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Sean P. Gallagher
Indiana University School of Law

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Great Lakes Water Quality Initiative: National Standards Governing a Binational Resource

A Call for International Rulemaking

SEAN P. GALLAGHER*

I. INTRODUCTION

The Great Lakes Water Quality Agreement (Agreement) has been in force for over two decades. The Agreement is a unique arrangement between the United States and Canada for the management of a binational resource as a complete ecosystem. During this time, concerns have been raised that the United States is not committed to full implementation of the Agreement.1 This Note will answer whether the U.S. Environmental Protection Agency (EPA), when promulgating the Great Lakes Water Quality Initiative, honored the binational ecosystem approach articulated in the Agreement.

Although the EPA's rulemaking process for the Great Lakes Water Quality Initiative (GLWQI) was impressive, numerous shortfalls exist. Particularly, neither the International Joint Commission (IJC) nor Canada was involved in the decision-making process. The absence of these two parties produced three distinct defects in the decision-making process: (1) the decisions of the EPA were not entirely consistent with the specific mandate of the Agreement; (2) the United States did not honor the binational approach to the management of the Great Lakes; and (3) the EPA did not attempt to manage the Great Lakes as an ecosystem.

In order to remedy these defects, this Note proposes that the EPA include both the IJC and the Canadian government in any decisionmaking

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* J.D./M.S.E.S. Candidate, 1996, Indiana University, Bloomington; B.S. with Honor, 1992, Michigan State University.

concerning the Great Lakes. This would set the course for true binational management of the Great Lakes. However, this would also result in inefficiencies. As a result, Congress should use its delegation power to establish international rulemaking power in the IJC.

True binational cooperation can only be achieved when the protectionism of national rulemaking is abandoned. The Great Lakes, as one of the world’s greatest natural resources, compel an ecosystem approach to management. For an ecosystem approach to be successful, political boundaries must be set aside and the interests of everyone involved must be considered. This Note proposes that Congress delegate rule-making authority pursuant to the Agreement to the IJC. It is only through international rulemaking that a true binational ecosystem approach can be attained.

II. BACKGROUND

A. The Boundary Waters Treaty of 1909 and the Creation of the International Joint Commission

In 1909, the United States and Great Britain entered into the Boundary Waters Treaty.² The basic purpose was to protect the Great Lakes against unilateral diversions and to secure the right of navigation.³ Significantly, the IJC was created in article VII of the Treaty.⁴ The IJC is composed of six representatives, three from the United States and three from Canada.⁵ The U.S. representatives are appointed by the President, while the Canadian representatives are appointed by the Canadian government.⁶ The IJC purportedly functions as a “single body seeking common solutions to the joint interests of the two countries. All Commissioners are expected to act independently of their respective national concerns.”⁷

⁴ Boundary Waters Treaty, supra note 2, art. VII, 36 Stat. at 2451, T.S. No. 548, at 5.
⁶ Id.
⁷ Id.
As articulated within the Boundary Waters Treaty, the IJC has three primary responsibilities: (1) to approve applications for the obstruction or diversion of water that would affect the level or flow of the Great Lakes; (2) to conduct studies of specific problems upon request from either government (references); and (3) to arbitrate specific disputes that may arise between the two governments.8

In 1964, both the United States and Canada requested that the IJC conduct a study, pursuant to its reference power, concerning the pollution problems of the lower Great Lakes.9 Six years later, the IJC issued the Lower Great Lakes Pollution Reference,10 identifying phosphorus loading as the principal cause of eutrophication in the Great Lakes.11 Most notably, the IJC’s report declared Lake Erie a “dead lake.”12 The discoveries from the pollution reference prompted the IJC’s recommendation to establish an integrated system of phosphorous control between the United States and Canada.13 The IJC’s direction “laid the foundation for the first Great Lakes Water Quality Agreement.”14

8. Id. at 20,819.
11. Proposed Rules, supra note 5, at 20,817. Eutrophication is “the process by which a body of water becomes either naturally or by pollution rich in dissolved nutrients . . . and often shallow with a seasonal deficiency in dissolved oxygen.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 429 (9th ed. 1989).
14. Grancis, supra note 9, at 361.
B. The Great Lakes Water Quality Agreement

1. The 1972 Great Lakes Water Quality Agreement

On April 15, 1972, the United States and Canadian governments entered into the 1972 Great Lakes Water Quality Agreement (1972 GLWQA). The underlying expectation of the 1972 GLWQA was to provide binational management of the Great Lakes, preventing further deterioration of the waters. The 1972 GLWQA’s immediate concern was to reduce the phosphorus levels in the lakes.

Article II of the 1972 GLWQA established “general objectives” for Great Lakes Water Quality. These are narrative statements that generally describe the desired water quality standards. In addition, article III contains “specific objectives” for Great Lakes Water Quality. The specific objectives incorporate both narrative and numerical standards for individual pollutants.

Under the Agreement, the IJC was assigned the power to “assist in the implementation of this Agreement.” The IJC has the ability to exercise any power granted to it under the Boundary Waters Treaty. In addition to the IJC’s role under the Boundary Waters Treaty, the IJC’s responsibilities include, but are not limited to: analyzing information relating to water quality; evaluating the effectiveness of programs; giving recommendations concerning water quality objectives, legislation, and other

17. Id. Phosphorus and other “nutrients” are a principal ingredient in municipal sewage effluent.
19. For example, waters of the Great Lakes System should be “[f]ree from floating debris, oil, scum and other floating materials entering the water as a result of human activity in amounts sufficient to be unsightly or deleterious.” Id.
20. Id. The specific objectives are set forth in annex 1 of the agreement. Id. annex 1, 23 U.S.T. at 324.
21. An example of a narrative standard is “phenols and other objectionable taste and odour producing substances should be substantially absent.” Id. annex 1, 23 U.S.T. at 324. An example of a numerical standard is, “[l]evels [of iron] should not exceed 0.3 milligrams per litre.” Id.
22. Id. art. VI, § 1, 23 U.S.T. at 308.
23. Id. art. VI, § 2, 23 U.S.T. at 309.
regulatory standards; and assisting in the coordination of joint activities.\textsuperscript{24} Except for the coordination of joint activities, the aforementioned responsibilities are consistent with the traditional “references” provided by the Boundary Waters Treaty.\textsuperscript{25}

The 1972 GLWQA established the Great Lakes Water Quality Board (WQB) and the Research Advisory Board.\textsuperscript{26} The WQB, as the principal advisor to the IJC, is responsible for supporting the IJC in the exercise of its powers and obligations.\textsuperscript{27} The Research Advisory Board’s duties included reviewing research activities, providing the IJC with advice on scientific matters, and facilitating cooperation and coordination of research.\textsuperscript{28}

2. The 1978 Great Lakes Water Quality Agreement

In 1977, the United States and Canada began a comprehensive review of the operation and effectiveness of the 1972 GLWQA.\textsuperscript{29} These negotiations resulted in a significant restructuring of the 1972 GLWQA. Even though the 1972 GLWQA proved to be very effective in the reduction of nutrients entering the Great Lakes,\textsuperscript{30} the agreement underestimated the extent of the toxic chemical problem. In the five years following the 1972 GLWQA, toxic chemicals escalated to the forefront of Great Lakes pollution issues.

As a result of the increasing toxic chemical problem, the United States and Canadian governments agreed to revise the 1972 GLWQA.\textsuperscript{31} The purpose of the 1978 Great Lakes Water Quality Agreement (1978 GLWQA) was “to restore and maintain the chemical, physical, and biological integrity

\textsuperscript{24} Id. art. VI, § 1, 23 U.S.T. at 308.
\textsuperscript{27} 1972 GLWQA, supra note 15, art. VII, § 1, 23 U.S.T. at 310.
\textsuperscript{28} Id. Terms of Reference for the Establishment of a Research Advisory Board, § 2, 23 U.S.T. at 346.
\textsuperscript{29} Id. art. IX, § 3, 23 U.S.T. at 311.
\textsuperscript{30} Proposed Rules, supra note 5, at 20,818.
\textsuperscript{31} See 1978 GLWQA, supra note 26, 30 U.S.T. at 1383.
of the waters of the Great Lakes Basin Ecosystem."\textsuperscript{32} The 1978 GLWQA shifted the focus from nutrients to toxic substances, calling for the "virtual elimination of the discharge of persistent toxic chemicals."\textsuperscript{33}

Article IV of the 1978 GLWQA established "specific objectives" for the Great Lakes System.\textsuperscript{34} These specific objectives represent the minimum levels of water quality desired in the Great Lakes.\textsuperscript{35} In addition, annex 10 established two lists, one involving hazardous substances \textit{known} to have toxic effects on aquatic and animal life,\textsuperscript{36} and the second consisting of "\textit{potential[ly]} hazardous polluting substances."\textsuperscript{37} Programs in both the United States and Canada must be developed to minimize or eliminate the release of such substances.\textsuperscript{38} The parties are required to consult "from time to time for the purpose of revising the list of hazardous polluting substances and of identifying harmful quantities of these substances."\textsuperscript{39}

The second major change found in the 1978 GLWQA is the addition of the term "Great Lakes Basin Ecosystem,"\textsuperscript{40} defined in article I as "the interacting components of air, land, water and living organisms, including man . . . ."\textsuperscript{41} This expansion to the 1972 GLWQA was a crucial breakthrough in the binational management strategy. The parties recognized that the "restoration and enhancement of the boundary waters can not be achieved independently of other parts of the Great Lakes Basin Ecosystem with which these waters interact."\textsuperscript{42}

\begin{itemize}
    \item [32.] \textit{Id.} art. II, 30 U.S.T. at 1387.
    \item [33.] \textit{Proposed Rules, supra} note 5, at 20,818.
    \item [34.] Article IV of the 1978 GLWQA replaced article III of the 1972 GLWQA. The specific objectives are set forth in annex I. Annex 1 of the 1972 GLWQA was completely replaced by a revised annex 1, which focused on toxic chemicals. \textit{See} 1978 GLWQA, \textit{supra} note 26, annex 1, 30 U.S.T. at 1415. An example of a specific standard is: "The concentration of total arsenic in an unfiltered water sample should not exceed 50 micrograms per liter to protect raw waters for public water supplies." \textit{Id.} annex 1, 30 U.S.T. at 1416.
    \item [35.] \textit{Id.} art. IV, § 1(a), 30 U.S.T. at 1388. The goal of the 1978 GLWQA is the virtual elimination of toxic chemical discharge into the Great Lakes. Therefore, the Specific Objectives relating to toxic discharges, which set specific standards, are "interim objectives," in effect until the elimination of such discharges can be accomplished.
    \item [36.] This list is known as appendix 1 of the 1978 GLWQA. \textit{Id.} annex 10, § 1(a), 30 U.S.T. at 1435 (emphasis added).
    \item [37.] \textit{Id.} app. 2, 30 U.S.T. at 1442 (emphasis added).
    \item [38.] \textit{Id.} annex 10, § 1(d), 30 U.S.T. at 1435.
    \item [39.] \textit{Id.} annex 10, § 1(j), 30 U.S.T. at 1392.
    \item [40.] \textit{Id.} art. II, 30 U.S.T. at 1387.
    \item [41.] \textit{Id.} art. I, 30 U.S.T. at 1385.
    \item [42.] \textit{Id.} pmbl., 30 U.S.T. at 1384.
\end{itemize}
3. 1987 Protocol Amending the 1978 Great Lakes Water Quality Agreement

The IJC, pursuant to the 1978 GLWQA, is mandated to make biennial reports to the United States and Canadian governments concerning the progress of the goals and objectives stated therein. Furthermore, the governments of each country were required to conduct a comprehensive review of the 1978 GLWQA following the third biennial report of the Commission.

The third biennial report of the IJC was issued in 1986. As a result, the parties entered into a comprehensive review of the agreement. Thereafter, the 1978 GLWQA was amended by protocol in 1987, with no major changes to the basic structure.

Nonetheless, the 1987 Protocol created two additional programs. First, the amendments required the implementation of Remedial Action Plans (RAPs). RAPs are programs designed to deal with “toxic hotspots that require immediate attention.” Second, the Protocol introduced the establishment of Lakewide Management Plans for all the Great Lakes. The Protocol continued to emphasize the ecosystem approach mandated by the 1978 GLWQA by stating that “Remedial Action Plans and Lakewide Management Plans shall embody a systematic and comprehensive ecosystem approach to restoring and protecting beneficial uses.”

More meaningful to this discussion, the 1987 Protocol redefined the roles of the two countries. It shifted responsibility from the IJC to the

43. Id. art. VII, § 3, 30 U.S.T. at 1394 (under the 1972 GLWQA the IJC was required to report annually).
44. Id. art. X, § 3, 30 U.S.T. at 1396.
47. Id.
49. Lake Michigan is entirely within the boundary of the United States and therefore the United States has the sole responsibility for developing its Lakewide Management Plan. The United States and Canada are jointly responsible for developing the plans for the other lakes. 1987 Protocol, supra note 46, art. VIII, T.I.A.S. No. 11,551, at 10 (amending annex 2 of the 1978 GLWQA).
50. Id. at 8.
51. See Proposed Rules, supra note 5, at 20,818.
parties to facilitate coordination of the 1978 GLWQA. The parties are required to meet at least once every two years for the purpose of establishing new or modifying the existing specific objectives. During the creation or modification of the specific objectives, the parties are to "be guided" by the list established in annex 10.

C. The 1987 Water Quality Act and the 1990 Critical Programs Act

The Water Quality Act of 1987 amended the Clean Water Act. According to legislative history, the amendments were enacted to provide a federal statutory requirement for the implementation of the 1978 GLWQA. Specifically, section 118 pertains to the Great Lakes, the purpose of which is "to achieve the goals embodied in the Great Lakes Water Quality Agreement of 1978."

In addition, the Water Quality Act permanently established the Great Lakes National Program Office (GLNPO). This office serves as the liaison to Canadian members of the IJC and the Canadian counterpart to the EPA. Furthermore, the GLNPO must implement and carry out the responsibilities of the United States under the 1978 GLWQA, as amended by the 1987 Protocol.

In 1990, the United States Congress passed, and former President Bush signed into law, the Great Lakes Critical Programs Act (CPA), amending section 118 of the Clean Water Act. The CPA was enacted to codify the

52. Telephone Interview with Jim Giattina, Deputy Director, Great Lakes National Program Office (Mar. 8, 1994) [hereinafter Telephone Interview].
54. Id. Annex 10 contains lists of hazardous polluting substances.
62. "Passage of this bill is an indication that the Congress shares my commitment to protecting the environment and my desire to clean up and maintain these bodies of water that are important recreationally and historically to the people of the United States and Canada." 26 WEEKLY COMP. PRES. DOC. 1849, reprinted in 1990 U.S.C.C.A.N. 4286-1 (statement by President Bush).
ongoing efforts of the EPA regarding the creation of water quality standards.\textsuperscript{64} Congress’s intent was “to incorporate general and specific objectives of the Agreement into the programs for development and implementation of water quality standards under the Federal Water Pollution Control Act.”\textsuperscript{65}

The CPA created programs to implement the RAPs and the Lakewide Management Plans created by the 1987 Protocol.\textsuperscript{66} In addition, the CPA required the Administrator of the EPA to publish proposed water quality guidelines for the Great Lakes System.\textsuperscript{67} The CPA mandated that the guidelines conform to the provisions of the 1978 GLWQA, as amended by Protocol in 1987.\textsuperscript{68}

III. THE IMPLEMENTATION OF THE GREAT LAKES WATER QUALITY AGREEMENT

A. Organization and Structure

In 1971, the EPA established the Large Lakes Research Station at Grosse Ile, Michigan.\textsuperscript{69} This was the first official “program” aimed at the Great Lakes.\textsuperscript{70} During the mid 1970s, the major focus of Great Lakes research was on eutrophication problems. The focus of the research shifted in the late 1970s to formation of models analyzing PCBs, heavy metals, and other toxic chemicals.\textsuperscript{71} To coordinate U.S. activities pursuant to the Agreement, GLNPO was established by the EPA in 1977.\textsuperscript{72} GLNPO is the

\textsuperscript{64}. Proposed Rules, supra note 5, at 20,823. The Great Lakes Water Quality Initiative is further discussed in part III.B. of this paper.


\textsuperscript{66}. Id. at 9, reprinted in 1990 U.S.C.C.A.N. at 4282.

\textsuperscript{67}. 33 U.S.C. § 1268(c)(2)(A) (Supp. 1992). As a result of this requirement, the EPA created the Great Lakes Water Quality Initiative. The proposed rules were not published until April 16, 1993, almost two years after the statutory deadline.

\textsuperscript{68}. Id.


\textsuperscript{70}. Id.

\textsuperscript{71}. Id. at 5-6.

\textsuperscript{72}. Id. at 97 (statement of Lee M. Thomas, Administrator, United States Environmental Protection Agency).
focal point for coordinating EPA efforts with all other entities that are working on Great Lakes issues.\textsuperscript{73}

The U.S. Policy Committee is composed of a consortium of federal agencies, states, and EPA Regions dedicated to implementing the Agreement.\textsuperscript{74} The U.S. Policy Committee was responsible for developing objectives and strategies for the GLNPO and overseeing the implementation of the GLWQA.\textsuperscript{75}

Prior to the 1987 Protocol, there was no official requirement that the U.S. and Canadian governments organize meetings to coordinate the implementation of the Agreement. The IJC’s role was to facilitate coordination between the parties. However, as part of the 1987 Protocol, emphasis shifted to the individual countries. The 1987 Protocol stated that “[t]he parties, in cooperation with State and Provincial governments, shall meet twice a year to coordinate their respective work plans with regard to the implementation of this Agreement and to evaluate progress made.”\textsuperscript{76} Additionally, the supplement to annex 1 requires the parties to meet a minimum of twice a year to establish or modify “specific objectives” pursuant to article IV of the 1978 GLWQA.\textsuperscript{77}

As a result, in 1988 the United States and Canada established the Binational Executive Committee (BEC) to fulfill the requirements of the 1978 GLWQA as amended by the 1987 Protocol.\textsuperscript{78} The BEC operates independently of the IJC,\textsuperscript{79} and its purpose is to guide the implementation of binational activities by establishing priorities and reviewing the progress of the programs.\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Great Lakes Water Quality Issues: Hearing Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation, 101st Cong., 2d Sess. 12-13 (1990) (statement of Valdas V. Adamkus, Regional Administrator, Region V, Environmental Protection Agency) [hereinafter Water Quality Issues].
\item \textsuperscript{75} The U.S. Policy Committee has not convened for several years. Currently, there is a proposal being considered at the EPA to create the Great Lakes Executive Council. This Council would replace the U.S. Policy Committee. Its responsibilities would be similar to the U.S. Policy Committee; however, it would consist of higher ranking governmental officials. Telephone Interview, supra note 52.
\item \textsuperscript{76} Revised Great Lakes Water Quality Agreement of 1978, as amended by Protocol signed Nov. 18, 1987, consolidated by the International Joint Commission, (Sept. 1989), art. X, § 3, 18 [hereinafter Revised 1978 GLWQA].
\item \textsuperscript{77} Id. supp. to annex 1, § 2(a), at 29.
\item \textsuperscript{78} Telephone Interview, supra note 52.
\item \textsuperscript{79} Id. The BEC is co-chaired by the Regional Administrator of Region V, EPA, and the Director General of Ontario, Environment Canada. Id.
\item \textsuperscript{80} Minutes from the Eighth Meeting of the Parties in Cooperation with State and Provincial
\end{itemize}
The BEC created the Binational Operations Committee (BOC), which has the responsibility to plan and coordinate programs that the BEC labels as priorities. The BOC comprises various committees. One such subgroup is the Binational Objectives Development Committee (BODC). The BODC was created to facilitate cooperation in establishing criteria pursuant to article IV of the 1978 GLWQA.

These organizations were created to foster a spirit of cooperation between the United States and Canada. As a result, a framework was established to facilitate interaction and teamwork. Decisions made by either country concerning the Great Lakes run through this framework.

B. The Clean Water Act and the Great Lakes Water Quality Initiative

Prior to the GLWQI, the Great Lakes were subject to National Water Criteria, which were applicable to all waters in the United States. Under the Clean Water Act, the EPA publishes National Water Criteria and the states are required to set standards that are consistent with such criteria. The EPA has the authority to reject state standards, and eventually promulgate individual standards if such state standards are inadequate.

In 1989, the EPA recognized the unique status of the Great Lakes. It acknowledged that the "implementation of the Agreement has been hindered by lack of consistent water quality criteria and guidance specific for the Great Lakes Basin." Using authority under section 304(a) of the Clean Water Act, the EPA decided to develop a "subchapter" to the

81. Id.
82. Id.
83. Id.
84. The requirements of article IV are set out in annex 1 of the 1978 GLWQA, as amended by the 1987 Protocol. 1978 GLWQA, supra note 26, 30 U.S.T. at 1415-20.
86. Id.
87. Id.
89. Section 304(a) requires the Administrator of the EPA to publish criteria for water quality that accurately reflect the latest scientific knowledge. Clean Water Act § 304(a), 33 U.S.C. § 1314(a) (1988).
National Criteria pertaining to the Great Lakes. Thus, the EPA began the long process of developing the GLWQI. The criteria for the Great Lakes are formulated in the GLWQI. These standards will be used as a basis for revising the state water quality standards during the next triennial review, as required by section 303(c) of the Clean Water Act.

In 1990, Congress passed the Great Lakes Critical Programs Act. The purpose of this act was to codify the ongoing efforts of the EPA in developing the GLWQI. Congress essentially compelled the establishment of criteria unique to the Great Lakes. It was Congress's clear intent that the GLWQI contain criteria consistent with the Agreement. Thus, the GLWQI's explicit purpose was to integrate the requirements of the Clean Water Act and the 1978 GLWQA, as amended by the 1987 Protocol.

Directed by federal statute, the EPA continued the process of establishing Great Lakes Water Quality Criteria. The EPA determined that the numerical criteria developed under the GLWQI will be submitted to the BODC as the U.S. "proposal" for specific objectives.

C. Administrative Process Used to Develop the Great Lakes Water Quality Initiative

The EPA prepared a discussion paper entitled Implementation of the Clean Water Act in Support of the Great Lakes Water Quality Agreement, which recognized the need to create the GLWQI. A concept paper created in June 1989 established three committees to conduct work under the GLWQI. First, the Steering Committee was created to head the

90. Id.
91. See generally Proposed Rules, supra note 5.
92. Each state shall hold hearings, at least every three years, "for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards." Clean Water Act § 303(c)(1), 33 U.S.C. § 1313 (c)(1) (1988).
93. This Act was passed one year after the process to develop the GLWQI began.
94. Proposed Rules, supra note 5, at 20,823.
97. Id.
99. Id. at i.
100. Id. at 4.
development process. This committee consists of the Water Program Directors for the eight Great Lakes states and representatives from regional and national EPA offices. The committee discussed and made final determinations concerning scientific and policy-related issues.

Second, the Technical Work Group was established to prepare the technical proposals that were submitted to the Steering Committee. The Technical Work Group consists of technical staff from the environmental agencies of each of the Great Lake states, the EPA, the U.S. Fish and Wildlife Service, and the National Park Service.

The final committee created was the Public Participation Group consisting of representatives from environmental groups, municipalities, industry, and academia. The responsibilities of the Public Participation Group were advising the committees of the public’s concerns and keeping their various constituencies updated on the activities.

This system received numerous compliments for the continued involvement of the states and interest groups throughout the process. Mark Van Putten, a co-chair of the Public Participation Group states, "[i]n my 15 years as an environmental activist, this is absolutely the fairest and the most open government decision-making process in which I have ever participated." However, despite this praise, the EPA included neither the Canadian government nor the IJC in the process. The Great Lakes are a binational resource, located on the U.S.-Canadian border; therefore there should be binational cooperation. In addition, the IJC is the leading expert on Great Lakes issues, and is required by the 1978 GLWQA to assist in the implementation of the agreement. Although the process seems fair and honest from the point of view of those involved, it does not include everyone affected by the decisions.

102. The eight Great Lakes states are Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.
103. Proposed Rules, supra note 5, at 20,820.
104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
IV. ANALYSIS OF THE PROCEDURE UTILIZED BY THE ENVIRONMENTAL PROTECTION AGENCY IN THE PROMULGATION OF THE GREAT LAKES WATER QUALITY AGREEMENT

A. The Procedure Followed by the EPA Resulted in Inconsistencies with the Great Lakes Water Quality Agreement

Disputes have occurred within the EPA and also between the EPA and the Department of State as to the legal significance of the 1978 GLWQA, as amended by Protocol in 1987. However, as a result of the CPA, Congress has mandated that the requirements of the Agreement are binding as federal law. Congress’s intent when passing the CPA was to codify the requirements of the 1978 GLWQA into federal law. Additionally, the CPA explicitly authorizes the EPA to promulgate guidance that is consistent with the 1978 GLWQA, as amended by 1987 Protocol.

The proposed GLWQI would result in significant progress in the U.S. efforts to implement the 1978 GLWQA. However, the proposed rules fall short of the federal mandate requiring consistency with the Agreement in several ways. First, no provision in the GLWQI requires the phasing out of the use of persistent toxic chemicals. The GLWQA commands the virtual elimination of toxic chemicals from the Great Lakes. Specifically, “the philosophy adopted for control of inputs of persistent toxic

110. According to a Congressional Research Service report, under international law, specifically the Vienna Convention on the Law of Treaties, agreements are considered binding as treaties. Agreement Hearing, supra note 69, at 108 (statement of Hon. James L. Oberstar, Chairman Subcomm. on Investigations and Oversight). However, many EPA officials, including former EPA General Counsel Joan Bernstein, have concluded that the Agreement does not bind the EPA. Implementation Hearing, supra note 1, at 13 (statement of Mark Van Putten, Director, Great Lakes Natural Resources Center, National Wildlife Federation).


114. NATIONAL WILDLIFE FEDERATION, A CITIZENS GUIDE TO THE GREAT LAKES WATER QUALITY INITIATIVE at ii (Sept. 13, 1993).

substances shall be zero discharge." The proposed EPA regulations are not based upon a zero discharge theory; therefore, the rules will not advance the goal of virtual elimination of toxic chemicals in the Great Lakes. As stated in the Agreement, the specific objectives for toxic chemicals are merely interim objectives; the final goal is the virtual elimination of toxic chemical discharge.

Second, although the GLWQI contains a list of "pollutants of initial focus," the list is incomplete because it omits pollutants that have serious impacts on the Great Lakes ecosystem. The 1978 GLWQA contains a list of "hazardous polluting substances." The parties to the Agreement are required to "[d]evelop and implement programs and measures to minimize or eliminate the risk of release of hazardous polluting substances to the Great Lakes System." However, the EPA failed to include in the GLWQI all the chemicals listed as hazardous polluting substances specified in the 1978 GLWQA. This list of hazardous polluting substances must be considered in the development of the specific objectives under the Agreement.

Although the GLWQI takes great strides toward the implementation of the 1978 GLWQA, it does not fully satisfy the objectives of the Agreement. Problems of implementation occur due to the protectionism of the rulemaking process. Significantly, Canada was not involved in the promulgation of rules, and was thus unable to protect its interests. Additionally, the IJC, whose delegated responsibility is to assist in the implementation of the 1978 GLWQA, was neither present nor consulted in the determination of whether the proposed rules satisfied the requirements of the Agreement.

116. Id. annex 12, § 2(a)(ii), at 70.
117. NATIONAL WILDLIFE FEDERATION, supra note 114, at 10.
118. Revised 1978 GLWQA, supra note 76, supp. to annex 1, § 1(a), at 29.
119. NATIONAL WILDLIFE FEDERATION, supra note 114, at 6.
120. Id.
121. Revised 1978 GLWQA, supra note 76, annex 10, § 1(a), at 56.
122. Id. annex 10, § 1(d), at 56.
123. NATIONAL WILDLIFE FEDERATION, supra note 114, at 6.
124. See Revised 1978 GLWQA, supra note 76, annex 10, at 56.
125. NATIONAL WILDLIFE FEDERATION, supra note 114, at 9.
B. The Binational Strategy of Cooperation Mandated by the 1978 GLWQA Was Disregarded

Under the 1978 GLWQA, it is the IJC’s responsibility to assist in the implementation of the Agreement. As a result, the IJC has become the leading expert in the area of ecosystem management of the Great Lakes. The Commission is composed of members from both the Canadian and United States governments, working together to meet the common goals of the Agreement.

The IJC’s duties include providing assistance in the coordination of joint activities. However, the IJC was not involved in the promulgation of the GLWQI—it was overlooked. The IJC was not invited to attend meetings, nor was it consulted when questions concerning the implementation of the Agreement arose. The IJC was minimally informed about the proposed rules and was not given an opportunity to participate.

Additionally, the 1987 Protocol, which amended the 1978 GLWQA, established explicit requirements for binational cooperation in the implementation of the Agreement. This cooperation includes the development and revision of specific objectives mandated by article IV. The BODC was established to coordinate a binational approach to the creation of specific water criteria. Although the BODC was informed of the status of the process when the EPA proposed the GLWQI, it was not consulted regarding the specific standards of the proposed rules.

The Canadian government expressed concern over the absence of binational cooperation in the promulgation of the proposed rules. “[T]he Canadian members of the BODC believe that the process outlined in the

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126. Revised 1978 GLWQA, supra note 76, art. VII, § 1, at 15.
127. Id. art. VII, § 1(e), at 15.
128. Telephone Interview, supra note 52.
129. Article X, § 3 requires the parties to meet twice a year to coordinate their respective work plans with regard to the implementation of the Agreement. Revised 1978 GLWQA, supra note 76, art. X, § 3, at 18. Additionally, the supplement to annex 1 requires that the parties meet at least twice a year to establish or modify specific objectives. Id. supp. to annex 1, § 2(a), at 29.
130. See id.
Great Lakes Water Quality Initiative for the development of water quality standards runs counter to the spirit of cooperation of the BODC."

When the United States, through the EPA, develops criteria independently of the Canadian government, the United States creates a risk of inconsistency and incompatibility of the regulations. This fear was expressed by a Canadian representative who said, "it is essential that [Canada] be given time to evaluate and negotiate the criteria numbers being developed by the initiative and that they take strong exception to anything that places them in a position of being confronted by a fait accompli from the U.S. side.""

The rules promulgated by the EPA would eventually be submitted to the BODC as the United States' proposal for specific objectives, but, is this really a true proposal? Administratively, once the EPA completes the rule-making process and establishes regulations, the likelihood of changes to the regulations is nil. As the Canadians feared, this is a fait accompli by the EPA.

The Canadian government was invited to participate in the GLWQI process as an observer. The EPA believed that "[p]articipation by Canada in the GLI [sic] through observer status [would] facilitate data sharing and input of Canadian expertise, [would] help Canada maintain full knowledge of the process and information used in developing the Great Lakes specific guidance, and [would] provide an opportunity for raising differences of opinion should they develop." However, this forces the Canadian government to compete with numerous U.S. companies and environmental groups for a limited time to speak and present its views in front of the Public Participation Group. Although the Canadian government was allowed to observe in the promulgation of the GLWQI, this was nothing but an external expression of courtesy by the EPA. Canada had no influence over the decision-making process, which runs counter to the explicit requirements of the Agreement.

133. Minutes, supra note 80 (statement by Gerald Rees, Ontario Provincial Representative).
135. Id.
136. The Canadian Government declined the invitation to participate as an observer in the process.
A Canadian official has expressed the need to involve the Canadian government in the decision-making process. "We think that it would be much more preferable for Canada and the United States to develop objectives by working together at each step of the process rather than negotiating the acceptance of modification of one or the other's product which may have been derived differently." Not only did the EPA ignore the mandate of the Agreement, but it also ignored the pleas of our northern neighbor.

In order to fully achieve the goals pursuant to the Agreement, there must be planning and coordination between all parties that influence the Great Lakes Basin Ecosystem. The Agreement commands an ecosystem approach to the management of the Great Lakes. "[W]e share the Lakes with our neighbors to the North. The criteria should be consistent across boundaries if we are going to achieve our goals." Therefore, the EPA failed to fulfill its mandate for binational cooperation concerning such an important binational resource.

C. The GLWQA Concept of Ecosystem Management Was Absent

The theory of an "ecosystem" has developed over many years. The pioneering limnologist, E.A. Birge, was one of the first to put forward an integrated view of a lake as a system: "a view of a lake, or of its plankton community, as a unit whole, a water-cosmos, a complex, interlocking network of physical, chemical and living process, yet subject to general laws which should not be beyond the wit of man to discover." Much time and effort has been spent by the United States and the Canadian governments to discover the "general laws" about which E.A. Birge wrote. This research has evolved into the concept of the Great Lakes Ecosystem.

[T]he Great Lakes system does not exist as a group of isolated lakes. The slow-paced, but determined flow of the Upper to the Lower Lakes means that the actions of one will someday impact

137. Letter from D. Egar, Regional Director Counsel, Environment Canada, to Valdas V. Adamkus, Regional Administrator, Region V, Environmental Protection Agency (Nov. 14, 1989) (on file in the EPA GLWQI Public Docket).
139. NATIONAL RESEARCH COUNCIL, supra note 25, at 28.
upon its neighbor, and upon its neighbor, and so on throughout the system. Our countries must understand that contamination does not recognize international borders.  

The need for an ecosystem approach to management of the Great Lakes was expressed in a report by the Research Advisory Board:

[...]he accent on water quality in the Boundary Waters Treaty of 1909 and the accent on water quality objectives in the Great Lakes Water Quality Agreement have, in the absence of an ecosystem approach, unduly constrained the parties and the Commission from attaining the desired goal... Adoption of the ecosystem approach will relieve these constraints, facilitating the restoration and enhancement in perpetuity of the quality of boundary waters.

This report launched the beginning of the development of the Great Lakes Ecosystem Approach. The governments of the United States and Canada, in the 1978 GLWQA, agreed to pursue an ecosystem management policy for the Great Lakes. This was the first international agreement to "embrace the ecosystem approach to the management of large regional resources." The purpose of the 1978 GLWQA was "to restore and maintain the... integrity of the waters of the Great Lakes Basin Ecosystem." The purpose behind this policy was to cross political boundaries and work together across the entire ecosystem. The Great Lakes cannot be treated as bordering only one shore. In order to effectively manage such a large resource, the cooperation must be immense. This ecosystem approach requires the governments of the United States and Canada to work together to develop criteria and plans.

Only through this spirit of cooperation can a true ecosystem approach be attained. Simultaneously viewing the Great Lakes from both shores will result in management strategies that will complement each other, management strategies that will take into consideration the differences of the

143. NATIONAL RESEARCH COUNCIL, supra note 25, at 105.
144. Revised 1978 GLWQA, supra note 76, art. II, at 7.
entire ecosystem, and management strategies that will look to the benefit of the whole and not just a single shoreline view.

Pollution does not recognize international borders. As a result, contaminants released from the Canadian side of the lakes have a direct impact on U.S. Great Lakes policy. In order to best formulate a management strategy, analysis must be made of all contaminants being released into the Great Lakes Basin. The negative effect of pollution in the Great Lakes is a result of the cumulative effects of contaminants released by both the United States and Canada. Therefore, in order to pursue an ecosystem approach, both countries must be aware of the activities on the other shore.

V. RECOMMENDATIONS

A. The Environmental Protection Agency, in Future Rulemaking, Must Allow the Canadian Government and the IJC an Opportunity to Participate in the Decision-Making Process

Neither the IJC nor the Canadian government was involved in the decision-making process of the promulgation of the proposed rules. As a result, three major deficiencies occurred in the process: (1) failure to achieve the specific requirements of the GLWQA; (2) failure to follow the approach of binational cooperation; and (3) failure to manage the Great Lakes as an ecosystem.

To correct these defects, the EPA should allow the Canadian government and the IJC an opportunity to participate in the decision-making process. Three actions are required in order to achieve this cooperation: (1) the EPA must create a seat on the Steering Committee for an appointed member of the IJC; (2) the EPA must create a seat on the Technical Committee for a member of the IJC’s Science Advisory Board; and (3) the EPA Steering Committee must consult with the Canadian government before making decisions.

It is the IJC’s role to “assist” in implementing the 1978 GLWQA. The IJC’s responsibilities include analyzing the effectiveness of programs and tendering advice and recommendations involving regulatory

145. Id. art. VII, § 1, at 15.
standards. It is impossible to fulfill these requirements when the IJC is not involved in the decision-making process. It is well settled that the IJC is the leading expert in the field of Great Lakes Ecosystem Management. It has the necessary practical experience on how best to implement the 1978 GLWQA. This experience and expertise would be very beneficial to the Steering Committee as it directs the development of the proposed rules.

In addition, the Science Advisory Board (SAB) is the scientific advisor to the IJC. The SAB’s duties include advising jurisdictions of relevant research needs and promoting coordination in the research and development of scientific data. The Technical Committee will benefit from the SAB’s knowledge and experience.

The members of these two seats would serve as ombudsmen for the Great Lakes. These two members would represent the Agreement, and it would be their job to point out possible violations of the Agreement that may arise throughout the development of the proposed rules. An ombudsman would serve as "a signal to the Great Lakes communities that the area must be treated as a basin-wide ecosystem and that the Agreement will be enforced on a basin-wide basis."

Additionally, the Steering Committee should formally meet with a Canadian assembly in order to discuss the rules before they are proposed. The Great Lakes are a binational resource necessitating the involvement of Canada in any decision regarding management of the resource. “If consultation with foreign counterparts promises to yield information of use to an agency in its policymaking functions, then that behavior legitimately forms part of agency practice.”

The issues presented by the Great Lakes are analogous to the issues confronting international air transportation, where the Second Circuit has recognized the need to consult with foreign countries. The court stated, “there is an obvious need for cooperation, coordination and mutual agreement regarding the regulation of scheduled and charter services among

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146. Id.
147. Id. Terms of Reference, at 82.
148. Id. at 83.
149. See Weiss, supra note 3, at 384-85.
150. Id. at 385.
the countries in international air transportation," recognizing the need for cooperation to protect safety. Since the Great Lakes also have potential health and safety effects on citizens of both Canada and the United States, increased cooperation is a necessity. Each country has rules and regulations affecting the management of the Great Lakes. Thus, no agency should "be expected to insulate itself from knowledge of the policies and preferences of foreign counterpart agencies."

The Administrative Procedure Act (APA) does not prevent an agency from consulting with a foreign government. However, concerns may arise that if an agency reaches a decision or compromise with a foreign agency, it would then be difficult for that agency to depart from such a compromise. This is a legitimate concern. Nevertheless, if an agency operates in good faith, then such problems will not arise. In the current situation, after the Steering Committee consults with its Canadian counterpart, the rules still must be published in the Federal Register and made subject to public comments. This is the necessary check to make sure that the agency is still open to the opinions of private interest groups.

When the EPA consults with Canada, an additional issue may arise concerning the procedure of the meetings. In order to address concerns relating to an outside advisory group, Congress, in 1972, passed the Federal Advisory Committee Act (FACA). The FACA requires that notice for all advisory committee meetings be published in the Federal Register, and that such meetings be open to the general public. In addition, "the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents" must be made available for public inspection and copying. Consequently, the issue arises as to whether these meetings must conform to the FACA.

The FACA defines an advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group" that was established for the purpose of rendering advice or

153. Id. at 746.
154. Berman, supra note 151, at 743.
155. See generally id.
156. Id. at 770.
158. Id.
159. Id. § 10(b).
recommendations. Under this definition, it would appear as if the Canadian delegation were operating as an advisory committee. However, the Supreme Court limited the applicability of FACA in *Public Citizen v. U.S. Dep’t of Justice.* The Court stated that FACA cannot be interpreted “to cover every formal and informal consultation between the President of an Executive agency and a group rendering advice.” The Court suggests that the FACA is applicable only to Advisory Committees that were established by the agency for that specific purpose. Under this definition, the Canadian government is not an advisory committee.

The Steering Committee should provide for binational meetings in which the Canadian government could give advice and recommendations prior to the publication of the proposed rules. This would give the Canadian government a chance to express its concerns and negotiate a compromise. Thereafter, the proposed rule would be published in the Federal Register and any private individual could comment on such proposed rules. Through the involvement of the IJC and the Canadian government, the flaws in the EPA rulemaking process can be alleviated.

### B. Congress Should Delegate Future Rulemaking Authority to the IJC

The procedural protection proposed in the preceding section would further the goal of a binational ecosystem approach to the Great Lakes. Nevertheless, there is a better organization in which to conduct rulemaking pursuant to the 1978 GLWQA. Under the current procedure, only the Environmental Protection Agency is involved. The EPA could remedy this situation by implementing this Note’s recommendation. However, the result would involve three separate organizations attempting to work together to promulgate a rule, which would lead to an inefficient decision-making process. This inefficiency can be avoided by having Congress delegate rulemaking authority to the IJC.

160. *Id.* § 3(2).
162. *Id.* at 453.
163. *Id.* at 455-67. Note, however, three justices in *Public Citizen* found that advisory committees could arise as a result of continual advisement. *Id.* at 477. There remains doubt today as to whether FACA applies to advisory committees that were not established by the agency itself. See Michael H. Cardozo, *The Federal Advisory Committee in Operation*, 33 ADMIN. L. REV. 1, 28 (1981).
Canada and the United States requested the first study of the Great Lakes in 1912. At that time, the IJC was not a scientific expert on Great Lakes issues. However, through the years the IJC gained the experience and background necessary to promulgate rules concerning the Great Lakes.

The 1972 GLWQA developed the WQB and the Research Advisory Board (later the Science Advisory Board). These Boards published numerous reports and conducted several studies concerning the Great Lakes. The IJC has been studying the Great Lakes since 1912, and its two boards have been conducting studies since 1972. Consequently, the organization has developed scientific expertise and has acquired experience in dealing with Great Lakes Management.

The IJC is a unique organization comprising delegates from both the United States and Canada. These members function together as a single body seeking common solutions to the management of the Great Lakes ecosystem. They are expected to set aside political boundaries and work together to establish the best management strategy for the Great Lakes.

For this reason, this Note proposes that the U.S. Congress delegate future rulemaking, pursuant to the 1978 GLWQA, to the IJC. The IJC has authority under the 1978 GLWQA to assist in the implementation of the Agreement. Similarly, the IJC has the responsibility of:

[t]endering of advise [sic] and recommendations to the Parties and to the State and Provincial Governments on problems of and matters related to the quality of the boundary waters of the Great Lakes System including specific recommendations concerning the General and Specific Objectives, legislation, standards and other requirements, programs and other measures, and intergovernmental agreements relating to the quality of these waters.

Compatible with the explicit authority granted to the IJC, the United States could request that the IJC prepare a Reference concerning the “specific objectives, legislation, and standards” necessary to implement the 1978

164. The issue of Great Lakes pollution was referred to the IJC in 1912. The final report was issued in 1918. The IJC found that the connecting channels and rivers were foul, unsightly, and polluted. NATIONAL RESEARCH COUNCIL, supra note 25, at 20.
166. Id. art. VII, § 1(c), at 15 (emphasis added).
GLWQA in the United States. Congress, by amending the Clean Water Act, has the power to delegate authority to the IJC to prepare a Reference. Consequently, this reference would become binding U.S. law upon completion.

The three basic problems that result from the EPA procedure would be avoided. First, since the IJC is the leading expert on the Great Lakes, and since it is the IJC's responsibility to "assist" in the implementation of the Agreement, it is more likely to assure that the regulations are consistent with the 1978 GLWQA, as amended by the 1987 Protocol.

Second, the lack of binational representation would be rectified. The IJC is composed of members from both Canada and the United States working together to execute the obligations of the GLWQA. Having members from both governments will facilitate cooperation and ensure that all concerns surrounding Great Lakes management are considered.

Finally, regulations that follow the ecosystem mandate of the 1978 GLWQA will only be produced when the ecosystem as a whole is considered. The IJC, as a binational organization, will not be hindered by the apparent differences in management strategies between the countries. It can successfully develop regulations that are best for the entire ecosystem and not just a single country.

The IJC is well equipped to operate a rule-making process. Pursuant to the GLWQA, the IJC has various explicit powers:

In the discharge of its responsibilities under this Reference, the Commission may exercise all of the powers conferred upon it by the Boundary Waters Treaty and by any legislation passed pursuant thereto including the power to conduct public hearings and to compel the testimony of witnesses and the production of documents.167

The IJC has proved in the past that it is successfully able to involve the public in its decision-making process.168 After the IJC receives a request for a Reference, notice of the investigation is published, often by notifying the media and interested private groups.169 A preliminary hearing is often

167. Id. art. VII, § 2, at 15.
held in order to acquire information and to inform the public on the investigation.\textsuperscript{170}

The IJC's boards, the SAB and the WQB, prepare reports and proposals that are submitted to the IJC Commissioners.\textsuperscript{171} In order to prepare these reports, the boards open their meetings to the news media and hold public hearings.\textsuperscript{172} After the Board has produced a report, it is submitted to the IJC, which publishes and distributes it to interested persons and organizations.\textsuperscript{173} Thereafter, the IJC then holds public hearings.\textsuperscript{174} These hearings are often very informal and are intended to allow interested persons an opportunity to express their views or opinions as to a finding by the Board.\textsuperscript{175}

This procedure used by the IJC sufficiently protects the interests of all the parties involved. The IJC would not be required to follow the procedures set forth in the APA. Section 553 of the APA applies "except to the extent that there is involved a military or foreign affairs function of the United States."\textsuperscript{176} Since the IJC would be performing a function concerning foreign affairs, it would be excluded from the procedures of the APA.\textsuperscript{177} One reason for such an exception is that an agency working on the international level might be forced to follow two sets of procedures in order to involve the proper people.\textsuperscript{178} In the current situation, the IJC must involve representatives from both the United States and Canada. Therefore, the APA exception was included to allow the formulation of unique procedures in order to accommodate both countries.

In addition, this exception is especially necessary "in the international area where Department regulations are developed by negotiation with foreign . . . authorities and are not subject to unilateral variation by the Department."\textsuperscript{179} Thus, it would appear that the IJC would fall under the

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\item \textsuperscript{170} Joint Commission Seventy Years On 24, 36 (Robert Spencer et al. eds., 1981).
\item \textsuperscript{171} Id.
\item \textsuperscript{172} See id.
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id. at 36-37.
\item \textsuperscript{176} Administrative Procedure Act § 553, 5 U.S.C. § 553 (1988).
\item \textsuperscript{177} Also, Congress could create an explicit exception to the APA when it delegates rulemaking authority to the IJC.
\item \textsuperscript{178} Arthur Earl Bonfield, Military and Foreign Affairs Function Rule-Making Under the APA, 71 Mich. L. Rev. 221, 274 (1972).
\item \textsuperscript{179} Id. (quoting the opinion of the U.S. Post Office).
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exception to APA rulemaking. The procedures required by the Canadian
government must be considered along with those of the United States.
Therefore, to best enable the IJC to accommodate the needs of both
countries, it is likely that the IJC will not be required to follow the strict
requirements of the APA.

However, this is not to suggest that the IJC abandon all rule-making
procedures. In order to maintain its credibility and to maintain a forum of
neutrality, it will be necessary to involve interested parties from both sides
of the border. As exemplified from past references, the IJC is well suited
to do so. The result of the APA exception allows the IJC to formulate the
rule-making procedures that best accommodate the unique international rule-
making situation.

This proposal will raise paramount concerns in the United States
regarding the rule-making authority of a Commission whose membership
includes Canadian citizens. Specifically, two serious constitutional problems
could arise over the delegation of rule-making authority to the IJC.

The first U.S. constitutional issue pertains to the Appointments
Clause.\(^\text{180}\) The Appointments Clause states that the President shall have
the power to appoint, with the advice and consent of the Senate, all Officers
of the United States.\(^\text{181}\) However, Congress may choose to vest the
Appointment of inferior officers in the President alone, the Courts, or the
head of departments.\(^\text{182}\)

In *Buckley v. Valeo*, the U.S. Supreme Court analyzed the function of
the Appointments Clause.\(^\text{183}\) The Court determined that the term “officers
of the United States” means “any appointee exercising significant authority
pursuant to the laws of the United States.”\(^\text{184}\) Similarly, a Ninth Circuit
case held that, for the purposes of the Appointments Clause, a council
created by an interstate compact was acting pursuant to the compact, and not
pursuant to the laws of the United States.\(^\text{185}\) Thus, the members were not
officers of the United States.

\(^{180}\) U.S. Const. art. II, § 2, cl. 2.
\(^{181}\) Id.
\(^{182}\) Id.
\(^{184}\) Id. at 125-26.
\(^{185}\) Seattle Master Builders Ass’n v. Pacific N.W. Elec. Power & Conservation Planning Council,
786 F.2d 1359, 1365 (9th Cir. 1986), cert. denied, 479 U.S. 1059 (1987).
Likewise, in the context of international law, the Appointments Clause has caused concern. Chapter 19 of the Free Trade Agreement created a binational panel to resolve disputes.\textsuperscript{186} This panel is composed of five individuals: two from the United States, two from Canada, and the one chosen from a list of citizens from both Canada and the United States.\textsuperscript{187} This delegation of U.S. governmental authority to a binational panel has caused many commentators to challenge the constitutionality of such a delegation.\textsuperscript{188} These commentators argue that the panel members do essentially the same job as administrative officers or judicial officers.\textsuperscript{189} Additionally, the substantive law being applied is U.S. law and not international law.\textsuperscript{190} Therefore, they must be appointed pursuant to the Constitution.

Conversely, many commentators, including some in the federal government, argue that the binational panel is constitutional. The panel members are created and are exercising authority pursuant to an international agreement.\textsuperscript{191} Therefore, they are not operating pursuant to laws of the United States.

In the current situation, the IJC is a binational commission operating pursuant to the 1909 Boundary Waters Treaty and the 1978 GLWQA. Three members of the Commission are appointed by the President and three members are appointed by the Canadian government.\textsuperscript{192} Their responsibility would be to promulgate regulations consistent with their reference power under that Agreement. Because the IJC would be operating pursuant to international law, and not federal law, it is unlikely that delegating rulemaking authority to the IJC would violate the Appointments Clause.

The second potential constitutional violation would be an infraction of the Delegation Doctrine. Two basic theories exist regarding the Delegation Doctrine. First, the Constitution states that "[a]ll legislative Powers herein

\textsuperscript{186} Free Trade Agreement, Jan. 2, 1988, U.S.-Can., Ch. 19, 27 I.L.M. 293, 386.
\textsuperscript{189} Id. at 1302.
\textsuperscript{190} Id. at 1303.
\textsuperscript{192} Even assuming that the Commissioners can be correctly labeled as "inferior officers," the Canadian representatives were not appointed in conformance with the Appointments Clause.
granted shall be vested in a Congress of the United States.” In *Carter v. Carter Coal*, the Supreme Court held that the power to regulate an industry cannot be delegated to a private group, because the authority to regulate is “necessarily a governmental function.” Thus, any legislative action must be taken by the legislature.

The second theory behind the Delegation Doctrine arises from a notion of Due Process. The delegation issue first arose over concerns deriving from the Due Process Clause of the Fifth Amendment.

The distinctions between a deprivation of due process or equal protection and an unlawful delegation of legislative power are often obscure. Thus it is not surprising that the Court in *Carter* held that the . . . Act . . . contained an improper delegation of legislative power, and as such deprived petitioners of “rights safeguarded by the due process clause of the 5th Amendment.”

The Court in *Carter Coal* seems to stress the fact that “[t]he power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form . . . .” The Court was concerned with private interests that were not only unrepresented, but which were adverse to those who did participate in the rulemaking.

“[R]egardless of its doctrinal basis, the Court has almost always upheld delegation of power.” In *Currin v. Wallace*, private tobacco growers were given the power to veto agency action by the Secretary of Agriculture. Additionally, in *United States v. Rock Royal Coop*, private milk producers were given the right to veto agency action. In both situations, the U.S. Supreme Court upheld the delegation of power to private

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196. *Id.* at 654 n.16.
parties. "The private actors in these cases were given the authority to make a governmental decision jointly with a public officer." \(^{202}\)

Courts have had little difficulty in upholding statutes that delegate rulemaking authority to boards made up of members of an industry. \(^{203}\) Furthermore, the Federal Open Market Committee, composed of a combination of public and private officials, was upheld as a valid delegation of authority. \(^{204}\)

A list of factors has been developed to determine whether there has been an impermissible delegation of rulemaking authority:

1. Does the statute confer upon private delegates the power not only to make rules but to apply the law to particular individuals?
2. Are the actions of private delegates subject to no further public or judicial review?
3. Are the private delegates chosen by a process involving public consent, as by nomination or confirmation by elected officials?
4. Are the private delegates sworn to oaths of office?
5. Do the private delegates have pecuniary interest in the determinations to be made? \(^{205}\)

The IJC is made up of three members appointed by the President and three members appointed by the Canadian government. The three Canadian delegates are analogous to private parties who have received a delegation of rulemaking authority. The Commission therefore operates as a joint commission made up of private and public members. On its face, it appears similar to the Federal Open Market Committee, which was upheld as a permissible delegation of rulemaking authority. \(^{206}\)

Additionally, the IJC would have no problem passing scrutiny of factors necessary for permissible delegation. First, the IJC has no enforcement powers. Second, the rules promulgated by the IJC would be subject to judicial review in federal court. Third, half of the members are appointed by the President of the United States, and half are appointed by the

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Canadian government. In both cases, they are appointed by elected officials of the respective countries. Fourth, it is the responsibility of the IJC to assist in the implementation of the GLWQA. Finally, the members of the IJC have no pecuniary interest in the outcome of the rulemaking. They are all working together for the benefit of the entire ecosystem.

Even if the delegation was found to be an impermissible delegation of rule-making authority, an argument similar to the one in the Appointments Clause can be made. Since the IJC is created by international law, and is operating pursuant to the 1978 GLWQA, then it rises above the domestic sphere and into an international analysis. “[T]he Supreme Court has traditionally been less concerned with separation of power issues” when there is an international forum.207

The method of appointment provides sufficient safeguards to protect the citizens of both countries against arbitrary decisionmaking on behalf of the IJC. The IJC is a binational committee, and the members are appointed by the respective countries’ elected officials. The entire ecosystem is represented by the IJC, whose members have been appointed by representatives accountable to their respective countries. The method used to appoint Commissioners reinforces representative democracy on an international scale.

It therefore appears that the IJC is not only the most appropriate forum for international rulemaking, but also that it overcomes any constitutional challenges that may come its way. Thus, in order to increase the efficiency of the process and to facilitate binational decisionmaking, the U.S. Congress should delegate rule-making authority to the International Joint Commission.

VI. CONCLUSION

The Great Lakes Water Quality Agreement is one of the “most radical and comprehensive experiments in ecosystem management yet articulated for transboundary water resource management.”208 However, the United States has been relaxed in the implementation of this Agreement. The Great Lakes Water Quality Initiative is the first real attempt by the U.S. government to implement the Agreement. Notably, the rule-making process exemplifies the United States’ history of rulemaking “protectionism.”

207. Davey, supra note 187, at 1315.
208. Becker, supra note 168, at 235 n.3.
Neither the International Joint Commission nor the Canadian government was involved in the decisionmaking.

As a result of this defect, three problems arose in the promulgation process: (1) the Proposed Rules do not meet the requirements specified in the 1978 GLWQA; (2) the binational strategy of cooperation articulated in the 1978 GLWQA was not utilized; and (3) the EPA failed to manage the Great Lakes as an ecosystem.

In order to correct these defects, the EPA must include both the IJC and the Canadian government in decisionmaking. A Commissioner of the IJC could be appointed as a voting member of the Steering Committee. Additionally, the SAB could be represented with a seat on the Technical Committee. These members would serve as ombudsmen for the Great Lakes. Next, the EPA must consult with its Canadian counterpart agency in order to assure conformity and cooperation.

However, this process could lead to inefficiencies. Three separate organizations would be involved in the decisionmaking, thus making an impractical and wasteful process. As a result, the better approach would be to vest rule-making authority solely in the IJC.

Delegation of rule-making authority to the IJC will emphasize the commitment of the United States to the implementation of the Great Lakes Water Quality Agreement. This will be the first true attempt at binational cooperation between the United States and Canada in the implementation of an ecosystem approach to the Great Lakes Basin. This type of rulemaking has the potential to alleviate the piecemeal rulemaking that has occurred between the two countries. The United States needs to demonstrate its commitment to the goals of the Agreement by delegating rule-making authority to the IJC. This would put extreme pressure on the Canadian government to do the same. True international rulemaking is the only avenue through which a binational resource can be properly managed.