

Addendum to The Toledo Journal of Great Lakes' Law, Science & Policy article titled:
“Challenges to the Constitutionality and the Effectiveness of the U.S. Management of the Bi-National Great Lakes Fisheries”

The information provided in the identified publication by Busch could be viewed as a cerebral exercise in legal processes until the results of some Lake Committees' actions and their implications are reviewed. Since I am most familiar with the lower Great Lakes, I will focus on them.

Further Clarification

The May 2005 publication of this peer-reviewed article in The Toledo Journal of Great Lakes' Law, Science & Policy¹ followed the preparation of a “white paper” on this topic that was made available in the late 1990s to the Great Lakes community. According to Article I, Section 10 of the United States Constitution the States may not enter into “any Treaty, Alliance or Confederation” without the congressional approval. This applies to the interstate management of the bi-national Great Lakes.

Two attempts had been made to formalize the interstate/bi-national management of the Great Lakes fisheries prior to the 1954 convention on Great Lakes fisheries. An international treaty was prepared in 1908 and in 1946 a bi-national convention produced an agreement. However, neither was approved or ratified by Congress. Dochoda and Jones² provide information that the 1954 convention which created the Great Lakes Fisheries Commission succeeded in getting congressional approval because it did not provide “regulatory authority for the commission over Great Lakes Fisheries (except possibly as pertains to sea lamprey).”²

From 1954 to 1964 the GLFC program expanded to include more fisheries research. A Canadian proposal was made in 1964 to have the GLFC sponsor inter-state/bi-national “lake committees.”² These were established in 1965 without congressional approval.

The Magnuson Fishery Conservation Act of 1976 provided an opportunity for the eight Great Lakes States to form a U.S. regional fishery management council. The States declined but tried to structure coordination by preparing and approving a “Joint Strategic Plan for Management of Great Lakes Fisheries” in 1981 and updated it in 1986 and 1997. All the major Great Lakes fisheries management agencies (federal, state, and 1st Nations) participated and signed the Plan. However, neither the “Strategic Plan” nor the membership under this Plan received approval by Congress as a formal Advisory Committee³ or as a regulatory body; in fact Dochoda and Jones² describe the “Strategic Plan” as a nonbinding “gentleman’s agreement.” The Strategic Plan identifies the interstate/bi-national lake committees as the implementation units² for managing the fishery.

In a 1997 response to a legal challenge by Ohio commercial fishermen that questioned the management authority of the Lake Erie Committee, the U.S. State Department dismissed the claim since nonbinding harvest allocations among the States and between the States and Canada were not prohibited by the US Constitution. The key term is *nonbinding*. However, in reality the harvest allocations and management goals and objectives are binding. The consensus decisions agreed upon by the participating States and Canada are binding to the same degree as those of the congressionally approved Atlantic, Gulf, and Pacific States Marine Fisheries Commissions. Furthermore, if Lake Committee harvest allocations and resource objectives are nonbinding on the participants why have Lake

¹ Vol. 5, No. 1, 2003. Legal Institute of the Great Lakes, The University of Toledo College of Law, Toledo, OH.

² Dochoda, M.R. and M.L. Jones. 2003. Managing Great Lakes Fisheries Under Multiple and Diverse Authorities. The Toledo Journal of Great Lakes' Law, Science and Policy. Vol. 5, No. 1. The University of Toledo College of Law, Toledo, Oh

³ Federal Advisory Committee Act, 5 U.S.C. App.2

Committees twice (1981 and 1986) requested arbitration to resolve harvest allocation and stocking issues? And, why has language been added to the 1997 version of the Strategic Plan to include: “each fishery agency should submit all substantive changes from existing practice to the lake committee before implementation.” Also language was added that “proposals from one agency that will influence the interest of another agency may become the subject of negotiations until consensus is achieved,” and for conflict resolution the use of “third party mediation.” Obviously the definition for “nonbinding” is very different as used by the Department of State for the eight Great Lakes States and by the Great Lakes Fisheries Commission’s Lake Committees.

Implications of the LOC and LEC Management Approaches to the Protection and Restoration of their Natural Resources

The Strategic Plan charges the Lake Committees with developing “fish community objectives that are comprehensive and principle-based.” Such lake specific goals and objectives are crucial in advancing an ecosystem-based approach to management⁴ and in guiding the present and future activities of federal agencies, such as USEPA, USACOE, FERC, and the International Joint Commission, in addressing their responsibilities in the specific lake basins. Therefore, the Lake Committees that neither operate with congressional approval nor are legally responsible to a congressional approved regulatory institution are developing fish community goals and objectives that directly influence the regulatory activities of federal agencies in the Great Lakes basin for decades to come. Furthermore, “the fish community objectives” developed by the lake committees are published by the GLFC under its logo.² This incorrectly implies that the GLFC and its commissioners (including the Assistant Secretary of the Interior) endorse these objectives.

Lake Ontario

A historic perspective of the changes in its fish community can be obtained from the GLFC.⁵ In summary, the native coldwater prey (such as deepwater sculpin and lake herring) and predator (such as lake trout, Atlantic salmon, and blue pike) fish community has been lost. The prey community has been replaced by the exotic alewife; management is focused on maintaining this species prominent role. Predator species are the exotic Pacific salmon and brown and rainbow trout with a limited quantity of stocked lake trout.

A 30 year effort has been underway to restore the native lake trout. However, it has had little success because the native strains are extinct, the forage quality provided by the exotic alewife is unsuitable, stocking density has been reduced to have forage available for stocked Pacific salmon, and harvest of lake trout is allowed as follows: New York – 3 lake trout outside of protected slot size; Ontario – 3 lake trout any size.⁶

The GLFC’s Lake Ontario Committee (LOC) has shown little support for restoring native forage fish and Atlantic salmon and, as indicated above, the lake trout restoration program can not be taken as a serious effort. The LOC has also not shown support in identifying the historic Atlantic salmon population as “sea run” or “landlocked;” this is a very important issue in addressing 50-year hydropower licenses on the St. Lawrence River.

⁴ Busch, W.-D.N., B.L. Brown, and G.F. Mayer (Eds). 2003. Strategic Guidance for Implementing an Ecosystem-based Approach to Fisheries Management. United States Department of Commerce, National Oceanic and Atmospheric Administration, NMFS, Silver Spring, MD 62p.

⁵ http://www.glf.org/pubs/SpecialPubs/Sp99_1.pdf

⁶ <http://www.glf.org/lakecom/loc/lochome.php>

Lake Erie

A historic perspective of the changes in the lake's fish community can be obtained from the GLFC.⁷ Lake Erie also lost its coldwater prey (such as lake herring) and predators (such as lake trout and blue pike). The LEC is not focused on restoring the historic fish community.

A 20 year effort has been underway to restore the native lake trout. However, it has had no success because the native strains are extinct, the forage quality provided by the exotic rainbow smelt is unsuitable, stocking density has been kept very low in order to have the forage species available for commercial harvest, and harvest of lake trout is allowed as follows: Michigan – NA; Ohio - 2 to 5 mixed 12"; Pennsylvania - 2 size 9" or 15"; New York - 1 larger than 9"; Ontario – 3 lake trout any size.

The GLFC's Lake Erie Committee (LEC) has shown little support for restoring native forage fish and, as indicated above, the lake trout restoration program can not be taken as a serious effort. The LEC has also not shown support in identifying the historic blue pike population; this is a very important issue in addressing the historic and restored coldwater fish community in the eastern basin of the lake.

Conclusion

The current fisheries management approach exercised by the independent, unregulated Lakes Ontario and Erie Committees, under the umbrella of the Great Lakes Fisheries Commission and their "Joint Strategic Plan for Management of Great Lakes Fisheries," is not in line with the principles of the *Public Trust Doctrine*. The Lake Committees' interstate/bi-national management structure is also not in compliance with the U.S. Constitution. Their operations have very significant consequences. This is demonstrated by the management goals and objectives prepared, supported, and promoted by these Lake Committees. Their reliance on artificially supported exotic predators, supported by exotic forage species, mislead and hamper federal regulatory agencies in their efforts to restore healthy, self-sustaining, basin-wide ecosystems which are in the public's long-term interest.

Prepared on June 28, 2005 by

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⁷ <http://www.glf.org/lakecom/lec/lehome.php>