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Representing
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Accompanied by
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I am James Chandler, Legal Advisor to the U.S. Section of the International Joint Commission, U.S. and Canada. Thank you for inviting the International Joint Commission (IJC) to provide information to the U.S. Commission on Ocean Policy. I am here on behalf of Dennis L Schornack, the United States Co-Chair of the IJC who was unable to be here with you today. I have with me Dr. Stephen B. Brandt, the Director of the NOAA Great Lakes Environmental Research Laboratory, who is the U.S. Co-Chair of the IJC's Council of Great Lakes Research Managers, who will be available to discuss research issues with you.

Some, but certainly not all of the issues you will be considering, in some way could affect Canada. The IJC's purpose in being here is to describe some of the key elements of the working relationship that has developed over the years between our two countries concerning boundary waters and the Great Lakes basin.

The basic framework of this relationship is in the Boundary Waters Treaty of 1909. The purpose of the treaty was to resolve specific issues along the boundary and to provide a framework for avoiding and resolving disputes that might arise in the future.

The features, which are particularly relevant to the Great Lakes basin, include the following:

- A distinction is made between boundary waters, which are the waters of rivers and lakes along which the boundary passes, and waters that are tributary to boundary waters or flow across the boundary. Different rules apply to each category of water.
- The treaty then confirms that there will continue to be freedom of navigation in boundary waters subject to the laws and regulations of either country, not inconsistent with free navigation, that are applied equally and without discrimination to individuals and ships of both countries.

- Next, Article II of the treaty provides that the upstream country has the exclusive jurisdiction and control over the use and diversion of waters in transboundary rivers and tributary rivers to boundary waters,
- Article III provides that international approval is needed for uses, obstructions or diversions of boundary waters in one country that affect water levels and flows on the other side of the boundary. These approvals can be given either by special agreements between the U.S. and Canada or by the International Joint Commission. I should note that there are exceptions to this requirement for governmental works on one side of the line that don't materially affect levels or flows on the other side. It is also important to note that these international approvals are in addition to and do not take the place of any domestic approvals that might otherwise be required.
- Article IV provides that boundary waters and rivers flowing across the boundary are not to be polluted to injury of health or property on other side. In recent years this has become one of the most important provisions of the treaty along the entire boundary.
- Finally, Article IX allows the two governments to refer questions or issues to the International Joint Commission for examination and report. Recommendations of the IJC in these cases are non-binding.

The treaty also established the International Joint Commission. The IJC is a unique binational organization to help the two governments achieve the goals of the treaty. IJC has been involved in helping resolve issues from coast to coast along the U.S.- Canadian boundary. IJC does most of its work with the assistance of international boards, task forces and other advisory bodies. These groups are made up of officials from the federal, state and provincial governments and, increasingly, individuals from outside government. Currently we are assisted by hundreds of individuals from both the U.S. and Canada serving on over 20 advisory groups. This approach enables the IJC to maintain a small staff and call upon senior officials from both countries, such as Dr. Michael Donahue, who is the President and CEO of the Great Lakes Commission, and Steve Brandt, to advise our Commissioners as needed. This mechanism allows U.S. officials to coordinate their activities in new and creative ways and encourages officials from both countries to establish and maintain better working relationships. Each individual is asked to participate in his or her personal and professional capacity and not as a representative of his or her employing agency.

Since the Treaty was signed, over 90 years ago, there have been many issues in the Great Lakes that have affected the coastal resources of both countries. The flexible framework of the Boundary Waters Treaty has helped the two countries find mutually acceptable solutions. The IJC has been involved in many of these.

The water levels of the Great Lakes are largely self-regulated although some human activities do affect those levels. People in both countries also want to make various uses of the waters of the Great Lakes that do affect water levels on the other side or the border.

To improve commercial navigation in the Great Lakes, considerable dredging has been done over the years. Typically this is done pursuant to special agreements between the two governments. Currently, the U.S. Government is conducting a reconnaissance study of the feasibility of increasing the capability of the navigation channels to accommodate larger vessels.

St. Lawrence Seaway and power development have been major undertakings by both countries. In the 1930s and 1940s there were two attempts at completing comprehensive Great Lakes Basin agreements that would cover a range of issues, including navigation and hydropower. In both instances agreements were signed, but neither passed the U.S. Senate. The two countries then decided to take a more ad hoc approach, using the Boundary Waters Treaty for hydropower development in the St. Lawrence River, a special agreement for the St. Lawrence Seaway and a separate treaty for increased hydropower in the Niagara River.

The IJC's role was to consider and ultimately issue what we call an Order of Approval approving the request of the two federal governments for the hydropower development under Article III of the Boundary Waters Treaty. The governments wanted to develop hydropower and, at the same time, facilitate the development of the Seaway and reduce the peak high water levels that occurred from time to time on Lake Ontario. The IJC's job under the treaty is to protect interests who are affected by changes in water levels. In this case that meant not only interests on Lake Ontario but also interest downstream in the Province of Quebec. The interests are really quite different as one heads downstream from the western end of Lake Ontario to the St. Lawrence River.

Over the last 50 years we have made a number of adjustments to help assure that we are meeting our treaty responsibility. For example, the operation of the hydroelectric project is under the direction of an IJC Board of Control. We have expanded the membership of our board to reflect the evolving interests that are affected by the operation of the project. We have found it essential that the interests affected by our decisions believe that they are being listened to and are being fairly treated. One approach we have taken is to find ways for people throughout the basin, who have very different interests and perspectives, to speak directly to each other so they can appreciate first hand different points of view. Also, we have recently begun a major review of our Order of Approval. The purpose of this binational review is to understand better the effects that water level regulation is having on a wide range of interests well down into the St. Lawrence River in Canada. This includes in particular the effect on environmental interests that were not well understood in the 1950s and the effect on interests that have developed since the project was built. The actual \$20 million study is being carried out by a diverse group from both in and out of government, including academics, technical

experts, and individuals from all affected interests. The IJC views this as an important effort, one that is certainly called for by the many changes that have taken place in the Lake Ontario- St. Lawrence River region.

The IJC is also involved in water level regulation in the upper portion of the Great Lakes basin at the outlet from Lake Superior. While the effects on water levels are not as great as on Lake Ontario because the St. Marys River is much smaller than the St. Lawrence, many interests are affected. Since regulation began in the early 1920s, some changes in the regulation goals have been implemented to address our improved understanding of our actions. We have proposed a major review of this activity and are hoping to begin work in the coming year.

The Article IX reference procedure that I mentioned earlier is another mechanism the governments have used to deal with issues in the Great Lakes basin. It allows the governments to have their officials examine issues and potential solutions to problems within a forum of experts in a way that does not formally commit the governments to any particular outcome. The approach encourages the achievement of a consensus among affected interests. These study teams make their recommendations to the IJC, which then reports to the two governments. The governments are then free to accept or reject the IJC's recommendations.

In 1999, the governments were concerned that current management principles and conservation measures may be inadequate to ensure the future sustainable use of shared waters. They asked the IJC review the current water use situation, particularly in the Great Lakes basin, and assess the pressures for future water use and the adequacy of the current legal regime to assure the sustainability of water resources in the basin.

This concern of the governments reflects a long standing concern in both the U.S. and Canadian portions of the basin that there will at some point be pressure to divert water from the Great Lakes basin to other areas of the United States. In its 2000 report, *Protection of the Waters of the Great Lakes*, the IJC found no proposals for or interest in any such diversions. We did note, however, that there would likely be pressure from communities near the basin divide for small diversions of water from the basin. We recommended that state and provincial governments not authorize new diversions from the basin that would endanger the integrity of the Great Lakes basin ecosystem and that great care be taken in authorizing major new or increased consumptive uses. We also recommended that the Great Lakes States and Ontario and Quebec, in carrying out their responsibilities under the Great Lakes Charter, develop agreed standards to achieve these goals. The Governors and Premiers, with the assistance of the Great Lakes Commission and others, are currently working extremely hard on this issue.

The big unknown on the whole issue of the sustainability of water resources in the basin is the possible effect of climate change on the basin's water levels and coastal resources. The IJC concluded that mounting evidence of the potential for climate change adds uncertainty to the nature of future supplies to the Great Lakes and how the levels and flows of the lakes will be affected. All climate models to date agree that there will be

some increase in temperature in North America. Although most models suggest that global warming would lower Great Lakes levels and outflows, there is some limited new information that suggests the possibility of a slight rise in water levels. There is information to suggest that there could be more frequent and severe local weather events. Climate change also has the potential to increase the demand for water, both inside and outside the Great Lakes Basin.

Early next year, the IJC will be submitting a report to governments describing the status of efforts to deal with the issues raised in the IJC's 2000 report.

The reference process has also been used by the governments to address the issue of Great Lakes water quality. In the 1960s when the Cuyahoga River in Cleveland caught fire and there was talk of Lake Erie dying, the governments used the treaty and the IJC as a vehicle to pool their resources in a major effort to scope the problem and develop a binational strategy to clean up the lakes. The IJC recommended the key features that became the Great Lakes Water Quality Agreement, which is recognized throughout the world as a model of how two countries can come together to solve major environmental problems. The Agreement has undergone major revisions in 1978 and 1987 to build on previous experience. There is provision for another review in two years.

The IJC's current role under the Agreement is to review the progress that is being made to achieve the goals and objectives of the Agreement. We do this with the assistance of three advisory boards and substantial input from the public. The first board is the Great Lakes Water Quality Board. It includes representatives from each of the Great Lakes States and Provinces and the two federal governments. The second is the Great Lakes Science Advisory Board, which is composed of experts on Great Lakes water quality problems. As I mentioned earlier, Dr. Michael Donahue is the U.S. Co-Chair of that board. The third is the Council of Great Lakes Research Managers, which provides the IJC with advice on the many research activities called for by the Agreement. One of the Council's major activities is the preparation of the Great Lakes Research Inventory. The U.S. Co-Chair of the Council is Dr. Stephen Brandt. Dr. Brandt will be addressing the Commission tomorrow during the public session on the subject of research issues from the Council's perspective.

One of the IJC's responsibilities is to submit biennial reports on progress under the Agreement. Last week we issued our Eleventh Biennial Report. Our major messages are the following:

- The Great Lakes are a good source of treatable drinking water; but the public cannot always safely swim at all Great Lakes beaches or safely eat some of the fish from the Great Lakes.
- While progress has been made toward achieving the goals of the Agreement, the goals will not be reached under the current incremental approach. There are significant problems to be faced and increased effort is needed.

- Highly toxic sediment continues to remain in many locations and is providing a pathway through fish to a significant number of people who live in the Great Lakes basin and endangering their health. Cleanup of these areas is lagging and lacks adequate funding and managerial support.
- Monitoring of progress is hit and miss and is seriously underfunded. It is difficult to measure progress without scientific support.
- Alien invasive species have severely damaged the Great Lakes ecosystem and future introductions could be catastrophic. With only two access points, the gates to the Great Lakes can be closed to alien invasive species now through increased management of ballast water and attention to a potential invasion by Asian carp through the Chicago Sanitary and Ship Canal. The IJC recommends that it be charged with leading a binational effort to immediately address the ballast water challenge.

The IJC looks forward to the governments' response to this report.

I would like to close by noting again that there are many complicated issues along the U.S.-Canadian boundary in the Great Lakes basin. Not all of them affect Canada, but many do, and it is extremely helpful to try to anticipate which are the ones that matter and begin discussions before they can become irritants. There are many tools available and the IJC is a long-tested one of those tools.