times, mentioned in the GLWQA, but in neither a comprehensive nor focused manner. Because the provinces and states operate many of the programs that are essential to achievement of Agreement goals, this aspect of the Agreement needs to be strengthened.</p> <p>Local governments, such as cities, towns, villages, townships, counties, and regions are not mentioned at all in the GLWQA. However, as members of the Great Lakes and St. Lawrence Cities Initiative note: “Municipal governments are on the front lines of Great Lakes water management.” Achieving the Agreement’s goals has involved and will continue to require billions of dollars in expenditures on municipal infrastructure alone. Accordingly, the role of municipal governments should be recognized explicitly in the Agreement.</p> <p>350,000 descendants of the first peoples of the Great Lakes live in 110 nations on 3 million hectares of federally recognized reserve land in the Great Lakes–St. Lawrence River basin. Many more live off reserve, most in urban centres. These aboriginal peoples have rights as sovereign independent governments.</p> <p>The IJC and others in the Agreement Review process have recommended that organizing Basin protection on a watershed basis has</p>	<p>CELA Response: The GLWQA should define the role of the provinces, states, and local governments in Agreement activities and the provinces and states should be included fully in the negotiating process so as to obtain their “buy-in” to the activities they will need to carry out.</p> <p>Mechanisms should be established to give municipal governments a place at the tables where Great Lakes decision-making occurs. Their role needs to be acknowledged in future arrangements for implementation of Agreement objectives under the Canada-Ontario Agreement and the Canada-Quebec Agreement on the St. Lawrence 2005-2010.</p> <p>The unique role of Tribes, First Nations, and Metis in protecting and restoring the Great Lakes should be recognized in the GLWQA, and in all institutional arrangements flowing from the Agreement, including their participation as IJC commissioners and as members on IJC boards. Specific provisions related to Tribes, First Nations, and Metis should be worked out through extensive discussions with these peoples.</p> <p>The watershed approach would work most effectively if it is entrenched within the existing LAMP framework as it would draw together information on</p>
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	management advantages. Such a shift should lead to better integration of local information and programming but not cause erosion of responsibilities or long delays in progress on programs.	impacts to individual lakes and their connecting channels.
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<p>4. Structure of Agreement</p>	<p>Problem: The GLWQA has made a very significant contribution over the past decades to improving environmental conditions in the Great Lakes. However, the Agreement needs to be revitalized because it is now less of a driver of Great Lakes programs than it was previously. Certain provisions are out of date and new understandings of some of the problems have arisen. In addition, governments are paying less attention to the Agreement than they did previously. For example, very little progress has been made to virtually eliminate persistent toxic chemicals through zero discharge beyond “the dirty dozen” chemicals. Therefore, the GLWQA should be revised. However, the existing Agreement should not be abandoned and replaced by a completely new agreement. Many important provisions of the GLWQA have not yet been fully implemented. In addition, the principles stated in the Agreement, such as ecosystem, virtual elimination, and zero discharge, are as vital now as when they were first placed into the Agreement. Therefore, if the governments decide to open up the Agreement, they should make a commitment not to weaken any the current provisions.</p>	<p>CELA Response: The GLWQA should be opened up to revitalize it, provided that the governments commit not to weaken provisions currently in the Agreement.</p> <p>New provisions to enhance and spell out accountability mechanisms should be added to the body of the new Agreement as set out below (see # 7).</p>
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<p>5. Review and revision of Agreement</p>	<p>Problem: CELA and other groups have been urging the Binational Executive Committee to ensure that a detailed independent review of the GLWQA is carried out. The review working group process that was carried out in 2006 was asked not to include a detailed assessment of what progress was and was not achieved under each section of the Agreement. It also does not include neutral professional judgments on the appropriate future direction of the Agreement. Previously, this was done in studies conducted by the National Research Council of the United States and the Royal Society of Canada prior to the 1987 amendment of the GLWQA. This input was essential to that review and renegotiation process. Over 20 years has passed since that review was conducted. A similar review is now urgently needed. Many are talking about amendments to the GLWQA that are more extensive than those in 1987. Accordingly, this should mean that another independent study such as the one prior to the 1987 amendments is essential.</p>	<p>CELA Response: As part of the review, the governments should ensure that a neutral, professional, detailed assessment of progress and performance under the Agreement is carried out before decisions are made on how to proceed with revitalization of the Agreement.</p>
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<p>6. Institutional Arrangements</p>	<p>Problem: Since the 1987 revisions to the Agreement, the IJC’s powers have been eroded and governments have avoided rigorous reporting. This occurred because Art. X.3 was added to the Agreement stating: “The Parties in cooperation with State and Provincial Governments, shall meet twice a year to contribute their respective work plans with respect to the implementation of this Agreement and to evaluate progress made.” These changes lead to shifts in responsibility. The Binational Executive Committee (BEC) was established by the Parties under this authority. The BEC became the forum for the Parties to report among themselves. Independent third party oversight and scrutiny, which once rested with the IJC and its boards, was correspondingly weakened. The results of some programs, like the Remedial Action Plans (RAPs), have been uneven and meager. Little attention has been paid to virtual elimination by the State of the Lakes Ecosystem Conference (SOLEC).</p> <p>Establishment by the governments of separate institutions independent of the IJC with functions that parallel those of the Water Quality and Science Advisory Boards suggest general dissatisfaction with IJC processes.</p> <p>While the purpose of the BEC was to strengthen the relationship between the parties and the IJC, the BEC now serves as a policy forum for government agencies. While the purpose of SOLEC was to facilitate reporting on progress</p>	<p>CELA Response: Review of the GLWQA should include attention to the effectiveness of the processes and institutions established by the Agreement.</p> <p>IJC performance in carrying out processes for which it is responsible including working with the advisory boards and the parties, and providing information to the public, should be reviewed. IJC role in achieving obligations of the Agreement should be expanded and strengthened.</p> <p>The parties should evaluate whether it is efficient and less costly to operate the BEC, SOLEC, and the Binational Toxics Strategy independently of the IJC processes. Clarification also is needed regarding the relationship of</p>
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	<p>by providing information needed by the IJC to make biennial reports to governments, SOLEC now seems to function in part as the IJC advisory boards did, though arguably not as well.</p> <p>The joint fact-finding principle first adopted in the 1909 Boundary Waters Treaty has broken down as the IJC now depends on information provided directly by lead agencies to the parties.</p> <p>Patronage undermines independence of IJC.</p>	<p>reports between BEC and the WQB and between SOLEC and the SAB. We recommend that the WQB mandate remain that of assessing the state of government programs to protect and restore the Great Lakes and St. Lawrence River system. The SAB role should continue to be that of advising the IJC on scientific matters and to evaluate the implications of new scientific insights for Great Lakes policies and programs. The SAB also should review SOLEC reports and prepare and forward reports, including recommendations, to the IJC on the adequacy of SOLEC reports.</p> <p>The Agreement should name the BEC as the forum to develop a basin-wide Great Lakes St. Lawrence Action Plan based on commitments in the GLWQA and its annexes.</p> <p>The Agreement should designate the IJC as the Body to evaluate progress on these action plans as well as the need for attention to new issues. The IJC should regularly report on progress achieved to the governments, Parliament, and Congress.</p> <p>The governments should assure that the IJC is adequately resourced to carry out these functions.</p> <p>The IJC should inform the parties about information it needs and be able to obtain it.</p> <p>End patronage, stagger appointments to IJC, and review/revise makeup of IJC advisory boards to ensure broad public participation, accountability, and transparency.</p>
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<p>7. Accountability</p>	<p>Problem: A key theme in the 2007 Agreement Review Committee (“ARC”) report is that governments have failed to implement the GLWQA. Accordingly, changes to the Agreement should be designed to improve the likelihood of existing and new commitments being carried out.</p> <p>Great Lakes United’s 2008 report, <i>A Way Forward Strengthening Decision-Making and Accountability under the Great Lakes Water Quality Agreement</i>, offers a prescription for ensuring strengthened accountability for the government of Canada. While the GLWQA provides the rudiments of government accountability by requiring the IJC to regularly report on progress under the Agreement, the IJC has been hampered in carrying out this role due to the failure of governments to submit necessary data to the IJC so that assessments could be conducted. Governments also have under-funded the IJC for this task.</p> <p>The GLWQA needs to be revitalized in a high profile manner by drawing public and political attention back to the need for basin-wide ecosystem protection.</p>	<p>CELA Response: Draft the GLWQA so that it fosters enforceability and accountability by (1) having specific targets and timetables for achieving those targets, (2) replacing words such as “seek” and “strive” with “achieve”; (3) incorporating targets and timelines from Agreement into domestic federal legislation; (4) including provisions for regular reporting to the public on progress towards achieving targets and timetables.</p> <p>In order for audits to be conducted properly, governments should commit to (1) providing the necessary data, in a timely manner, to those charged with the responsibility to audit progress under the GLWQA; and (2) reporting regularly on progress for each commitment under the Agreement.</p> <p>Governments should demonstrate their commitment to a revitalized GLWQA by: (1) having it approved and signed by the Prime Minister of Canada and the President of the United States and appropriate aboriginal representatives, and (2) making financial commitments adequate to achieving Agreement goals. In Canada, the Prime Minister should create a new ministerial position or identify an existing minister as having direct responsibility for the Great Lakes St. Lawrence River basin including the development of a Great Lakes St. Lawrence Action Plan, and its implementation, as well as</p>
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		<p>GLWQA implementation. A Parliamentary standing committee also should provide input into the review of the Agreement as well as the Action Plan and receive regular updates from the IJC and hold progress hearings. The Canadian Action Plan should form the basis for Canada's contribution to the development of basin-wide plan.</p>
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<p>8. Participation and Engagement in Agreement</p>	<p>Problem: In general, review of the GLWQA has been conducted in an open manner. In their draft review report, ARC recommended that the “public should be consulted in any revision of the Agreement.” The consultation processes thus far have not been based on government proposals for possible revisions. While welcome, public involvement opportunities to date are far less important than the recommendations that CELA makes here.</p> <p>The four mechanisms CELA recommends are the minimum we believe governments should commit to. Such mechanisms have precedents in the 1987 revision of the GLWQA. DOE held 3 public meetings on the Canadian side of the Great Lakes basin on the draft amended agreement. USEPA held 4 public meetings on a similar document. In addition, 5 environmental non-government representatives were appointed as official observers to the negotiations and directly participated in discussions during the formal bilateral negotiating session.</p>	<p>CELA Response: Governments should commit to full public involvement in any significant decisions regarding changes to the GLWQA, including (1) opportunities to comment on advice from DOE and USEPA to DFAIT and the Department of State; (2) opportunities to comment on preliminary positions of DFAIT and State; (3) formal public hearings on a complete draft of proposed revisions to the GLWQA, if it is revised; and (4) formal status as observers at the negotiating table during the negotiations.</p>
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<p>9. Role of the public</p>	<p>Problem: A recurring theme in the 2007 ARC report is the need to include provisions in the GLWQA by which the governments commit to public involvement. The public also should be assured of more meaningful participation in IJC activities. Citizen experts in the appropriate fields should be included on the IJC's existing boards (i.e. Water Quality Board, Science Advisory Board, Council of Great Lakes Research Managers). Also a new citizens' advisory board should be established for the IJC to advise IJC commissioners on the adequacy of government programs to achieve GLWQA goals and to make recommendations on how these programs could be improved. Furthermore, governments should commit through the GLWQA to include the public in meaningful ways in their domestic Great Lakes programs, including committing to set up public advisory committees for their GLWQA-related programs and/or including members of the public on their program steering committees.</p>	<p>CELA Response: A strong role for the public should be included in the Agreement respecting (1) citizen petition mechanisms, (2) public representation on all IJC boards and establishment of a citizens advisory board to the IJC, and (3) creation of public advisory committees for government initiatives or programs related to the Great Lakes, and/or inclusion of the public on program steering committees.</p>
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Many of our positions have been amalgamated from several documents that ENGOs have determinedly put together over the past decade in anticipation of the time when there would be a thorough examination of the GLWQA. These are:

The book *Evolution of the Great Lakes Water Quality Agreement* by Lee Botts and Paul Muldoon published in 2005 by the Michigan State University Press East Lansing;

The Great Lakes Water Quality Agreement Promises to Keep; Challenges to Meet Perspectives from Citizens In Consultation with the Great Lakes Basin's Environmental Community December 2006

http://s.cela.ca/files/uploads/553GLWQA_promises.pdf;

The Future of the Great Lakes Water Quality Agreement: The ENGO Perspective July 2007 endorsed by 65 groups.

http://s.cela.ca/files/uploads/588ENGO_perspective.pdf; and

A Way Forward Strengthening Decision-Making and Accountability under the Great Lakes Water Quality Agreement by John Jackson and Karen Kraft Sloan, published in 2008 by Great Lakes United.

<http://www.glu.org/sites/default/files/Governance%20GLU%20Jan08.pdf>.

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