

June 20, 2015

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*Transmission: original by e-mail*

Dear Michael Goffin and Susan Hedman:

***RE: Progress on Implementation of Annex 3 on Chemicals of Mutual Concern***

It is now almost three years since the protocol to the Great Lakes Water Quality Agreement (GLWQA) was signed. The Parties began working on the implementation of the Agreement shortly after the formal signing of the revised Agreement in Washington, D.C. on September 7, 2012. We consider it appropriate, therefore, to now assess the adequacy of progress on implementation.

Attached you will find documents detailing our experiences as participants over the past two years around Annex 3 activities, and drawing upon our decades of dedicated work to the implementation of the commitments on toxic substances in the GLWQAs of 1978 and 1987, and through implementing activities such as the Binational Toxics Strategy [1997].

This assessment and these experiences have led us to have major concerns with how Annex 3 is being implemented. We are, therefore, making recommendations to you on how to better achieve the goals of that Annex.

**CONCERNS**

**1. Identifying Chemicals of Mutual Concern**

When Canada and the U.S. signed the GLWQA in September 2012, we were upset that no chemicals of mutual concern were listed. Now, almost three years later, we still do not have a complete listing of chemicals of mutual concern. This situation obviously does not correspond with the reality of the situation in the Great Lakes Basin. There are many lists of chemicals developed specifically for the Great Lakes Basin that have been recognized by the governments to be of mutual binational concern. These include the substances listed in the previous GLWQAs, in the Binational Toxics Strategy, in the Lakewide Management Plans, and in the Areas of Concern plans. We have compiled these into one list in our attached brief.

The list of chemicals of mutual concern should be put through a refinement process to determine priorities for action and to determine whether any of these substances can be removed from the list because they are no longer of concern in the Great Lakes Basin.

Even those substances where governments and industry have made progress at reducing the release of them are still at levels that scientists agree are too high to drop from our attention. Even if we think that they are not the top priorities now for action, we should continue to monitor their presence and effects in the basin, keep alert for all actions that could reduce or increase their presence in the basin, and report on their status every three years under the GLWQA and under the State of the Lakes Ecosystem Conference (SOLEC). If we do not list them as chemicals of mutual concern, it sends an inappropriate message that they no longer need our attention.

### *Current Approach Implemented under Annex 3*

In contrast with this inclusive approach, in March 2014, the Canadian and U.S. governments submitted a list of seven substances or classes of substances to Annex 3's Identification Task Team (ITT) as "candidate chemicals" for consideration as to whether they should become the first chemicals of mutual concern.<sup>1</sup> It is expected that the recommendations on these seven substances or groups of substances will go to the Great Lakes Executive Committee (GLEC) in June 2015 and from there to the Parties (Canada and the U.S. governments) for decision as to whether they should be designated. If they are designated as a chemical of mutual concern, the plan is to then set up a different task team – the Strategies Task Team (STT) – to develop a plan for addressing the issues associated with each chemical of mutual concern.

This has not been a good use of either the ITT's time and energy or of the governments' limited resources. It is like reinventing the wheel because the governments have already clearly stated that all of these and many others are substances of concern in the Great Lakes. Substantial comments by environmental non-governmental organizations were submitted during the public comment period on the Binational Summary Reports prepared by the ITT. These reports highlighted several weaknesses in the review conducted by the ITT on the candidate chemicals.<sup>2,3</sup>

It would be a better use of the ITT's time to have them propose, in consultation with the concerned public, criteria for selecting from the larger list of designated chemicals of mutual concern and the different levels of priority that each chemical or class of chemicals should receive based on scientific criteria such as thresholds of persistence,

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<sup>1</sup> The ITT is the task team set up under Annex 3 of the GLWQA to identify substances proposed by the governments to recommend to the governments whether they should be designated as chemicals of mutual concern.

<sup>2</sup> See NGO response to Binational Summary Reports for candidate Chemicals of Mutual Concern (CMC) in the Great Lakes Basin. Letter to U.S. Environmental Protection Agency, and Environment Canada dated June 3, 2015.

<sup>3</sup> See Healing Our Waters Great Lakes Coalition. Comments on Annex 3 Binational Summary Reports, June 3, 2015.

bioaccumulation potential, toxicity, data gaps, etc. Once such criteria have been set, the ITT should categorize each chemical or class of chemicals of mutual concern.

In the current approach, the ITT review of the candidate chemicals resulted in four chemicals with “No Determination” due to insufficient data and information. A “No Determination” result is unacceptable and undermines the credibility of the review process and the principle of precaution as promoted in the GLWQA. To uphold the precautionary principle, the implementation framework should not include a conclusion of “No Determination.”

## **2. Determining Actions to take on Chemicals of Mutual Concern**

We are concerned with the emphasis in the Annex 3 process on decision-making based on risk assessment conclusions with exposure as the key variable in the rationale for determining chemicals of mutual concern. This is particularly alarming because it is coupled with the absence of substantive discussion of hazard assessment and hazard management. By subordinating hazard assessment to the exposure aspect of risk assessment, the Parties and the GLEC have created an inherent contradiction with the intent of the Agreement and its guiding principles. Zero discharge and virtual elimination, precaution and prevention are principles in the Agreement that require front-of-pipe strategies. These focus on reduction of hazard and the elimination or reduction of exposure, thereby eliminating or reducing risk. Risk management, particularly quantitative risk management, technical and management controls as a whole tend to focus on end-of-pipe practices that prioritize managing risk and exposure over preventing hazard.

The governments have stated that once they have designated chemicals of mutual concern, they will set up a Chemicals of Mutual Concern Binational Strategies Task Team (STT) to develop recommendations for action plans. We support setting up this task team to focus on action plans. We recommend that the STT be structured in a manner similar to the way in which the Binational Toxics Strategy operated. This would mean that a multi-stakeholder STT would be set up, as well as multi-stakeholder STT subcommittees for each chemical or class of chemicals. The overall STT should, with input from the Annex 3 Subcommittee (C3), Extended Subcommittee (EC3) and the public, develop action plans.<sup>4</sup>

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<sup>4</sup> The Annex 3 C3, or Annex 3 Subcommittee, is composed of representatives of the Parties from federal level offices and agencies, provincial and state level offices and agencies, and Tribes. The EC3, or Annex 3 Extended Subcommittee, is comprised of the C3 plus six non-governmental organization representatives, three from Canada and three from the U.S., with equal representation from business and industry and environmental organizations. The Annex 3 C3/EC3 is co-led by one senior Canadian government representative and one senior U.S. government representative. The C3 and EC3 were considered one group and met (via conference calls) as one group. However, the C3 would meet to adopt and recommend CMCs to send to the GLEC.

One example included a proposal by the C3 co-leads to appoint NGO members of the EC3 as co-chairs of the EC3. Following further discussions with key EC3 members, the proposal was withdrawn.

For example, provide greater input into the development of Terms of Reference, how citizens could nominate chemicals for consideration, and limited time available to engage in substantive discussions with the Annex 3 C3 on issues of substance being raised by the EC3.

To ensure a proper balancing of interests on the STT and each subcommittee of the SST, the membership of the STT and each subcommittee should be divided approximately equally among the following sectors: 1) industrial, 2) environmental group, 3) First Nation, Métis, and Tribes, 4) academic, and 5) federal, provincial and municipal government. This has become an issue on the ITT where at least one of the substance-specific groups is co-chaired only by scientists affiliated with the industry sector.

### **3. Support for Task Teams**

The experience over the past year in the operation of Annex 3's ITT provides valuable lessons for the future work of any task team. First of all, there has been confusion about exactly what the role of the ITT is and of the governments' expectations of its members. Secondly, it was extremely hard for the ITT to fulfill its functions in a timely manner through e-mail and conference calls. More face-to-face meetings are needed. Thirdly, there have not been adequate resources to assist the ITT members with their work. The ITT has had to spend substantial time on gathering information; instead they should be able to focus on reviewing information and draft documents prepared by the governments, and providing input and recommendations. If the governments do not have sufficient staff to carry out this role, they should hire consultants to help out. If the expectations of the ITT members are greater than this, the governments should contract with ITT members to do this research and writing.

### **4. Public Engagement**

The public has not been kept up-to-date on Annex 3 activities, including activities of the ITT. People need to be kept aware of what is happening so that they have a sense of the progress that is occurring. While we appreciate that the binational.net website has recently been upgraded, the information provided on the site still does not fulfill that need. For example, the site only provides information on the purpose of the ITT, not what it is doing or has done. The twice-yearly reports at GLEC are too infrequent and too brief to be an adequate mechanism to fulfill this role. Besides those reports are only available to GLEC members and attendees; they are not put up on binational.net website, which is available to everyone. Even the members of the Annex 3 EC3 have expressed frustration about not being kept up-to-date on the work being carried out through the Annex.

In addition, despite requests, the public has not been informed of how and when they will have the opportunity to make input into Annex 3 activities. The most concrete item related to input that the Annex has put together is on the stakeholder process for submission of candidate chemicals of mutual concern. The governments put this together in reaction to environmental group demand for such a mechanism. The nomination process has now been put on the binational.net website.

This is an alarming situation because one of the principles in the new GLWQA (public engagement in Article 2) highlights a greater emphasis on public engagement.

Addressing chemicals of mutual concern is critically important for us and for the well-being of all life in the Great Lakes basin. Therefore, we want to work with you to make sure that Annex 3 is implemented in the best way possible.

## **RECOMMENDATIONS**

In response to the concerns on the operations of the ITT and STT highlighted above, we propose the following recommendations to improve the implementation of the Annex 3 of the GLWQA.

***Recommendation 1:***

***The C3, working with the EC3 and in consultation with the public, should establish a list of criteria to set priorities for the list of Chemicals of Mutual Concern.***

***Recommendation 2:***

***The Parties should immediately formally adopt a list of substances from already existing Great Lakes-specific lists as Chemicals of Mutual Concern under Annex 3 of the GLWQA.***

***Recommendation 3:***

***The Parties should give the list of Chemicals of Mutual Concern adopted in Recommendation 2 to the ITT to prioritize for action.***

***Recommendation 4:***

***Hazard prevention, reduction and elimination should be the primary strategies for determining the actions to be taken when addressing Chemicals of Mutual Concern in the Great Lakes basin instead of a risk assessment approach that results in a focus on risk management and exposure control. Emphasis should be placed on methods that promote prevention, zero discharge, and the reduction and eventual virtual elimination of toxic chemicals in the Great Lakes Basin as required in the Great Lakes Water Quality Agreement.***

***Recommendation 5:***

***The ITT Terms of Reference should be revised to assure a balanced membership. Recommendations for CMCs should be made by majority vote with public availability of minority views.***

***Recommendation 6:***

***The designation of “No Determination” for a CMC should be eliminated. Chemicals designated “Not a CMC” should have recommendations for further actions to address deficiencies or rationales to be dropped from further consideration and should include preventative measures and precautionary measures that should be taken immediately before more data is gathered.***

**Recommendation 7:**

***The Parties should assure that all Task Teams established under Annex 3 receive adequate support from the C3 and Team co-leads, including adequate funding.***

**Recommendation 8:**

***The Parties should set up a multi-stakeholder Strategies Task Team (STT). The STT should set up a multi-stakeholder sub-committee for each chemical or class of Chemicals of Mutual Concern to develop action plans. The timing for developing action plans for each chemical or class of chemicals would be determined by the STT, in consultation with the public.***

**Recommendation 9:**

***The Parties should publish the criteria for designation of chemicals of mutual concern and the process by which the GLEC chose those chemicals.***

**Recommendation 10:**

***The Parties should ensure that all documents, including drafts, associated with each Annex and its Task Teams are posted on the binational.net as well as other tools such as wiki/SharePoint attached to a Facebook page.***

**Recommendation 11:**

***The Parties should improve public engagement in Annex 3 by:***

- 1. Providing a public update every three months at a minimum on the status of activities under Annex 3;***
- 2. Informing the people of plans for public consultation, including the timing of the consultation and the mechanisms that will be used to consult and updating as new plans develop;***
- 3. Informing the public of ways that they can be engaged in the Annex beyond the consultation processes. This approach should include: establishing open call-in sessions advertised on Facebook, and other social media sites and through e-mail list-serves as well as providing the public opportunities to request or petition the GLEC or Annex co-chairs for a community conference call or meeting if they have a particular subject they wish to discuss in their community.***

We the undersigned look forward to your responses to our comments and recommendations and would appreciate the opportunity to discuss them with you.

## **SIGNATORIES**

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