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Panel IV – The Future of the Boundary Waters Treaty –
Perspectives from NGOs and Industry
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Remarks by George H. Kuper, President
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Thank you, etc.

Caveats:

- 1. Although a long time ago I did study international law, I am not a lawyer.*
- 2. CGLI does not include - therefore I don't represent - the shipping industry, and cannot predict navigation rights issues so prominent a feature and important part of the Boundary Waters Treaty.*
- 3. I am prejudiced by a half-dozen years of Sam Speck's leadership in developing a Compact for water withdrawal, and facing a similar length of time to resolve some still unresolved important issues.*
- 4. Finally, my focus is exclusively on the Great Lakes basin, not the breadth (a 9,000 kilometer border) of boundary waters (134 Lakes and Rivers) covered by the treaty.*

I am here representing the Council of Great Lakes Industries (CGLI) and its three dozen Canadian and U.S. company members. The CGLI was formed a decade and a half ago by a number of companies and the President of the Chicago Federal Reserve Bank. They were concerned that policies that were emerging in the Great Lakes basin were potentially affecting industry's ability to attract new capital and to operate in the basin. The mission of the Council continues to be "to promote the economic growth and vitality of the region in harmony with its human and natural resources..." – in other words, sustainable development in the Great Lakes Region. Concerns impacting sustainable development continue today although the specifics are somewhat different than in the early '90's.

Industry in this Region, at least the industry represented by CGLI, does not usually relate regional policy development directly with the Boundary Waters Treaty. But, industry in the Great Lakes is directly impacted by the many policies, programs, rules and regulations that have been developed in response to the Boundary Waters Treaty.

From a global perspective, industry in the basin must attract capital from outside the basin in order to function and grow. That capital, as we all know, can go anywhere. We must make sure that basin policies create the most attractive business environment as possible to ensure our Region can continue to receive the investment it needs.

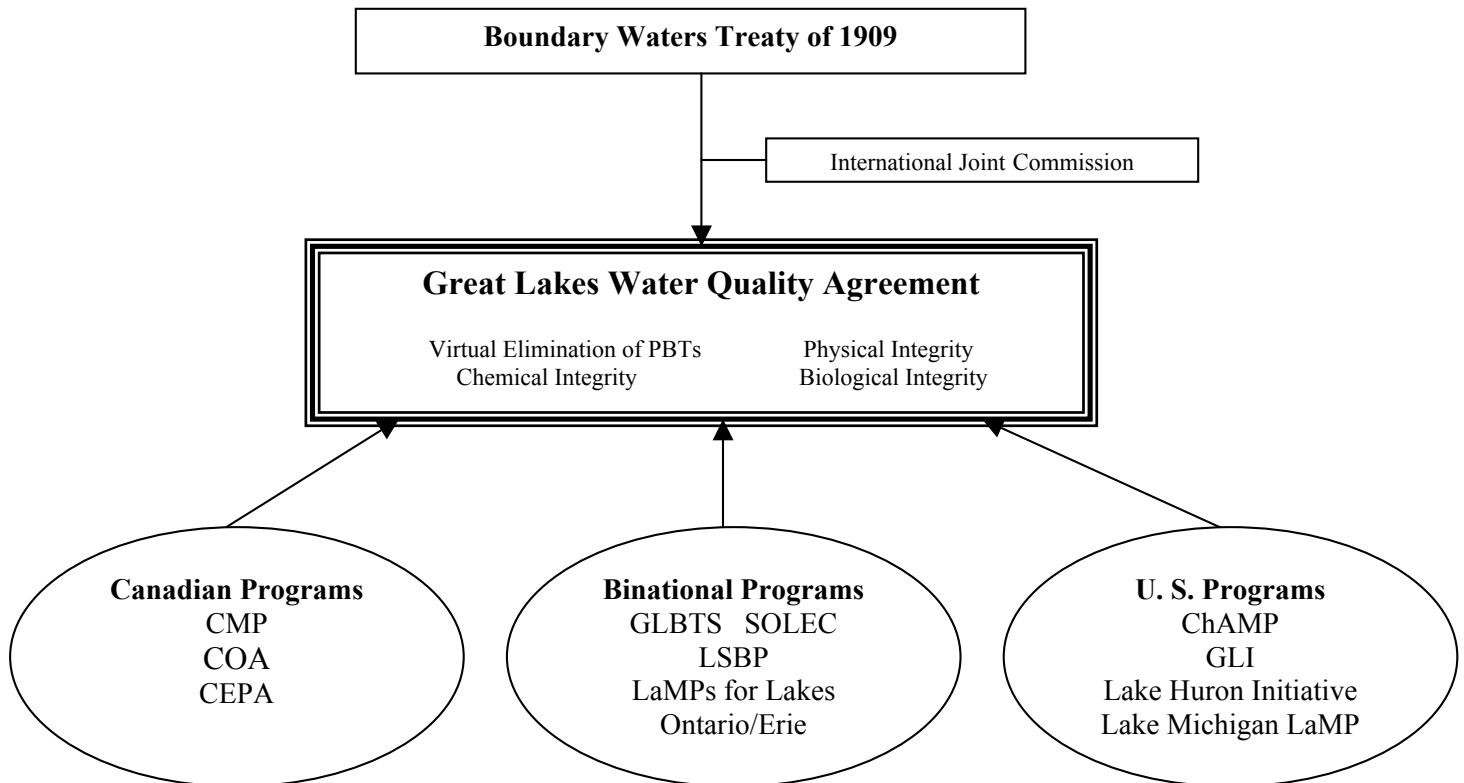
Similarly the success of products produced in the Basin is dependent upon world markets and, therefore, world competition. We must ensure that in our effort to provide our citizens with the highest quality of life possible, we don't do so in a fashion which would prejudice our product performance in the marketplace, either through technological restrictions or cost inhibitors.

I mention this in the context of this discussion because a 100 years ago the Boundary Waters Treaty initiated a tradition of policy creation – obviously intended to do good and contribute to political and economic stability between the two parties. Implementing the Treaty spawned a plethora of regional institutions, programs and arrangements resulting in an extraordinarily complicated governance structure in the Great Lakes basin. A perhaps un-intended consequence of the Boundary Waters Treaty is that the “policies” which, in some instances, exceed established law in one or both countries, emerge from what are essentially extra-constitutional bodies, such as the IJC.

At the same time good did come of this remarkable initiative between the Parties, or as the Treaty calls them, “High Contracting Parties”. The history of dispute resolution under the Treaty has been impressive (the IJC has dealt with more than 100 referred disputes). Equally impressive has been the facilitation of Great Lakes shipping.

On environmental issues, the “High Contracting Parties” obligation not to pollute the boundary waters was a driver for the 1978 Great Lakes Water Quality Agreement (GLWQA) and its subsequent amendments, most recently in 1987. That pioneering Agreement pre-dated the Clean Water Act in the United States, and has established the Great Lakes basin as a leader in clean water policy. That leadership has been directed by the Great Lakes Critical Programs Act of 1990 (an amendment to the U.S. Federal Clean Water Act) and then the Great Lakes Initiative, a complex set of regulations that implemented portions of the Act, promulgated in 1995. The Great Lakes Initiative led to the development of lake-wide management plans (LaMPs), formalization of AOC Remedial Action Plans (RAPS), Regional water quality criteria, and Great Lakes Regional discharge permitting regimes in the basin that are the strictest in the U.S. While industry may not initially make the connection between these protective measures and the Boundary Waters Treaty, industry is subject to Great Lakes Water Quality Agreement provisions through the laws, regulations, and Regional policies and programs that implement it.

Great Lakes Program Linkages

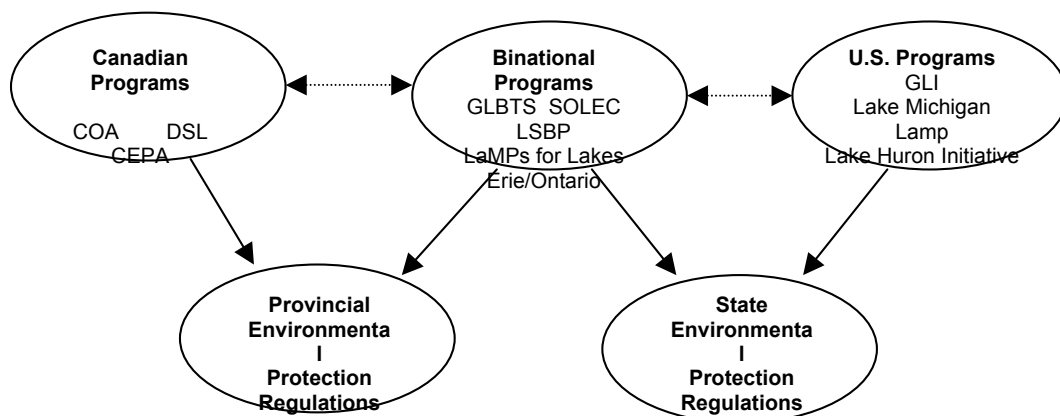


CEPA = Canadian Environmental Protection Act
 ChAMP = Chemical Assessment and Management Program
 CMP = Chemical Management Program
 COA = Canada Ontario Agreement
 GLBTS = Great Lakes Binational Toxics Strategy
 GLI – Great Lakes Initiative
 LaMP = Lakewide Management Plan
 LSBP = Lake Superior Binational Program and LaMP
 SOLEC = State of the Lakes Ecosystem Conference

Industry leadership throughout the Basin - and indeed the U.S. - knows the GLWQA calls for discharges of persistent toxic substances (PTSs) into the Great Lakes to be virtually eliminated. This ‘virtual elimination’ (VE) policy is unique to the Great Lakes basin. One of the biggest challenges we have faced within the Basin has been the ability to define just what VE is and

means.¹ In addition to no U.S. accepted definition of VE, the concept does not provide for a risk management element. Within the Region we continue to discuss whether or not it is necessary to extend virtual elimination to additional substances beyond the persistent bioaccumulative toxics currently selected by the governments via the Great Lakes Binational Toxics Strategy Level 1 substances list. The outcome may or may not turn out to be in sync with the outcome of Canada's Chemical Management Plan assessment process. In the U.S., National assessment programs will identify substances that may require additional management actions. It remains to be seen whether or not those actions will be regarded as sufficient to satisfy GLWQA objectives.

Complicated Relationship Between Two Federal Plus Regional Policies And Provincial or State Environmental Regulations



The result of all of this experience is that, in addition to very messy governance, there are a number of policy issues recognized by industry as being problematic, or potentially problematic, in the Region. How issues related to the Region's economic challenges are addressed by actions

¹ In the U.S., until the most recent report by the U.S. Government Accountability Office (GAO) which claimed the Great Lakes Initiative (GLI) is inadequate to meet the VE goals of the GLWQA, the words "virtual elimination" had not crept into national policy jargon. In the U.S. some Regional policy practitioners who have been around since the late 80s and early 90s interpret the GLI regulation's special water quality criteria and special permitting provisions, including those allow for establishment and use of Tier 2 water quality criteria, require stringent "reasonable potential" tests and Water Quality Based Effluent Limitations to be U.S. EPA's means of defining VE. Canada took a more direct approach in 1999 by defining VE in the Canadian Environmental Protection Act. When they did so, they defined VE as "the ultimate reduction of the quantity or concentration of the substance in the release below the level of quantification".

taken in the name of the Boundary Waters Treaty will be of concern, as much as whether they are protective of the Basin ecosystem.

Let me summarize the current issues from industry's perspective and let you judge how the Treaty and its progeny may impact on their resolution:

I. Industry requires the ability to responsibly use Great Lakes water. That means that industry needs access to the freshwater resource to:

- (A) withdraw it,
handle it,
treat it, and
- (B) return it via treated discharge.

(A) Regarding withdrawals: Annex 2001 to the Great Lakes Charter was implemented by the Great Lakes-St. Lawrence Water Resources Compact among the eight Great Lakes States; and, a matching Agreement between those States and two Canadian Provinces. The interstate Compact became law on 8 December 2008 in the United States. The matching Agreement is a good-faith undertaking signed in December 2005 by the Governors and Premiers. It is expected to be honored, led by the precedent established by the Boundary Waters Treaty.

The Compact on the U.S. side is a legal obligation, the equivalent of a contract among the States, endorsed by the U.S. Congress. It ensures State control of water usage while requiring minimum standards that are to be administered by all States.

The Compact:

- prohibits out-of-basin diversions, requires registration of all withdrawals greater than 100,000 gallons per day,
- applies permit and management standards to all new and increased withdrawals above thresholds that will be determined by each State, and
- requires new conservation measures to be implemented by each State.

Industry in the basin has supported the development and acceptance of the Compact and Agreement. But, there are still several issues from a sustainable economic development point of view that need to be addressed as it is implemented:

(1) The Regional Body created by the Compact should not have the unchecked ability to change the standards that must be met before water withdrawal permits can be issued (standard of review) without prior approval of State and Provincial legislatures. In the tradition of the Boundary Waters Treaty, authority remains with the elected governments, and should not be ceded to unelected representatives. Therefore, all States and Provinces should adopt rules for their representatives on the Regional Body and Council created by the Compact and Agreement. Whether or not Compact/Agreement processes will proceed in this vein is unclear. Compact/Agreement language appears to give the extra-constitutional Regional Body authority to act independently. Industry

continues to seek assurance that elected governments are held accountable for Regional Body decisions.

(2) A second problem is the lack of clarity in the document itself regarding the geographical scale to be used in judging the potential for impact of a withdrawal. Clarifying language has been incorporated in Congressional acceptance of the Compact, and is now part of the legislative history, but needs to be understood as the Compact/Agreement is fully implemented by the States and Provinces.

(3) A third need is to insure that the implementation processes pursued by the individual State and Provincial jurisdictions are as efficient as possible and constitute a policy of assured access to sustainable sources. That means that executive branches of each State and Province should develop effective, non-burdensome policies that are supportive of efficient and effective Compact/Agreement implementation processes.

(4) Lastly, several key definitions (e.g. “significant harm”) need to be resolved by the Regional Body/Council to avoid their being defined by “judicial decision(s)”.

(B) On the discharge side of water use, we have a lot more experience with regional collective action. Since the 1960s, regulatory structures have been put into place that are designed to allow utilization of the resource as a place to put treated water discharges without significantly impacting water quality. As a result, our waterways are in much better condition now than they were before we learned to regulate these discharges. And, don’t forget, in the Great Lake Region the U.S. Federal Clean Water Act requires us to maintain a standard of wastewater treatment performance more stringent than required elsewhere.

Despite those extra precautions, some still question the acceptability of public policies that recognize the need for a place to discharge - return, actually - waters withdrawn for manufacturing or power generation purposes. Industry, as well as our communities, need to have the current water discharge permitting processes reaffirmed. A consistent, established process is necessary for industry to operate, expand or decide to locate in the Great Lakes region. Uncertainty in the outcome of permitting processes by jurisdictions in the Basin is seen as a great risk to industry. It appears that if the critics prevail in some areas of the Region, the permit approval procedure may gravitate from a known established process to one without functioning rules, guidelines and predictable outcomes. This causes significant concern for industry operating in the region, and for those considering investment in the region.

The existing Great Lakes Basin-specific standards require reaffirmation by the political leadership and executive branch operatives. Science tells us current laws and regulations do, in fact, protect the population and the lakes. Officials should both defend the standards now on the books and commit to timely permit updates through transparent, predictable renewal processes for environmental operating permits. The Region’s manufacturers and employers need that reassurance – while policy makers work to restore and protect our water resources.

Dealing with legacy sediment problems remains a constraint on sustainable economic progress for both industry and Regional governments. In the U.S., the Federal Great Lakes Legacy Act, passed in 2002 and renewed in 2008, provided very limited but critical funds for stimulating remediation of toxic hotspots. Many of these lie in areas labeled by the IJC as “Areas of Concern” (AOCs). This law is unique to the Great Lakes basin on the U.S. side, and is designed to facilitate effective clean-ups. Although just renewed, the Legacy Act still needs better funding. During its first five years the Act has been administered carefully to ensure public funds are not used to ‘clean-up toxic dumps left behind by for profit industries.’ Funding has been deployed successfully to jump-start clean-up actions and address orphaned sites.

Also on the U.S. side, the region’s ecosystem and infrastructure was determined to require significant investment by the Great Lakes Regional Collaboration’s *Strategy to Restore and Protect the Great Lakes* (released in 2005). In addition to AOC clean-ups, it called for modernization of, and enhancements to, the Region’s publicly owned treatment works, restoration of wetland and habitat areas, and other improvements all of which would greatly benefit the ecosystem. The significant investment in infrastructure called for by the *Strategy* is in the same spirit as the Boundary Waters Treaty, which clearly envisaged the economic advantage of the Lakes being available to both of the “High Contracting Parties”.

A significant economic return from this investment for the Region has been clearly identified in subsequent studies. And efforts on the U.S. side to demonstrate the economic stimulus impact from these investments will hopefully mean that progress will be made. The Brookings Institution study, “Healthy Waters, Strong Economy: The Benefits of Restoring the Great Lakes Ecosystem”, partially quantifies that relationship.

III. Industry in the Great Lakes basin must be able to compete in world markets.

In order to operate, Basin industry has to appeal to absentee capital landlords for investment. The stability of the policy environment is a critical element of the investment pitch made to those investors. In addition to the issues identified above, two key aspects of Boundary Waters Treaty implementation that relate to policy stability are:

- (A) application of science in environmental policy setting; and,
- (B) toxics management.

(A) Science must be the underpinning of environmental policy in the Great Lakes basin. The Parties have endeavored to ensure that science leads policy by investing in the State of the Lakes Ecosystem Conference (SOLEC). This conference has been bringing scientists together since 1994 to determine the current environmental status of the Great Lakes and identify the stressors that need be addressed to improve/attain ecosystem sustainability. The process was developed in response to the Great Lakes Water Quality Agreement. Outcomes guide the USEPA and Environment Canada’s oversight of air and water programs.

Without a scientific basis for public policy decisions and programming in the basin, policy responses could easily be driven by alternative perspectives that are not likely to achieve the objective or be cost-effective, and would create an anti-investment atmosphere.

(B) The successful Great Lakes Binational Toxics Strategy (GLBTS) was undertaken by the Parties also in response to the Great Lake Water Quality Agreement – and therefore, the Boundary Waters Treaty. The GLBTS has focused on the virtual elimination of a specific set of substances with persistent, toxic and bio-accumulative characteristics. This multi-stakeholder process has relied on binational cooperation. The driving force for that cooperation can be traced back to the Boundary Waters Treaty. The success of the GLBTS has led the governments to consider greatly expanding the scope of the multi-stakeholder program.

All of these activities are in addition to the comprehensive national risk assessment programs in both the Canadian Chemical Management Program (CMP) and the U.S Chemical Assessment and Management Program. (ChAMP). Separately, Ontario has recently embarked on a broad toxics agenda. The problem is that evaluating chemicals used in today's society, although valid and important, is a resource intensive task requiring substantial and special technical skills. The task is being undertaken at national and international levels. While the Great Lakes Region may have some unique perspectives and needs, the use of some of these substances in global markets requires that we rely on national programs to provide information about which substances require management actions in the basin. Our public policy decision makers must recognize both our unique Regional needs as well as the necessities of operating within, and depending on, National and international programs and standards as they seek to protect the Region and simultaneously preserve our competitiveness

The issues have presented related to the Boundary Waters Treaty are not just important to industry. There is a much broader recognition, in these difficult economic times, of the close relationship between the unique physical environment we have in the Great Lakes and a thriving economy. Progress on these issues - rooted in a 100 year old treaty - needs to be made for the Basin to be an attractive place to invest, live and work today and in the future.