

A Citizen's Guide to the International Joint Commission Draft Detroit River Area of Concern Status Assessment



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&
Downriver Citizens for a Safe Environment

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Prologue – November 2002

In October 1995, the Citizens Environment Alliance of Southwestern Ontario submitted a *Submission on Enforcement Matters* complaint to the North American Commission for Environmental Cooperation (NACEC). The NACEC is an international organization created by Canada, Mexico and the United States under the North American Agreement on Environmental Cooperation. The NACEC reports, "... (The NACEC) was established to address regional environmental concerns, help prevent potential trade and environmental conflicts, and to promote the effective enforcement of environmental law." The North American Agreement on Environmental Cooperation was supposed to complement the environmental provisions of the North American Free Trade Agreement (NAFTA). (For more information on The North American Commission for Environmental Cooperation visit <http://www.cec.org/>).

We later learnt that we were the first Canadian environmental organization to use the Commission to complain about transboundary pollution along the Canada/US border. Our submission requested an investigation of the deteriorating conditions of the transboundary environment of the Detroit River. We asserted that the United States Environmental Protection Agency (USEPA) was violating U.S. law by allowing the City of Detroit's Waste Water Treatment Plant to continue to discharge numerous toxins above permitted levels. The Detroit Waste Water Treatment Plant is the largest municipal polluter on the Great Lakes.

After a review, the NACEC determined it was more appropriate for the International Joint Commission to address this complaint. Partly as a result of our submission and the subsequent NACEC referral, the IJC selected the Detroit River as the first Great Lakes Area Of Concern (AOC) to undergo a Status Assessment by the IJC. (*For more information on Great Lakes Areas Of Concern or the IJC see Appendix A.*)

According to the IJC, it was their intention to focus the Detroit River Area of Concern Status Assessment on technological and institutional issues which influence the restoration of so-called beneficial uses (see Appendix A) within Areas of Concern in the Great Lakes basin. The process began in November 1996. It involved several IJC Commissioners, Regional Office staff and the IJC Science Advisory Board hosting several meetings and conducting numerous interviews with non-governmental organizations, governmental agencies and other concerned citizens. Government agencies also made several written submissions.

Introduction

The fact that the IJC has published a "draft" and is subjecting it to comments prior to final publication is very concerning. It implies that positions taken by the IJC can be subject to modification. We are particularly concerned that the findings and recommendations will be further weakened once the governments respond to this draft. Only time will tell whether the IJC Status Assessment will be successful in implementing actions or if this effort will be a further insult to the work, energy and commitment of so many members of the public who have given so much for so little since 1987.

The need to highlight the positive points of the draft Status Assessment as well as further clarify or elaborate on misconceptions is what has prompted the Citizens Environment Alliance (CEA) and Downriver Citizens for a Safe Environment (DCSE) to produce a Citizen's Guide to the Detroit River Status Assessment.

Purpose

This Citizen's Guide to the Detroit River Area of Concern Status Assessment has been prepared to assist interested citizens in understanding the IJC's report. The Guide is intended to do the following:

- highlight the results of the Assessment that are on target
- translate bureaucratic statements into understandable terms
- extend statements in the Assessment that do not go far enough
- challenge statements that do not further the objectives of Restoration efforts

We have taken this approach because much of the IJC's Status Assessment is accurate and should not be further weakened once government agencies respond to it.

Introduction to the RAP Process

According to Annex 2 of the Great Lakes Water Quality Agreement (GLWQA), Remedial Action Plans (RAPs) for each of the 43 Areas of Concern (AOCs) are to be submitted to the IJC for review and comment at three stages:

Stage 1 -- when a definition of the problem has been completed;

Stage 2 -- when remedial and regulatory measures are selected, and

Stage 3 -- when monitoring indicates that identified beneficial uses have been restored.

Most RAPs, including the Detroit River RAP, are now in Stage 2. The reviews involve the selection of peer reviewers, summarization of review comments, a RAP review meeting in the Area of Concern and a final report to governments by the IJC. This process has sometimes been confrontational, especially when a majority of the RAP reviewers felt that the existing RAP process did not meet the requirements laid out in the GLWQA.

The GLWQA clearly states a Stage 2 RAP submission must include:

- an evaluation of the remedial measures in place;
- an evaluation of additional measures to restore beneficial uses;
- a selection of additional measures to restore beneficial uses along with an implementation schedule, and
- identification of the persons or agencies responsible for implementation.

The Detroit River Remedial Action Plan Report recently submitted to the IJC by the Michigan Department of Environmental Quality (MDEQ) is not a Stage 2 RAP Report. The MDEQ, the lead agency for the Detroit River RAP, unilaterally decided that instead of preparing a Stage 2 RAP Report, it would issue biennial progress reports on all RAPs within the State of Michigan. This is in line with the MDEQ strategy of weakening the overall RAP process. The 1996 Detroit River Remedial Action Plan Report or "progress report" is the first such biennial report for the Detroit River AOC and only makes recommendations that minimize accountability.

Problems Recognized by the IJC

Through the Status Assessment process, the IJC learnt about some of the serious problems that have hindered the Detroit River RAP process and, as a consequence, have resulted in failure to move the Detroit River AOC closer to remediation. Among the problems identified:

- A leadership void among the agencies responsible for ensuring that the RAP is implemented. The fact that ten years have been allowed for “planning” with very little action to remediate environmental problems makes this void all too clear.
- Public awareness and understanding of the RAP goals has been totally lacking on the U.S. side, particularly among the most environmentally impacted communities in the AOC.
- There has been a failure to involve elected officials in the RAP process, thus minimizing their accountability.
- The agencies are more interested in controlling the public consultation process than securing the funding and political support necessary for remedial actions.
- The 104 recommended remedial activities have not been prioritized and it is unclear what level of restoration of beneficial uses would occur if any or all of them were to be implemented.
- A comprehensive monitoring network no longer exists in the Detroit River AOC. Without this network, Stages 2 and 3 of the RAP will be impossible to complete.

Shortcomings of the Status Assessment

The authors of the Status Assessment have taken too much of the information provided to them at face value. In the six months since the process began, statements made in reports and interviews should have been corroborated. Since this was not done, the draft Status Assessment has the following shortcomings:

- The Status Assessment does not address two key issues in the Detroit river AOC: environmental justice and human health concerns.
- The “Technical” section merely repeats the status of beneficial use impairments from the MDEQ Detroit River “Progress Report”. It does not provide a critical, independent assessment of the statements made concerning ecological status nor the difficulty of restoring the beneficial uses.
- The “Public Consultation” section fails to make the distinction between outreach activities and participation by informed members of the public in RAP decisions. While the IJC correctly notes the inadequate nature of outreach programs, it does not recognize the secondary status that members of the public had to endure within the RAP Committee.
- The Status Assessment incorrectly implies that the Monguagon Creek cleanup and the Auto Project pollution prevention effort were part of the RAP activities to restore beneficial uses. These projects were the result of ongoing programs and would have occurred even if there had been no RAP. Further, no attempt was made to evaluate the effect of these actions on beneficial use restoration.

Status Assessment Excerpts

The following excerpts (in bold) from the draft Status Assessment accompany our analysis:

“Possible beneficial impacts of the Detroit Water and Sewage Department’s PCB and mercury minimization program cannot be quantified at this time.”

This statement indicates the weak technical basis of the Status Assessment. The only definitive estimates of the point source contributions of PCBs (prior to the 1992-1993 estimates from the 1996 RAP document) were made in the 1986 Upper Great Lakes Connecting Channels Study (UGLCCS). Comparison with these loads show that current Detroit WWTP loadings have increased not decreased as has already been reported by the CEA. PCB loads increased by an average of 254%, while mercury loads increased by an average of 673% compared with 1986 estimates.

“... Detroit has expended nearly one billion dollars toward the restoration of the Detroit River since 1971.”

The Detroit Sewage Treatment Plant is the largest discharger in the Great Lakes Basin. Serving the Detroit Metropolitan area, it processes between 700 million and 1 billion gallons of municipal and industrial waste everyday. It should come as no surprise that improvements and upkeep for this vast system will be tremendously expensive. Also, Lake Erie received much of the benefits of the improvements. In the 1970s, the major expenditure was for phosphorus removal, which was targeted to restore Lake Erie, not the Detroit River. Further, Detroit initially opposed these improvements, and finally made them under court order. Detroit continues to be under litigation for Detroit River remedial actions: the U.S. EPA has sued them over the inadequacy of their industrial pretreatment program and they have a contested case with Michigan DEQ over their most recent discharge permit. Detroit has also resisted a regional approach to wastewater and stormwater management problems in which treatment facilities are located optimally to deal with problems on a regional (i.e., county, watershed, etc.) level.

“The Commission’s Science Advisory Board has also pointed out the impact of funding cuts on research that is necessary to support decision making related to implementation.”

In 1992, the Detroit River RAP Team formed four Technical Work Groups (TWG) to define remedial options. Membership on the TWGs included subject matter experts from governmental agencies, the private sector and local universities. Several recommendations from TWGs that would lead to effective identification of remedial options were ignored by the Government Agencies on the RAP team, prompting many local researchers to resign. Without this expertise, implementation of remedial actions to restore beneficial uses becomes a haphazard and inefficient process.

“... the Michigan DEQ RAP contact also serves as the RAP contact for the Clinton River, River Basin, Saginaw River/Bay and the St. Clair River.”

One person for five RAPs; this is clearly a reduction of effort in the Detroit AOC by the Michigan DEQ. However, for an admittedly difficult, binational RAP that is supposedly in the implementation phase, there should be more effort not less. Further, staff assigned to the Detroit River RAP should believe in the RAP process and not be a hindrance to it. They should

be willing to work on a consensus basis so that the resulting RAP will be a cooperative effort and support the public's agenda. Based on eight years of experience with Michigan, few such staff exist within its agencies. It is therefore the role of the U.S. EPA to step in and fill this gap so that RAP efforts may proceed.

“Budget cutbacks in OMEE have resulted in several staffing changes for the RAP coordinator position for the Detroit River AOC within the last few years.”

Translation: Ontario has cut back its efforts the same way Michigan has. One casualty of the cuts was the effort by Ontario to predict levels of toxic chemicals in the Detroit River and the resulting effects on fish and other aquatic life. Staff at Ministry of the Environment (OMEE) were using mathematical models of the river ecosystem to track the release of contaminants from sources and their fate in the food chain. Since many of the impaired beneficial uses relate to these effects, remedial efforts will be made in a vacuum without this work. Other AOCs that Ontario has the lead for, such as the St. Clair River, have retained similar modeling projects but OMEE has failed to continue supporting this work in the Detroit River.

“... the Commission's Status Assessment confirmed that neither Detroit nor Windsor is willing to absorb more than a small fraction of the expected costs of suggested remedial activities.”

It is obvious that these and other municipalities in the Detroit River AOC will not be able to pay for remedial activities other than those required by law (i.e., infrastructure and treatment works improvements). Competing priorities in difficult economic times for these cities make it impossible. The expectation of serious municipal-level funding is just a ploy by Michigan and Ontario to shift the responsibility for clean-up. It is important, however, that these municipalities see the benefits of remediation and be willing to endorse clean-up plans when they are finally prepared. So far, there has been very little municipal buy-in.

“The 1996 Detroit River RAP Report lists 104 recommendations, but makes no ranking of necessary remedial actions.”

This is a direct consequence of Michigan DEQ's failure to respect the GLWQA. Annex 2 of the GLWQA is explicit about evaluation of remedial measures (paragraphs 4 (a) (iii), (iv), and (v)): *Each RAP shall include an evaluation of remedial measures in place; an evaluation of alternative additional measures to restore beneficial uses; and, a selection of additional remedial measures to restore beneficial uses and schedule for their implementation.* In fact, the Michigan DEQ's work plan for Stage 2 ignored these requirements.

“A consequence has been the inclination to pursue actions that are popular with outside funding sources yet do not serve to solve existing sources of persistent toxic substances.”

Translation: There is money available, but it is spent in ways inconsistent with the goals of the RAP. Prime examples are the BASF Waterfront Park and Wyandotte Shore Golf Course, which were built in 1995 on a former industrial site on the Trenton channel by BASF. Although BASF is a member of Detroit River RAP Committee, the decision to fund and implement this action was never discussed in Committee or at its Habitat Technical Work Group meetings.

“... elected officials do not appear to have been apprised of RAP developments on a regular basis.”

The membership “sectors” of the Binational Public Advisory Council (which is the official RAP Committee) included elected officials and governmental representatives, yet very few elected officials were members of BPAC, even fewer actually attended meetings. As a consequence, government accountability was filled by high-ranking employees of the City of Detroit and City of Windsor responsible for the wastewater treatment facilities discharging into the Detroit River. Rather than working to achieve RAP goals of pollution prevention and the reduction of toxic discharges, these city employees used their positions to deflect criticism from their City’s discharges to the River. Elected City officials, including Detroit Mayor Archer and Windsor Mayor Hurst, are too willing to hide behind the rhetoric that “efforts to improve the environment are taking place” without taking the time or interest to ensure that that is the case. Scientific research on sediments collected throughout the Detroit River continue to show high concentrations of metals and organic substances that contaminate fish and wildlife and degrade the water quality. Yet, elected officials continue to be insulated from accountability.

“The relationship between the RAP effort for the Detroit River and other endeavors such as the Southeast Michigan Initiative (SEMI) is unclear.”

The Southeast Michigan Initiative (SEMI) was originally intended to be a joint U.S. EPA – MDNR (later MDEQ) geographic initiative that would focus on the problems that have both historically caused and continue to cause environmental degradation in this area. As envisioned by U.S. EPA, SEMI would bring a much-needed federal presence to achieve environmental improvement in southeast Michigan, where more than 4 million people work and live. SEMI was envisioned to help RAPs, but this was not to be so. MDEQ adamantly opposed having enforcement and compliance of environmental regulations as part of this initiative and, after four years of negotiations aimed toward protecting business interests rather than seeking environmental improvement, SEMI has turned into an ineffective public relations forum that is designed to “exchange information ... to help any interested stakeholder use resources more efficiently.... And not an entity that develops its own action plan.”*

**SEMI Forum Mission Statement, 1996.*

“RAPs being developed...in the SEMI region will be a priority activity.... A hot spot sediment remediation strategy will be developed and implemented.”

The fact that there are five separate Areas of Concern in southeast Michigan alone should be enough reason for a serious federal presence to coordinate sediment remediation projects. If SEMI were functioning as originally intended by U.S. EPA, the sediment remediation goals of the Detroit River RAP could have been adopted by SEMI and coordinated with the other four AOCs’ sediment remediation goals and objectives. In this manner, SEMI would have been acting as a tool to assist with the sediment remediation efforts of the Detroit River, NOT competing against the RAP efforts. Given the current structure of SEMI, however, there is no capability to either develop, coordinate or implement a sediment remediation strategy for any one of the AOCs, let alone all five. The statements made about SEMI in the Status Assessment expose how poorly understood the role of SEMI in coordinating the RAP activities is, and how weak the federal government has become in the SEMI process.

“A fundamental problem, regarding proper functioning of the RAP effort has been the lack of corporate ‘membership’ in the RAP process.”

This statement is correct and the underlying reason for such a failure resides with the leading agency for the Detroit River RAP: the Michigan Department of Environmental Quality (MDEQ). Maintaining the status quo is sanctioned by MDEQ and, therefore, there is no obligation for corporations whether or not they are significant polluters to ‘step up and be counted’ in the Detroit River RAP process. The companies chose to participate on the Binational Public Advisory Council (BPAC) did so mostly to ensure damage control. As a result, there are no specific objectives in the RAP to reduce the toxic substances being discharged to the Detroit River. Maintenance of the status quo for both Michigan and Ontario prevails. Corporations are members of the greater Detroit River area community and there is a moral responsibility for both Detroit-based and Windsor-based corporations to contribute toward environmental improvement. All of them have benefited from local people and local resources - it is time to pay back. There are several large corporate foundations that exist to support community needs and activities, yet none have been involved in RAP initiated projects on the Detroit River. Now that the “leadership” of the Detroit River RAP is shifting to the local level, the ability to leverage corporate support seems even less likely to occur.

“Since contaminated sediment problem areas occur within the U.S. side of the Detroit River and the contaminated areas appear to lack any viable, potentially responsible parties, it is probable that without strong financial commitment from the U.S. government, little or no remediation of contaminated sediment will occur within a reasonable time-frame.”

Translation: What is meant by not finding any “viable, potentially responsible party” is that the public will be expected to foot the bill in sediment remediation of the Detroit River. This responsibility is enormously unfair, given the number of “viable” industries that knowingly discharge pollutants to the Detroit River causing sediment contamination. As pointed out earlier (see section on SEMI), if the Southeast Michigan Initiative were functioning as originally envisioned by the U.S. EPA, the sediment remediation goals of the Detroit River RAP could have been coordinated with the other four southeast Michigan AOC sediment projects in a joint federal-state effort to ensure a U.S. government commitment to funding and cleanup. Using the empowerment zone within Detroit as an analogy to stimulate funding is a poor suggestion. A more relevant example would be the Rouge River basin’s Wet Weather Demonstration Project and the federal dollars used to coordinate the many Combined Sewer Overflow (CSO)-impacted communities within.

“No evidence of specific outreach programs directed to the most impacted subset of the population was discovered during the Commission’s Status Assessment.”

As the Status Assessment clearly points out, Annex 2 of the Great Lakes Water Quality Agreement states the governments “.....shall ensure that the public is consulted in all actions undertaken pursuant to the Annex.” What is meant by public consultation is also “outreach programs” directed to the public so that they are familiar enough to understand the environmental problems and their causes to make informed comments on the actions that will be taken to fully correct them. The Status Assessment correctly states that the public consultation process, particularly for the Detroit residents most impacted by the environmental degradation, was completely inadequate. What the Status Assessment fails to mention, however, is the issue of public participation in the Remedial Action Plan (RAP) process. Members of the public, representing the public’s interest to fully remediate local environmental

problems, must lead the RAP process and be given equal status with industrial, municipal and governmental representatives in contributing to the development and final production of the RAP. The level of meaningful public participation in the Detroit River RAP process has been as inadequate as the public outreach programs. Issues raised by citizen members of the Binational Public Advisory Council were typically disregarded or trivialized. Written contributions from citizens were “lost” or edited out of numerous reports. The public has no ownership of the Detroit River RAP because they have been disenfranchised from the process. The only way to correct this is to create a cooperative, consensus driven group that is totally responsive to the public’s agenda for environmental action.

According to Dr. Bunyan Bryant, Professor at University of Michigan School of Natural Resources, Environmental Justice is defined as the fair treatment of people of all races, cultures, incomes, and educational levels with respect of the development, implementation and enforcement of environmental laws and policies. Fair treatment implies that no population of people should be forced to shoulder a disproportionate share of the negative environmental impacts of pollution or hazards due to lack of political or economic strength. For Detroit, the “impacted subset of the population” is the African-American community that comprises 75% of the population. The environmental impacts are clearly public health issues, yet these issues have not been considered in the 1996 MDEQ Detroit River RAP Report or in the IJC Status Assessment. Beneficial use impairments such as restrictions on fish and wildlife consumption and tainting of fish and wildlife flavor are directly relevant to human health*. Fish tumours and other deformities and degradation of benthos are early warning indicators of potential human health problems*. Yet the aquatic food chain still continues to be contaminated by permitted discharges of persistent toxic substances. Toxic hotspots in the Trenton Channel and other areas remain toxic, while bureaucrats decide who is responsible for their clean up. It is well known among local researchers that plentiful samples of fish with tumours and other deformed animals and insects can be readily found in the Trenton Channel. One study at the University of Windsor estimated that 33% of the brown bullheads in the Trenton Channel have cancer. Raw sewage discharges to Fox Creek, which runs through an economically disadvantaged Detroit neighborhood, means this water body does not meet the General Objectives of the Great Lakes Water Quality Agreement signed 25 years ago. The failure to incorporate public health concerns in the Detroit River RAP has kept the public from understanding the real implications of Michigan’s policy of neglect for this AOC.

*Report on Incorporating Human Health Considerations into RAPs by Myers, Manno, Schmeltz and Cabala.

“The intended role of SEMCOG was to assist in the smooth functioning of BPAC.”

The Southeast Michigan Council of Governments (SEMCOG) is a quasi-governmental organization that has, for over 8 years, received \$68,000 to \$100,000 per year from the State of Michigan to “.....assist MDNR and OMEE in completing the RAP in accordance with the guidelines of Annex 2 of the GLWQA,involve representatives of the general public in key decisions related to the development of the RAP.....gain support of the general public for the RAP and its implementation.....” (quoted from the 1995-'96 signed contract between SEMCOG and the Michigan Department of Natural Resources). The role of SEMCOG as a contractee extended far beyond “smooth functioning of BPAC”. As noted in the Status Assessment, both public participation and outreach for the Detroit River RAP have been less than adequate, yet the Assessment could give no reason for failure. The failure can be squarely placed on SEMCOG. They received money to do the job; they have access to all of the communities in the Detroit River AOC; SEMCOG are to blame for poor public participation.

Conclusions

The “findings” listed in the Status Assessment are generally valid, but would be further strengthened by the addition of the following conclusions:

1. The U.S. EPA should assume responsibility as the lead agency for the Detroit River RAP;
2. Environment Canada and the Ontario Ministry of the Environment should get serious about their commitment to the binational plan to restore beneficial uses in the Detroit River. While it is recognized that most of the problems originate from the Michigan side of the river, Canadian officials should insist that all remediation efforts have clearly identified implementation schedules and responsible parties, and
3. Citizens should be brought back to the table and given an equal voice in consensus based decisions about the restoration of the Detroit River AOC.

It is the intent of the Citizens Environment Alliance and Downriver Citizen for a Safe Environment to further monitor the progress in this AOC and further report our findings to the public.

Appendix A

The International Joint Commission and the Great Lakes Water Quality Agreement

The stated mission of the International Joint Commission (IJC) is to prevent and resolve disputes between the United States and Canada under the 1909 boundary Waters Treaty. The IJC is also supposed to rule upon applications for approval of projects affecting boundary or transboundary waters and may regulate the operation of these projects. Their role was greatly expanded in the 1970s when they were given the task of overseeing the implementation of the Great Lakes Water Quality Agreement and improvements of transboundary air quality, especially in the Great Lakes basin.

The Great Lakes Water Quality Agreement, as amended via a 1987 protocol, directs the two federal governments to cooperate with state and provincial governments to develop and implement Remedial Action Plans for each Area of Concern.

Great Lakes Areas of Concern (AOCs) are severely degraded geographic areas within the Great Lakes Basin. They are defined by the U.S. - Canada Great Lakes Water Quality Agreement (Annex 2 of the 1987 Protocol) as "geographic areas that fail to meet the general or specific objectives of the agreement where such failure has caused or is likely to cause impairment of beneficial use of the area's ability to support aquatic life." The U.S. and Canadian governments have identified 43 such areas; 26 in U.S. waters, 17 in Canadian water (five are shared between U.S. and Canada on connecting river systems). Collingwood Harbour, in Ontario, was the first and only of these 43 sites to have been "delisted".

The Great Lakes Water Quality Agreement calls for Remedial Action Plans (RAPs) to restore and protect 14 beneficial uses in Areas of Concern. An impaired beneficial use means a change in the chemical, physical or biological integrity of the Great Lakes system sufficient to cause any of the following:

- restrictions on fish and wildlife consumption
- tainting of fish and wildlife flavor
- degradation of fish wildlife populations
- fish tumors or other deformities
- bird or animal deformities or reproduction problems
- degradation of benthos
- restrictions on dredging activities
- eutrophication or undesirable algae
- restrictions on drinking water consumption, or taste and odor problems
- beach closings
- degradation of aesthetics
- added costs to agriculture or industry
- degradation of phytoplankton and zooplankton populations
- loss of fish and wildlife habitat