

Comments of Barry Boyer on Proposed Lake Ontario Levels Decision

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My name is Barry Boyer, and I am a law professor teaching courses in Environmental and Administrative Law at the State University of New York at Buffalo. I also serve as a board member (emeritus) of Buffalo Niagara Riverkeeper, a trustee of the Central and Western New York Chapter of The Nature Conservancy, and a member of the Buffalo River Remedial Advisory Committee and the Lake Erie Forum. These affiliations are presented for identification purposes only; the comments herein are solely my own views, and should not be attributed to any of these organizations.

In general, the Commission's tentative decision is confusing, poorly explained and justified, and apparently defective both legally and as a policy analysis. Given such a sloppy and unconvincing rationale for the decision, the Commission's choice of Plan 2007 over Plan B+ is arbitrary, capricious, and an abuse of discretion. The case for the second-place alternative, Plan B+, seems much more convincing on the basis of the documents made available for public review, and B+ should have been the alternative selected.

The Framework of the Decision

The task of analyzing and critiquing the tentative decision is made more difficult than it ought to be because of the way that the Commission has structured its decision. Available documentation such as the brochure "For Consideration and Discussion: Proposed New Order and Plan 2007" provide long laundry-lists of performance indicators with quantitative scores for each of the four plans under consideration, but no good explanation as to how these various relevant factors have been weighted or valued by the Commission in reaching a decision. Economic and environmental considerations are kept totally separate, with different systems of quantification and scant explanation of how the Commission attempted to reconcile them. Stakeholders deserve a more transparent decision, especially in view of the Commission's emphasis on accountability in its most recent Biennial Report. Moreover, since the tentative decision appears to embody an extreme and unjustified deference to the interests of shoreline property owners, it raises an inference that the eleventh-hour emergence of Plan 2007 might be linked to the Bush Administration's firing of IJC Commissioner and International Boundary Commissioner Schornack for showing insufficient solicitude to the interests of property owners. See *Leu v. International Boundary Commission*, 523 F.Supp. 1199 (W.D. Wash. 2007). A careful, detailed and persuasive explanation of the rationale for the Plan chosen to govern the Order of Control that will ultimately be chosen for Lake Ontario can help to dispel such appearances.

Plan 2007 Appears To Be Inconsistent with the Boundary Waters Treaty

The Commission's Proposed New Order (Introduction, paragraph 2) correctly states that any changes to the existing Order must be consistent with Article VIII of the Boundary Waters Treaty¹. For present purposes, that Article contains two key provisions: one setting an order of priority among uses, and another dealing with compensation to those who may be damaged by IJC-approved works.

Use Priorities, Economic Performance Indicators, and the Issue of Factor-Weighting

Article VIII of the Boundary Waters Treaty provides:

The following order of precedence shall be observed among the various uses enumerated hereinafter for these waters, and no use shall be permitted which tends materially to conflict with or restrain any other use which is given preference over it in this order of precedence:

1. Uses for domestic and sanitary purposes;
2. Uses for navigation, including the service of canals for the purposes of navigation;
3. Uses for power and for irrigation purposes.

Notably absent from this list are two key interests incorporated in the Indicators for the Proposed New Order: shoreline property owners and environmental considerations. Both receive some recognition in the Treaty; as the following section indicates, there is a compensation provision in Article VIII, and environmental concerns are partially addressed by Article IV's directive that the boundary waters "shall not be polluted on either side to the injury of health or property on the other." This suggests that while the Commission may take account of property and environmental factors in establishing orders of control, it may not allow these other uses to "materially interfere" with the three priority uses. At minimum, the priority uses are entitled to greater weight than nonpriority uses and values.

When one looks at a side-by-side comparison of the economic variables for the two primary candidate plans, Plan B+ and Plan 2007, it becomes apparent that the Commission is proposing to do exactly the opposite: nonpriority factors (Coastal Properties and Recreational Boating) are

¹ Presumably, the Commission intends by this statement to indicate that Article VIII is the most relevant provision of the Boundary Waters Treaty, and is not saying that Article IV is the only Article it feels bound to comply with when issuing a revised order.

given prominence over the Treaty’s priority factors (Commercial Navigation and Recreational Boating). Plan 2007 is inferior to Plan B+ with respect to both Hydropower and Commercial Navigation:

	Plan 2007	Plan B+	Advantage 2007
ECONOMIC VARIABLES			
Coastal Properties	0.15	-2.75	2.9
Commercial Navigation	1.69	2.13	-0.44
Hydropower	2.37	6.09	-3.72
Recreational Boating	1.32	-0.74	2.06
NET ECONOMIC ADVANTAGE PLAN 2007			0.8

[Values in millions of dollars per year.]

Several other aspects of this comparison deserve comment. First, the losses to coastal properties evidently assume that these would all be uncompensated losses yet, as the discussion in the following section of these comments indicates, that is highly questionable. Second, the loss of \$3.72 million per year in hydropower that would result from adopting Plan 2007 also carries with it an environmental cost. As the Study Group’s Technical Work Group Summaries and Contextual Narratives make clear, this forgone generating capacity would have to be made up by fossil fuel sources such as natural gas and coal, contributing to atmospheric pollution with both conventional pollutants and greenhouse gases along with thermal pollution and environmental costs associated with extracting, transporting and burning the fossil fuels. Hydropower is also an important economic development and job retention tool in New York State’s economy, as evidenced by the state’s Power for Jobs program. Finally, the net economic advantage of Plan 2007 of \$800,000 per year provides a rough benchmark for how the Commission is valuing the environment: Plan 2007 is better than Plan B+ only if the greater environmental benefits that would be realized from adopting B+ are worth less than \$800,000 per year. This is the core tradeoff that is being made, and it is obscured in the Commission’s decision documents.

If one does a side-by-side comparison of the Commission’s environmental indicators similar to the one reproduced above for economic factors, the following variances appear:

- In Lake Ontario, Plan B+ is superior to Plan 2007 in ten out of eleven environmental indicators.
- On the St. Lawrence River above the dam, Plan B+ is greatly superior to Plan 2007 on one indicator, Muskrat House Density, while the others are roughly equivalent on balance.
- Below the dam, the two plans are roughly equivalent, with Plan B+ superior in 5 indicators, Plan 2007 superior in 6, and two even.

How significant are these variations? While the Commission's decision documents do not address this issue, the Technical Work Group summaries do provide some information about the meaning of the variable most affected by the choice between these two plans, Muskrat House Density:

Current muskrat population levels in the upper St. Lawrence River are extremely low Muskrats constitute a very important part of both wetland structure and function and therefore represent much more than just their own species. They can influence vegetation species richness in wetlands, offer suitable substrate for seed germination, help facilitate decomposition processes, provide nesting sites for birds and turtles including some species at risk, and create microtopography in wetlands. [p.26]

Why are these lost ecosystem services not worth \$800,000? The Commission's decision documents provide no clue to this mystery.

The Treaty Compensation Provision and Twisted Mitigation

At the heart of the Commission's tentative decision is what it calls "mitigation," as in the following passage from the IJC's "Plan 2007 Overview":

[The Commission's experts in developing Plan 2007] were not able to gain the same level of environmental benefits as the study's best regulation plan option for the environment, B+, without unacceptable negative effects on other interests that are a consequence of B+ based plans. However, there may be future opportunities to move to a more environmentally beneficial plan, such as a B+ based plan, if mitigation measures are implemented to effectively address the harmful effects to some interests that are specifically associated with B+ based plans.

Here and elsewhere in the Commission's decision documents, the normal meaning of the term "mitigation" is being twisted in a truly Orwellian fashion. Normally, "mitigation" means measures that are being taken by or imposed upon a permit applicant or other party seeking government approval in order to offset adverse environmental impacts from the action in question.² The IJC has twisted that meaning 180 degrees, so that in IJC World, "mitigation" evidently means holding property owners harmless against possible wealth reductions from any

² See, e.g., CEQ regulations for environmental impact statements under the National Environmental Policy Act, 40 CFR 1502.14 ("Include appropriate mitigation measures not already included in the proposed action or alternatives"); Philip E. Karmel and L. Margaret Barry, *Mitigation of Environmental Impacts Under SEQRA*, 19 *Env. Law in New York* 21 (Feb. 2008) ("SEQRA [the New York State Environmental Quality Review Act] requires agencies not only to consider any significant adverse impacts but to minimize or avoid them to the maximum extent practicable. It is this obligation that gives SEQRA its teeth.")

governmental action that might restore or protect the environment. In other words, it appears to be an example of “greenwashing,” the appropriation of pro-environment language to mask anti-environmental actions.

Not surprisingly, the Commission does not define what it means by “mitigation.” From the context and usage in the decision documents, it seems that what really is being talked about is “waterfront property owners’ compensation” or (perhaps more accurately) taxpayer-funded bailouts for shoreline property owners who might suffer some losses if a more natural regime of levels and flows were restored in the Lake Ontario system. The Commission does not provide any rationale for why potential environmental benefits should be held hostage in this manner to compensation of shoreline property owners, and more significantly, it does not provide any explanation as to why existing legal regimes for dealing with the interests of property owners are believed to be inadequate, or how the proposed property owner hold-harmless requirement would interface with these existing systems.

a. The Boundary Waters Treaty System. The Treaty’s compensation provision³ provides that if a project will cause damage

[i]n cases involving the elevation of the natural level of waters on either side of the line as a result of the construction or maintenance on the other side of remedial or protective works or dams or other obstructions in boundary waters flowing there from or in waters below the boundary in rivers flowing across the boundary, the Commission shall require, as a condition of its approval thereof, that suitable and adequate provision, approved by it, be made for the protection and indemnity of all interests on the other side of the line which may be injured thereby.

In other words, the entity seeking to take actions that will raise water levels above the natural regime—presumably in this case NYPA and/or OPG--is the party who should compensate (or act as insurer for) shoreline property owners who might suffer damage in future storm events.⁴ The Commission’s duty is to incorporate such a provision into its Order of Approval. The first substantive article of the conditions in the existing Order of Approval in fact does contain such a

³ There are two separate but similar indemnification provisions in Article VIII. In addition to the provision quoted in the text, the preceding paragraph deals with “remedial or protective works to compensate” for the effects of projects altering levels or flows: “The Commission in its discretion may make its approval in any case conditional upon the construction of remedial or protective works to compensate so far as possible for the particular use or diversion proposed, and in such cases may require that suitable and adequate provision, approved by the Commission, be made for the protection and indemnity against injury of all interests on the other side of the line which may be injured thereby”

⁴ In economic policy terms, this is simple cost-internalization: if one of the costs of generating electricity through hydropower is damage to upstream or downstream properties, that cost should be borne by the entity generating and selling the power, so that the cost of electricity will reflect its true social cost. The Commission’s favored taxpayer subsidy to waterfront property owners would subvert this market discipline.

mandate to provide “suitable and adequate protection and indemnity” in accordance with the laws of the two nations. Presumably a new Order of Approval would also contain such a provision. Several judicial decisions brought by property owners seeking to recover for damages to their lands caused by the operations of works authorized by the IJC have made clear the legal routes by which property owners can be compensated.

b. Court cases on property damage. Early in the history of the Moses-Saunders dam, shoreline property owners who were concerned about potential storm damage from higher lake levels associated with operation of the project contested the New York Power Authority’s license. In *Lake Ontario Land Development and Beach Protective Association v. Federal Power Commission*, 212 F.2d 227 (D.C. Cir. 1953), the court upheld the license, noting that the IJC had incorporated a provision for property owner indemnification in its Order of Control, and that in addition, “Section 10(c) of the Federal Power Act provides that each licensee shall be liable for all damages occasioned to the property of others.” More recently, the Second Circuit Court of Appeals clarified the appropriate legal route for property owner compensation in *DiLaura v. Power Authority of the State of New York*, 982 F.2d 73 (2d Cir. 1992). In *DiLaura*, shoreline owners sought compensation for ice damage caused by manipulation of Niagara River levels and flows associated with operation of the Niagara Power Project. The court concluded that Congress had not intended to create a separate federal implied right of action for property owners under relevant FERC statutes, but that property interests could be vindicated under applicable state law. Finally, *Erosion Victims of Lake Superior Regulation v. United States*, 833 F.2d 297 (Fed. Cir. 1987) indicates that the United States might in some cases be liable for property-damaging actions taken under the aegis of the International Joint Commission if there had been “sufficient direct and substantial United States involvement” in the action in question, taking account of the nature of the government activity and the benefit of the action to the United States.

Against the background of this clear, consistent, and longstanding line of authority regarding the compensation rights of shoreline property owners, the Commission’s insistence on the creation of a separate compensation program for shoreline property owners as a precondition of stronger environmental protections is mystifying. Absent some persuasive explanation for the Commission’s departure from this line of authority, its decision is arbitrary, capricious, and an abuse of discretion. Moreover, if there are in fact plausible reasons to believe that existing compensation mechanisms are inadequate, why doesn’t the Commission use its Treaty authority to condition its Orders of Approval on the provision of adequate indemnification?