THE GREAT LAKES RESTORATION INITIATIVE: A REVIEW OF THE PROGRESS AND CHALLENGES IN RESTORING THE GREAT LAKES

(114–27)

HEARING

BEFORE THE

SUBCOMMITTEE ON
WATER RESOURCES AND ENVIRONMENT

OF THE

COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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September 25, 2015

SUMMARY OF SUBJECT MATTER

TO: Members, Subcommittee on Water Resources and Environment
FROM: Staff, Subcommittee on Water Resources and Environment
RE: Hearing on "The Great Lakes Restoration Initiative: A Review of the Progress and Challenges in Restoring the Great Lakes"

PURPOSE

On Wednesday, September 30, 2015, at 10:00 a.m. in 2167 Rayburn House Office Building, the Subcommittee on Water Resources and Environment will meet to receive testimony on "The Great Lakes Restoration Initiative: A Review of the Progress and Challenges in Restoring the Great Lakes." Witnesses will include representatives from the Environmental Protection Agency (EPA), the Natural Resources Conservation Service, the Government Accountability Office (GAO), the U.S. Conference of Mayors, the Great Lakes Commission, the Great Lakes Metro Chambers Coalition, the Ohio Agribusiness Association, and the Healing Our Waters-Great Lakes Coalition.

BACKGROUND

Millions of people in the United States and Canada depend on the Great Lakes – the largest system of freshwater in the world – as a source of drinking water, recreation, and economic livelihood. The Great Lakes Basin has been vulnerable to the effects of toxic and other pollutants as a result of industrial, agricultural, and residential development.

The Great Lakes Basin includes parts of the states of Minnesota, Wisconsin, Illinois, Indiana, Ohio, Pennsylvania, and New York, all of the State of Michigan, and part of Ontario, Canada. Over 33 million people live in the Great Lakes Basin, representing one tenth of the U.S. population and one quarter of the Canadian population. The Great Lakes hold 18 percent of the world's fresh water supply and 90 percent of the U.S. fresh water supply.

Over the past 200 years, the Great Lakes region has undergone significant development. Some of the industries include mining, steel, machine tools, and automobile manufacturing. Agriculture is also a significant component of the regional economy. The Great Lakes system provides convenient waterways for the movement of goods, is the source of drinking water for millions, supplies process and cooling water for industrial uses, and is used to generate hydroelectric power.

In addition, the Great Lakes provide significant recreational benefits, including sightseeing, fishing, boating, and swimming. According to a study authorized by Congress and carried out by the U.S. Army Corps of Engineers in partnership with the Great Lakes Commission, one-third of all U.S.-registered recreational boats are in the Great Lakes, resulting in $34.6 billion annually in economic activity and 244,000 jobs. Nearly $18 billion in fishing, hunting, and wildlife watching occurs annually in the Great Lakes region, according to the U.S. Fish and Wildlife Service.

Industrialization and development have had a significant impact on the Great Lakes ecosystem. The Great Lakes are particularly vulnerable to contamination because outflow rates from most of the Lakes are very slow: Lake Superior retains water for 173 years, Lake Michigan for 62 years, and Lake Huron for 31 years. Lake Erie, the shallowest of the Lakes, has the shortest water retention, at 2.7 years. Lakes with low outflow rates do not flush pollutants quickly. As a result, some pollutants discharged into the Great Lakes settle into the sediments at the bottom of the Lakes.

Non-indigenous species and excessive nutrients from a variety of sources have greatly impacted the Great Lakes ecosystem. More than 180 invasive aquatic species have become established in the Great Lakes, some of which have caused extensive ecological and economic damage. In the 1950s, the sea lamprey was introduced unintentionally into the Lakes and decimated trout fisheries. In the 1960s, excessive growth of algae in portions of the Lakes led to a decline in oxygen levels and excessive phosphorus (nutrient) loadings were identified as the primary cause of this problem. More recently, in 2014, Toledo, Ohio implemented a drinking water ban that affected 500,000 people due to a harmful algal bloom caused in part by excessive nutrient runoff. Decades of industrial activity in the region left a legacy of polychlorinated biphenyl (PCB) and other contamination in sediments that make up the beds of many of the rivers and harbors in the Great Lakes. While efforts have been made to address these problems, they remain serious concerns.

GREAT LAKES RESTORATION INITIATIVE (GLRI)

In 2004, Executive Order 13340 was issued, creating the Great Lakes Interagency Task Force (Task Force). Chaired by the Administrator of the EPA, the Task Force is made up of senior officials from EPA, nine federal departments (the Departments of Agriculture, Commerce, Defense, Health and Human Services, Homeland Security, Housing and Urban Development, the Interior, State, and Transportation), and the Council on Environmental Quality. The Task Force was established to address nationally significant environmental and natural resource issues involving the Great Lakes. In addition to the Task Force, the Great Lakes Regional Working Group (Regional Working Group) was also established and is composed of the appropriate

regional administrator or director with programmatic responsibility for the Great Lakes system for each agency represented on the Task Force.

In 2010, the Great Lakes Restoration Initiative (GLRI) was established to provide additional resources toward critical long-term goals for the Great Lakes ecosystem, and its progress is overseen by the Task Force. Task Force agencies conduct work themselves or through agreements with state, local, or tribal government entities, nongovernmental organizations, academic institutions, or other entities.

During the first phase of the GLRI Action Plan, for Fiscal Years 2010 through 2014, GLRI resources supplemented agency budgets to fund over 2,000 projects to improve water quality, protect and restore native habitat and species, prevent and control invasive species and address other Great Lakes environmental problems. GLRI resources have also been used to double the acreage enrolled in agricultural conservation programs in watersheds where phosphorus runoff contributes to harmful algal blooms in western Lake Erie, Saginaw Bay and Green Bay. Five Task Force agencies (EPA, Fish and Wildlife Service, National Oceanic and Atmospheric Administration, Natural Resources Conservation Service, and the U.S. Army Corps of Engineers) received 85 percent of GLRI funds made available in Fiscal Years 2010 through 2014.

The EPA transfers GLRI funds to other federal agencies in support of the program. These funds are intended to supplement – not supplant – other agency funding. Each Task Force agency then uses the funds to carry out GLRI work itself, or awards funds to recipients through financial agreements, such as grants or contracts.

The second phase of the GLRI Action Plan is for Fiscal Years 2015 through 2019 and consists of five major focus areas: (1) Toxic Substances and Areas of Concern, (2) Invasive Species, (3) Nearshore Health and Nonpoint Source Pollution, (4) Habitat and Wildlife Protection and Restoration, and (5) Accountability, Education, Monitoring, Evaluation, Communication and Partnerships (Foundations for Future Restoration Actions). Each of the five focus areas has specific objectives, commitments, and measures of progress that are clearly identified within the Action Plan.

The Toxic Substances and Areas of Concern Focus Area has the objectives of remediating, restoring, and delisting Areas Of Concern (AOCs) and increasing knowledge about contaminants in the fish and wildlife of the Great Lakes. AOCs are locations that have experienced environmental degradation that results in an impairment of the area's ability to support aquatic life. The objectives of the Invasive Species Focus Area are to prevent new introductions of invasive species, control established invasive species, and develop invasive species control technologies and refine management techniques. The Nonpoint Source Pollution Impacts on Nearshore Health Focus Area aims to reduce nutrient loads from agricultural watersheds and reduce untreated runoff from urban watersheds, while the Habitats and Species Focus Area aims to protect, restore, and enhance habitats to help sustain healthy populations of native species and maintain, restore, and enhance populations of native species. The Foundations for Future Restoration Actions Focus Area was not previously addressed in the first GLRI Action Plan. The objectives of this new focus area are to ensure climate resiliency of GLRI-funded

projects, educate the next generation about the Great Lakes ecosystem, and implement a science-based adaptive management approach for GLRI.

The President's budget for FY 2016 requested $250 million for GLRI activities, $50 million less than the enacted FY 2015 level of $300 million.

GAO REPORT

In 2013, the GAO reviewed and reported on the implementation of the GLRI and methods to assess GLRI progress, among other things. GAO concluded that EPA and the Task Force agencies have made strides but face significant challenges in ensuring the future success of the GLRI. Among other things, GAO found that information in the Great Lakes Accountability System (GLAS), the GLRI's system for monitoring and reporting on GLRI progress, may not be complete and may prevent EPA from producing sufficiently comprehensive or useful assessments of GLRI progress. GAO also found that quantifying overall Great Lakes restoration is difficult and that it is often impossible to link specific environmental changes to specific projects or programs.

In July 2015, GAO released a second report on the GLRI, reviewing the manner in which GLRI funds have been used since the program's initiation. The report examined the (1) amount of federal funds made available for the GLRI and expended for projects, (2) process the Task Force used to identify GLRI work and funding, and (3) information available about GLRI project activities and results.

According to GAO's 2015 report, in Fiscal Years 2010 through 2014, Congress provided $1.68 billion for the GLRI. As of January 2015, $1.15 billion had been expended on 2,123 projects – about 68 percent of available funds. The Task Force agencies have not expended all of the funds made available for the GLRI for several reasons, chief among them being that many projects take several years to complete. GLRI funds are available for obligation for the fiscal year the appropriation was made, and the successive fiscal year. After these two fiscal years of availability, GLRI funds can be used for seven additional years in order to adjust these obligations in the event that events, such as extreme weather, cause a project to be completed later than planned.

In addition to GLRI funds, federal agencies can receive budget authority to obligate and expend funds that contribute to the overall restoration of the Great Lakes. Federal agencies have expended other funds on Great Lakes restoration activities such as reducing atmospheric deposition and controlling the generation, transportation, storage, and disposal of hazardous wastes. GAO found that, while EPA has data on the amounts of GLRI funds allocated, obligated, and expended, data on other funds received, obligated, and expended by federal agencies for Great Lakes restoration activities are not easily available for comparison. Budget crosscut reports prepared by the Office of Management and Budget have not identified federal agencies' obligations and expenditures for Great Lakes restoration activities, as required by recent appropriations laws. Information on obligations and expenditures on other Great Lakes restoration activities could be valuable to Congressional decision makers even several years later. Without this information it is not possible for decision makers to view GLRI funding in the

context of the funding of *overall* Great Lakes restoration activities, because information on such activities would only be available from each agency, making less information readily available for Congressional oversight.

The GAO's 2015 report examined 19 projects funded through the GLRI and carried out by government agencies, nongovernmental organizations, and academic institutions to identify the activities GLRI funds were spent on and the results that were achieved.

The projects examined range from environmental education initiatives to habitat assessment, modeling, and restoration, to soil erosion and sediment control, to green infrastructure plans. At the time of the review, 16 of the 19 projects had been completed and three projects were ongoing.

GAO reported that the projects studied contributed to Great Lakes restoration efforts in a variety of ways, including – but not limited to – improving the ability of ecosystems to act as buffers to watersheds by reducing runoff, using climate simulations to explain how nutrients enter the Great Lakes, developing trapping technologies and protocols for invasive species in Great Lakes tributaries, reducing the loss of sediments and nutrients, engaging teachers in comprehensive environmental education training, and building a commitment to stewardship among residents of the Great Lakes Basin.

GAO also found that some of the monitoring and reporting data in the GLAS database is inaccurate, in part because EPA did not provide clear guidance on entering certain information and GLAS did not have data quality controls. GLAS limited users to reporting progress using a single measure, while GLRI projects may directly address multiple measures. This prevented EPA from collecting and reporting complete progress information on each of the measures addressed by GLRI projects.

GAO recommended in its 2015 report that EPA determine if it should continue using GLAS or acquire a different system and ensure that the agency develops guidance for entering data and establishes data quality control activities. EPA took action to address these recommendations as GAO completed its work on the report. In May 2015, EPA replaced GLAS with the Environmental Accomplishments in the Great Lakes (EAGL) information system. The new system was accompanied by guidance on information entry and plans to establish data control activities for ensuring reliability of the new system. GAO reviewed the actions taken by EPA and determined that the recommendations had been addressed. As a result, GAO removed the recommendations from the final report. GAO had no additional recommendations in the final report.

CHALLENGES

According to an August 2015 letter from the board of directors of the Great Lakes Commission (Commission) to the Administrator of the EPA, Gina McCarthy, one of the main challenges being faced by the GLRI is insufficient coordination and consultation with the states. The Commission believes that a symptom of this issue is limited funding to the states from the GLRI to support the increasing volume of Great Lakes work that has become the responsibility

of the states. In addition, the Commission indicates that there are some concerns that available GLRI funds are not always given to projects that appropriately address the objectives of the GLRI Focus Areas.

According to the Commission, the states are more than just stakeholders – they have sovereign authorities and regulatory responsibilities for the Great Lakes. The states are called on to support, coordinate, permit and sometimes manage GLRI projects underway within their jurisdiction, even when they are not directly receiving funds to implement these activities.

Some initial suggestions put forward by the Commission to alleviate these concerns related to the federal-state partnership include more regular, collective consultation between the states and federal agencies; participation of state representatives on the Regional Working Group or creation of a state subgroup; and annual state-specific meetings with federal agencies to identify and coordinate investments within their jurisdiction, as currently done to support state programs to address the AOCs.

Restoration will be a long-term effort and, in the meantime, environmental and public health problems persist in the Great Lakes ecosystem.

WITNESSES

Panel I

Mr. Chris Korleski
Director, Great Lakes National Program Office
U.S. Environmental Protection Agency
Chicago, Illinois

Mr. Jose Alfredo Gomez
Director, Natural Resources and Environment
U.S. Government Accountability Office
Washington, D.C.

Mr. Tony Kramer
Acting Regional Conservationist, Northeast Region
Natural Resource Conservation Service
Washington, D.C.

Panel II

Mr. Jon W. Allan
Acting Chair
Great Lakes Commission

The Honorable John Dickert
Mayor of the City of Racine
Racine, Wisconsin

Mr. Ed Wolking, Jr.
Executive Director
Great Lakes Metro Chambers Coalition

Mr. Douglas Busdeker
Director
Ohio Agribusiness Association

Mr. Chad Lord
Policy Director
Healing Our Waters-Great Lakes Coalition

THE GREAT LAKES RESTORATION INITIATIVE: A REVIEW OF THE PROGRESS AND CHALLENGES IN RESTORING THE GREAT LAKES

WEDNESDAY, SEPTEMBER 30, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2156, Rayburn House Office Building, Hon. Bob Gibbs (Chairman of the subcommittee) presiding.

Mr. GIBBS. Good morning. The Subcommittee on Water Resources and Environment will come to order.

We welcome our panels. We have two panels today, but we will first have some opening remarks.

The hearing today is about the Great Lakes Restoration Initiative. It's a review of progress and challenges in restoring the Great Lakes.

The Great Lakes, of course, are a vital source for both the United States and Canada to move goods; supply drinking water for industrial and agricultural purposes, a source of hydroelectric power, and swimming and other recreational activities.

But the industrialization and development of the Great Lakes over the past 200 years has had an impact on water quality in the Great Lakes.

The Great Lakes are a high priority to our Members from Minnesota, Wisconsin, Michigan, Illinois, Indiana, Ohio, Pennsylvania and New York, particularly in those districts that border the lakes. However, the Great Lakes are also important to our entire Nation.

The Great Lakes are the largest surface freshwater system on the earth, with 6 quadrillion gallons of water. The Great Lakes account for approximately 20 percent of the world's freshwater supply and approximately 90 percent of the U.S. freshwater supply.

Thirty-five million people live in the Great Lakes region, representing roughly one-tenth of the U.S. population and one-quarter of the Canadian population. The lakes are the primary water supply for most of these people.

The Great Lakes constitute the largest inland water transportation system in the world, and have played an important role in the economic development of both the United States and Canada.

According to some estimates, the Great Lakes help support more than $200 billion a year in economic activity in the region, and contribute nearly a quarter of the Nation's exports and 27 percent of the U.S. gross domestic product. Over 200 million tons of cargo are shipped annually through the Great Lakes.

The Great Lakes present a unique environmental challenge. Legacy issues, including the buildup of toxic substances in lake sediments in areas of concern, and the introduction of invasive plant and animal species, are impacting the Great Lakes. More than 180 invasive aquatic species have become established in the Great Lakes, including at least 25 major nonnative species of fish and zebra mussels, which invade and clog water intake pipes, costing water and electric generating utilities $100 million to $400 million a year in prevention and remediation efforts.

Efforts to improve the Great Lakes water quality and restore the health of the Great Lakes ecosystem are proceeding through cooperative efforts with Canada as well as through the efforts of numerous Federal, State, tribal, local, and private parties.

The EPA [Environmental Protection Agency], Army Corps of Engineers, Fish and Wildlife Service, the National Oceanic and Atmospheric Administration, the U.S. Geological Survey, the Natural Resources Conservation Service, the Great Lakes States, local communities, industry, and other parties all are involved. With so many parties involved in trying to restore the Great Lakes, coordination of the effort can be difficult.

To improve coordination, in 2004, the President signed an Executive order creating the Great Lakes Interagency Task Force. The Executive order called for the development of outcome-based goals like cleaner water, sustainable fisheries, and system biodiversity, and called on the task force to ensure Federal efforts are coordinated and target measurable results.

The task force, under the lead of EPA, brings together 11 Federal agencies responsible for administering more than 140 different programs in the Great Lakes region, to provide strategic direction on Federal policy, priorities, and programs for restoring the Great Lakes.

Congress has enacted more than 30 Federal laws specifically focused on Great Lakes restoration and there are currently more than 200 programs that provide funding and resources to Great Lakes States for restoration activities.

In 2010, the task force released an action plan, as part of the new Great Lakes Restoration Initiative, to accelerate efforts to protect and restore the Great Lakes. More than 2,000 projects have been funded to date through the first action plan.

In September 2014, the Federal agencies released an updated action plan II, which summarizes the actions that the Federal agencies plan to implement during fiscal years 2015 through 2019, using Great Lakes Restoration Initiative funding.

This action plan aims to strategically target the five biggest threats to the Great Lakes ecosystem and to accelerate progress toward long-term goals. The five focus areas in summary include: toxic substances, invasive species, nonpoint source pollution, habitat restoration, and accountability and education.

Since the beginning of the Great Lakes Restoration Initiative, there has been a concern voiced by some that restoration activities have slowed or even been halted due to a lack of coordination among the Federal agencies that encompass the task force. Other critiques include a lack of communication between the Federal task force and their partners in State governments.

In response to my requests, the Government Accountability Office conducted a review of Great Lakes Restoration Initiative implementation and prepared reports of its findings in 2013 and July of this year.

Our colleague, Congressman David Joyce, introduced H.R. 223 to amend the Great Lakes program provisions under section 118 of the Clean Water Act to formally authorize the Great Lakes Restoration Initiative for 5 years, and to carry out projects and activities for Great Lakes protection and restoration.

Under this legislation, the Environmental Protection Agency is to collaborate with other Federal partners, including the Great Lakes Interagency Task Force, to select the best combination of projects and activities for Great Lakes protection and restoration.

This hearing today is intended to review the progress of the Great Lakes Restoration Initiative and to hear from witnesses on the implementation of the GLRI program and the types of improvements that need to be made to the program.

I look forward to hearing from the witnesses, and at this time I recognize my ranking member from California, Mrs. Napolitano.

Mrs. NAPOLITANO. Thank you, Chairman Gibbs, for today's hearing on the Great Lakes Restoration Initiative, and thus providing the subcommittee with a chance to review the progress made in the restoration of one of our Nation's greatest resources, the Great Lakes.

Welcome to our witnesses and I look forward to hearing your testimony and to engaging dialogue on this very successful program.

The Great Lakes Restoration Initiative, known as GLRI, was organized in 2010 to coordinate the multitude of efforts already underway to protect and restore the Great Lakes, the world's largest system of fresh surface water and the source of drinking water for over 40 million Americans.

As we can imagine, the economic importance of the Great Lakes to the country cannot be overstated. The 4.3 million recreational boats registered in the Great Lakes alone create nearly $16 billion in economic activities each year. That supports 107,000 jobs annually.

Specifically, the program was created to clean up toxins and address areas of concern, combat invasive species, of which I am very interested in how you combat the quagga mussel issue because that's California's biggest issue and some of the Western States; to protect watersheds from pollutant latent runoff; restore wetlands and track progress; education, especially on invasive species, I think; and collaboration with strategic partners, including State and local governments and other stakeholders.

During the first 5 years of this program, $1.68 billion of Federal funding was allocated to over 2,100 projects that were implemented to improve water quality, control or eradicate harmful, invasive species, and restore valuable ecosystems.

In that time and because of Federal support, the Great Lakes Restoration Initiative has enjoyed the following accomplishments:

Five areas of concern have been removed from the list of contaminated areas.

Forty-two beneficial use impairments in 17 areas of concern were removed.

Target level control populations have been reached for multiple invasive species, including the bighead carp, sea lamprey, and emerald ash borer. Interesting.

Federal and State local partners increased the number of acres of farmland enrolled in agricultural conservation programs in priority watersheds by more than 80 percent.

More than 100,000 acres of wetlands and 48,000 acres of coastal, upland and island habitat are now protected.

While much more work remains to be done, these are demonstrable successes, and I commend today's witnesses for their dedication to the success of this program.

In September 2013, GAO [U.S. Government Accountability Office] released a report recommending EPA develop a more comprehensive and useful progress assessment tool for demonstrating the program's accomplishment. Understand that we look at some of these things, and we want to understand it and not have to ask questions about what does it mean.

GAO found that the GLRI monitoring system at the time may have been deficient, but also found as GAO and others have noted that quantifying overall restoration progress in the Great Lakes is a very difficult task and that it's often impossible to link specific environmental changes to specific programs or projects, which some are long term.

Again, earlier this year the GAO concluded an extensive study of the use of these funds. It examined the amount of the funds available for projects and processes used by GLRI to identify projects and the GLRI's reporting tools.

I am very pleased to say that EPA took action to address—thank you very much—the recommendations made by the draft GAO report prior to the release of the report and, in doing so, established a new system for entering data and created new data control methods.

Having undertaken these efforts, EPA and its partners will be better able to track and demonstrate the success of the program.

So in the 5 short years since this program's inception, communities throughout the Great Lakes region have enjoyed measurable results that have made a difference in the lives of their citizens and their economy.

One might ask what has made the difference, and to answer this question, I point to the GAO report published in September 2004, which found that the lack of clearly defined organizational leadership posed a major obstacle and that coordinating existing restoration efforts across the many participating organizations was a significant challenge.

So we need to be able to address that so that we can understand it when we are able to go through and look at what improvements and what challenges have been addressed.

I would argue that today you have overcome these challenges. Simply put, this is one of the most influential, coordinated interagency efforts in the country and stands as an example of what we can achieve when multiple partners agree, work together toward a common goal, politics aside.

Again, I welcome our witnesses and thank you for your testimony.

And, Mr. Chairman, I yield back.

Mr. GIBBS. Thanks.

Before I recognize our witnesses, we have a little bit of housekeeping. I ask unanimous consent that the hearing record be kept open for 30 days after this hearing in order to accept written testimony for the hearing record. Is there objection?

[No response.]

Mr. GIBBS. Without objection, so ordered.

I also ask unanimous consent that written testimony submitted on behalf of the following parties be included in this hearing record: David Ullrich, executive director of the Great Lakes and St. Lawrence Cities Initiative; Clarence Anthony, the CEO and executive director of the National League of Cities; Matthew Chase, the executive director of the National Association of Counties; Tom Cochran, the CEO and executive director of the U.S. Conference of Mayors; Joanna Turner, the executive director of the National Association of Regional Councils; Tracy Mehan, the executive director for government affairs for the American Water Works Association; John Hall, the executive director of the Center for Regulatory Reasonableness; Christopher Rissetto, general counsel for the Center for Regulatory Reasonableness; and Adam Krantz, the CEO of the National Association of Clean Water Agencies.

Is there objection?

[No response.]

Mr. GIBBS. Without objection, so ordered.

Today we have two panels. Our first panel is Mr. Chris Korleski. He is the Director of the Great Lakes National Program Office, the U.S. Environmental Protection Agency in Chicago, and also a former director of the Ohio EPA when I was in the legislature.

We also have Mr. Jose Gómez. He is the Director of Natural Resources and Environment of the U.S. Government Accountability Office in Washington, DC.

And Mr. Tony Kramer, who is the Acting Regional Conservationist for the Northeast region of the National Resources Conservation Service in Washington, DC.

Welcome, panelists, and Mr. Korleski, the floor is yours.

And pull it up closer. In this room sometimes it is hard to hear.

TESTIMONY OF CHRIS KORLESKI, DIRECTOR, GREAT LAKES NATIONAL PROGRAM OFFICE, U.S. ENVIRONMENTAL PROTECTION AGENCY; JOSE ALFREDO GÓMEZ, DIRECTOR, NATURAL RESOURCES AND ENVIRONMENT, U.S. GOVERNMENT ACCOUNTABILITY OFFICE; AND TONY KRAMER, ACTING REGIONAL CONSERVATIONIST, NORTHEAST REGION, NATURAL RESOURCES CONSERVATION SERVICE

Mr. KORLESKI. Is the volume OK? Can everyone hear me?

Well, good morning, Chairman Gibbs, Ranking Member Napolitano, and members of the subcommittee. My name is Chris Korleski, and I am pleased to serve as the Director of U.S. EPA's Great Lakes National Program Office, or as we call it, GLNPO.

I am very pleased to be here this morning to discuss the remarkable progress that has been made under the Great Lakes Restoration Initiative, or as we know it, the GLRI.

The GLRI was launched in 2010 to accelerate efforts to protect and restore the largest system of freshwater in the world—to provide additional resources to make progress toward the most critical long-term goals for this important ecosystem.

Since its inception, the GLRI has been a catalyst for unprecedented Federal agency coordination to the GLRI Interagency Task Force and the GLRI Regional Working Group, both of which are led by EPA. This unprecedented coordination has led to unprecedented results.

During the first 5 years of the initiative, GLRI resources have supplemented agency-based budgets to fund over 2,600 projects in five focus areas.

Focus Area 1, toxic substances in areas of concern. Federal agencies and their partners delisted three areas of concern, what we call AOCs, and completed all of the physical work that will lead to the delisting of three additional AOCs. That is a major change from the 25 years before the initiative when only one AOC was cleaned up and delisted.

It is our hope that we can keep this momentum going and ultimately achieve the delisting of all the remaining AOCs.

Focus Area 2, invasive species. Federal agencies and their partners engaged in an unprecedented level of activity to prevent new introductions of invasive species, including Asian carp, into the Great Lakes ecosystem. Asian carp are a significant threat to the ecological health of the Great Lakes and its multibillion-dollar sports fishery, and the GLRI provides support to the Asian Carp Regional Coordinating Committee to prevent bighead and silver carp from becoming established in the Great Lakes ecosystem.

To date monitoring has not found any established, self-sustaining populations of silver or bighead carp in the Great Lakes. Nevertheless, the threat of Asian carp entering the Great Lakes continues, and the Federal partners are eager to continue the work necessary to keep them out of the Great Lakes.

Focus Area 3, nearshore health and nonpoint source pollution. Federal agencies and their partners targeted activities to reduce phosphorus runoff from farmland which contributes to harmful algal blooms in western Lake Erie, Saginaw Bay, and Green Bay.

Federal agencies used GLRI support to increase the number of acres of farmland enrolled in agricultural conservation programs in GLRI priority watersheds by more than 70 percent.

Focus Area 4, habitat and wildlife protection and restoration. Federal agencies and their partners protected, restored and enhanced more than 100,000 acres of wetlands and 48,000 acres of coastal, upland and island habitat. Over 500 barriers were removed or bypassed in Great Lakes tributaries enabling access by fish and other aquatic organisms to over 3,400 additional miles of river.

These activities have accelerated the restoration of native fish and wildlife populations to self-sustaining levels.

Focus Area 5, accountability, education, monitoring, evaluation, communication and partnerships. Maybe you can see why we changed the name in the next action plan.

Federal agencies and their partners implemented "teach the teacher" activities and helped science teachers throughout the basin incorporate Great Lakes-specific material into their class curricula. But what's next?

Well, the first 5 years of the GLRI have achieved remarkable progress. The Federal agencies are already well underway implementing the GLRI Action Plan II, which summarizes the actions that Federal agencies will implement during fiscal years 2015 through 2019. These actions will build on restoration and protection work carried out under the first action plan with a continuing focus on cleaning up AOCs, preventing and controlling invasive species, reducing nutrient runoff, and restoring habitat.

We have modified Focus Area 5, and while we will continue to educate educators about the Great Lakes, Focus Area 5 now more directly incorporates an adaptive management approach into the GLRI's implementation.

It also requires that GLRI projects take into account the need for resiliency in the face of climate change.

Action plan II is tighter and more focused than action plan I in large part because it incorporates suggestions for strengthening the GLRI that were contributed by the Great Lakes Advisory Board, U.S. EPA Science Advisory Board, GAO, the Congressional Research Service, States, tribes, municipalities, and the general public.

We are committed, devoted to improving the implementation of the initiative and have recently adopted new budgeting and planning processes that will provide for a closer working relationship between Federal agencies and their State and tribal partners to ensure that appropriate projects are being prioritized and implemented.

Thank you, Chairman Gibbs, Ranking Member Napolitano, and members of the committee. I look forward to your questions.

Mr. GIBBS. Thank you.

Mr. Gómez, the floor is yours.

Mr. GÓMEZ. Chairman Gibbs, Ranking Member Napolitano, and members of the subcommittee, good morning. I am pleased to be here today to discuss our work on the Great Lakes Restoration Initiative.

The Great Lakes, as can be seen in the screens, is the largest system of freshwater in the world, and it provides economic and recreational benefits to millions of people. Decades of industrial and agricultural activities in the region have left a legacy of contamination.

In addition, more than 180 nonnative species have become established in the Great Lakes, some of which have caused extensive ecological and economic damage.

The Great Lakes Restoration Initiative, as has been noted, was created to accelerate restoration by addressing issues such as water quality contamination and invasive species that continue to threat-

en the health of the Great Lakes ecosystem. The restoration is overseen by the Great Lakes Interagency Task Force and is chaired by the Environmental Protection Agency.

So my statement today summarizes the results of our two reports on the topic. I would like to make three key points about the GLRI, the initiative: first, the funding and monitoring and reporting; two, the process used to identify restoration work; and, three, information available about Great Lakes restoration project activities and results.

The first point is that nearly all of the $1.68 billion in Federal funds in fiscal years 2010 to 2014 have been allocated, and as it can be seen in the next slide, EPA and the task force agencies have made funding available to a range of recipients. We found that the Great Lakes Interagency Task Force agencies conduct restoration work themselves or by awarding funds to recipients through financial agreements, such as grants, cooperative agreements or contracts.

EPA and the other 10 agencies have since expended $1.15 billion for over 2,100 projects.

With regard to monitoring and reporting, we found that some information on restoration projects in EPA's database is inaccurate and may not be complete, which may prevent EPA from producing comprehensive or useful assessments of progress.

We recommended that EPA capture more complete information on progress, which the agency did. In May of 2015, EPA replaced its old database with a new information system.

Second, with regards to the process for selecting each agency's Great Lakes restoration work, this process has evolved since fiscal year 2010 to emphasize interagency discussion. Originally, each agency made its own project and funding decisions in agreement with the task force.

Now, multiple agency subgroups discuss and decide what work should be done. In fiscal year 2012, the task force created subgroups to discuss and identify work on three priority issues. The first issue was cleaning up severely degraded locations, called areas of concern, which we have heard about already.

Number two is preventing and controlling invasive species.

And three is reducing nutrient runoff from agricultural areas.

According to EPA, the focus on priority issues allowed for two areas of concern, the White Lake and Deer Lake areas in Michigan, to be targeted for accelerated cleanup. Both were delisted in 2014.

Third, the task force has made some project information available to Congress and the public in three accomplishment reports and on its Web site.

In addition, individual agencies collect information on activities and results, although this information is not collected and reported by EPA.

Of the 19 projects that we reviewed, 8 reported results directly linked to restoration, such as improved methods for capturing sea lamprey, an invasive species that can kill up to 40 pounds of fish in its lifetime. The remaining 11 reported results that can be indirectly linked to restoration. That is, the results may contribute to restoration over time.

In summary, the U.S. has committed enormous resources to restore the health of the Great Lakes ecosystem with some progress. Currently the restoration effort is in a period of transition, as EPA and the task force agencies are using a new action plan, new subgroups to identify work in funding, and a new system to collect information on projects.

Great Lakes restoration is an ongoing, long-term effort. As such, it can benefit from continued congressional oversight.

Mr. Chairman, Ranking Member Napolitano, and members of the subcommittee, this completes my statement. I would be pleased to answer questions.

Mr. GIBBS. Thank you.

Mr. Kramer, the floor is yours. Welcome.

Mr. KRAMER. Thank you and good morning. Mr. Chairman, Ranking Member, and distinguished members of the subcommittee, thank you for the opportunity to appear before you today to discuss the Great Lakes Restoration Initiative and the role of the Natural Resources Conservation Service within the U.S. Department of Agriculture.

At NRCS, we know that voluntary private lands conservation is making a difference so that producers can sustain highly productive agriculture while making progress protecting and improving a Nation's natural resources. As Acting Regional Conservationist for the Northeast region, I have the privilege of serving multiple States, including Ohio and even Michigan.

I was raised on a farm in northwest Ohio and graduated from the Ohio State University with a bachelor's degree in agriculture. I have worked with NRCS in many capacities over 30 years, and I understand personally the conservation work my agency performs on private lands.

This is a great time for conservation, and I welcome the opportunity to share this with you today.

At NRCS, our conservationists work with State and local partners, as well as private organizations to deliver conservation, technical, and financial assistance to private landowners on a purely voluntary basis. In fiscal year 2014, NRCS provided technical assistance to over 135,000 customers nationwide to address natural resource objectives on almost 60 million acres of farm, ranch and forest land.

NRCS technical and financial assistance is delivered to private landowners primarily through programs authorized by the Farm bill, which include the Environmental Quality Incentives Program, the Conservation Stewardship Program, and the Agricultural Conservation Easement Program.

This assistance helps producers plan and implement a variety of conservation practices, such as cover crops, no-till, removing invasive species and restoring wetlands.

GLRI complements the significant investment made by NRCS within the Great Lakes region. Since 2010 and through 2014, GLRI has provided an additional $106 million in financial and technical assistance for conservation through the interagency agreement between NRCS and EPA. This was used to fund over 1,500 contracts with producers committing to implement conservation practices in

over 300,000 acres within the Great Lakes Basin and to provide direct technical assistance to producers and landowners.

NRCS works very closely with partners across the country and in the Great Lakes to maximize the Federal investment and leverage that with non-Federal contributions. Within the context of GLRI, between fiscal years 2010 and 2014, NRCS has leveraged about $7 million of the GLRI funds in agreements with partners to increase the impact of the Federal investment in conservation.

Mr. Chairman and members of the subcommittee, thank you for this opportunity to appear before you today. Conservation continues to be a solid investment in our Nation's future. GLRI and other NRCS conservation programs and activities supported by Congress and the administration have demonstrated success to helping farmers, ranchers and private forest owners achieve their production and operational goals in balance with nature, with the natural resource objectives which provide benefits for the rural communities and the Nation as a whole.

I will be very happy to respond to any of your questions at this time.

Thank you.

Mr. GIBBS. I thank you.

And I will start out with questions.

First of all, I want to thank Mr. Gómez for the report that we requested from your office. It was very helpful.

I recognize that the EPA is implementing some of what you mentioned and you also mentioned in your report that they implemented a big initiative before the final report came out because of the draft report, and I want to talk about that just for a minute and then I will get to another issue.

In your report you talk about sharing future success and the challenges, and needing the EPA to address the issue. It is about communication between the different agencies and States. Mr. Korleski created subgroups from my understanding, the way I read this, and so hopefully the intent is that the subgroups are working together, communicating, because what we have heard, and I think what Mr. Gómez and the study determined, is that one hand did not know what the other hand was doing.

So do you want to elaborate a little bit about the functioning and the mechanism going forward with the subgroups?

Mr. KORLESKI. Mr. Chairman, thank you.

Yes, I think what my colleague was referring to is that in the early years of GLRI there was more of what we would call an allocation approach where each agency would have its own projects that it would like to do, and then we would get together and talk about how much money should go to each agency to let them do their projects.

I am simplifying, but that is the way it worked.

I think come 2011, there was a consensus that, wait a minute; this is not the best way to do this. This idea of having agencies sort of saying, "We want to do these projects," was not we think as good as saying, "Let us all work together and figure out, looking at that ecosystem as a whole, what is the work that should be prioritized without regard to what this agency would like to accomplish or

what that agency would like to accomplish. What should we as the GLRI accomplish?" and prioritizing that.

So that is what resulted in, I think, much more of a collaborative approach. The subgroups were created to focus on what we agreed were priority areas like AOCs.

Mr. GIBBS. Excuse me. The subgroups would consist of different agencies, the EPA, NOAA [National Oceanic and Atmospheric Administration] and all?

Mr. KORLESKI. So if I understand your question, when I think of a subgroup, I think of a subgroup within the Regional Working Group. So the Regional Working Group made up of EPA, NOAA, the Corps of Engineers. There are representatives from those agencies on those subgroups for, again, AOCs, invasive species, whatever it might be.

So that way all of the agencies were focused.

Mr. GIBBS. I think that is a good way to go forward.

Mr. KORLESKI. Yes.

Mr. GIBBS. That was one of the criticisms of the report.

But to take that further, I think the Great Lakes Restoration Initiative Action Plan for 2015 to 2019 does not include targets to measure any progress. If the EPA and the task force do not have targets, how are they going to measure?

You do not have in this new action plan specific targets, goals. Am I understanding that right?

Mr. KORLESKI. Mr. Chairman, no, there are targets in the action plan. If I can briefly, in the new action plan, specifically, there are five focus areas. There are 12 objectives. There are 22 commitments. There are 34 measures of progress, and 10 of those measures of progress have annual targets where we are actually trying to hit numbers, for example, the number of AOCs where all of the work has been completed or the number of BUIs [beneficial use impairments] removed.

So there are most definitely targets and objectives within action plan II.

Mr. GIBBS. OK. I wanted to ask a question on the algae issue in western Lake Erie. Can you describe to the subcommittee how the EPA shows deference to the expertise of other Federal agencies for funding these activities?

For instance, the EPA recognizes NOAA as the agency with the expertise related to harmful algal blooms. Why is it important that that one agency not be given sole discretion over the GLRI activities?

Mr. KORLESKI. Mr. Chairman, I think a number of the agencies have expertise in areas pertinent to harmful algal blooms. NOAA, for example, I think has great expertise in areas, such as satellite monitoring and monitoring the bloom.

In fact, after the Toledo drinking water crisis in 2014, we very quickly freed up about $12 million in GLRI funds to devote. For example, some of that money went to NOAA so they could improve their ability to monitor algae and microsystem levels in the Toledo area. We provided money to USGS [U.S. Geological Survey] to do more stream monitoring, to measure the amount of phosphorus getting into Lake Erie, which USGS is extremely good at.

NRCS was provided with additional funds because our colleagues at NRCS are very good at getting——

Mr. GIBBS. My last question I wanted to just go to Mr. Kramer. What would it take to reduce the amount of nutrients entering the Great Lakes to prevent the algae blooms that have occurred in the last few years?

Mr. KRAMER. That is a good question. Eliminating it, I do not know if that is going to be possible. I think we have an opportunity here to reduce the impact, maybe the duration.

Just since 2010 to 2013, the GLRI funding that was provided to NRCS has reduced, we estimate, the nitrogen entering into the Great Lakes by over 3.5 million pounds and over 600 pounds of phosphorus.

Now, the algal blooms still develop. There are many other sources. It is not just agriculture.

Mr. GIBBS. Yes.

Mr. KRAMER. There's residential. There's commercial. There's what we call legacy phosphorus, which there is phosphorus sitting in Lake Erie, you know, in the sediment, on the ground or under the surface, and turbidity, water, air temperature, water depth, sunlight, all have an impact on whether that comes up.

Mr. GIBBS. Are we noticing more dissolved phosphorus compared to maybe phosphorus attached to the sediment? Is dissolved phosphorus more of an issue than it was in previous years?

Mr. KRAMER. I can't answer that. I do not know that we have made that distinction, Congressman.

Mr. GIBBS. OK.

Mr. KRAMER. But we have reduced and we are looking at other methods and processes. We do know that a lot of the dissolved phosphorus gets out in the tile.

Mr. GIBBS. Pardon?

Mr. KRAMER. Gets out in the tile, through the farms, and as of right now Ohio has just with assistance from GLRI funding entered into agreement with the Ohio Farm Bureau to do demonstration farms, you know. So there are a lot of different things going on.

Mr. GIBBS. Yes, I know. The Ohio Farm Bureau put up $1 million towards that.

Mr. KRAMER. Yes.

Mr. GIBBS. This is my last question before I yield to my ranking member.

On these programs, can you kind of elaborate, voluntary versus regulatory, mandatory? You know, what is the best fit? What is the best way to address this issue?

Mr. KRAMER. Well, for me it is voluntary, at least when it comes to private landowners, private agricultural farms. I think the voluntary approach works.

One good example of why it works, and this is not just in the Western Lake Erie Basin or the Great Lakes but across the country, every single one of the programs that NRCS offers is well oversubscribed. We have backlogs forever.

People want to participate. They want to put conservation on their ground, and they want some assistance to do that, and we have shown that it does work.

Mr. GIBBS. And I will concur with that, being a farmer, and I would also just in closing say that, you know, farmers drink the water first.

Mr. KRAMER. That is right.

Mr. GIBBS. I mean, it is on the land because all of their wells are where they are getting it, and it is just critical. And they want to do the best for the environment. We have seen that with best management practices, no-till, and a bunch of things that are happening.

And my concern has been, especially with the WOTUS rule, when you come down with a heavy hammer at some point you just overburden them with redtape and bureaucracy. They will throw their hands up in the air and they are not going to do what they would have done voluntarily. I am really concerned with the WOTUS rule that we can actually go backwards in water quality with the strides we have made.

So I yield to my ranking member.

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

And on that note, Mr. Kramer, one of the things that a pilot project in California is looking at is on-site new technology that might clean the runoff, recycle the runoff right from the farms.

Is there anything being looked at or touted or at least considered as part of the assistance to the farmers?

Mr. KRAMER. The one thing that we are doing that is not actually cleaning, but what we called edge of field monitoring, which we now do within NRCS. That allows, on the farms, they can monitor the nutrient loads that are coming off that farm.

We have looked at things such as bioreactors and things of that nature in the ground, subsurface, to clean it, but what you are referring to I am not aware of, but it is a possibility. We could look at those different methods and processes, and within NRCS what we typically do is take a look at something like that. If it provides merit, we can try it on a pilot basis.

Mrs. NAPOLITANO. Well, I will check, but it was supposed to be a pilot in Bakersfield by the Costner, the group that did the Bridge petroleum spill.

Mr. KRAMER. OK.

Mrs. NAPOLITANO. So that might bring some change.

In the algae bloom, is not probably the temperature also responsible for the creation of a lot more of the algae?

Mr. KRAMER. Yes, yes. The water temperature, air temperature. I think we avoided it a lot this year because we did not have as much duration of hot, humid days, and we had some winds that kind of, you know, stirred the lake a little bit. At least that is from the reports from NOAA that we receive on a pretty regular basis.

Mrs. NAPOLITANO. And I notice, and I am sorry but my time is running, and I want to be sure that I take in all the questions that I have in mind, but in the runoff, going back to the runoff, the fact that there are more effective ways of partners working together to combat the runoff, what else is being done to be able to help farmers and the ability to restrict the amount of runoff into the streams and rivers?

Mr. KRAMER. Well, I think, you know, one of the big things that we do is not just controlling the runoff. It is what is being applied.

Mrs. NAPOLITANO. OK.

Mr. KRAMER. You know, only apply what you absolutely need through our nutrient management standard specification, which is a widely used practice throughout the basin and throughout the Great Lakes.

So what is being delivered on the field should be controlled first, and a lot of producers are doing that.

Mrs. NAPOLITANO. Of course, there are great results, but some are saying that GLRI is going after the low-hanging fruit, and what remains is going to be a bigger challenge. Can you explain?

Mr. KRAMER. I believe maybe it is kind of what I referred to before. We have developed a Conservation Effects Assessment Project that we have done, and our scientists have estimated that for Western Lake Erie Basin alone, if we treated every single agricultural farm, we would still only reduce the nutrients by 40 percent.

So I guess what I am trying to say is that maybe what that statement is referring to is even in doing everything that we could do, there are still so many other factors involved that we are not going to be able to get there.

Mrs. NAPOLITANO. Do you have an idea of how many farms are voluntary for partners? Is it a percentage?

You mentioned it was voluntary.

Mr. KRAMER. Yes, yes. I do not have that with me, but we could provide that.

Mrs. NAPOLITANO. It would be nice to know.

Mr. KRAMER. The number of producers in the Great Lakes that are actually working with us, yes. We could provide that information.

Mrs. NAPOLITANO. Thank you.

Mr. KRAMER. Yes.

Mrs. NAPOLITANO. Mr. Korleski, your testimony notes that action plan II incorporates fresh approaches. Can you describe the science-based adaptive framework you plan to use and when do you feel that it is going to be implemented?

Mr. KORLESKI. Yes, Ranking Member. I think adaptive management is a fancy way of saying learn as we go, learn from your mistakes, learn from what works, learn from what does not work.

Mrs. NAPOLITANO. But who looks at those?

Mr. KORLESKI. What is that?

Mrs. NAPOLITANO. Who looks? Who determines what works and what is not working?

Mr. KORLESKI. The agencies implementing the projects.

Mrs. NAPOLITANO. OK.

Mr. KORLESKI. So under the action plan, the way this should work is when projects are implemented, the agencies implementing them should look at project results and look at project impacts and look at, again, what worked.

If you did a project, if we tried something as a pilot project and it did not work, we have to remember that, and we have to say, "Yeah, that did not work. Do not do that again."

Mrs. NAPOLITANO. But what is turnaround time? Do not forget Government works very slowly.

Mr. KORLESKI. Well, we do adaptive management really over the course of two different cycles. So we do an action plan every 5

years. So one of the things that we do is when we're drafting a new action plan, as we did in the second action plan, we looked about what worked, what did not work, what kind of targets did we have in the first action plan that were not realistic, and we did not have the technology or we did not have good measurements, and come up with a better action plan.

But I think more importantly, adaptive management is also looked at on an annual level when we are actually doing project selection because the agencies essentially get together and look at the potential universe of projects that could be done and say, "OK. Given what we know, where should we prioritize?"

Mrs. NAPOLITANO. Do you share that information with other areas that might have similar problems?

Mr. KORLESKI. For example, other geographic areas?

Mrs. NAPOLITANO. Yes.

Mr. KORLESKI. Like the Chesapeake, yes.

Mrs. NAPOLITANO. OK.

Mr. KORLESKI. Yes.

Mrs. NAPOLITANO. OK. Because that would save some time in some people having to reinvent the wheel.

The other question I have, recently, actually yesterday, there was a news release in regard to Line 5, the pipeline, and the question, of course, comes up about, according to the University of Michigan, it is the worst possible location for an oil spill.

This crude coming out or transfer being out of Canada? You are aware of that, I am sure.

Mr. KORLESKI. Yes.

Mrs. NAPOLITANO. And some of the challenges that they may face in winter if there is a spill, and apparently there was a winter spill test that was very challenging.

Is there a way to be able to understand? Because I understand Senator Stabenow and Congressman Peters have a bill to ban crude oil shipments through that region.

Mr. KORLESKI. Well, Ranking Member, if I can tell you about EPA's rule, maybe that will help clarify.

Mrs. NAPOLITANO. OK.

Mr. KORLESKI. So in region 5 where we are, our response office, our Superfund program, is deeply involved in planning contingency work, trying to anticipate what can go work, and working with PHMSA [Pipeline and Hazardous Materials Safety Administration], States, tribal nations, to again make sure——

Mrs. NAPOLITANO. I know, but that was in summer. The program was looking at transportation in summer, but what about winter? Because there is a challenge there.

Mr. KORLESKI. Ranking Member, I confess I am not that familiar with the challenge that occurred in the winter exercise. So that is something we can follow up on. But I do know that EPA and the Coast Guard would be the first line of response in the event of any——

Mrs. NAPOLITANO. Well, apparently there is another test being held early next year. I would like to be able to know the results of that because of the protection for that area.

Mr. KORLESKI. Yes, Ranking Member. We will be sure to note that.

Mrs. NAPOLITANO. Thank you.

And then of course, in the past 5 years the program has improved the quality in the region and addressed a lot of the environmental problems. How is GLRI prepared to produce the same result in the next 5 years?

Mr. KORLESKI. I am sorry. Could you repeat the question?

Mrs. NAPOLITANO. How is the GLRI prepared to produce the same results in the next 5 years as it has in the past 5 years, considering the scope of the problems?

Mr. KORLESKI. Ranking Member, I think we actually hope to do better in the next 5 years.

Mrs. NAPOLITANO. Based on your experience?

Mr. KORLESKI. Based on the adaptive management approach and learning from what we learned the first 5 years. Also the fact is, as I mentioned earlier, the agencies I think are coordinating much better on identifying priorities. So it is not just an agency-by-agency "let us do what we want." I think that is going to achieve better and greater results.

So I think we have learned a lot, and we are working together more closely.

Mrs. NAPOLITANO. Thank you.

And now I will refer back to my chairman. I have one more question for Mr. Gómez. I will hold.

Mr. GIBBS. Mr. Ribble.

Mr. RIBBLE. Good morning, everybody. Thanks for being here. I appreciate the work that you are all working on and doing this.

I happen to live in the Lower Fox River Watershed in northeast Wisconsin. I live on the shoreline, and so I have been able to see in real-time some of the improvements that are actually happening. And, Mr. Korleski, can GLRI funds be awarded to support partnerships between water systems and the agriculture industry?

And by that I mean you have got both point source and nonpoint source issues, and so can there be some combination of partnership there and the funds be used in an equal partnership with them together?

Mr. KORLESKI. So, Mr. Chairman, Mr. Representative, I think the short answer is yes. It would depend on how the project was organized and who was doing what, but one of the great things about the GLRI is that there is flexibility in terms of how we award and provide money.

So I would think that, yes, depending on what was being proposed and who was involved, that is something that we could do and we could certainly look at it.

Mr. RIBBLE. So it is a bit of kind of an exploration of ideas, and you are looking at the best ideas, and if someone comes up with some type of program that makes sense to you all, that would be something you would take a look at?

Mr. KORLESKI. Mr. Chairman, Representative, absolutely. The one thing that we do not pretend to have is all the answers, and we do not pretend that we have got everything down to a science. We do not, and we are open to new ideas.

Mr. RIBBLE. Are the hypoxic zones in Green Bay similar to the ones in Lake Erie?

Mr. KORLESKI. So my understanding, I am more familiar with the Lake Erie area partly because, frankly, I am from Ohio.

Mr. RIBBLE. Yes.

Mr. KORLESKI. But I think the problem is the same. I think the magnitude of the blooms in the Western Basin of Lake Erie have been greater. That is not to minimize what is happening up in either the Saginaw Bay or the Fox River area, but the problem we believe is caused by the same issue, which is too much phosphorus getting into the water, and we think the solutions are essentially the same: try to figure out how to reduce phosphorus, both dissolved and in other forms, from getting into the water.

Mr. RIBBLE. Yes. Basically keeping the nutrient on the soil and not in the water.

Mr. KORLESKI. Where they are needed.

Mr. RIBBLE. Ultimately where they are needed to go.

Mr. KORLESKI. Where they are needed, yes.

Mr. RIBBLE. And, Mr. Kramer, first of all, I want to commend the work that your agency has been doing in Wisconsin and Lower Fox.

Mr. KRAMER. Thank you.

Mr. RIBBLE. One of the things I hear repeatedly from county executives in the entire Lake Winnebago, Lower Fox Watershed which drains into Green Bay is that they actually could use more conservation agents, whether they are agents that are on the ground at the county level or with your agency.

Can GLRI funds be used by county executives to increase agency partnership with working with agriculture?

Mr. KRAMER. Yes, they can, and as a matter of fact, NRCS has utilized some of the GLRI funding in just such that way.

In my oral and, I believe, written testimony, it alluded to the agreements to extend the Federal contributions. We can enter into agreements with soil and water districts, State departments of agriculture, and others to put more boots on the ground, more folks out there in the field, and we have done that in various areas throughout the Great Lakes.

Mr. RIBBLE. Because in this watershed, the one I am speaking of here in northeast Wisconsin, the 71 CAFOs [concentrated animal feeding operations], large farming operations, one of the highest density in the country, and around 1,500 to 1,600 smaller dairies, and there are a lot of animals in this area.

Mr. KRAMER. Yes.

Mr. RIBBLE. And reaching out to that many individual dairy farmers is a tough task with the number of bodies there, but what I have experienced both with your agency and working with Wisconsin's dairy industry is that they are anxious to start solving this problem. They want to be part of the solution.

But for some of the smaller dairies, it does become an issue of resources. Are funds available for some type of joint sharing of equipment, for example, direct injection of manure into the soil as opposed to just mass spreading it using water as a carrying agent?

But that equipment is $80,000, $90,000, $100,000. Could it be shared by a county over a large area of land so that multiple farmers would have access to that type of equipment through the grant system?

Mr. KRAMER. Yes, typically the NRCS program, specifically EQIP [Environmental Quality Incentives Program], would not actually purchase a piece of equipment, but what it would do is provide an incentive to those farmers where if they want to go out and purchase that together to share it, they could use those funds to do that.

What we are looking for is the activity. What are they actually doing on the farm? We are paying an incentive for that activity. Now, if that means they have to get a piece of equipment or modify it, that is fine, but we definitely stray from using the tax dollars to actually purchase a piece of equipment which may not be there in 2 to 3 years or it might be.

Mr. RIBBLE. Sure.

Mr. KRAMER. But there are ways to get to where you are going.

Mr. RIBBLE. Yes, because when you look at the technologies available with low-till equipment, with direct injection of manure, the things that will actually keep the nutrient in the field, those bear a fair amount of costs.

Mr. KRAMER. Yes, they do.

Mr. RIBBLE. And then my final question, and then, Mr. Chairman, I will yield back. Mr. Gómez, in your report did you guys look at the efficiency of the funding?

In other words, how much money is going to just the administration of the fund itself versus how much is actually getting to specific projects?

Mr. GÓMEZ. Sure. So I mentioned earlier we did look at 19 projects in detail, and in those projects we did look at the amount of money that was going to indirect cost, and we found that that varied from zero to 37 percent.

In the cases where it was zero, it was because the entities had not established an indirect cost rate. Those that were higher, those tend to be universities that charge a higher indirect rate. So that is the way we looked at it in terms of the projects, and we looked at, as I said, 19 projects.

Mr. RIBBLE. Was there obviously anything that we can do to reduce the indirect cost so that more of it actually gets to the ground is going to be a better use of this taxpayer funding.

Thank you, and, Mr. Chairman, I yield back.

Mr. GIBBS. Ms. Norton.

Ms. NORTON. Thank you, Mr. Chairman.

I have been listening to this very impressive collaboration which apparently has bipartisan support even here. I note that this Great Lakes restoration effort is not authorized, but it has been funded. It appears that the Federal Government is the major actor pressing forward, using its full expertise with working groups and Federal agencies, and one is left to wonder if other areas, and somebody mentioned the Chesapeake, for example, if this kind of collaboration and effort driven by the Federal Government, the EPA and other agencies is occurring in other watersheds or are we hearing a unique effort that has not been exported.

Perhaps Mr. Korleski or Mr. Kramer would be able to speak to that.

Mr. KORLESKI. Mr. Chairman, Representative, I do know that we, for example, have had conversations with the Chesapeake Bay

program, which has similar problems. They are different, but they have nutrient problems that show up in different ways.

And not that long ago we spent a couple hours on the phone with them sharing our practices about what we were trying to do to reduce nutrient loadings into water bodies, and that was very helpful.

There is a Chesapeake Bay program within EPA as a separate line item in the budget, I believe. So we have worked with them. We are aware of other geographic programs which are receiving funding from EPA.

Ms. NORTON. Are the results that you obtained repeated anywhere else or are we talking about a unique effort?

I understand there's huge importance, massive importance of this major water supply, the Great Lakes. I'm trying to find out whether it's unique or not, particularly since it is driven by the Federal Government.

Mr. KORLESKI. I know that Federal dollars are being directed to other programs.

Ms. NORTON. That I know. I am looking at the impressive results that have been attained here.

Mr. Gómez, do you have any notion of whether we are talking about a unique effort, completely federally driven, it seems to me, by one of the great watersheds. We couldn't do without it.

Mr. GÓMEZ. Sure, sure.

Ms. NORTON. Would it go anywhere else?

Mr. GÓMEZ. What I can mention is GAO has actually looked at ecosystem restoration efforts around the country. One was mentioned earlier, Chesapeake Bay. We have looked there, and they have a slightly different organizational structure. The Chesapeake Bay States are partners with the Federal agencies and other entities are also key partners.

The Great Lakes are organized slightly differently. We looked also at the Florida Everglades restoration efforts in years past where, again, it is managed by the State, the Feds, and tribes.

Ms. NORTON. Is that not different here? The Federal Government is the driver here, is it not?

Mr. GÓMEZ. Yes, correct.

Ms. NORTON. And one of the problems in the Chesapeake Bay is the same huge number of States, but where they are the leadership with water the crosses State lines, it does not appear to me that we get results anywhere in the ballpark of what we are seeing here with this federally driven project.

Mr. KORLESKI. Representative, if I may, one of the things that I would emphasize is that while the GLRI funding is Federal funding and the Great Lakes Interagency Task Force and the Regional Working Group are made up of the Federal departments, a large reason for the success in the Great Lakes Basin is because we do partner very closely with States.

Ms. NORTON. How did you get the States who obviously have different interests, just as they do on the Chesapeake Bay, to collaborate except for the force of the Federal Government, its money and its expertise behind this project?

Mr. KORLESKI. Representative, I think it is because they recognized the GLRI brought an opportunity for significant changes to make an improvement.

Ms. NORTON. The what?

Mr. KORLESKI. An opportunity for significant——

Ms. NORTON. And what brought it? What do you say brought this opportunity?

Mr. KORLESKI. The GLRI and the States recognizing that through our grants in providing them with funds and working with them, that jointly we could get a tremendous amount of work done.

Ms. NORTON. I think it was Federal leadership, Mr. Korleski. I think it is very difficult when you say to the Chesapeake Bay, the nine States. I mean, there is something like that. You get together. This is one of the great wonders of the world, and together figure out what to do about it.

You have your own budgets, your own priorities, and everyone speaks about how extraordinary this is, but what you do not have is the kind of leadership that the Federal agencies have given to this extraordinary project with extraordinary results, and you have not been able to name a single other project which has had similar results.

And I would with knowing nothing hazard a guess that it is because it has not had the same Federal leadership that this project has had.

Thank you very much, Mr. Chairman.

Mr. GIBBS. Mr. Nolan.

Mr. NOLAN. Thank you, Mr. Chairman.

I want to thank Chairman Gibbs and Ranking Member Napolitano for holding this hearing and thank the witnesses for being here.

I first of all want to commend you all for the work that you are doing and the importance of it. With no pun intended, I do have a couple of areas of concern myself that are unrelated to pollution at the Great Lakes. One of them is what appears to be a rather abrupt shift in programming and in funding, and I will start with you, Mr. Korleski.

You talked about the significance of the unprecedented coordination, and I applaud you for that; the unprecedented results, and I applaud you for that; and you used that word "unprecedented coordination" a number of times, and I applaud you for that.

My two concerns with regard to the shift in programming and funding relate—forgive me for being parochial—but to the Duluth area. We are proud to have eliminated our first area of concern on the St. Louis River there, but based on the first 5 years of funding where we had received $4.5 million, there has been a dramatic reduction of almost three-fourths, down to $1.2 million, and based on the first 5 years of work, it had been expected that we would have eliminated all of our areas of concern by 2019, which of course will not happen at this point in time, and that is an area of concern for me, and I would like you to address that.

And then secondly, we have heard from Minnesota Pollution Control Agency and from the Minnesota Department of Natural Resources, and they, like you, were celebrating the unprecedented co-

ordination and collaboration in what I believe they referred to as "flexible dollars."

And now I see that funding for staffing will be restricted to project specific, and there is a concern that I have and others have that that will reduce the ability for that kind of collaboration and cooperation between State and county and local on a broader basis.

So if you could address both of those concerns, it would be much appreciated.

Mr. KORLESKI. Mr. Chairman, Representative, yes, there is no question that in this latest funding cycle the money that we were able to provide to States for what I would describe as capacity funding was less, and the main reason for that is because the first determination of how much States, including Minnesota, would get as capacity funds was put together back in 2010 when GLRI was funded at a level of $475 million.

That was a 5-year allocation, if you will, and it was based on the belief that there would be $475 million. During that 5-year period we did not reduce that annual allocation even though the amount dropped from $475 million to roughly $300 million a year over the last 4 years. We did not change the allocation during that 5 years.

When that grant expired after 5 years and it was time to renegotiate a new grant with the States, we were looking at what was essentially a 37-percent reduction in the GLRI if we were looking at a $300 million level. If we were looking at a $250 million level that was proposed, that was a 48-percent reduction compared to what we had back in 2010.

That was the main reason why we had to reduce the amount of capacity funding for the States.

Your second comment, which I am very glad you raised the issue of this project-specific funding, one of the things that we are trying to emphasize——

Mr. NOLAN. Staffing for project specific, yes.

Mr. KORLESKI. Exactly. One of the things that we are trying to do is make a clear distinction between funding for capacity and funding for projects. I will give you an example.

Capacity funding for us would be money given to a State, for example, to allow staff to attend meetings, to allow them to travel, to allow them to do overall budgeting over their plan as a whole.

Project specific work would be, for example, staff working on a specific AOC-related project. And one of the things that we tried to convey to the States is we want them to start putting their staffing needs in their project applications rather than just relying on capacity grants to take all of that into account.

So in other words, we think there should be an appropriate amount of capacity funding to do overall planning, but if staff is going to be working on a specific AOC project, our advice to the States is build that number into your project application; build that cost into the project application; and then that will be treated as part of the project.

We would intend to fund it, assuming we had the money, but it gets us away from this "is there enough capacity money to do both capacity- and project-specific work?" The reason we want to do that is because we think if we can more clearly identify when money

has gone to specific projects, it just gives us a better ability to account for that money.

Mr. NOLAN. Well, and I appreciate that, but you know, having staffing for a greater coordination and collaboration, you know, as you were celebrating and I celebrate, it gives the regional groups a greater capacity to adjust as well, depending on, you know, what the county/State priorities are and what they might want to fund, and so I appreciate your trying to take a look at a bigger picture.

But if the city or the State or the county wants to do something differently, but significant, you know, with that coordination, that collaboration, that is how you know about that, and that is how you can adjust to it and make the things happen.

Well, I am about out of time here, but thank you very much for all the great work that you do. This is really important, and I lament the fact, Mr. Chairman, that we celebrate and, you know, we might be able to come up with $300 million, you know, when it is darn near $200 million short of what we are used to.

So, you know, I think we should look at trying to find some ways to authorize a greater expenditure here for this important project.

Lastly, Mr. Kramer, and just a quick answer, you talked about if we did away with all of the agricultural pollution we would reduce it like 40 percent, and you alerted to the other sources.

Do you have any statistics on exactly how much comes from municipal and industry and other?

And if you do, could you share those with us?

Mr. KRAMER. No, Congressman, I do not. We can check with some of our scientists and see if they have pulled some of that information, but I am not aware of that. We were just looking at the agricultural and what reductions in phosphorus and nutrients and nitrogen we would see from all of the treatment of all of the agricultural land.

Mr. NOLAN. Well, if you come across any of that, take a look, would you please, and let us know?

Mr. KRAMER. Yes.

Mr. NOLAN. And maybe we could have our staff look at that, too, and that would be helpful to us in understanding the scope of this problem.

Thank you, Mr. Chairman.

Mr. GIBBS. Before we excuse the panel, I know I have one question. I think my ranking member has a question.

But I guess, Mr. Korleski, we are going to go to you with your background as a former Ohio EPA director and your role now. There has been a lot of discussion about the impact of open-lake disposal for dredging and the legacy issues.

Can you just give us your thoughts of what the impact might be on, you know, the legacy issues of phosphorus for the open-lake disposal?

Mic, mic, mic, mic.

Mr. KORLESKI. The green button was on. You fooled me.

Mr. Chairman, that is a great question. So we know that open-lake disposal is a huge issue, for example, in the Cuyahoga area. There the issue is not so much phosphorus or nutrients——

Mr. GIBBS. It is PCBs [polychlorinated biphenyls].

Mr. KORLESKI. PCBs, exactly. So that is one kind of issue you have.

Out in Toledo where there is a much larger amount of sediment that needs to be dredged there, there is some speculation that by open-lake disposal that material could exacerbate the phosphorus problem. I have never heard anyone point to any scientific certainty or as close as you can get on science.

What we are thinking about, one of the big issues that we are thinking about with regard to open-lake disposal is in general I think most people would prefer if it did not go into the lake.

The problem is, and the problem that we want to work on with our partners is, finding beneficial uses for that material, whether it is filling in old basements, whether it is for stockpiling for soil for gardens, whatever that is. We think that beneficial use is critical.

Mr. GIBBS. Just to comment a little bit on the Cuyahoga-Cleveland issue, I think they have made significant progress on finding beneficial uses, the filling in the basements of the Land Bank Program there. The bedload interceptor, I do not know if you are familiar with that, started this spring going up the Cuyahoga River upstream and collecting a lot of sediment before it gets more in the contaminated legacy areas. So I am hopeful that could come in.

The good thing about that issue there, the amount of cubic yards is a lot less than what we have in the Toledo-Maumee area.

Mr. KORLESKI. Yes.

Mr. GIBBS. And that is highly laden with phenyl phosphorus, and I know that you said there is no scientific evidence. I did not know if there was any thought of trying to do more studies.

I know there have been comments made by certain elected officials in Ohio that, you know, they put it out in the lake and Lake Erie is so shallow out there, that is one of the major problems, issues, challenges. It kind of gets washed back into it.

And we think that could be a hypothesis as a fact that maybe it is adding to the legacy issues. Go ahead.

Mr. KORLESKI. Mr. Chairman, going back to my days at Ohio EPA, I wrote a very heartfelt letter to the Corps of Engineers expressing concerns with in-lake disposal in the Toledo area because of the volume of the amount.

During that time I talked to a lot of technical people, scientists, about is there any—I will not even call it conclusive—hard evidence that this is going to exacerbate either the phosphorus problem, the nutrient problem through any mechanism.

Mr. GIBBS. Yes.

Mr. KORLESKI. And I could not get a clear answer. So I think I am relying on what many other people are relying on, which is it is such a large amount of sediment there must be a better use for it.

Mr. GIBBS. Yes.

Mr. KORLESKI. But finding that use——

Mr. GIBBS. It should be an asset instead of a liability.

Mr. KORLESKI. That is the way we would look at it.

Mr. GIBBS. This is the last quick question. The Western Lake Erie Basin, you know, is so shallow, 30 feet or whatever it is, com-

pared to maybe up in Mr. Ribble's area of Lake Superior I have heard 700 feet. I do not know. It is very deep.

So open-lake disposal in depths like that, common sense would tell you that maybe it is not an issue because of the depth. Would you concur with that?

Mr. KORLESKI. I think that, Mr. Chairman, if you are talking about the Western Basin where I think somewhere around 20, 25 feet is the average depth——

Mr. GIBBS. OK.

Mr. KORLESKI [continuing]. If you are dumping in roughly 1 million cubic yards—I do not recall what the exact volume is—I can see the argument that, well, OK, you are certainly just keeping this shallow.

But, again, I would be reluctant to assert with any certainty that I know that that is either exacerbating the nutrient problem or any other problem.

The one thing I would say and what I pointed out several years ago though is the question I would have is: how much are you redredging that you have already dredged?

And I raised that issue back in 2010 when I believe this came up and was not able to get a clear answer then either.

Mr. GIBBS. It would be nice if somebody put markers on there so that you actually tracked that.

Mr. KORLESKI. Yes. Yes, it would.

Mr. GIBBS. Thank you.

Mrs. NAPOLITANO. Thank you, Mr. Chairman.

Mr. Gómez, the GAO's report of July 2015 indicated EPA should improve its monitoring reporting data. So before your report came out they changed it to the EAGL system. How is that improving and will that satisfy?

Mr. GÓMEZ. So that is a good question, and, right, as we were doing our work we had recommendations for EPA to either decide to do away with the old system or improve the old system.

The new system that they have, which is referred to as EAGL, when we were doing our work, EPA was still finalizing it. So we have not looked at it to see how it is working. We do think that it is——

Mrs. NAPOLITANO. When will you know though?

Mr. GÓMEZ. Well, so we are going to be tracking the development of it. So I believe that EPA is supposed to allow data entry at the beginning of fiscal year 2016.

Mrs. NAPOLITANO. So not until next year?

Mr. GÓMEZ. So once that happens, we were also interested to make sure. I know one thing that EPA has done already is restricted who inputs information into that system so that now you get more consistent information. In the old system, everybody I believe who was a grantee or was an entity receiving funds could input information.

EPA has also improved the guidance that they have provided to——

Mrs. NAPOLITANO. Is it project specific?

Mr. GÓMEZ. Yes. It would be project specific, and they are restricting who can do it. It is just Federal agencies, and they have better guidance.

So we would like to see how that goes and can report back on it.

Mrs. NAPOLITANO. How long will it take you after you review that data next year?

Mr. GÓMEZ. Well, we would have to wait until at least there is some data entry. So once the Federal agencies enter the information I would give it a year for us to see how well it is working.

Mrs. NAPOLITANO. How often will you track that data?

Mr. GÓMEZ. Well, at this point because we did not make a recommendation, because EPA was taking action, we would probably have to look at the effort again. So we would get a request from you that says go back in and see how this system is working. We would be more than happy to do that.

Mrs. NAPOLITANO. Or if it is working.

Mr. GÓMEZ. The one thing that I just wanted to add which has not been brought up, and I think it is important to mention, the issue of nutrient runoff, and that is in the work that we did as we talked to stakeholders, they told us about an issue that really is not addressed by the GLRI, and that is the issue of inadequate stormwater and wastewater infrastructure that leads to runoff.

Mrs. NAPOLITANO. Water treatment plants.

Mr. GÓMEZ. So that is a big area. We refer to it sometimes as urban runoff. I think it has maybe been referred to, but that is an area that stakeholders said is key. It contributes to nutrient runoff, and it's not addressed really by the GLRI.

Obviously, you know, EPA has the State Revolving Funds and each State then provides money.

Mrs. NAPOLITANO. What would provide the ability to be able to not control but actually modify how it is being treated and who is treating it?

Mr. GÓMEZ. So in a lot of cases what happens with this infrastructure, it is just one pipeline. So in heavy rains, the overflow just goes into streams, lakes, rivers instead of the treatment plant. So it is an issue in a lot of places, and you will probably hear from the second panel, it is an issue that a lot of cities and towns across the country face.

Mrs. NAPOLITANO. So are you looking at the improvement or upgrading of the water treatment plants to be able to accommodate that?

Mr. GÓMEZ. That is one option, yes. So others are——

Mrs. NAPOLITANO. But is that being considered?

Mr. KORLESKI. So under the GLRI one of the things that we are focusing on is controlling stormwater runoff through something called green infrastructure. We do not spend and we are prohibited from spending GLRI money on hard infrastructure like wastewater treatment plants.

Mrs. NAPOLITANO. OK.

Mr. KORLESKI. We cannot do that, but we are very well aware that stormwater runoff can cause health hazards. You cannot swim in a beach because of E. coli, whatever the problem may be. So we have devoted a considerable amount of funds and we are continuing to focus on this concept of green infrastructure, which can be as simple as where you have got runoff running down into a beach area you construct a little—we would call it a swale, a little

ditch. You put plants in it that absorb the runoff. They filter the runoff so that before it actually gets into the lake, it has essentially been filtered and you have captured a lot of the E. coli.

That kind of project we can do, and we have had two rounds now of what we have called green infrastructure funding, and we plan to continue.

Mrs. NAPOLITANO. But wouldn't it make sense to be able to assist the treatment plants to be able to upgrade or expand, to be able to handle in times when you have exceeding amounts of rain?

Mr. KORLESKI. And again, part of the green infrastructure intent is to capture some of the water before it gets into the concrete stormwater system. By reducing that amount of stormwater getting into the system, it can reduce the likelihood of overflows.

But again, the way GLRI is structured, we can't offer money to fix or update treatment plants themselves.

Mrs. NAPOLITANO. OK. Well, it might be something you might want to consider in the future.

Now, you mentioned an issue—I think it was Mr. Kramer—on quagga mussel infestation. Somebody did. Was it you, Mr. Korleski?

Quagga mussel, that is very costly to reduce or clean the intake valves in all the systems that are affected. What have you found is, how would I say, working to be able to reduce the impact it has on those intakes?

Mr. KORLESKI. So, Ranking Member, probably the latest news is within the past year there has been—I am not recalling the term—I will call it a "quaggacide" or a "zebracide." There has been essentially a pesticide that has been found to be effective against Dreissena mussels, which are the quagga and zebra mussels.

Mrs. NAPOLITANO. The zebra, yes.

Mr. KORLESKI. And the information thus far shows that it can have an impact on them without impacting other, for example, native mussels.

Mrs. NAPOLITANO. Would you send to this subcommittee information on that? Because I am sure some of our entities would be glad to know what it is that is successful in that area.

Mr. KORLESKI. We would be happy to do so. The one thing I would point out is that thus far it has only been tried on a pilot level.

Mrs. NAPOLITANO. OK.

Mr. KORLESKI. It has only been tried on a pilot level.

Mrs. NAPOLITANO. Now, California has many problems with water, as you well know, we are facing drought. But are there any recommendations you have for California?

Mr. KORLESKI. Ranking Member Napolitano, the only thing I can say is I think with each passing month and year, whether we live in California or we live in the Great Lakes Basin, we all realize that water is precious.

Mrs. NAPOLITANO. Correct.

Mr. KORLESKI. And it is being recognized as being more precious, and we have to protect it. Whether it is on one extreme a drought where we have to do a better job of conserving water or on the other extreme, you are seeing more intensive storms dumping a

large amount of water in a short period of time; we have to plan for that.

Mrs. NAPOLITANO. But what I find more interesting is the partnerships that were forged to be able to make this happen.

So thank you, Mr. Chair.

Mr. GIBBS. I want to thank the panel for coming in today and sharing your thoughts and expertise, and I think it is in the report and in our hearing today that collaboration, working with all of the different agencies, and the private entities, and, Mr. Gómez, you raised a good point about the hard infrastructure, the mine sewer overflows and all of that issue, and we did put in the WRRDA [Water Resources Reform and Development Act] bill the last time a WIFIA pilot program to try to help supplement the State Revolving Funds to address the hard issues.

But also on the green side of things, as a farmer I can tell you I have seen amazing things happen with buffer strips and grass waterways. The filtration process in nature is really amazing, and so there are some things that can be incorporated that I think make a lot of sense.

I think we know the work that NRCS and all the people who do that on a voluntary basis, working with all of the farmers in the agricultural sector out there, is very important, and moving forward I think we can make some good progress.

So again, thank you for coming in today, and you are excused, and we will bring up the second panel.

Welcome to the House Committee on Transportation and Infrastructure Subcommittee on Water Resources and Environment. Today on our panel 2 we have Mr. Jon Allan. He is the acting chair of the Great Lakes Commission; the Honorable John Dickert, the mayor of the city of Racine, Wisconsin; Mr. Ed Wolking, Jr., the executive director of Great Lakes Metro Chambers Coalition; Mr. Doug Busdeker, director of the Ohio AgriBusiness Association; and Mr. Chad Lord, who is the policy director of Healing Our Waters—Great Lakes Coalition.

Welcome, and, Mr. Allan, the floor is yours.

TESTIMONY OF JON W. ALLAN, CHAIR, GREAT LAKES COMMISSION; HON. JOHN DICKERT, MAYOR, CITY OF RACINE, WISCONSIN; ED WOLKING, JR., EXECUTIVE DIRECTOR, GREAT LAKES METRO CHAMBERS COALITION; DOUGLAS R. BUSDEKER, DIRECTOR, OHIO AGRIBUSINESS ASSOCIATION; AND CHAD W. LORD, POLICY DIRECTOR, HEALING OUR WATERS—GREAT LAKES COALITION

Mr. ALLAN. Thank you, Chairman Gibbs, Ranking Member Napolitano, for holding this hearing today.

The Great Lakes Restoration Initiative remains a top priority for the Great Lakes Commission and its member States, and we appreciate your oversight and your interest in it.

I serve as director of Michigan's Office of the Great Lakes, but I am here today as chairman of the Great Lakes Commission. I moved from acting to chair just the other day.

The commission was formed by eight States in 1955 to provide a common voice on behalf of the eight States on important Great Lakes issues.

The Great Lakes are a great national treasure and a vital economic interest. They provide us with multiple benefits, but most profoundly they constitute the social and cultural background for nearly 40 million U.S. and Canadian citizens who live within that basin. The lakes are a significant and growing component of our regional and national economies.

Restoring and properly caring for the Great Lakes is a longstanding and a bipartisan priority for our region's leaders, including my boss, Governor Rick Snyder. The focus has continued through Democratic and Republican administrations and enjoys broad-based support among States, tribes, cities, businesses, industries, and with conservation groups.

The commission and its member States have been deeply engaged with the GLRI since its inception. The States actually helped formulate some of the original GLRI focus areas and State staff are supporting many of the projects and actions underway either directly on projects or assisting local partners across each of our States. The States' contributions are vital to the program's success.

The GLRI is a strong and well-managed program that is targeting resources at our most serious problems and areas. It is supported by sound science, and is guided by an action plan with important performance metrics.

The GLRI has stimulated impressive progress over the past 5 years. Noteworthy highlights include actions to thwart bighead and silver carp from invading the Great Lakes, targeted nutrient reductions in watersheds contributing to dangerous algae blooms, and of course, the cleanups of the AOCs we have been talking about.

Really one of the most striking impacts, I think, has been in this area of AOCs, where the GLRI together with State resources and local resources and capacities is enabling communities to clear their legacy contamination and to revitalize degraded waterfronts, transforming them into once again valuable assets.

Last year we were very proud in Michigan that we were able to delist two of those AOCs, and it is really not the Federal Government that I want to think about and the States, but it is 30 years of people in communities that worked hard towards that end. So I want to recognize how important the communities have been. It is important, and they feel the benefit of that progress.

I will say though that it would not have been possible under any circumstance without GLRI to promote that activity. Communities have been waiting for decades for this kind of progress.

While the GLRI predominantly focuses on ecosystem improvements, it is also generating important cultural, social, and economic benefits for the region and the Nation and for our communities and should be recognized and celebrated. Businesses, jobs, wildlife, and people—people—are returning to waterfronts across the region that were once written off, ignored, forgotten about.

Performance metrics really cannot fully capture this evolution as much as we work towards that end, but it is profoundly important for local economies and for our quality of life and really, human well-being.

There is room for improvement, however. You have seen some of that in our written testimony. The commission's specific recommendations have been provided there. However, I will just high-

light a few of the following things that we have already touched on, I believe.

First, we really urge improved coordination, consultation, engagement with the States. We really see ourselves as more than just stakeholders. We have sovereign authorities. We have regulatory responsibilities. We have direct connections to communities, and really work hand in hand with them and our Federal partners as well. We see this as collateral partnerships.

Second, we need to sustain State capacity to support an effective Federal-State partnership. We need to ensure that Federal programs are integrated with State priorities and workplans, and we must maintain State capacity towards that end.

Third, we must maintain long-term monitoring to assess progress, success, and as we have heard, to adapt over time.

Finally, we need to better target our nutrient reduction actions to prioritized watersheds that contribute to the formation of harmful algae.

While some of that coordination is directly beyond GLRI, it is in other programs and other Federal programs that can be aligned with both the Federal and the State interests, and the States can play a very unique role in helping that coordination amongst multiple programs.

In conclusion, the commission reiterates two priorities for Congress: sustained funding for Great Lakes restoration. We really need to continue the progress that we have seen, continue the efforts that really have been happening for decades with great success recently; and ultimately to pass formal legislation authorizing the GLRI.

The GLRI has generated real progress, progress that would not have occurred without it and refinements such as the ones in our testimony can build upon that success. The commission and its member States urge Congress to support the program, and we pledge, as States and through the Great Lakes Commission, our continued partnership towards the restoration of the Great Lakes.

Thank you.

Mr. GIBBS. Mayor, welcome. The floor is yours.

Mr. DICKERT. Mr. Chairman, good morning, and committee members, good morning. Ranking Member Napolitano, good morning, and all of you watching in TV land, good morning.

I am Mayor John Dickert, mayor of Racine, Wisconsin. We are a city between Milwaukee and Chicago on Lake Michigan, about 80,000 folks.

I sit as the vice chair of the Metro Economies Committee with the U.S. Conference of Mayors and also serve on their Mayors Water Council. I was the past chair of the binational Great Lakes and St. Lawrence Cities Initiative, and I serve on Governor Walker's Coastal Management Commission, and was president of the Urban Alliance in Wisconsin.

What does this all mean? It means I am a little familiar with water. I am here to testify for the U.S. Conference of Mayors and the Great Lakes and St. Lawrence Cities Initiative, and I ask that the testimony be inserted in the record.

We did have the best tasting water in 2011. Our Blue Wave Beach has been consistent for 12 years, and USA Today and NRDC

[Natural Resources Defense Council] rated us as one of the top beaches in the world. So to say the least, we are committed to water.

We have put our focus on it, and the importance of the Great Lakes obviously cannot be overstated. As we saw with Toledo, 20 years ago they were actually rated as the best tasting water in America.

We just recently had a meeting with them and Mayor Rahm Emanuel, which we held in Chicago because of the problems that they had in shutting down water to 500,000 people. When you don't pay attention to the problems, obviously we can have dramatic effects.

We are obviously seeing that 20 percent of the freshwater in the world is from the Great Lakes, and the Conference of Mayors did a study where only 35 percent of the mayors that responded knew where their water was coming from in 2020. That is a sad fact, but the mayors, we spend a lot of money on our infrastructure and our water. In 2012, we spent $111 billion on our infrastructure to provide those two. Congress, thankfully, spent $2 billion. So we thank you for that.

We recognize the importance of infrastructure when 94 percent of the withdrawals that we are taking are for food, food production, drinking water and energy. That is why GLRI is so incredibly important. You know when you look at nearly 2,700 projects have been done since this started, this is incredible, and I have got to tell you, Mr. Chairman and Ranking Member, thank you for doing this. Thank you for holding this meeting and talking about this. It is important to us.

The Conference obviously supports this. We ask and pray that you break down the silos within the agencies so we can all work together. We have been doing that. We have been officially and effectively using your taxpayer dollars because we know how vital every one of those dollars is.

Closer to home in Racine, we have used GLRI money in a blending of three projects, one to take a beachfront that was so polluted you could not even walk on it it smelled so bad, and turning that beach around making it available to handicapped and seniors. We then blended it with a road project where we took the road and took the runoff into an environmentally friendly, sensitive cleaning, and then cleaned out our harbor and worked with pervious pavement to provide an opening for the largest inland fishing tournament in the world.

We do this blending because we know the dollars are important. We do it because we get peak efficiencies and cost savings by blending all of this together, and I will tell you GLRI has been consistently used to leverage multiple partners in funding because we have redeveloped areas that would have never been redeveloped without these funds.

We rebuild our cities, and we do them efficiently and effectively. We are the ground game that you are talking about. When you are asking who is doing all of the work, well, we are the ones, and we are here because we know the dollars are precious.

Mayors have been responsible to protect the public health and safety of our citizens. That is our job. That is what we do. So we

are prepared to break down the silos, work with you, create that efficiency and effectiveness, but also that flexibility.

There is a Native American saying that I wanted to end with and maybe touch on two other points if we have a second, which is that we do not inherit the land from our ancestors. We borrow it from our children. So we ask you to work with us so that we can create a future for our children that is an amazing one.

With your permission, Mr. Chairman and Ranking Member, I would just like to say I know you have talked about brownfields in the past, and you have had testimony on it, and I will tell you that in cities like ours that are industrial, we would not be able to rebuild our cities and create new growth and a new economy without it.

So I have leveraged the brownfields funding in my city for a potential of up to $200 million in growth over the last 5 years.

The last thing is that I know that you are looking at authorization of this, as mentioned earlier. I hope you do do that.

The last piece is that I know that the appropriations language and the EPA section 428 of Senate bill 1645 is regarding discharges, and I will simply leave it at this because my time is over. We can control discharges about as well as we can control weather, and because of that we simply cannot prepare for all of it.

So we are doing our best, and we look forward to that conversation, but I hope you will consider that language carefully.

Mr. GIBBS. Thank you.

Mr. Wolking, the floor is yours. Welcome.

Mr. WOLKING. Thank you, Mr. Chairman, Ranking Member Napolitano, members of the subcommittee, thank you for the opportunity to be here today.

I represent the Great Lakes Metro Chambers Coalition, which is a group of Midwestern chambers dedicated to the competitiveness of the Great Lakes trading region, emphasizing Federal actions that will accelerate our region's economic comeback. We have an appreciation of the fundamental role of manufacturing in our region and a tight focus on targeted key issues especially important to this region.

Together with the Great Lakes Manufacturing Council, we have pioneered the notion that the binational Great Lakes region is the third largest economy in the world when you take the combined State and provincial GDPs [gross domestic products] together.

More about our agenda and our issues is in this brochure. I am happy to make that available to the subcommittee with your leave.

At the center of our region is the Great Lakes. It is a fundamental transportation artery, as Chairman Gibbs has noted, but it is also from a different perspective, a defining and precious geographic asset. It is the most important body of freshwater in the world. It is critical to the economic well-being of our region, the social fabric of our region, and the employment of many thousands of people, and it is key to the region's and Nation's future.

A critical consideration is whether you can have growth and economic development and quality environment at the same time, and it used to be that people thought it was a false choice between growth and the environment and you had to choose one or another.

But with technology and processes we have today, we can have both clean, desirable waterways and economic growth, and that is often cited by political, business and community leaders.

Our coalition's Great Lakes-related priorities include what has been mentioned here before a time or two: the Clean Water State Revolving Fund, which is very important to the lakes; prevention of Asian carp; and eradication from the Mississippi and Ohio watersheds which sit on the doorstep of our region, and obviously the Great Lakes Restoration Initiative where we spend much of our time.

The effects of this program, the GLRI, are enormous. More than 2,500 projects that GLRI has been involved in overall; over 5,300 miles of U.S. coastland; and 99 percent of the funds have been obligated.

We have gone over the numbers and the five pillars from other speakers. I will not belabor those, but those pillars are very, very important to the region's future.

Some have tried to pin a specific ROI [return on investment] on this wide-ranging initiative. Our view is that that takes major time. There is a lot of interrelated, intricate, hard to quantify moving parts. It is complicated work, but we are learning. About 10 years ago a Brookings group calculated an ROI that was about 3½ to 1. More recently a Grand Valley State University Muskegon Lake project calculated an ROI of about 6 to 1.

These are systems approaches, however, and they are hard to model, but we would say the real key to all of this is that everybody in our region knows that this is the right thing to do and that if we stay the course, good things, many good things, are going to come of this initiative.

It is bringing activity back, and it is vital to placemaking, which plays such a fundamental role in economic growth and decisions today.

We support the minimum $300 million annual investment, which we think is a sensible level in these challenging times. We heartily support the notion of H.R. 223, the Great Lakes Restoration Improvement Act, for continuity purposes and to really solidify this program for the next 5 or so years.

We are very supportive of the EPA's action plan II and obviously that adds up to being supportive of the fundamental work that this initiative is accomplishing.

Many things are working in this approach. You can see the results. That is an important part of it. The multiagency interdisciplinary approach is key. We can build on this project, this initiative and gain momentum from our results, from learning how to work on this together, and also from engaging more stakeholders.

A question came up, how to do better. Really there are a few things I would recommend on high-level terms and leave the details to the experts.

Number one, a formal authorization of H.R. 223 is very important.

Also, improved consultation, collaboration and coordination both vertically, up and down between Federal and State agencies, and local communities as well as across the range of Federal agencies.

Obviously the measuring and the monitoring systems are key, and the improvements that are coming in action plan II. The data, the stories, making everything accessible to all, and also the Great Lakes Restoration Initiative Action Plan II, also very, very important to the future.

And one final comment, thinking about Canada, it is very, very important to think of our relationship to our neighbor to the north. They are also the other key stakeholder.

Thank you.

Mr. GIBBS. Thank you.

Mr. Busdeker, welcome. The floor is yours.

Mr. BUSDEKER. Chairman Gibbs, Ranking Member Napolitano and members of the subcommittee, thank you for this opportunity to be here today.

I am Doug Busdeker of Pemberville, Ohio, in northwest Ohio. I am employed by the Andersons in Maumee, Ohio. I serve as a board member of the Ohio AgriBusiness Association, which represents the Ohio crop nutrient industry, along with grain, feed, seed and crop protection.

The Andersons, Incorporated, my employer, was founded in 1947 by Harold Anderson and built the first grain elevator in Maumee, Ohio. Currently I serve as a senior manager for Northern Farm Centers consisting of Ohio, Indiana and Michigan.

I am pleased to be here today to relate the many positive agricultural activities occurring in the Western Lake Erie Basin. During my career I have engaged with farmers, engaged as an agricultural retailer in the region.

Following the large algal bloom that occurred in 2011 in the Western Lake Erie Basin, many in the agricultural community recognized that agricultural retailers and farmers would need to play a bigger role finding solutions to address water quality challenges. Healthy water, clean, fishable and drinkable water is important to everyone, including all in agriculture. We recognize that agriculture must be part of the solution.

Following the algal bloom of 2011, the Nature Conservancy partnered with several key agricultural retailers in the Western Lake Erie Basin to develop the 4R Nutrient Stewardship Certification Program. This voluntary program was focused on agricultural retailers since agronomists, certified crop advisers, sales personnel, and applicators were recognized as having a strong influence on nutrient use.

Currently 17 agricultural retailers have been certified representing 1.2 million acres of cropland and 3,200 farmers in Ohio and Michigan. Another 10 are awaiting confirmation. Since our program launch on March 18, 2014, a total of 71 agricultural retailers are in the process or have indicated interest in becoming certified.

The 4R Nutrient Certification Program was founded on the Fertilizer Institute's 4R Nutrient Stewardship Principles of the right source, right rate, right time, and right place, and includes social, economic and environmental BMPs [best management practices].

SCS Global, a respected independent audit development firm, was hired to create the 4R Nutrient Stewardship Certification standard. This standard involves 41 different specific criteria that

are audited to become certified. Many newer BMPs are already occurring in the Western Lake Erie Basin. Cover crops of all types are growing in popularity. Equipment manufacturers are offering several new tillage options to inject crop nutrients below the surface. Application of gypsum is quickly being adopted, the sequestered phosphorus reducing dissolved reactive phosphorus runoff.

Use of nutrient management plans to precisely determine the required nutritional balance for each crop is common. Commercial fertilizer nutrients are one of the single largest expense for traditional growers, and overuse leads to undesirable financial implications.

Improving soil health resonates with all farmers. There is still much work to be accomplished, but conservation activities advance each year. On April 2, 2015, Ohio Governor John Kasich signed Senate bill 1 into law. Senate bill 1 prohibits manure and fertilizer application when fields are frozen, snow-covered or saturated.

In addition, Ohio Senate bill 150, which requires anyone applying fertilizer on 50 acres or more to become certified, was signed by the Governor in May 2014.

The Ohio AgriBusiness Association fully supported passage of both Senate bill 1 and Senate bill 150.

Research has shown that algal blooms in the Western Basin of Lake Erie are predominantly the result of excess dissolved reactive phosphorus in our rivers and streams. While the exact source and why the increasing amounts of DRP [dissolved reactive phosphorus] is not clearly understood, research has shown that transport from agricultural land plays a significant role.

In the 1970s and 1980s, when Lake Erie was in serious trouble, through research farmers widely adapted new tillage techniques, such as no-till conservation tillage. These practices remain in place today and contribute greatly to a reduction in particulate phosphorus runoff and erosion.

Additional research is needed to identify new BMPs that support a reduction of dissolved reactive phosphorus during periods of extreme rainfall. To that end the fertilizer industry has committed $7 million to establish a 4R research fund. The goal of the fund is to establish sustainability indicators and environmental impacts for implementation of 4R Nutrient Stewardship across America. The fund provides a much needed resource for the focus on measuring and documenting the economic, social and environmental impacts of 4R Nutrient Stewardship.

For the sake of time, I thank you again for this opportunity to provide you with an update on the many positive activities and projects occurring in the Western Basin of Lake Erie as we seek solutions to improve water quality.

We all share the goal of having clean water for many generations to come.

I would be happy to answer any questions.

Mr. GIBBS. Thank you.

Mr. Lord, welcome. The floor is yours.

Mr. LORD. Members of the subcommittee, thank you for this opportunity to share our coalition's views with you today.

As you have heard, the Great Lakes are a global resource with millions depending on their clean water. Yet the lakes still suffer

from a legacy of toxic pollution, invasive species, harmful algal blooms, and the loss of habitat.

Ten years ago President Bush asked our region to prepare a comprehensive restoration plan to address these and other problems. The Great Lakes Regional Collaboration Strategy was created. Four years later, President Obama proposed the Great Lakes Restoration Initiative that launched our region on a restoration path barely imaginable a decade ago.

Because of the GLRI, we have been able to undertake one of the world's largest freshwater ecosystem restoration projects. Groups across the region are focusing on public-private partnerships to clean up toxic hot spots, restore fish and wildlife habitat, and combat invasive species, partnerships that may never have come together had it not been for the GLRI.

The GLRI's size and scope means it plays a central, albeit not the only, role in successfully restoring and protecting the Great Lakes. The GLRI has accelerated progress and catalyzed critical restoration action that likely would never have happened otherwise.

For example, in Duluth, toxic mud from the bottom of Stryker Bay was removed, making the bay safe to swim in once more.

The city of Marysville, Michigan, replaced a failing seawall with a natural sloping shore and wetland providing valuable fish and wildlife habitat.

The Brickstead Dairy near Green Bay planted cover crops reducing runoff to improve water quality.

How we are accomplishing this is equally as impressive. The GLRI is a model for large, landscape-scale restoration. It ensures the focus remains on the region's highest priorities. It sought to fix the problem GAO identified all the way back in 2003 that there was inadequate coordination among Federal agencies.

Now, the EPA quickly converts the funding it receives for restoration activities by passing it through to other Federal agencies so they can direct it through their existing authorized programs at the region's highest needs. The GAO seemed to recognize these benefits in its most recent report. It found that Federal agencies had allocated almost all the GLRI funds that they had received and that it promotes efficiency and effectiveness by bringing agencies together to agree on common goals to prioritize restoration work.

In short, the Great Lakes Restoration Initiative is working. However, no program is perfect. The GLRI should be continuously reviewed and updated to reflect the changes to the lakes, program deficiencies that have arisen or yet to be addressed, or new threats that have emerged.

So what changes should be made? First, Congress should remove all doubt that the region is on the right path and restoration efforts are on track. Pass H.R. 223, the Great Lakes Restoration Initiative Act. Passing this bill creates greater certainty for the program and allows everyone to focus on getting the job done.

Second, we support even greater targeting of GLRI funds in priority watersheds. However, we expect the GLRI to invest in all five focus areas and to fund activities in these areas as a prescription for recovery.

We also want to see more consistency on when requests for proposals are released each year.

Third, we remain worried that we are not as effective on larger lakewide scales at monitoring, scientific assessment and program project evaluation. Generally speaking, our coalition's members support the integration of monitoring requirements for projects they are undertaking.

Successful monitoring has assisted HOW [Healing Our Waters] groups in documenting short- and long-term project successes. However, it is not clear how comprehensive and systematic monitoring is and how these local efforts add up to a well-monitored, scientifically assessed system.

Since the beginning we have been saying that monitoring requires more GLRI resources than it receives now, and that those funds be available beyond just a couple of years so we can track long-term progress. It would also help if this monitoring stems from a Great Lakes research plan which has yet to be assembled.

Fourth, buy-in from the Great Lakes community is also critical to the overall success of the GLRI. Agencies at every level of Government must talk to the public to help understand what progress has been made, where efforts should focus next, and whether the restoration priorities of the Great Lakes restoration community and, therefore, the GLRI, should change based on those assessments.

Annual engagement of the non-Federal stakeholder community leads to better coordination and better alignment of resources and work at all levels.

To sum up, the Great Lakes restoration investments are paying off for the environment and economy. The Great Lakes Restoration Initiative is Government at its best; agencies working with business, civic and community groups collaboratively on a common goal. The results are impressive and underscore why this national effort needs to be authorized so that we can see the job through to the end. Cutting funding will only make the job harder and more expensive.

Thank you for inviting me to share our views with you. I am happy to answer any questions.

Mr. GIBBS. Thank you.

I will start off with a question here.

Mr. Allan, in your testimony you describe the need for increased coordination, consultation and engagement between the Federal GLRI agencies and the Great Lakes States. Can you give us examples of how the current efforts by the Federal agencies in the area are just not enough?

And then are States treated as coequal partners? Can you just elaborate?

Mr. ALLAN. Yes, thank you.

It has been subject to our written testimony as well. I think the States are feeling the necessity to be sort of engaged in some of the decisionmaking process, not just as the recipients of the funds, but really a little more upstream in that process to make sure that we can coordinate as much as we can with other existing State programs, State resources, and really at the community level, too, to help be part of that facilitation.

So I think that is an important aspect. As I said, I think the program has worked well. A lot of money gets targeted to the right things, but I think the States would like to see some further integration sort of upstream in that decisionmaking.

We did receive a letter to our letter to Administrator McCarthy.

Mr. GIBBS. Are the States involved in the subgroups that we talked about in the first panel?

Mr. ALLAN. They have not up to this point, but we have some commitments from EPA that the States will be included further in that deliberative process.

Mr. GIBBS. Yes, I think that would be a critical component. I mean, it is a partnership.

Mr. ALLAN. Yes.

Mr. GIBBS. States ought to be involved in getting down in the weeds.

Mayor Dickert, can you explain kind of on that same question, as a mayor, the relationship of the municipalities with the Federal Government on this question about the consultation and involvement?

Mr. DICKERT. Well, first of all, thank you, Mr. Chairman.

First of all, we have had a great coordination with EPA region 5. We do not as mayors, at least I do not and most of the mayors that I know, we do not go out and just ask for money willy-nilly and just say we want to take all the money without project coordination and dramatic results.

So the first thing is we work with the EPA and on the problem areas that we see for the end game, and that end game is usually not only cleaning up the environment, but providing that economic benefit as it moves forward, whether it's helping as business development or overall quality of life issues for your cities.

The coordination that can go on top of that is the additional coordination with the State, and when you have got all three of those players playing in the same sandbox, you have got some really good things going on. So they can coordinate their money for efficiency and effectiveness with the cities and the counties and the Federal Government. It is the perfect answer.

The issue that we deal with, candidly, is the silos within the Federal Government that there is no flexibility and that limits sometimes even the money that you can go after because it does not fit perfectly into a box.

Mr. GIBBS. Yes, you would think with a grant process that would help break down some of that, but that is what we need to work on, I think, in the authorization.

Mr. DICKERT. Grants and prioritization, correct.

Mr. GIBBS. Yes. Mr. Busdeker, on the 4R Program you talk about, nutrients, stewardship, dealing with the right source, right rate, right time and right place, obviously that is just plain common sense to me as a farmer. Your statement about excess nutrient supply costs money, and you cannot hardly do it especially with today's commodity prices. It is not a smart thing to do.

Has the GLRI provided any funds to help with your efforts for the 4R Program?

Mr. BUSDEKER. Mr. Chairman, thank you for that question.

Not directly for the 4R Certification Program. That has been funded by industry as well as the folks who become certified that go through the audit. They have to pay for the auditing process and so forth.

Mr. GIBBS. Are you seeing with GPS, global positioning system, and I know my larger green farmer friends, it is in all their equipment out there, especially in northwestern Ohio, seeing more farmers moving to more specific placement of nutrients using GPS? Is that starting to happen or not?

Mr. BUSDEKER. Well, that is becoming very common. We call it variable rate technology in terms of application of nutrients, and I would say that is becoming commonplace. It is not 100 percent, but it is rapidly progressing forward as the way to apply nutrients.

Mr. GIBBS. And I think for anybody listening to this or viewing this, you know, the reason I raise that question is I think it is important because people do not realize that in any given field you can have tremendous yield differentials and fertility levels because the soil does change, you know, across a 5,800-acre field or whatever.

It helps the farmer's bottom line by getting that nutrient placed where it is needed and not putting excess on where it is not needed, and that is where GPS would come in. I think you would concur with that, right?

Mr. BUSDEKER. Yes, that is correct. And we have actually for years, many, many years previously, used one rate across a field, but today we are breaking this up into individual management zones based on yields, and that has been occurring not on all fields, but we are progressing that way. That is kind of becoming the way of the industry.

Mr. GIBBS. Has the Natural Resources Conservation Service, are they doing enough? Is there more they can do or what are your thoughts on that?

Mr. BUSDEKER. Well, they are doing a lot in the area, especially with the cover crops and the various things that are going on. They are a great help, yes.

Mr. GIBBS. OK. Thank you.

Mrs. Napolitano, I yield to you.

Mrs. NAPOLITANO. Thank you, Mr. Gibbs.

And to that question, Mr. Busdeker, this is all voluntary if I remember correctly, the farmers utilizing fertilizer that was being now informed in the way it is being utilized by you. Do you have data on that?

Do you have any data that shows the trend, the lines of the application of these nutrients to the land, both commercial and manure?

Mr. BUSDEKER. Well, the voluntary part that you have made mention was the certification program for the agricultural retailer.

Mrs. NAPOLITANO. It is only about 70 percent certification, right?

Mr. BUSDEKER. Well, not 70 percent. We have got I think it was 17, I believe I said, that were certified agricultural retailers. Now, that is not farmers. That represents about 1.2 million acres in the Western Basin of Lake Erie and about 3,200 farmers.

But as far as the participation and all in this nutrient management and so forth, that is a pretty high percentage of farmers be-

cause really our sales and certified crop advisors provide that information to the grower.

Mrs. NAPOLITANO. Do you have any of that data?

Mr. BUSDEKER. Specifically I am not sure I understand the question.

Mrs. NAPOLITANO. The data that shows the trend of the reliance on the application of the nutrients, commercial and manure. Are you showing how much it is being utilized?

Mr. BUSDEKER. Well, we know based on crop production. That is how we determine how much to apply. It starts with a soil test. Then we go through the crop production. We determine yield goals, and then we determine how much nutrient needs to be applied, which includes livestock waste, if there is livestock waste, as well as commercial nutrients.

Mrs. NAPOLITANO. OK. Well, could you provide any of that information to this subcommittee so we know what is happening and maybe be able to understand a little more?

Mr. BUSDEKER. Certainly.

Mrs. NAPOLITANO. Thank you, sir.

And several of you have talked about the importance of the authorization of the GLRI that is in H.R. 223. Mr. Lord does raise the importance of the reauthorization of the EPA's Great Lakes National Program Office and also of the Great Lakes Legacy Act. Both are laws.

Do you agree that these programs also are important for Congress to reauthorize?

Mr. DICKERT. If I may, yes, and the reason why is simply when we are working at the local level, it is all about consistency, and if you know, for instance, if you have a developer coming into a city like ours where you have just done a brownfield redevelopment and that person, that investor knows that they are coming in, but they are going to need some additional EPA work to make that happen, to create that better riverfront or lakefront, then if there is a consistency in the program, you know that if you do not get it in the first year, you can still apply the next year and still try to work through those to make those blend together.

If there is no consistency, then you do not know if that money is there. Then you are always battling back and forth to see if the project is actually going to happen.

So for us at the local level, it is purely the consistency knowing that the opportunity is there. It allows us to do longer planning, create more efficiency and make our projects more effective.

Mrs. NAPOLITANO. Anybody else?

Mr. ALLAN. I would agree. Having a suite of tools available, GLRI, Great Lakes Legacy Act, and then having a Federal agency in this case, EPA, through the Great Lakes National Program Office, through GLNPO, being able to really sort of be that voice and really have that set of relationships develop——

Mrs. NAPOLITANO. So it does have importance.

Mr. ALLAN. We think it has great importance moving forward.

Mrs. NAPOLITANO. OK.

Mr. ALLAN. It adds to that clarity and adds to the collaboration.

Mrs. NAPOLITANO. Anybody else? No?

Well, thank you for that, and, Mayor Dickert, I hate to bring up the issue of the MS4 [municipal separate storm sewer system], but that is going to have to be another issue that is going to affect all communities, and I am sure you know Mary Ann Lutz.

Mr. DICKERT. Oh, all too well.

Mrs. NAPOLITANO. Who is now on my staff doing the MS4 work with EPA.

Mr. DICKERT. Yes, yes.

Mrs. NAPOLITANO. So I would want to be sure that we communicate that we need to get more of that information so that EPA does work with the community to ensure that that is done and that it is not heavyhanded as an unfunded mandate to our communities.

Mr. DICKERT. Right. And candidly, the unfunded mandates that come down and sometimes the consent decrees that come down, we are already at the local level working on. We may not have met necessarily the goal, but I rarely know a mayor who simply sits back and says, "Ah, whatever happens happens."

We are trying to work ahead of everything so that we do not have to worry about it. So any time that we can get the effort working together, it is great. It is dealing with the consent decrees and the mandates. I always tell everybody it is always better to work together.

Mrs. NAPOLITANO. Well, yes, but keep Members of Congress informed because they do not know anything about the stormwater issue or many of them are not aware that it is going to be an unfunded mandate on their communities.

Mr. DICKERT. Absolutely.

Mrs. NAPOLITANO. And they are going to be raising holy you-know-what when it comes down as a mandate.

Mr. DICKERT. Yes, absolutely.

Mrs. NAPOLITANO. To Mr. Lord, some have criticized the GLRI for the pace which expends the funds. Is it not true that these programs take years to complete and that a more appropriate measure would be the total number of funds obligated to the long-term projects?

Mr. LORD. I would agree with that. We see that this is a region that has winter. The lakes freeze. There is snow cover. The ability for projects to actually be implemented can take years just by the vagaries of the weather patterns. I mean we just do not know.

So using obligations I think is a much better benchmark than trying to use expenditures or funds.

Mrs. NAPOLITANO. Make more sense?

Mr. LORD. I think it does and I think the GAO report that came out in 2015 also highlights three or four reasons why expenditures may take longer and why you may not be seeing expenditures as quickly as you do the obligation of those funds.

Mrs. NAPOLITANO. Thank you.

A question, Mr. Allan, real quickly. The issue that the EPA's old reporting system is now replaced by EAGL, have you seen that system? Have you looked at it?

Mr. ALLAN. I have not yet. I think it was still in final testing, and I have not had a chance to take a look at it.

Mrs. NAPOLITANO. Are you being included in being able to understand how it will be applicable?

Mr. ALLAN. We will definitely.

Mrs. NAPOLITANO. OK. Thank you, Mr. Chair.

Mr. GIBBS. Mr. Ribble.

Mr. RIBBLE. Thank you, Mr. Chairman.

Mayor Dickert, it is good to have you here. I live up near Green Bay and had a chance to visit your city on many occasions in my 35 years that I have been traveling around the country and stayed as a commercial contractor.

My question for you, and I have got a couple questions for you if you do not mind, I have heard from the Green Bay Clean Water Agency as well as read in your testimony your concerns about the Interior appropriations bill in the Senate.

It sounds a little inconsistent. I wonder if you could help me navigate the inconsistency when you talk about opposing the language when they are asking for no discharge. Can you expand your comments on that a little bit? Because it seems like it is not consistent with the rest of your testimony.

Mr. DICKERT. Sure, and thank you, Mr. Ribble. It is great to see you again, Congressman Ribble.

When you come down with Senator Kirk's proposal I believe you are talking about, when you come down with a proposal that says that you have to eliminate all overflows, there is no system, and you can ask the city of Houston because I was talking with our mayor the week that they had their storm flooding; there is no system in America that is designed for the complexities of the weather that we are having right now.

If we get 7 inches of rain in Milwaukee, 28 hours later it will be in Racine, and we will be flooding, and there is nothing that we can do about it because it is a 500-year event.

So what we are talking about is we are all working, and we talked about this earlier. I think Congresswoman Norton brought it up. We are all working at creating methods and systems that capture stormwater, hold it, clean it, allow it to filter through the ground, all working to try to prevent those big 500-year events, but it is impossible to do that.

There is no way Houston could have prepared for what happened with their storm that they had. They were 3 feet under water. So to simply say that we all have to get to that level, by the time we get to that level and that 500-year flood happens, we are probably going to have to have an overflow at that time.

So what we ask is that we are already working as a city. We do not have combined sewers. So we are already working as a city to prevent all of that. We are putting in 2-million-gallon storage tanks. We are doing all of the work environmentally. To simply say that we have to do that, that will cost the city of Racine $700 million for 80,000 people. Sixty-five billion dollars, I think, is the pricetag for the country for the Great Lakes region.

It simply is unaffordable. So what I would ask is that we work together in advance with these communities to find those best practices and work through those.

Milwaukee is a perfect example. MMSD [Milwaukee Metropolitan Sewerage District] is working to do different stormwater systems with their combined sewer to make sure that that stormwater never even makes it into the system. So we are trying to do that.

When you look at Green Bay, 1.4 percent of the Lake Michigan water, 30 percent of the nutrient load into that areas. You know, there are problems that we are all trying to work through. We ask that you focus on the big problems and work with those folks, like Mayor Jim Schmitt in Green Bay, and try to help them out.

We are trying to do our own at the local level to prevent this from coming in the first place, but I will tell you when a 500-year flood hits, you pray. You pray hard because there is not a heck of a lot else you can do besides that.

Mr. RIBBLE. I thank you for expanding your comments that you had in writing here.

I want to also go a little bit further in your testimony. You mentioned the use of porous pavements and things like that in one of the projects. Has your city gone to the point of modifying your building codes to a 21st-century standard requiring porous pavements, parking lots, sidewalks, vegetative roofing?

Mr. DICKERT. Right.

Mr. RIBBLE. Things like that that would actually bring our construction practices into the 21st century as far as managing the water runoffs during high rain events.

Mr. DICKERT. Absolutely. We do, and we work through a series of best practices within the U.S. Conference of Mayors and the Great Lakes groups to do that. We have actually gone above and beyond that.

That project that I talked about earlier where we have the boat ramp, the harbor and the road, all of those were done with environmental sensibility to not only do porous pavement, but to then take stormwater management and manage it through the process of plants and things like that to preprocess the water.

We have the system that you talked about earlier where the stormwater comes off and it goes through five tiers of environmental purifying before it even gets to the lake. We do all of that.

The thing that we are doing on top of that because as mayors we have to stay efficient and then we have to continue to be efficient. We actually go to a road system where once we do stormwater and water and you put the cement on top of the road, utilities have the right to cut that road up the next day. We actually work now with our roads where we bring everybody in ahead of time, all the utilities, including water and stormwater, so that when we do a road, all those five layers are done so that when that cement cap goes on top, that road is not going to be touched for 20 years.

Those types of processes in long-term planning, to the issues, Mr. Chairman, that you brought up earlier about whether those funds and Congresswoman Napolitano talked about whether that consistency of those funds are there; that allows us to plan all of that out so that we can create all of that efficiency so we can hold back all of those items.

So we do that every day. The best practices we get from our colleagues. Mayor Daley said that, you know, the one thing you do as a mayor is steal, and I said as a Catholic that is tough for me, but we do. We steal each other's ideas and we blend them into what we are doing.

Mr. RIBBLE. And I think it is really important because I often read language like is in your testimony where you say, "I cannot emphasize enough that we all must be fully engaged and fully committed to water issues if we are going to succeed. You cannot do this halfway."

I hear that a lot, but then when you do the deep dive on building codes, you see that they are not really fully committed. I would also suggest that to Mr. Wolking for the chambers to also be taking a look at how corporate America can be a partner in this issue as well.

It has to be all of us participating as agriculture, in dealing with the nonpoint source, endpoint source. If we all would actually move into the 21st century, we could preserve this very important chain of water.

So thank you very much for being here, and with that I yield back.

Mr. DICKERT. Thank you.

And if I may, Mr. Chairman, not just in the ordinances, but in the bidding. Your bidding has to include that as well.

Thank you.

Mr. GIBBS. Mr. Davis, do you have any questions? Mr. Davis.

Mr. DAVIS. Thank you, Mr. Chairman.

I apologize for the side conversation there.

And thank you, Mr. Rokita.

First off, witnesses, we really appreciate you being here. My first question is for Mr. Allan.

You wrote in your testimony that Federal agencies are not coordinating, consulting and engaging with the States as well as they could or should. What are some ways that the Federal agencies need to treat the States more as coequal partners in implementing the GLRI program?

Mr. ALLAN. Good question.

Mr. DAVIS. Thank you.

Mr. ALLAN. So we did pose that to the EPA in our letter to Gina McCarthy, and she has written us back just as of a day or so ago, and we can enter that letter into the record as a response.

And we do agree with it. She is going to invite us or open up additional quarterly discussions with the States, with the Regional Working Group. We think this will help really start to facilitate more sort of that front-end planning than just, you know, here are the priorities, here are the projects, here is where we have to go.

So as I mentioned before, we are really looking to move that upstream a little bit more in the decision process.

[The information follows:]

THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

SEP 2 8 2015

Mr. Jon W. Allan
Acting Chairman of the Board
Great Lakes Commission
2805 South Industrial Highway
Suite 100
Ann Arbor, Michigan 48104

Dear Mr. Allan:

I very much appreciate your August 31, 2015, letter about the Great Lakes Restoration Initiative. The U.S. Environmental Protection Agency is grateful to the Great Lakes Commission and commission-member states for their significant role as partners in implementing this important initiative. The EPA also appreciates commission-member states' participation in periodic discussions with the Great Lakes Restoration Initiative Regional Working Group, including the August discussion you summarized in your letter.

Creating transparent, ongoing opportunities to strengthen our partnership with states is a priority for me. Similarly, the Regional Working Group has unanimously agreed to invite commission-member states to participate in quarterly discussions to gather views for the Great Lakes Restoration Initiative planning and budgeting process. My senior advisor, Cameron Davis, will be in touch soon to propose some dates to kick off that process this autumn.

I hope that commission-member states will be able to participate in these new quarterly discussions with the Regional Working Group. I also encourage you to continue to take advantage of the many other opportunities for federal and state agencies to collaborate on Great Lakes issues, including the annual Area of Concern conference, the Asian Carp Regional Coordinating Committee and various Great Lakes Water Quality Agreement bodies, such as the Great Lakes Executive Committee, Great Lakes Water Quality Agreement Annex subcommittees and Lakewide Action and Management Plan partnerships.

In the meantime, please know that the EPA and the other federal agencies involved in the Great Lakes Restoration Initiative look forward to continuing to work with the commission and member states to protect and restore the world's largest surface fresh-water system.

Sincerely,

Gina McCarthy

Mr. DAVIS. Great. Thank you.

And, Mayor—Racine, Wisconsin, right?

Mr. DICKERT. Yes.

Mr. DAVIS. Who is your Member of Congress in Racine?

Mr. DICKERT. Congressman Ryan.

Mr. DAVIS. Who?

Mr. DICKERT. Congressman Paul Ryan. You might know him.

Mr. DAVIS. Not ringing a bell. No, no.

Mr. DICKERT. He is a good looking, tall guy. You should get to know him.

[Laughter.]

Mr. DAVIS. No, Paul is great, and please do tell him that we were giving him some flak here in the T&I Committee.

Mr. DICKERT. I hope to see him in a little bit. I will remind him.

Mr. DAVIS. Yes. Let him know we do have other committees here besides his vaunted Ways and Means. OK?

Mayor, I have been a supporter of public-private partnerships. Mr. Lord mentioned more public-private partnerships in his testimony. I think they are a good means of leveraging and coordinating resources.

As a matter of fact, my colleague, Cheri Bustos, and I, along with our Senators from Illinois, ensured that there was a provision in the WRRDA package to encourage more public-private partnerships.

Do you see a role for P3s [public-private partnerships] in the Great Lakes restoration projects?

And if so, how can that role lead to further success? And what idea may you have to get the Federal agencies past their hesitance of doing them?

Mr. DICKERT. Well, first of all, I think P3s are imperative. We use them on a regular basis because the fact is many of these companies, large and small, have the expertise that you need.

If there is one thing you learn early as a mayor, there is no book on how to do the job. So you have to go out and find the organizations, the companies that actually can provide the work, especially when you are in emergency modes to finish and help you with these.

I think P3s are not only imperative, but I think it is part of everything that we do. How can we encourage that and move it forward? I still think that the blending of the local governments, the State priorities and the Federal priorities should be matched up a little bit more. I think that we can get better leverage.

The other thing I would suggest is that—and I think the EPA has allowed for this already. Regionalization of project planning, so in other words, if you have two or three municipalities in the same area and especially in the Maumee Valley in Ohio, looking at solving that bigger, very complex situation, allowing projects to be worked together by one company, if there is one company that is very good at what they are doing, allow them to work on three projects at the same time to help blend the efficiencies and savings of that effort.

So those are a couple of things that I would suggest.

Mr. DAVIS. So you are saying the Federal agencies should let local municipalities walk and chew gum at the same time.

Mr. DICKERT. We would love that.

Mr. DAVIS. Yes, thank you. We would, too.

Mr. Busdeker, hey, thank you for being here, too. I have a question for you. Is the NRCS doing enough to support the agricultural community to implement conservation and best management practices to reduce nonpoint source pollution?

Yes or no?

Mr. BUSDEKER. Yes and no. They could do more. We could always do more. There is a lot of work to be done. We are not——

Mr. DAVIS. That was my next question. What more should they be doing?

Mr. BUSDEKER. Well, certainly cover crops are a big piece of what we are doing out here today; control structures on tile, and even maybe a little bit off to the side here, research is another big piece. We need to do more research on this edge of field work so we know where this dissolved reactive phosphorus is really coming and what BMPs can help mitigate it.

Mr. DAVIS. Excellent. We actually just had a research hearing in my other committee. I had another hearing which is why I was late for this one in the House Committee on Agriculture, and in our hearing yesterday and the subcommittee I chair focused on agricultural research and working with our land-grant universities.

If you see a way to partner with our land-grants and with other institutions within the agricultural community to get more research dollars towards conservation, please do let me know.

And with that, Mr. Chairman, I yield back the second I have left.

Mr. GIBBS. Mr. Rokita.

Mr. ROKITA. I thank the chairman, and I appreciate the witness testimony today and also from the first panel as well.

I give my apologies. Today in three committees and starting yesterday actually where we are getting ready to employ a concept called reconciliation, and the Workforce Committee just did its part of the reconciliation process for this year that originated in the Budget Committee that I am also a part of. So it was a busy day for a lot of us. No excuse, but just want you to know where I was before this.

And even though I was distracted by the gentleman from my left and though I associate with him regularly, I was able to hear a little bit of your testimony, and so I would like to focus my questions I think mostly, and no offense to anyone else, but I want to focus my questions directly to Mr. Lord if that is OK.

Reading your statement last night, you talk about the number of jobs that can be created on the Great Lakes due to these restoration projects. I am from Munster, Indiana, Lake County. So we are right up there, grew up there, and I would like to think I appreciate the cultural value, the economic value, the environmental value of those lakes.

But this committee and this subcommittee is new to me. I want to understand more when you say this will create jobs. Do you mean to imply that these restoration efforts are going to go on in perpetuity or is there some day when this ends, therefore technically making the jobs temporary?

Yes, that is a trick question.

Mr. LORD. I would suggest that that day is a while away. So the jobs would be fairly permanent. We have a lot of work that needs to be done in the Great Lakes region to address the decades of problems that have been building.

While we have been able to make progress in cleaning up our areas of concern, for example, we still have 27 that remain unattended and need to have more focus. While we have been able to make some progress in creating new habitat and wetlands, we have had a significant amount of——

Mr. ROKITA. So in your mind, when is enough enough? When would you be satisfied definitionally that the restoration has, in fact, occurred? When these 20 projects are done?

Mr. LORD. Well, I do not know if it is as simple as that. That is a very good question, but it is a very difficult question at least for me to answer.

Mr. ROKITA. You have got 2 minutes.

Mr. LORD. Well, I will do my best. I think I don't know when we will be done. I think some of the indicators that we would like to see that would help suggest when we may be close to being finished with our restoration activities would be for a system of lakes and connecting channels that are resilient, that can accommodate the stresses that we have put on them through the legacy of toxic pollution or habitat loss or the introduction of new invasive species or the impacts that we are seeing from climate change.

So we would have a better sense as to knowing that we will be closer to being finished with this project when the reaction of the system is such that it is able to adapt more effectively to the changes that we are asking the system to make.

Mr. ROKITA. Thank you.

Would anyone else like to jump in my line of questioning in terms of response? Mr. Allan?

Mr. ALLAN. I would, and I will direct it in one hand specifically to the Area of Concern Program. That is one of the big pieces of GLRI.

Communities have set out very real markers for what they see on all the different beneficial use impairments. When they meet the next threshold to be able to remove that and if you remove all of the beneficial uses, then you can delist the area of concern. So that one has very real and definitive markers of success: habitat replacement, loss of habitat, fish, consumption of fish, all of those pieces.

And we see "done" in the case of GLRI and under Area of Concern Programs specifically when each of those markers are met and the community essentially agrees with the progress made.

So as principals and actions and projects take place in those communities, as we continue to delist the use impairments, whatever that is, once those are agreed to and acknowledged by the community, we can then move on to other things.

Mr. ROKITA. Anyone else?

Mr. ALLAN. If we collect enough of those, then the community can celebrate its success.

Mr. ROKITA. Anyone else for 10 seconds?

Mr. WOLKING. If I may, yes. I think you need to understand, too, that getting there gets us to a point where we can say we have ac-

complished these objectives, but we also have to be able to sustain, and these are changing ecological and environmental systems. So can we also sustain and can we also then find there are other needs as well?

We do not know.

Mr. ROKITA. Thank you. My time has expired. Appreciate it.

Mr. GIBBS. I have one question. I want to kind of finish up with Mr. Wolking.

In your written testimony, I do not think you highlighted this in your verbal testimony, but you talk about the 5,300 miles of shoreline and the complex work and we learn as we go. Then you talk about the second major phase of the plan, 2015 to 2019, and the introduction of science-based adaptive management, improvements in prioritization, and better reporting on measures of progress and their impact.

I see you have Brookings Institution and Grand Valley State trying to get cost-benefit analysis and trying to quantify where we are headed.

It is hard to do, but do you want to elaborate a little bit on trying to monitor the impacts, the economic impacts for the benefit?

Mr. WOLKING. I think that is the most difficult part of this whole process when we are talking about measuring in metrics. I think it is easier to measure the environmental impact and results, but then when you start talking about, well, what economic activity proceeds from that, it is a lot more complicated than saying we are putting a machine on the floor that can put out a certain number of parts at a certain estimated cost, and we are borrowing X funds at X percent.

You know, this is different, and it would seem to me that there is a great opportunity here if we stay the course to observe as we have finished projects and we have attained results to watch what happens in those communities, which partly will be as a result of what has been accomplished with the initiative.

Again, you are talking about people and systems and environment, and they all come together. There are many things that go into the soup, but clearly I think as we get more time under our belts observing what we have been able to accomplish and observe what happens in the communities as we go forward I think we will be able to see measurable results. That can at least partly be attributed and tied back to the initiative.

It is the level of activity, I think. That is a great word to keep in mind. As these things happen and are completed, you are going to see activity as a result in those areas, whereas before you were seeing no activity.

Mr. GIBBS. That is a good point to end this hearing, I think.

I want to thank you all for coming in.

Do you have one more point? Go ahead.

Mrs. NAPOLITANO. Just one very quickly, and that is to Mr. Lord.

Mr. Rokita touched on the job creation issue, and while it has been 5 years and you have already created the jobs, it will hopefully be another 5 years. How long do you think this can continue to create the jobs and will those jobs change as new technology and as improvements are done?

What do you see will happen, the challenges that may be ahead?

Mr. LORD. Well, it depends on the type of jobs that we are talking about, but some of the things that we have seen, some of the results that we have seen as a result of the Great Lakes Restoration Initiative through some of the habitat improvements, for example, very much sustain the kinds of outdoor jobs that we would like to see in the region, jobs for folks that sell the guns and the ammo and the fishing hooks and the rest of it to the people who are going into Michigan or Ohio or any of the other Great Lake States in order to enjoy the outdoors.

As I also noted, the restoration project that we have undertaken while we are 5 years in, we have got a long way to go.

Mrs. NAPOLITANO. How long do you think that might have to go?

Mr. LORD. I cannot answer that question, ma'am. It is a very——

Mrs. NAPOLITANO. Three decades, four decades?

Mr. LORD. These are large lakes with a lot of problems, and we have, I think, made a very significant and valiant effort and a lot of progress to date in cleaning them up, but as noted, we have got 27 AOCs, areas of concern, that remain, and they are very complicated projects in terms of getting those finished.

So I think the bottom line is there is a lot more work, but the benefits, as Mr. Wolking was highlighting, are that when we clean up these areas of concern, for example, these communities that have had this anchor around their necks in terms of this—it's gone, and so you can see the development coming, the highrises or whatever they may want to do in these newly cleaned up places.

We have begun to see some of that happen, and so that is the kind of excitement that the GLRI can bring and I think will continue to bring as we make more progress in the future.

Mrs. NAPOLITANO. Thank you, sir.

Thank you, Mr. Chair.

Mr. GIBBS. Well, again, I want to thank you for coming in.

I think this was quite an interesting discussion, and hopefully we can move forward with the formal authorization and reliable, sustainable funding.

We had a hearing just recently on brownfields, Mayor. That is a key issue. We have made a lot of progress, sir, I think, in integrated permitting and planning, I think you highlighted that. We have had hearings on that, and are trying to work with the U.S. EPA to allow municipalities like yourselves to do integrated permitting so that you can address what your needs are, which might be different than the needs in Cleveland, for example.

And so thank you all for coming in to highlight the importance of the Great Lakes to economic stability and job creation in the region.

Thank you very much, and this concludes our hearing.

[Whereupon, at 12:27 p.m., the subcommittee was adjourned.]

TESTIMONY OF
CHRIS KORLESKI, DIRECTOR
GREAT LAKES NATIONAL PROGRAM OFFICE
U.S. ENVIRONMENTAL PROTECTION AGENCY

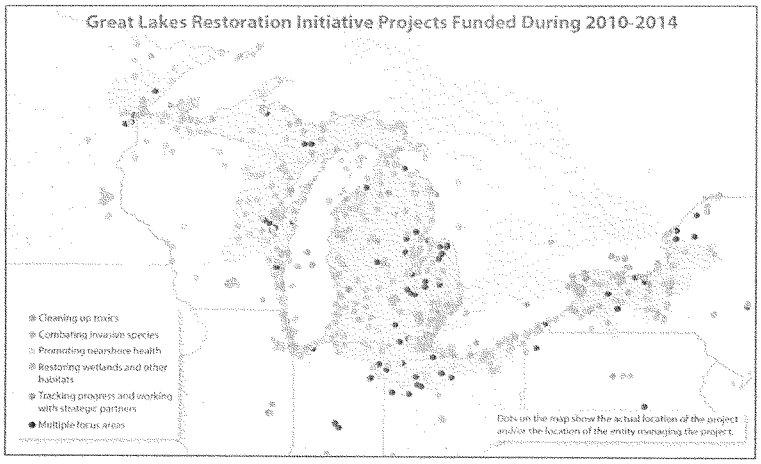
BEFORE THE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT,
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES

September 30, 2015

Good Morning Chairman Gibbs and Ranking Member Napolitano, and members of the Committee. My name is Chris Korleski and I serve as the Director of the U.S. EPA's Great Lakes National Program Office in Chicago. I am very pleased to be here this morning to discuss the remarkable progress made under the Great Lakes Restoration Initiative (GLRI).

The GLRI was launched in 2010 to accelerate efforts to protect and restore the largest system of fresh surface water in the world — to provide additional resources to make progress toward the most critical long-term goals for this important ecosystem.

Restoring and protecting the Great Lakes is not just a regional imperative; it is a national one. The lakes hold 90 to 95 percent of the nation's fresh surface water supply providing ecological and public health benefits, as well as direct economic and recreational benefits, to tens of millions of American citizens (including members of Tribal nations) who live in the Great Lakes basin.



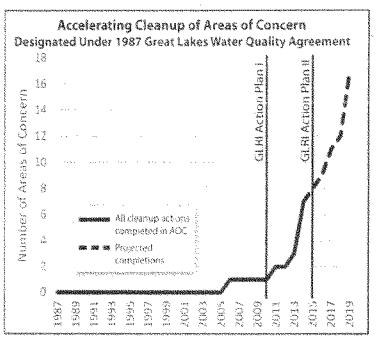
Since its inception, the Great Lakes Restoration Initiative has been a catalyst for unprecedented federal agency coordination — through the GLRI Interagency Task Force and the GLRI Regional Working Group, both of which are led by EPA. This unprecedented coordination has produced unprecedented results. GLRI resources have supplemented agency base budgets to fund over 2,600 projects to improve water quality, to protect and restore native habitat and species, to prevent and control invasive species and to address other Great Lakes environmental problems.

The GLRI Interagency Task Force and Regional Working Group work very hard to ensure that the Initiative: identifies the key threats to the Great Lakes ecosystem; ensures that the projects funded address those key threats; assesses projects using measures of progress to ensure that the Initiative is actually achieving results; and communicates those results through

a *Report to Congress and the President*. In addition, the Task Force and Working Group ensure that these activities are undertaken with the input of key stakeholders.

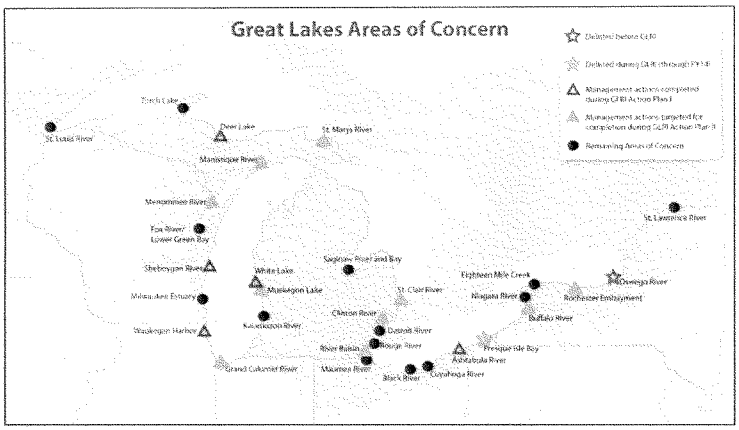
This coordinated effort is showing results:

Toxic Substances and Areas of Concern[1]



During the first five years of the GLRI, federal agencies and their partners delisted three Areas of Concern (Presque Isle Bay in Pennsylvania and Deer Lake and White Lake in Michigan) and completed all of the initial work that will lead to the delisting of three additional Areas of Concern (Sheboygan River in Wisconsin, Waukegan Harbor in Illinois, and Ashtabula River in Ohio). That's a major change from the 25 years before the Initiative, during which only one Area of Concern was cleaned up and delisted. With continued funding and the continued coordination of all our federal and state partners, we hope to keep the momentum going and ultimately achieve the delisting of all the remaining Areas of Concern.

[1] "Areas of Concern" (AOCs) were designated under the Great Lakes Water Quality Agreement of 1987 due to large amounts of legacy contaminants, primarily from industrial sources. There are 43 separate AOCs: 26 in the U.S., 12 in Canada, and 5 bi-national.



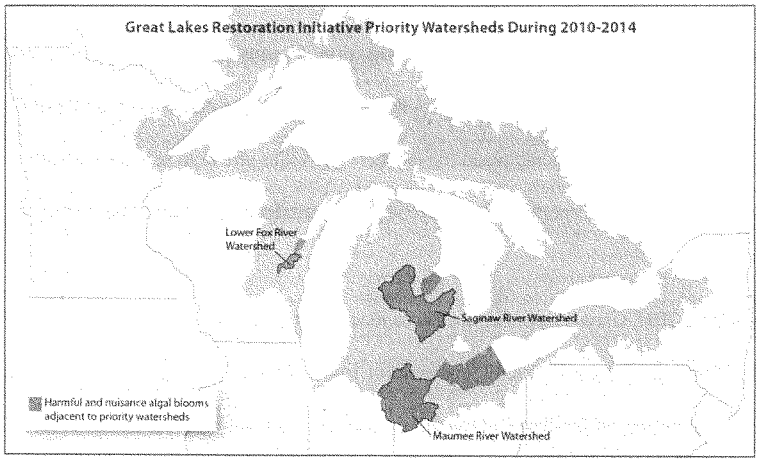
Invasive Species

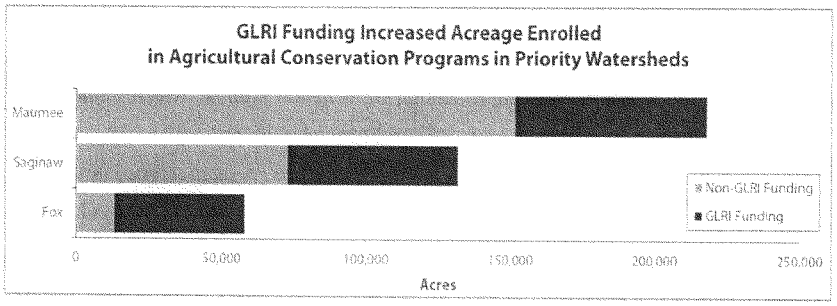
During the first five years of the GLRI, federal agencies and their partners engaged in an unprecedented level of activity to prevent new introductions of invasive species in the Great Lakes ecosystem. Some of this activity was focused on Asian carp, which are a significant threat to the ecological health of the Great Lakes and its multi-billion dollar sport fishery. The GLRI provides support to the Asian Carp Regional Coordinating Committee to prevent bighead and silver carp from becoming established in the Great Lakes ecosystem; to date, monitoring has not found any established self-sustaining populations of silver or bighead carp. Nevertheless, the threat of Asian carp entering the Great Lakes continues, and the federal partners are eager to continue the work necessary to keep them out of the Great Lakes.

Agencies and their partners also controlled over 84,000 acres of property for terrestrial invasive species such as Japanese knotweed, Phragmites and purple loosestrife.

Nearshore Health and Nonpoint Source Pollution

During the first five years of the GLRI, federal agencies and their partners targeted activities to reduce phosphorus runoff from farmland, which contributes to harmful algal blooms in western Lake Erie, Saginaw Bay and Green Bay. Federal agencies used GLRI support to increase the number of acres of farmland enrolled in agricultural conservation programs in GLRI priority watersheds by more than 70 percent.





Habitat and Wildlife Protection and Restoration

During the first five years of the GLRI, more than 100,000 acres of wetlands and 48,000 acres of coastal, upland, and island habitat were protected, restored and enhanced. Over 500 barriers were removed or bypassed in Great Lakes tributaries, enabling access by fish and other aquatic organisms to over 3,400 additional miles of river. These activities have accelerated the restoration of native fish and wildlife populations to self-sustaining levels.

Accountability, Education, Monitoring, Evaluation, Communication and Partnerships

During the first five years of the GLRI, less than a quarter of one percent (<0.25%) of GLRI funding was used to implement "teach the teacher" activities and help science teachers throughout the basin incorporate Great Lakes-specific material into their class curricula.

The July 28th, 2015 *Great Lakes Restoration Initiative Report to Congress and the President* provides detailed progress on each focus area for fiscal years 2010-2014[2]. It also includes detailed information on funding and overall performance on Action Plan measures of progress, objectives and long-term goals.

While the first five years of the GLRI have achieved remarkable progress, the federal agencies are already well underway implementing *GLRI Action Plan II*[3], which summarizes

[2] *Great Lakes Restoration Initiative – Report to Congress and the President, Fiscal Years 2010-2014* (July 28, 2015): http://glri.us/pdfs/21050720-report_to_congress.pdf

[3] *Great Lakes Restoration Initiative – Action Plan II* (September 2014): http://glri.us/actionplan/pdfs/glri_action-plan-2.pdf

the actions federal agencies will implement during fiscal years 2015 through 2019. These actions will build on restoration and protection work carried out under the first GLRI Action Plan, with a major focus on:

- cleaning up Great Lakes Areas of Concern;
- preventing and controlling invasive species;
- reducing nutrient runoff that contributes to algal blooms;
- restoring habitat to protect native species; and
- supporting Great Lakes resilience, education and science-based adaptive management (*i.e.*, how we make even better investment decisions over time).

While *Action Plan II* will continue to focus on key Great Lakes problems, it incorporates several fresh approaches:

- It expressly incorporates a science-based adaptive management framework that will be used to prioritize ecosystem problems to be targeted with GLRI resources, to select projects to address those problems and to assess the effectiveness of GLRI projects. Measures of Progress have been developed to track all actions implemented under *Action Plan II*.

- It commits agencies to develop and incorporate climate resiliency criteria in project selection processes. Agencies will develop standard criteria to ensure climate resiliency of Great Lakes Restoration Initiative-funded projects.

- It incorporates feedback for strengthening the GLRI that was contributed by the Great Lakes Advisory Board, the U.S.EPA Science Advisory Board, the U.S. Government Accountability Office, the Congressional Research Service, states, tribes, municipalities and the general

public through in-person meetings, webinars and conference calls. We will continue to improve implementation of the Initiative and have recently adopted new budgeting and planning processes that make it easier for federal agencies to work more closely with their state and tribal partners to ensure that appropriate projects are being prioritized and implemented.

Thank you Chairman Gibbs, Ranking Member Napolitano, and members of the Committee, for the opportunity to appear before you today. I look forward to answering your questions.

United States Government Accountability Office

Testimony
Before the Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, House of Representatives

For Release on Delivery
Expected at 10 a.m. ET
Wednesday, September 30, 2015

GREAT LAKES RESTORATION INITIATIVE

Some Information on Projects and Progress Made Available to Congress and the Public

Statement of J. Alfredo Gómez
Director, Natural Resources and Environment

GAO Highlights

Highlights of GAO-15-841T, a testimony before the Subcommittee on Water Resources and Environment, Committee on Transportation and Infrastructure, House of Representatives

Why GAO Did This Study

The Great Lakes, which contain much of North America's freshwater supply, provide economic and recreational benefits to millions of people. They face significant stresses, however, that have caused ecological and economic damage. Decades of industrial activity in the region, for example, left a legacy of contamination that resulted in the United States and Canada identifying, since 1987, 43 Areas of Concern.

The GLRI was created in 2010 to, according to EPA, accelerate efforts to protect and restore the Great Lakes. It is overseen by a Task Force of 11 federal agencies that is chaired by the EPA. EPA was directed, in a conference report, to develop a restoration action plan, establish a process to ensure monitoring and reporting on progress, and provide detailed yearly accomplishments.

This testimony is based on GAO reports issued in September 2013 and July 2015. It focuses on (1) GLRI funding, action plans, and reports; (2) the process used to identify GLRI work and funding; and (3) information available about GLRI project activities and results. For the 2015 report, GAO reviewed a sample of 19 GLRI projects funded by the five Task Force agencies that received the majority of GLRI funds, among other things.

What GAO Recommends

GAO recommended in 2013 that EPA improve assessments of GLRI progress, among other things. EPA agreed and has taken several actions. GAO is not making any recommendations in this testimony.

View GAO-15-841T. For more information, contact J. Alfredo Gómez at (202) 512-3841 or gomezj@gao.gov.

September 30, 2015

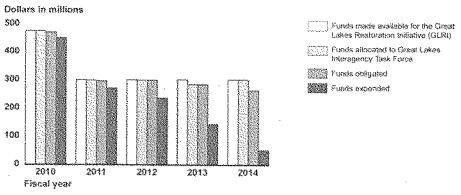
GREAT LAKES RESTORATION INITIATIVE

Some Information on Projects and Progress Made Available to Congress and the Public

What GAO Found

As GAO reported in July 2015, of the $1.68 billion in federal funds made available for the Great Lakes Restoration Initiative (GLRI) in fiscal years 2010 through 2014, nearly all had been allocated as of January 2015. Of the $1.66 billion allocated, the Environmental Protection Agency (EPA) and the other 10 Great Lakes Interagency Task Force (Task Force) agencies expended $1.15 billion for 2,123 projects (see fig.).

Status of GLRI Funds, FY 2010-2014



Source: GAO analysis of EPA's January 2015 GLRI financial management update reports. | GAO-15-841T

Task Force agencies can either conduct work themselves or enter into financial agreements, such as grants, cooperative agreements, or contracts with others, such as federal entities; state, local, and tribal entities; nongovernmental organizations; and academic institutions. To guide restoration work, EPA and the Task Force have developed two consecutive multiyear restoration action plans. EPA also created a process to ensure monitoring and reporting on the progress of the GLRI, and EPA and the Task Force issued three accomplishment reports.

The process to identify each agency's GLRI work and funding has evolved to emphasize interagency discussion. In fiscal year 2012, the Task Force created subgroups to discuss and identify work on three issues: cleaning up severely degraded locations, called Areas of Concern; preventing and controlling invasive, aquatic species that cause extensive ecological and economic damage; and reducing nutrient runoff from agricultural areas. EPA officials said that the Task Force created additional subgroups to identify all GLRI work and funding in 2015.

In July 2015, GAO found that the Task Force has made some information about GLRI project activities and results available to Congress and the public in three accomplishment reports and on its website. In addition, the individual Task Force agencies collect information on activities and results, although this information is not collected and reported by EPA. Of the 19 projects GAO reviewed, 8 reported results directly linked to restoration, such as improved methods for capturing sea lamprey, an invasive species that can kill up to about 40 pounds of fish in its lifetime. The remaining 11 reported results that can be indirectly linked to restoration; that is, the results may contribute to restoration over time. These included results such as simulations and data for helping decision makers make better restoration decisions in light of climate change, as well as education and outreach tools to increase awareness of invasive species.

GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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Washington, DC 20548

Chairman Gibbs, Ranking Member Napolitano, and Members of the Subcommittee:

I am pleased to be here today as you consider the Great Lakes Restoration Initiative (GLRI) and its role in restoring the health of the Great Lakes ecosystem. Millions of people in the United States and Canada depend on the Great Lakes—the largest system of freshwater in the world, containing much of North America's freshwater supply—as a source of drinking water, recreation, and economic livelihood. Over the last several decades, the Great Lakes Basin, including the five Great Lakes—Superior, Michigan, Huron, Ontario, and Erie—has proven vulnerable to the effects of toxic and other pollutants resulting from industrial and agricultural activities. In addition, more than 180 nonnative aquatic species have become established in the Great Lakes, some of which have caused extensive ecological and economic damage. The discovery of Asian carp near waterways connected to the lakes threatens to increase this problem.[1] The GLRI was created in fiscal year 2010, after the President's fiscal year 2010 budget request included a new interagency initiative to accelerate Great Lakes restoration by addressing regional issues, such as water quality contamination and invasive species that continue to threaten the health of the Great Lakes ecosystem. It is overseen by the Great Lakes Interagency Task Force (Task Force), which is chaired by the Administrator of the Environmental Protection Agency (EPA) and made up of senior officials from EPA, nine federal departments, and the Council on Environmental Quality.[2] According to the

[1]The term Asian carp refers collectively to four species of carp—including bighead and silver carp—that are native to Asia and were first introduced into the United States in 1963. Their rapid expansion and population increase can decrease populations of native aquatic species, in part by consuming vast areas of aquatic plants that are important as food and spawning and nursery habitats.

[2]The Task Force was created by Executive Order 13340, Establishment of Great Lakes Interagency Task Force and Promotion of a Regional Collaboration of National Significance for the Great Lakes, 69 Fed. Reg. 29043 (May 20, 2004). The Task Force originally consisted of the Administrator of the EPA, the Secretary of State, the Secretary of the Interior, the Secretary of Agriculture, the Secretary of Commerce, the Secretary of Housing and Urban Development, the Secretary of Transportation, the Secretary of Homeland Security, the Secretary of the Army, and the Chairman of the Council on Environmental Quality. Another department, the Department of Health and Human Services, and its Secretary, were added later.

Task Force, the GLRI was created to accelerate efforts to protect and restore the Great Lakes.

When Congress made funds available for the GLRI in fiscal year 2010,[3] the conference report accompanying the appropriations act directed EPA to take several actions, including to (1) develop a comprehensive, multiyear restoration action plan for fiscal years 2011-2014, (2) establish a process that ensures monitoring and reporting on progress of the GLRI, and (3) provide detailed yearly program accomplishments beginning in 2011.[4] EPA is authorized to transfer GLRI funds to any federal agency to carry out activities in support of the program. EPA enters into agreements with the Task Force agencies identifying the funds to be transferred and describing the work to be done. To use GLRI funds on restoration activities, Task Force agencies conduct work themselves or enter into financial agreements, such as grants, cooperative agreements, or contracts, with other groups to perform specific projects. Recipients of GLRI funds can include federal entities; state, local, or tribal entities; nongovernmental organizations; academic institutions; and others such as agricultural producers.

My statement today focuses on (1) GLRI funding, action plans to guide the activities of the GLRI, process to ensure monitoring and reporting, and accomplishment reports; (2) the process used to identify GLRI work and funding; and (3) information available about GLRI project activities and results. This testimony is based on reports we issued in September 2013 and July 2015.[5] To conduct our work, we reviewed GLRI agreements between the Task Force agencies and agencies' policies and guidance on financial agreements. We also interviewed officials representing the Task Force agencies. We focused primarily on the five Task Force agencies that received the majority—about 85 percent—of GLRI funds made available in fiscal years 2010 through 2014. These agencies were EPA, Fish and Wildlife Service (FWS), National Oceanic

[3]Department of the Interior—Appropriation, Pub. L. No. 111-88, 123 Stat. 2904, 2938 (2009).

[4]H. R. Rep. No. 111-316, at 111 (2009).

[5]GAO, *Great Lakes Restoration Initiative: Further Actions Would Result in More Useful Assessments and Help Address Factors That Limit Progress*, GAO-13-797 (Washington, D.C.: Sept. 27, 2013) and *Great Lakes Restoration Initiative: Improved Data Collection and Reporting Would Enhance Oversight*, GAO-15-526 (Washington, D.C.: July 21, 2015).

and Atmospheric Administration (NOAA), Natural Resources Conservation Service (NRCS), and U.S. Army Corps of Engineers (Corps). To examine information available about GLRI project activities and results for the 2015 report, we analyzed GLRI accomplishment reports, the GLRI website, and project documents for a nonprobability sample of 19 projects funded by the five Task Force agencies.[6] In most cases, EPA, FWS, NOAA, and NRCS require their grant recipients to submit quarterly, semiannual, or annual progress reports, and quarterly or annual financial reports, consistent with the Office of Management and Budget (OMB) circulars in effect at the time of the agreements.[7] In addition, the Task Force agencies that used contracts—the Corps and NOAA—require their contractors to submit progress reports. More details on the scope and methodology for this work can be found in each of our issued reports.

The work upon which this statement is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

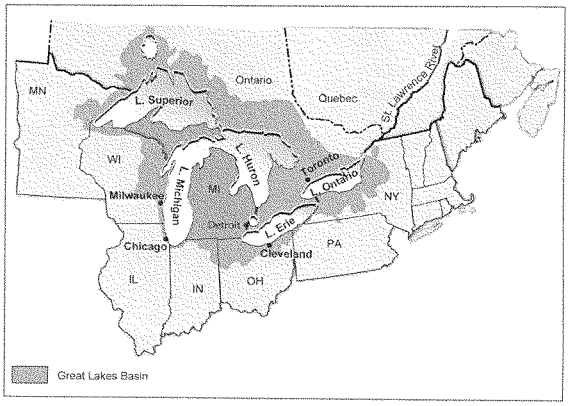
The Great Lakes Basin covers approximately 300,000 square miles, encompassing Michigan and parts of Illinois, Indiana, Minnesota, New York, Ohio, Pennsylvania, Wisconsin, and the Canadian province of

[6]This nonprobability sample provides examples of both projects with typical and large funding amounts from a range of recipients, and is not representative of all GLRI projects.

[7]OMB Circular A-102, Grants and Cooperative Agreements With State and Local Governments (Oct. 7, 1994; further amended Aug. 29, 1997) and OMB Circular A-110, Uniform Administrative Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations (Nov. 19, 1993; further amended Sept. 30, 1999). In December 2013, OMB consolidated its grants management circulars into a single uniform guidance document, the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (Uniform Guidance), to streamline its grants management guidance, promote consistency among grantees, and reduce administrative burden on nonfederal entities. In December 2014, OMB, along with grant-making agencies, issued a joint interim final rule implementing OMB's Uniform Guidance for new grant awards made on or after December 26, 2014. Because we reviewed GLRI projects awarded before that date, we used OMB's previous circulars in our review. OMB circulars in effect during the first 4 years of the GLRI are available at http://www.whitehouse.gov/omb/circulars_default/.

Ontario (see fig. 1), as well as lands that are home to more than 40 Native American tribes. It includes the five Great Lakes and a large land area that extends beyond the Great Lakes, including their watersheds, tributaries, and connecting channels.

Figure 1: Area Comprising the Great Lakes Basin



Sources: GAO, Map Resources (map). | GAO-15-841T

Numerous environmental stressors threaten the health of the Great Lakes and adjacent land within the Great Lakes Basin. Decades of industrial activity in the region have left a legacy of contamination, such as from polychlorinated biphenyls (PCB), in the sediments that make up the beds of rivers and harbors in the Great Lakes Basin. In 1987, the United States and Canada identified a list of 43 severely degraded locations in the Great Lakes Basin as Areas of Concern—26 of which are located entirely in the United States; 5, shared by the United States and Canada; and 12,

located entirely in Canada.[8] As of May 2015, 4 of the Areas of Concern located entirely in the United States had been delisted, or removed, from the binational list. In addition, the fertile soil in the surrounding states makes them highly productive agricultural areas, resulting in large amounts of nutrients such as phosphorus and nitrogen—as well as sediment, pesticides, and other chemicals—running off into the Great Lakes.[9] Moreover, large population centers on both sides of the U.S. and Canadian border use the Great Lakes to discharge wastewater from treatment plants, which also introduces nutrients into the Great Lakes. Even with progress in reducing the amount of phosphorus in the lakes in the 1970s, harmful algal blooms are once again threatening the Great Lakes Basin.[10]

The United States has long recognized the threats facing the Great Lakes and has developed agreements and programs to support restoration actions. For example, in 1972, the United States and Canada signed the Great Lakes Water Quality Agreement to restore, protect, and enhance the water quality of the Great Lakes to promote the ecological health of the Great Lakes Basin. In addition, in 2002, the Great Lakes Legacy Act authorized EPA to carry out sediment remediation projects in the 31 Areas of Concern located entirely or partially in the United States, among other things.[11] In 2004, the Task Force agencies collaborated with governors, mayors, tribes, and nongovernmental organizations in the Great Lakes region in an effort referred to as the Great Lakes Regional Collaboration, which led to the development in 2005 of the *Great Lakes*

[8]These areas are defined as "geographic areas where a change in the chemical, physical, or biological integrity of the area is sufficient to cause restrictions on fish and wildlife or drinking water consumption, or the loss of fish and wildlife habitat, among other conditions, or impair the area's ability to support aquatic life."

[9]Pollutants from these nonpoint sources remain leading causes of impairment to the nation's waters. See GAO, *Clean Water Act: Changes Needed if Key EPA Program Is to Help Fulfill the Nation's Water Quality Goals*, GAO-14-80 (Washington, D.C.: Dec. 5, 2013).

[10]These algal blooms are a result of increases in phosphorus and nitrogen entering the lakes from nonpoint sources of runoff from urban and rural areas. According to NOAA officials, while phosphorus is generally the primary nutrient that controls the amount of algae that will grow suspended in freshwater, nitrogen can also control algal growth. Increases in phosphorus or nitrogen can result in increases in algae, which can be detrimental to aquatic life by reducing the amount of sunlight and indirectly reducing the amount of available oxygen, among other things.

[11]Pub. L. No. 107-303, 116 Stat. 2355 (2002).

Regional Collaboration Strategy to Restore and Protect the Great Lakes.[12] More than 1,500 individuals participated in this effort. In 2009, the President created the Asian Carp Regional Coordinating Committee to coordinate efforts to prevent Asian carp from spreading and becoming established.

Even with these actions, the Great Lakes are environmentally vulnerable. In 2009, the President proposed $475 million in his fiscal year 2010 budget request for a new interagency initiative to accelerate the restoration of the Great Lakes. Specifically, the President requested that EPA and its federal partners coordinate state, tribal, local, and industry actions to protect, maintain, and restore the integrity of the Great Lakes. Most recently, in 2015, multiple bills to authorize the GLRI were introduced in the House and Senate. Some of these bills, if enacted, would authorize $300 million to be appropriated annually to carry out the GLRI for fiscal years 2016 through 2020.

EPA Made Funding Available to a Range of Recipients, Guided Activities through a GLRI Action Plan, Created a Monitoring Process, and Issued Accomplishment Reports

When Congress made funds available for the GLRI in fiscal year 2010, the conference report accompanying the appropriations act directed EPA to develop a comprehensive, multiyear restoration action plan for fiscal years 2011 through 2014, to establish a process to ensure monitoring and reporting on the progress of the GLRI, and to provide detailed, yearly program accomplishments beginning in 2011.

GLRI Funding

As discussed in our July 2015 report,[13] in fiscal years 2010 through 2014, $1.68 billion of federal funds was made available for the GLRI,[14] and as of

[12]Great Lakes Regional Collaboration, *Great Lakes Regional Collaboration Strategy to Restore and Protect the Great Lakes* (December 2005).

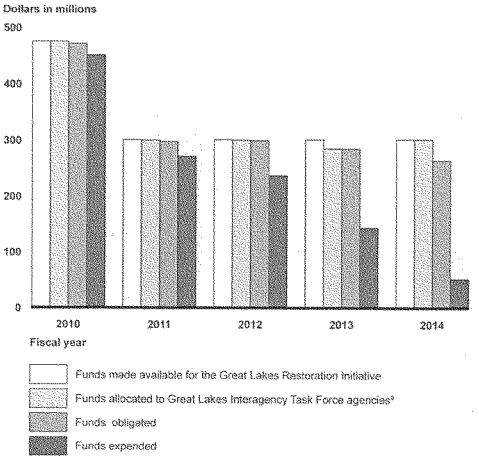
[13]GAO-15-526.

January 2015, EPA had allocated nearly all of the funds, about $1.66 billion. Also, as of January 2015, Task Force agencies had expended $1.15 billion for 2,123 projects (see fig. 2).[15] GLRI funds are available for obligation for the fiscal year the appropriation was made and the successive fiscal year. After these 2 fiscal years of availability, GLRI funds can be used for 7 additional years to expend and adjust those obligations.

[14]GLRI funds were made available through appropriations and transfer authority. Transfer authority is statutory authority provided by Congress to transfer budget authority from one appropriation or fund account to another. In fiscal years 2010, 2012, 2014, and 2015, Congress did not provide appropriations for GLRI purposes. Instead, in those fiscal years, Congress provided EPA with transfer authority, up to a maximum amount, to undertake GLRI programs and projects. However, in fiscal years 2011 and 2013, Congress did provide EPA with specific appropriations for GLRI purposes. As such, this testimony will, hereinafter, use "made available" when referring to the maximum amount of transfer authority and/or appropriations provided for GLRI purposes.

[15]For budgeting purposes, an allocation means a delegation, authorized by law, by one agency of its authority to obligate budget authority and outlay funds to another agency, and it is made when one or more agencies share the administration of a program for which appropriations are made to only one of the agencies or to the President. For funds control purposes, an allocation is a further subdivision of an apportionment. Obligations are definite commitments that create a legal liability of the government for the payment of goods and services ordered or received, or a legal duty on the part of the United States that could mature into a legal liability by virtue of actions on the part of the other party beyond the control of the United States. Expenditures are the actual spending of money, that is the outlays that liquidate obligations. See GAO, A Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (Washington, D.C.: September 2005).

Figure 2: Great Lakes Restoration Initiative Funds Made Available, Allocated, Obligated, and Expended as of January 2015



Source: GAO analysis of the Environmental Protection Agency's January 2015 Great Lakes Restoration Initiative financial management update reports. | GAO-15-841T

Notes: The fiscal years in this figure refer to the years in which the funds were made available for the Great Lakes Restoration Initiative (GLRI).

[a]The Great Lakes Interagency Task Force is chaired by the Environmental Protection Agency (EPA) Administrator and includes senior officials from the U.S. Departments of Agriculture, Commerce, Defense, Health and Human Services, Homeland Security, Housing and Urban Development, the Interior, State, and Transportation and the Council on Environmental Quality. EPA allocates GLRI funds to the other Task Force agencies responsible for carrying out GLRI work.

Task Force agencies conduct GLRI work themselves or by awarding funds to recipients through financial agreements, such as grants, cooperative agreements, or contracts. Potential recipients of GLRI funds include federal entities; state, local, or tribal entities; nongovernmental organizations; academic institutions; and others, such as for-profit entities, agricultural producers, or private landowners. A single GLRI project can involve multiple funding recipients. Table 1 shows the number of projects funded with GLRI funds made available in fiscal years 2010

through 2013 by the five agencies we reviewed in our 2015 report and type of recipient, as of July 2014. The type of GLRI funding recipients vary depending on the agency and financial agreements involved. For example, NOAA has entered into agreements with a variety of recipient types, with the exception of private landowners and agricultural producers. Funding recipients are responsible for reporting information to their funding agencies about the progress of their GLRI projects.

Table 1: Number of Great Lakes Restoration Initiative (GLRI) Projects Funded by Five Agencies, by Type of Recipient as of July 2014

	Projects by recipient type				
Agency	Federal entities[a]	State, local, or tribal entities	Nongovernmental organizations	Academic institutions	Other
Environmental Protection Agency	17	318	100	134	0
Fish and Wildlife Service	181	138	148	47	1[b] 11[c]
U.S. Army Corps of Engineers	330	0	0	0	0
Natural Resources Conservation Service	22	17	5	2	1b 18d
National Oceanic and Atmospheric Administration	53	42	30	45	3[b]
Total	**603**	**515**	**283**	**228**	**5[b]** **11[c]** **18[d]**

Source: GAO analysis of data from the Great Lakes Accountability System (GLAS) as of July 2014, and data on GLRI recipients from the Environmental Protection Agency, Fish and Wildlife Service, U.S. Army Corps of Engineers, Natural Resources Conservation Service, and National Oceanic and Atmospheric Administration. | GAO-15-841T

Notes: This table includes only those projects that were identified in GLAS as of July 2014 as funded with GLRI funds made available in fiscal years 2010 through 2013.

Recipients in this table are entities that received GLRI funds directly from the federal agencies.

Because projects in GLAS may have multiple recipients of different types, the same projects may be counted under multiple columns that cannot be added together to equal an agency's total number of projects.

[a]For GLRI projects categorized under the federal entities recipient type, the recipient may be the funding agency itself, other federal agencies to which they have provided funds, or an entity that was awarded a contract. We have included contracts in this category because contracts are used when the principal purpose is acquisition of property or services for the direct benefit or use of the federal government.

[b]For-profit entities.

[c]Private landowners.

[d]Agricultural producers.

GLRI Action Plans

As discussed in our September 2013 and July 2015 reports,[16] in response to the conference report's direction to develop a multiyear restoration action plan, in February 2010, the Task Force published the *Fiscal Years 2010 to 2014 Great Lakes Restoration Initiative Action Plan* (2010-2014 Action Plan) to guide the activities of the GLRI for those years.[17] The 2010-2014 Action Plan was organized into five focus areas that, according to the Task Force agencies, encompassed the most significant environmental problems in the Great Lakes: (1) toxic substances and Areas of Concern; (2) invasive species; (3) nearshore health and nonpoint source pollution; (4) habitat and wildlife protection and restoration; and (5) accountability, education, monitoring, evaluation, communication, and partnerships.

For each focus area, the 2010-2014 Action Plan included long-term goals, objectives to be completed within the 5-year period covered by the plan, and measures of progress—28 in total—that were designed to ensure that efforts are on track to meet the long-term goals. Each of the 28 measures included annual targets for fiscal years 2010 to 2014.[18] The Task Force issued an updated Action Plan for 2015 to 2019 (2015-2019 Action Plan) in September 2014 to guide the GLRI for those years.[19] The updated plan retains four of the focus areas of the 2010-2014 Action Plan, and the fifth focus area was modified and called "foundations for future restoration actions."[20]

[16]GAO-13-797 and GAO-15-526.

[17]Great Lakes Interagency Task Force, *Fiscal Years 2010-2014 Great Lakes Restoration Initiative Action Plan* (Washington, D.C.: Feb. 21, 2010)

[18]For example, one measure for the habitat and wildlife protection and restoration focus area addresses the number of fish passage barriers that are to be removed or bypassed annually for the period of time covered by the Action Plan. The annual targets for the measure are the removal or bypassing of 100 barriers in 2010, 150 in 2011, 250 in 2012, 350 in 2013, and 450 barriers in 2014

[19]Great Lakes Interagency Task Force, *Great Lakes Restoration Initiative Action Plan II* (Washington, D.C.: September 2014).

[20]The focus area "foundations for future restoration action" includes objectives to ensure the climate change resiliency of GLRI projects, educate future generations about the Great Lakes ecosystem, and implement a science-based adaptive management approach.

As we reported in September 2013, EPA assesses GLRI progress primarily by evaluating performance toward meeting the annual targets for the 28 measures of progress in the Action Plan. In our 2013 report, we found that the 2010-2014 Action Plan did not identify the links between a focus area's goals, objectives, and measures of progress. That is, some of the goals and objectives in the Action Plan were not linked with any measures. We recommended that the EPA Administrator, in coordination with the Task Force as appropriate, identify linkages between long-term goals, objectives, and measures in the Action Plan for 2015 to 2019. In response to our recommendation, each focus area in the updated Action Plan is associated with two or three objectives and several measures of progress, clearly identifying the links between each objective and measure of progress.

Monitoring and Reporting on Progress

In response to the conference report's direction to establish a process to ensure monitoring and reporting on the progress of the GLRI, EPA created the Great Lakes Accountability System (GLAS) in 2010 to collect information for monitoring GLRI projects and progress. In cooperation with the Task Force, EPA also created a GLRI website, to provide information to both the public and funding recipients about the GLRI program and GLRI projects.[21] In September 2013, we found that the information on GLRI projects in GLAS may not be complete, which may prevent EPA from producing sufficiently comprehensive or useful assessments of GLRI progress.[22] For example, GLAS limited users to submitting information about progress using a single measure of progress, while GLRI projects may directly address multiple measures.[23] This prevented EPA from collecting and reporting complete progress information on each of the measures addressed by GLRI projects. As a result, we recommended that the EPA Administrator, in coordination with the Task Force, capture complete information about progress for each of the measures that are addressed by a project. In response to this recommendation, EPA modified GLAS to allow GLAS users to report

[21]See http://glri.us/.

[22]GAO-13-797.

[23]For example, as we reported in 2013, a National Park Service GLRI project involved managing acres for invasive species, which is one measure, as well as outreach to the public on practices that prevent the introduction and spread of invasive species, which is another measure. However, GLAS required the agency to choose only one of these measures for reporting progress.

information in GLAS about more than one measure of progress, beginning in January 2014.

In July 2015,[24] we found that some GLAS data were inaccurate, in part because recipients entered information inconsistently due to inconsistent interpretation of guidance, unclear guidance, or data entry errors. In May 2015, while we were completing our work for that report, EPA stopped using GLAS and began using the Environmental Accomplishments in the Great Lakes (EAGL) information system to collect GLRI project information and issued initial guidance for using EAGL. EPA officials told us that the agency created EAGL and, after consulting with Task Force agencies, conducted pilot tests of the system while we were completing our review of GLAS. After the pilot tests, in May 2015, EPA officials decided to use EAGL to collect information to monitor and report on GLRI progress, and they made the system available to Task Force agencies for an initial period of data entry. In our July 2015 report, we said that this is a good first step to resolving the data inconsistencies that we identified in GLAS, which resulted, in part, because of unclear or undocumented definitions, data requirements, and guidance about entering important data. However, as of that date, EPA had not yet established data control activities or other edit checks, although in commenting on a draft of the report, EPA stated that it planned to establish data control activities, such as verifications and documented procedures, for ensuring the reliability of the EAGL information system. Fully implementing the actions needed to address the reliability of GLRI project data should ensure that EPA and the Task Force agencies can have confidence that EAGL can provide complete and accurate information. EPA officials told us that the agency plans to use the initial data entry period to solicit feedback from the Task Force agencies in order to make changes to EAGL and the user guidance. The officials said their goal is to have EAGL ready for data entry at the beginning of fiscal year 2016.

Yearly Accomplishments Reports

As we reported in July 2015, in response to the conference report's direction to provide detailed, yearly program accomplishments beginning in 2011, EPA and the Task Force released two accomplishment reports in 2013 and one in 2014 that provided overviews of progress under the

[24]GAO-15-526.

GLRI for fiscal years 2010 through 2012. [25] These reports included summary accomplishment statements for each of the five focus areas from the 2010-2014 Action Plan, as well as specific performance information for many of the 28 measures of progress in the 2010-2014 Action Plan.

Task Force's Process for Identifying GLRI Work and Each Agency's Share of Funding Has Evolved to Emphasize Interagency Discussion

The process for identifying each agency's GLRI work and share of GLRI funding has evolved since fiscal year 2010 to emphasize interagency discussion. As discussed in our July 2015 report,[26] EPA officials described four steps that Task Force agencies generally followed to identify GLRI work and funding, and the five agencies we reviewed followed these steps. The steps are as follows:

- **Agency identification of GLRI work.** EPA officials said that during the first step, each agency conducted an internal analysis to identify GLRI work that they wanted to conduct, either themselves or through other entities, within a fiscal year.
- **Task Force agreement on scope and funding for agencies' work.** In the second step, the five agencies we reviewed held discussions with the Task Force and agreed on the work that would be done in a given fiscal year, as well as the amount of GLRI funds that would be needed to conduct that work. In general, once the agencies made a final determination of the work they would conduct in a fiscal year, and the GLRI funds that would be made available, each agency entered into an interagency agreement with EPA to transfer GLRI funds from EPA to the agency.
- **Solicitation of proposals for projects designed to carry out agencies' GLRI work.** In the third step, agencies solicited project proposals from potential recipients to conduct the work identified in the second step. Project proposals were generally solicited through an

[25] EPA in partnership with the Great Lakes Interagency Task Force, *Great Lakes Restoration Initiative Fiscal Year 2010 Report to Congress and the President* (Washington, D.C.: March 2011); *Great Lakes Restoration Initiative Fiscal Year 2011 Report to Congress and the President* (Washington, D.C.: September 2011); and *Great Lakes Restoration Initiative Fiscal Year 2012 Report to Congress and the President* (Washington, D.C.: February 2014).

[26] GAO-15-526.

announcement, such as a request for applications, posted on an agency's website or in other ways, such as by e-mail. Requests for applications included criteria that the agency would use to rank applications and select projects, among other things.[27]

- **Selection of projects.** In the fourth step, agency officials evaluated project proposals and selected the projects they would fund. Officials from the Task Force agencies we reviewed generally described similar processes for evaluating project proposals. Specifically, they said that agency officials with the appropriate expertise reviewed and ranked proposals against information in the request for applications and selected the best scoring projects for funding.

The process for identifying each agency's annual GLRI work and share of GLRI funding has evolved from one in which project and funding decisions were made on an agency-by-agency basis to one in which subgroups formed of multiple agency officials discuss and decide on what work should be done. According to EPA officials, for fiscal years 2010 and 2011, the Task Force and the five agencies agreed on work that each agency would do on an agency-by-agency basis. Officials from the agencies said that they identified work based on existing plans and worked with the Task Force to determine the work the agencies would do and the funds the agencies should receive.[28] Beginning with fiscal year 2012, the Task Force began emphasizing interagency discussions as it created three subgroups made up of federal agency members, one subgroup for each of three priority issues. The three priority issues, which aligned with three of the five focus areas in the 2010-2014 Action Plan, were (1) cleaning up and delisting Areas of Concern located entirely or partially in the United States, (2) preventing and controlling invasive

[27]Criteria vary by request for application. For example, criteria in an EPA request for application included that applicants would be evaluated on their plan and approach for measuring and tracking their progress toward achieving the expected outcomes and outputs that apply to the relevant focus area, and on the technical and scientific merit of the proposed project, among other things. On the other hand, criteria in a FWS request for application included that applicants must specify in detail how habitat quantity or quality will be improved and must include a detailed budget indicating how the funding will be used, among other things.

[28]Because the GLRI began in fiscal year 2010, this process did not take place 2 years in advance, as it would in subsequent years. EPA officials told us that in 2010 the agencies also began agreeing on work for fiscal year 2011. After Congress made funds available for the GLRI for fiscal year 2010, and again after fiscal year 2011, the Task Force revisited the initial agreements made with each agency to finalize the funding amounts.

species, and (3) reducing phosphorus runoff that contributes to harmful algal blooms.[29] For example, the Areas of Concern subgroup considered how close each Area was to being delisted and what cleanup actions were needed for delisting, as identified by the Area of Concern managers, among other things.[30]

Overall, the Task Force set aside a total of $180 million of the available GLRI funds to address the priority issues for fiscal years 2012 through 2014: $52.2 million in fiscal year 2012, $63.4 million in fiscal year 2013, and $64.7 million in fiscal year 2014. For 2015, EPA officials said that the Task Force began creating additional subgroups to identify work and funding for all five of the focus areas in the 2015-2019 Action Plan, not just the three priority issues.

According to EPA officials, the focus on priority issues for fiscal years 2012 through 2014 accelerated restoration results for one of the three priority issues. Specifically, two of the Areas of Concern targeted for accelerated cleanup by the relevant subgroup were delisted in 2014. EPA announced in October 2014 that the White Lake and Deer Lake Areas of Concern had been delisted—both had been identified by the Areas of Concern subgroup for accelerated cleanup with priority issue funds—and EPA officials told us that they expect cleanup work to be completed at four other Areas of Concern in fiscal year 2015 as a result of receiving

[29]We will refer to these three priority issues as (1) Areas of Concern, (2) invasive species prevention, and (3) phosphorus reduction in this testimony. EPA officials told us that the Task Force created the three priority issues because of direction in congressional conference and committee reports. Specifically, the conference report accompanying EPA's fiscal year 2012 appropriation directed EPA to spend not less than the fiscal year 2011 enacted level for the toxic substances and Areas of Concern and the invasive species focus areas. H.R. Rep. No. 112-331, at 1074 (2011). In addition, the House committee report accompanying a fiscal year 2013 appropriation bill that was not enacted and the explanatory statement accompanying EPA's fiscal year 2014 appropriation directed EPA to spend not less than the fiscal year 2012 enacted level on those focus areas. H.R. Rep. No. 112-589, at 52 (2012); 160 Cong. Rec. H475, H978 (daily ed. Jan. 15, 2014). Furthermore, the House committee report accompanying the fiscal year 2013 appropriation bill that was not enacted identified the nearshore health and nonpoint source pollution focus area as critical for maintaining healthy communities within the Great Lakes region, and directed EPA and other federal partners to prioritize the work surrounding algal bloom control to improve water quality.

[30]Areas of Concern are typically managed by local groups that can include representatives of federal agencies, state, local, and tribal entities, nonprofit organizations, landowners, businesses, and other interested parties.

priority issues funds.[31] In the 25 years before the three priority issues were identified, only one Area of Concern located entirely in the United States had been delisted.

In addition, EPA officials said that identifying and funding the three priority issues for fiscal years 2012 through 2014 also allowed for continued success in invasive species prevention and resulted in some progress in reducing phosphorus runoff that contributes to harmful algal blooms. However, restoration results in those two priority issues are less clear than in the Areas of Concern priority issue, in large part because the factors contributing to those priority issues persist and are likely to continue into the future.

Information on GLRI Project Activities and Results Is Available from Individual Agencies

In July 2015, we reported that the Task Force, as part of its oversight of GLRI, makes some information on GLRI projects available for Congress and the public in two ways: annual accomplishment reports and the GLRI website.[32] The annual accomplishment reports included information about some, but not all, project activities and results. Specifically, we found that the accomplishment report for progress in fiscal year 2011 identified 10 GLRI projects, (2 projects in each of the five focus areas in the 2010-2014 Action Plan) and included some information about project activities and results for each project. For example, the report noted that the "Milwaukee River (Wisconsin)—restoring fish passage" project removed a dam, opening 14 miles of the river and 13.5 miles of tributaries to allow fish to move more freely, and reconnected the lower reach of the river with 8,300 acres of wetlands, improving water quality. The report provided similar information about nine additional projects. The accomplishment reports about GLRI progress in fiscal years 2010 and 2012 also included information about project activities and results, although most information was not associated with individual projects. For example, a statement from the accomplishment report for fiscal year 2012, "GLRI partners are implementing strategic invasive species control efforts that establish or take advantage of partnerships that will continue invasive species monitoring, maintenance, and stewardship beyond the duration of individual projects," does not identify the specific projects where these efforts are taking place. EPA also made some information available on

[31]Cleanup work included removing contaminated sediment and diverting water from an underground mine.

[32]GAO-15-526.

GLRI projects on the GLRI website, including a project's funding agency, title, funding amount and year, recipient identification, focus area, and description. This information does not include GLRI project activities and results because the website is not designed to include it.

Each of the five Task Force agencies we reviewed collected information on its projects, including activities and results of the projects they funded, although this information is not collected and reported by EPA. Overall, for the 19 projects we reviewed, recipients reported a variety of project activities, including applying herbicide, conducting training and workshops, and collecting data. In addition, we found that recipients reported a range of results. For example, funding recipients from 8 projects reported results that can be directly linked to restoration, such as increasing lake trout production, removing acres of invasive plant species, and protecting acres of marshland. For one of these projects, the Buffalo Audubon Society reported results needed to restore critical bird habitat, such as planting 3,204 plants and removing invasive species, among other results. For another project, the Great Lakes Fishery Commission reported results in the form of improved methods for capturing sea lamprey, an invasive species, which is a parasite that was a major cause of the collapse of lake trout, whitefish, and chub populations in the Great Lakes during the 1940s and 1950s. According to a Great Lakes Fishery Commission official, the results from this project will help to further suppress sea lamprey production in the Great Lakes, thereby reducing the damage they cause to native and desirable species. For example, a single lamprey can kill up to about 40 pounds of fish in its lifetime.

For the 11 remaining projects, recipients reported results that can be indirectly linked to restoration; that is, the results may contribute to restoration over time. These included results such as simulations and data for helping decision makers make better restoration decisions in light of climate change, as well as education and outreach tools to increase awareness of invasive species. In addition, a University of Wisconsin-Madison representative told us that the university's project to improve applied environmental literacy, outreach, and action in Great Lakes schools and communities through train-the-trainer professional development institutes can contribute to restoration. Progress reports for the university's project noted that the project resulted in more than 110 school teams that guided students in restoration, service learning, inquiry, and citizen science monitoring during the 2013-2014 school year, among other things. The representative said that this contributed to restoration because participating students have implemented conservation practices,

such as building rain gardens that slow stormwater runoff and remove contaminants from polluted runoff.[33]

Chairman Gibbs, Ranking Member Napolitano, and Members of the Subcommittee, this concludes my prepared statement. I would be pleased to answer any questions you may have at this time.

GAO Contact and Staff Acknowledgments

If you or your staff members have any questions about this testimony, please contact me at (202) 512-3841 or gomezj@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this testimony. Susan Iott (Assistant Director), Mark Braza, John Delicath, Carol Henn, Kimberly McGatlin, Jeanette Soares, Kiki Theodoropoulos, and Michelle K. Treistman also made key contributions to this testimony.

[33]A rain garden is a depressed area of the ground planted with vegetation, allowing runoff from impervious surfaces such as parking lots and roofs the opportunity to be collected and infiltrated into the groundwater supply or returned to the atmosphere through evaporation and transpiration.

Statement by
Anthony "Tony" Kramer
Acting Regional Conservationist, Northeast Region
Before the House Committee on Transportation and Infrastructure
Subcommittee on Water Resources and the Environment
September 30, 2015

Good Morning. Mr. Chairman, Ranking Member, and distinguished members of the Subcommittee, thank you for the opportunity to appear before you today to discuss Great Lakes Restoration Initiative (GLRI) and the role of the Natural Resources Conservation Service (NRCS) within the U.S. Department of Agriculture. Voluntary private lands conservation is making a big difference in the Great Lakes region and demonstrating that we can sustain highly productive agriculture while making progress in protecting and improving the Nation's natural resources.

The Natural Resources Conservation Service mission in brief is to "help people help the land". The Agency has offices in nearly every county nationwide and natural resource professionals who assist producers to plan and implement conservation solutions that meet their environmental and operational objectives.

Voluntary Conservation Works

At NRCS, our conservationists work with State and local partners, as well as private organizations, to deliver conservation technical and financial assistance to private landowners. In FY 2014, NRCS provided technical assistance to over 135,000 customers nationwide to address natural resource objectives on almost 60 million acres of farm, ranch, and forest land.

NRCS technical and financial assistance is delivered to private landowners primarily through programs authorized in the Farm Bill. Through Farm Bill conservation programs, NRCS technical and financial assistance enables landowners to make conservation improvements to their land. This assistance helps them plan and implement a variety of conservation practices, such as planting cover crops, adopting no-till, removing invasive plants and restoring wetlands. These programs include the Environmental Quality Incentives Program (EQIP), the Conservation Stewardship Program (CSP), and the Agricultural Conservation Easement Program.

Voluntary conservation efforts are making a difference in the water quality of the Great Lakes. Through the Conservation Effects Assessment Project (CEAP), NRCS and other USDA agencies quantify the environmental effects of conservation practices and programs and develop the science base for managing the agricultural landscape for environmental quality. The NRCS

CEAP estimates that the GLRI contracts from 2010 thru 2013 have reduced nitrogen delivery by an average of 12 lbs. per acre and phosphorus delivery by 2.1 pounds per acre (at the edge-of-field). These estimated reductions total 3,596,000 lbs. of nitrogen and 635,500 lbs. of phosphorus, which means fewer nutrients available to feed harmful algal blooms and hypoxia in the lake.

The Great Lakes as a Critical National Resource

Containing 20 percent of earth's fresh water and 95 percent of the United States' fresh surface water, the Great Lakes are a vital natural resource. Over 30 million Americans get their drinking water from the Great Lakes, which also support a $62-billion dollar economy based on fishing, boating, and recreational activities. These vital waters of the Great Lakes are highly sensitive to biological and chemical stresses and many of the coastal areas have become impaired by sediment and nutrients. Wildlife in the Great Lakes region has also been impacted by habitat fragmentation and competition from invasive species.

In the Great Lakes, excess phosphorus has been identified as a significant issue where high levels of this nutrient contribute to algal blooms in Western Lake Erie, Saginaw Bay, and Green Bay. These parts of the lakes receive water and excess nutrients from watersheds and lands of the Maumee River in Ohio, Michigan and Indiana; the Saginaw River in Michigan; and the Lower Fox River in Wisconsin. NRCS is also helping producers and land managers to plan and implement activities to improve and protect the natural resources in watersheds throughout the eight states within the Great Lakes basin-- Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin.

Great Lakes Restoration Initiative – A Boost in Federal Funding

GLRI complements the significant investment made by NRCS in the Great Lakes region. Since 2010, GLRI has provided an additional $137 million in financial and technical assistance through Interagency Agreements with the Environmental Protection Agency (EPA). Over $59 million of this was used to fund over 1,575 contracts with producers committing to implement conservation practices on over 300,000 acres. During this same time period, NRCS planned and obligated 3,655 contracts to implement conservation on over 400,000 acres in the Great Lakes Basin, using over $65 million in Farm Bill financial assistance funding.

NRCS has delivered these funds primarily through three conservation programs: Environmental Quality Incentives Program, Wildlife Habitat Incentives Program (now repealed) and Conservation Technical Assistance. With GLRI funding, NRCS has accelerated work in the following priorities identified in the Great Lakes Action Plan: invasive terrestrial species control;

nearshore and non-point source pollution; habitat and wildlife protection and restoration; and accountability, education, monitoring, evaluation, communication and partnerships.

NRCS has further targeted funds into Phosphorus Priority Watersheds to maximize effectiveness and efficiency through the voluntary efforts of producers, particularly to reduce nutrient losses but also to accelerate wildlife habitat restoration and terrestrial invasive species control. Since 2012, produces have entered into about 400 contracts to implement critical conservation measures on nearly 80,000 acres in these important watersheds. These Phosphorus Priority Watersheds include:

- Subwatersheds of the Upper Blanchard River watershed in the Western Lake Erie Basin in Ohio
- Swartz, Kearsley, and subwatersheds of the Upper Shiawasee River watershed draining to Saginaw Bay.
- Subwatersheds of the Lower Fox River in Wisconsin
- Several additional Phosphorus Priority watersheds were added in Indiana, New York, and Michigan in fiscal year 2015.

Partnership is Key to Conservation

NRCS works closely with partners across the country and in the Great Lakes to maximize the federal investment and leverage private investment. Nationwide, in FY 2014, non-Federal partners contributed an estimated $77.9 million in in-kind goods and services along with nearly $123 million in financial assistance to address local resource concerns that support the goal of getting conservation on the ground. These partnerships extend the effectiveness of the federal investment and enable more conservation work to be delivered on the ground.

Within the context of the GLRI, between 2010 and 2014, NRCS worked with 37 different entities including 18 local soil and water conservation districts, three state conservation districts associations, five Resource Conservation and Development Districts, one University, seven non-governmental organizations, and three State Departments of Natural Resources and Agriculture. During this time, 57 cooperative agreements were completed leveraging $6.8 million of GLRI funds. These agreements varied in partner match from 10% to 50% and equaled at least $2 million.

NRCS recognizes that some of the best partners and salesmen for conservation practices are farmers who are using conservation systems successfully and have benefitted from our programs. NRCS is supporting this strategy in GLRI by working with local partners and farmers to establish networks of demonstration farms. These are farms that have adopted conservation practices and are open for formalized tours to neighboring farmers. So far, demonstration farms

are established in the Lower Fox River watershed near Green Bay, Wisconsin, and we are working with partners to establish a similar network in sub-watersheds of the Maumee River in northwest Ohio, draining to western Lake Erie.

GLRI has also facilitated the cooperation between the federal partners in this initiative. NRCS has worked with USGS to establish edge-of-field monitoring with willing farmers in priority watersheds. The knowledge gained from these monitoring stations helps to quantify water quality improvements achieved based on practices that are implemented and provide valuable feedback to producers who are seeking to maximize the efficiency of their operations.

Conclusion

Mr. Chairman and members of the Subcommittee, thank you for the opportunity to appear before you today. Conservation continues to be a solid investment in our Nation's future. GLRI and other NRCS conservation programs and activities supported by Congress and the Administration have demonstrated success in helping farmers, ranchers, and private forest owners achieve their production and operational goals in balance with natural resource objectives, which provide benefits for rural communities and the nation as a whole. I would be happy to respond to any questions at this time. Thank you.

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EXECUTIVE DIRECTOR
Tim A. Eder

Testimony of the Great Lakes Commission to the House Transportation and Infrastructure Committee Subcommittee on Water Resources and Environment

The Great Lakes Restoration Initiative: A Review of the Progress and Challenges in Restoring the Great Lakes

Testimony Presented by
Jon W. Allan, Chair, Great Lakes Commission
Director, Michigan Office of the Great Lakes

September 30, 2015

Introduction

The Great Lakes Commission welcomes the opportunity to review progress in restoring the Great Lakes under the Great Lakes Restoration Initiative (GLRI) and appreciates the Subcommittee on Water Resources and Environment convening a hearing on a topic of such importance to the Commission's eight member states. This testimony is based on approved policy of the Great Lakes Commission representing the eight Great Lakes states. The Commission was established in 1955 by joint legislative action of the Great Lakes states (via the Great Lakes Basin Compact) and granted Congressional consent in 1968. A Declaration of Partnership established associate membership for the Canadian provinces of Ontario and Quebec in 1999. The Commission's offices are located in Ann Arbor, MI.

The Great Lakes: A Vital Asset for the Great Lakes States

The Great Lakes are a vital environmental and economic asset for the eight states and two provinces of the Great Lakes region. With 90 percent of our nation's supply of fresh surface water, the Great Lakes provide unparalleled recreational opportunities for residents and tourists; abundant fresh water for communities and industries; an efficient transportation system for raw materials and finished goods; and extensive habitat for valuable fish and wildlife resources. They provide the social and cultural backdrop for millions of citizens and visitors to our communities, cities and shores. The Great Lakes are ecologically, economically, socially and culturally important to the United States and to Canada.

The lakes are a significant component of our regional economy. A recent report from NOAA found that 300,000 jobs and $16 billion in GDP depend on the Great Lakes. For instance, the water-dependent economy of the Great Lakes states grew much faster than other sectors of the economy in 2012, and now has more value than the electric power generation, telecommunication and home construction industries combined. A recent economic study from a coalition of Michigan's top research universities documented that in Michigan alone one in five jobs depend on water.

These figures—and the growing value of abundant fresh water—illustrate that the Great Lakes provide our region with a unique competitive advantage. For this reason, restoring,

protecting and wisely using the lakes is a key component of our region's broader strategy to create jobs, stimulate economic development, and strengthen waterfront communities and remains in the national interest to support a vibrant regional economy.

Restoring the Great Lakes: A Bipartisan Priority

Restoring and caring for the Great Lakes is a longstanding and bipartisan priority for federal, state and local leaders in the region. The region's current restoration program is based on a comprehensive strategy initiated by a set of priorities identified by the region's Governors and developed with active input from more than 1,500 stakeholders across the eight-state region. This strategy was put into action under the Great Lakes Restoration Initiative, which began under President Obama and enjoyed the support of a bipartisan contingent of Members of Congress.

Since it began in 2010, the GLRI has enjoyed enthusiastic and bipartisan support among Great Lakes leaders, regional organizations, and the Great Lakes Congressional delegation. Each year the Commission collaborates with a coalition representing state, tribal and local governments, conservation groups, and business and industries on a suite of priorities for the Great Lakes, with the GLRI being top on the list. Sustaining Great Lakes restoration has been a consistent priority for the House and Senate Great Lakes Task Forces, and earlier this year a bipartisan group of 51 members of the House delegation wrote to the appropriations committee supporting level funding of $300 million for the GLRI in FY 2016. Since it began, Congressional support for the GLRI has been consistent and bipartisan.

Key Elements of the Great Lakes Restoration Initiative

The Great Lakes Commission and its member states have been actively engaged with the GLRI since its inception and, overall, have found it to be a strong and well-managed program. It has been innovative in administering funding through an array of programs and authorities from across a spectrum of federal agencies with the intent to target resources to projects that address the most serious problems facing the Great Lakes. While U.S. EPA manages the overall program, the Great Lakes Interagency Task Force ensures engagement from across the federal government and leverages specific areas of expertise in each agency. This process has evolved to include multi-agency subgroups focused on specific priorities with the goal being to improve efficiency in identifying and targeting resources to priority projects.

The GLRI is supported by sound science and is guided by an Action Plan with detailed performance goals. A Science Advisory Board recommended improvements that have largely been incorporated. Perhaps most significant, U.S. EPA convened a Great Lakes Advisory Board in 2013 to secure advice and guidance on the GLRI from a broad range of interests, including the Great Lakes states. This engagement process needs to be ongoing to appropriately adjust performance goals to reflect changes in the lakes.

The Government Accountability Office's (GAO) reviews of the GLRI have offered useful recommendations for improving its efficiency and managing information, monitoring and reporting. Two noteworthy improvements are the implementation of a new information management system to replace the Great Lakes Accountability System (GLAS); and the creation of interagency subgroups to identify priority actions in specific areas. Interagency collaboration and coordination with the Great Lakes states is critical in targeting resources toward high priority cleanup projects in the remaining Areas of Concern (AOCs). The GAO's reviews have been mostly positive and have not identified critical flaws in the management of the GLRI program. This generally is consistent with the states' experiences working under the program.

Role of the Great Lakes States in Implementing Great Lakes Restoration Efforts

The Great Lakes states are deeply involved in implementing the GLRI, as they must be. Over the past decade the states helped formulate the GLRI focus areas, which draw from a suite of overarching priorities originally identified by the Great Lakes Governors. Because of their delegated authorities under the Clean Water Act and other federal laws, the states have the staff and programmatic resources in place to identify and support implementation of restoration projects that are priorities for the states. The states have a particularly prominent role in guiding cleanup work in the AOCs, including establishing criteria for removing beneficial use impairments, identifying the necessary remediation actions,

conducting monitoring to assess progress, and coordinating progress in achieving goals with local stakeholders. State staff are leading implementation of many restoration projects and frequently assist local agencies and other partners in this area. The states are best able to discern which projects are truly critical for achieving the GLRI's goals and designing them toward that end. In most cases, state agencies are also responsible for issuing regulatory permits for projects under relevant federal and state laws. Collectively, these are critical functions that most often only the states can provide; without them, GLRI projects would be harder or impossible to identify, cost more or take longer to implement. The states are also in the best position to coordinate state-based resources that provide collateral benefits to a location or region, such as using recreational, public access or other programs.

Beyond the GLRI, the states are actively involved in—and are vital to the success of—other Great Lakes-related programs and initiatives, including efforts under the ten annexes of the Great Lakes Water Quality Agreement with Canada, which was renewed in 2012. In the long term, it is important that actions under the GLRI are consistent with, and supportive of, the broader ongoing domestic and binational management regime for the lakes.

Highlights of Progress to Date

The GLRI has stimulated impressive progress over the past five years. Nearly $2 billion has been appropriated by Congress and administered through the Interagency Task Force for more than 2,500 restoration projects across the eight-state Great Lakes region. This has resulted in the removal of 42 beneficial use impairments—with more removals in the pipeline—and completed cleanup work in six AOCs; generated a 70 percent increase in farmland enrolled in conservation programs in priority watersheds; restored or protected nearly 150,000 acres of habitat; removed or bypassed 500 barriers to open more than 3,400 miles of rivers and streams for fish; and helped prevent the introduction of Asian carp by supporting surveillance and response actions and development of new control technologies through the multi-agency Asian Carp Regional Coordinating Committee.

Perhaps the most striking impacts from the GLRI are being seen in the AOCs, where cleanup and restoration work is enabling communities to revitalize once-degraded waterfront areas, provide new recreational opportunities, enhance fishing, maintain commercial and recreational boating, and stimulate business development in under-utilized urban areas. Some noteworthy examples include, but are by no means limited to:

- In **Ashtablula, Ohio**, U.S. EPA, the Ashtabula City Port Authority and local industries completed the largest cleanup to date under the Great Lakes Legacy Act on the Ashtabula River, removing nearly 600,000 cubic yards of contaminated sediments. The project deepened the river and allowed for the return of normal commercial navigation and recreational boating. This will generate long-term economic benefits by ensuring the future viability of the Port of Ashtabula, which moves more than 10 million tons of coal annually and ranks among the top 10 busiest ports in the Great Lakes. The project will also contribute to the removal of fish consumption advisories on the river and reduce toxic pollution flowing into the open waters of Lake Erie.

- In **Wisconsin, the Kinnickinnic River**, south of downtown Milwaukee, was plagued by contaminated mudflats and a dilapidated shoreline that threatened the viability of existing businesses and hampered new economic development. Removing contaminated sediments and improving the shoreline brought back boaters, revitalized existing businesses and stimulated new development. The sediment cleanup and subsequent business investments have revitalized a formerly neglected part of the city and made the Kinnickinnic River a vital part of the local economy that will pay dividends for decades.

- In **Michigan, Muskegon Lake** was left with widespread contaminated sediments, a severely degraded shoreline, and diminished fish and wildlife following the decline of heavy industries and nearly a century of intensive use and neglect. Concerted efforts by state, federal and local agencies and citizens have remediated much of this pollution and the community is developing bike trails, promoting outdoor recreation and other tourism-friendly activities, and developing a port plan that is consistent with the restoration work. The shoreline restoration alone will increase property values by nearly $12 million, contribute $600,000 in new tax revenues annually, and attract 65,000 new visitors to the lake generating more than $1 million in new recreational spending.

- The **Buffalo River in New York** is undergoing one of the largest river revitalization efforts in the country and is a leading example of how environmental remediation can drive economic development. Dozens of polluted industrial sites have been cleaned up and nearly 1 million cubic yards of contaminated sediments have been removed from the river bottom. Habitat is being restored for valuable native species and new "pocket parks" are providing community access to the river for fishing, boating and wildlife viewing. More than $75 million in public and private investment is fueling new development, much of it on former brownfields along the river. More than 3,000 jobs will be created by one new facility alone—the largest solar panel production plant in the world being built along the restored Buffalo River.

The common theme among these and other restoration projects being implemented under the GLRI is how they are transforming an eyesore and liability into an important asset for local communities. Communities across the Great Lakes are once again turning their face back to the water after decades of ignoring waterfronts or using them as dumping grounds. As a result, businesses, jobs, wildlife and *people* are returning to these rivers and other waterfront areas across the Great Lakes region. While the GLRI's performance measures assess the number of beneficial use impairments removed and AOCs "delisted," the true value rests in communities reclaiming their water resources as positive, productive assets—as economically, socially and culturally important places—to be embraced and leveraged to promote economic growth and a high quality of life. Ultimately, the GLRI will generate multiple benefits beyond the ecosystem improvements that are its primary focus.

Opportunities to Improve the GLRI and the Great Lakes Management Regime

The Great Lakes Commission offers the following recommendations for improving the GLRI and the overall Great Lakes management regime. These recommendations will benefit the GLRI in the near term while also strengthening long-term, collective resource management, protection and conservation efforts.

- **Coordination, consultation and engagement with the Great Lakes states**: Existing structures and practices in this area are not working as well as they could or should. The states are more than just stakeholders and have sovereign authorities and regulatory responsibilities for the Great Lakes. They need and deserve better engagement from both U.S. EPA and other federal agencies, particularly in establishing program priorities and planning projects. The states' implementation capabilities and relationships with local communities are vital to bringing federal funding to bear on priority actions. The Commission recently wrote to the EPA Administrator requesting that improved mechanisms be established for more routinely engaging the states on both near-term GLRI-related priorities and implementation projects, as well as longer-term resource management programs and priorities.

- **State capacity and an effective federal-state partnership for long-term Great Lakes conservation:** The Commission looks forward to strengthening and sustaining an effective partnership with the federal government to ensure federal programs – whether the GLRI or GLWQA – are integrated with state workplans, strategies and priorities. Integrated federal-state planning will ensure the right projects get done and that our investments are sustainable—both are significant concerns for the states. Maintaining consistent capacity at the state level is vital and must be a cornerstone of an effective federal-state partnership. Critical actions to reduce nutrient loadings, remediate contaminated sediments, restore habitat, protect drinking water, or adapt to climate change will not be possible without state support consistent with their sovereign jurisdiction over water resources.

- **Information management and reporting**: The states and others implementing GLRI projects have long been frustrated with the GLAS system. The new Environmental Accomplishments in the Great Lakes (EAGL) system is coming online and appears to be a significant improvement. Efficient information management and reporting is vital, both for administrative purposes but also to effectively communicate progress to the public.

- **Long-term ecological monitoring to assess progress and adapt programs**: Greater emphasis and resources are needed for long-term ecological and water quality monitoring. The recent GLRI report to Congress showed that funding in this area has declined by more than two thirds since 2010. Ongoing monitoring is needed to

inform an adaptive management framework to enable us to assess the effectiveness of our work and best target future investments.

- **Integration with actions under the Great Lakes Water Quality Agreement (GLWQA):** A variety of new activities and structures are being implemented under the 2012 GLWQA, including Lakewide Action and Management Plans, ecosystem monitoring, nutrient reduction and nonpoint source management, and resiliency to climate change. Work under the GLRI and its associated intergovernmental processes should be integrated with these efforts to ensure an efficient and effective long-term management regime for the Great Lakes.

- **Targeting conservation and nutrient reduction actions to priority watersheds:** The increase in harmful algal blooms in recent years, and their impacts on drinking water and recreation, underscore the need to target nutrient reduction programs to watersheds that contribute significant nutrient loadings to the lakes. Working in conjunction with the states, the GLRI has wisely targeted priority watersheds to Western Lake Erie, Saginaw Bay and Green Bay. However, continued improvement is needed to target and coordinate with the states on other conservation programs, particularly those administered by the Natural Resources Conservation Service. The new Regional Conservation Partnership Program, established under the 2014 Farm Bill, is now underway, with the Great Lakes designated as a Critical Conservation Area due to harmful algal blooms. Significant resources are being provided under this program, which must be monitored closely to ensure nutrient reduction actions are directed to watersheds identified by the states as priorities and that generate documented, long-term water quality improvements. While this is beyond the purview of the GLRI per se, it speaks to the need for effective coordination of all programs that address the health of the Great Lakes. Finally, nutrient reduction actions and strategies are needed in many other watersheds, beyond those currently being targeted by the GLRI, that are known to contribute significant amounts of nutrients to the lakes.

Legislative priorities for Congress

The Commission reiterates two priorities for the current Congress:

1. **Sustain funding for the GLRI:** Continued funding for the GLRI, together with ongoing program reviews and accountability, will build on planning, investments and progress underway at the federal, state, tribal and local levels. This will help maintain progress toward achieving goals outlined in the new GLRI Action Plan, which focuses on completing the clean-up in 10 more Areas of Concern, reducing phosphorus runoff that causes harmful algal blooms, controlling invasive species, and restoring habitat for native species. We strongly encourage regular, objective review and evaluation of the program's results toward these goals and benchmarks. As discussed above and documented by the GAO, a solid foundation is in place to maintain and accelerate the progress we have achieved over the past five years. The Commission urges Congress and the Administration to continue this successful program and that it be implemented with clear performance measures and accountability built in at the federal and state levels.

2. **Pass legislation formally authorizing the GLRI:** A top priority for the Commission is to secure formal legislative authorization of the GLRI to ensure Congress is able to maintain the program's original mission into the next administration, while also clarifying and focusing accountability and congressional oversight of that mission. It is critical that all partners engaged in Great Lakes restoration and management see a long-term commitment to the program and one that will sustain and build on the progress seen to date. Bipartisan legislation has been introduced in both the House and Senate by Rep. David Joyce (H.R. 223) and Senators Mark Kirk and Tammy Baldwin (S. 1024/S. 504). Rep. Joyce's bill was passed by the House late last year under unanimous consent. In July the Commission and its regional partners wrote to Speaker Boehner and Majority Leader McConnell urging them to take up these bills, which direct U.S. EPA to collaborate with the Interagency Task Force and state and local partners to select the best projects to protect and restore the Great Lakes, with a focus on restoration projects that can be implemented quickly, that will achieve environmental outcomes outlined in the GLRI Action Plan and GLWQA, and that leverage other funding.

Achieving our Great Lake restoration goals is taking longer and is more complex than originally anticipated. While the achievements to date are substantial, they often reflect the "low-hanging fruit." Looking ahead, we face daunting challenges, including cleaning up the largest and most complex AOCs, such as the Detroit, Cuyahoga, Fox and Grand Calumet rivers—rivers that were heavily used and, in many cases, severely degraded during the latter half of the 20th century; further implementing a long-term solution to prevent the introduction of Asian carp into the Great Lakes system; and preventing harmful algal blooms in Lake Erie. Successfully confronting these challenges will require sustained focus, collaboration, science-based solutions, and long-term monitoring and adaptive management. The GLRI provides the necessary framework and capacities for continued progress and the Commission urges Congress to support the program and continue the successful federal-state-tribal-local partnerships underway to restore the Great Lakes.

Conclusion: Accelerating the "Blue Economy" to Build a Better Future for the Great Lakes Region

Great Lakes restoration is accelerating a growing "Blue Economy" as states, tribes, local communities, businesses and others leverage benefits from the immense supply of fresh water that defines our region. The increased interest in the Great Lakes as an economic asset, and the many new "place-based" opportunities for recreation, waterfront development, fishing or wildlife watching, underscore that our current restoration efforts are important not just to correct mistakes from the past, but also to build a better future for our children and grandchildren. The Great Lakes Commission thanks Congress for helping to restore the lakes as a natural treasure and vital economic asset for the eight-state region.

Written Testimony for Mayor John Dickert
Great Lakes Restoration Initiative (GLRI)
Before the House Subcommittee on Water Resources
Transportation and Infrastructure Committee
September 30, 2015

Introduction

Thank you Chairman Gibbs, Ranking Member Napolitano, and members of the subcommittee for allowing me to testify on the Great Lakes Restoration Initiative (GLRI). My name is John Dickert, I serve as the Mayor of Racine, Wisconsin, I am the Vice-Chair of the Conference of Mayors Metro Economies Committee and a member of the Mayors Water Council. I also serve on the Board of Directors and am past Chair of the Great Lakes and St. Lawrence Cities Initiative, and served as past President for the Urban Alliance. I am here today testifying on behalf of both the Conference of Mayors and the Great Lakes and St. Lawrence Cities Initiative and I ask that my testimony being inserted into the record.

A short list of recognitions my city has earned during my tenure include: Best Tasting Water in America by the Conference of Mayors in 2011, the America in Bloom Award, certified as a Blue Wave Beach, designated a Well City in 2013, and USA Today named one of our beaches as one of the best in the nation. All of these awards signify my city's deep commitment to make my community better and how integral a role that the Great Lakes play in achieving that goal.

For those of you who may not know, Racine is a city of about 80,000, located South of Milwaukee and North of Chicago, right on the shores of Lake Michigan. Like many cities that are along the Great Lakes, Racine is trying to utilize one of our greatest assets. We have focused much of our economic redevelopment along the Lakeshore, utilizing our beaches to enhance our community as well as creating opportunities for travel and tourism.

The importance of water to our cities on the Great Lakes cannot be overstated. It nourishes our residents, provides industry and agriculture with what they need to be successful, is a place for recreation such as swimming, boating, fishing, and much more, and is essential to the overall quality of life and economic well-being of our communities. There is a tendency to take the resource for granted, as we learned again most recently in August of 2014 when the Mayor of Toledo had to advise nearly 500,000 citizens not to drink the water or bathe in it.

And let me state another obvious statistic related to that last point. The Great Lakes represent 20 percent of the fresh water supply in the world. The Conference of Mayors Water Council did a study where 35% of the cities surveyed did not know where there drinking water supplies would come from in 2020. It doesn't take that statistic or a four-year drought in the West to recognize how important it is to protect such a valuable natural resource.

And we, as Mayors, in turn, spend a lot of money on water priorities because our job is to protect the public health and safety of our residents. In 2012, local governments spent $111 billion dollars on water and wastewater needs while unfortunately, Congress provided less than $2 billion that eventually gets to cities in the form of loans. We need all of us to recognize the importance that water as well as infrastructure plays in maintaining a robust economy as well as protecting our environment. Please remember that 94 percent of our water withdrawals is used for drinking water, food production, and energy.

That is why the Great Lakes Restoration Initiative is so important. It provides the opportunity to work with Federal and State agencies to protect this asset and accelerate the restoration of the Great Lakes substantially. I know this program has only been around since 2010 but, to date, it has funded nearly 2,700 projects, and has been very successful. There are 16 Federal Agencies that work together on GLRI priorities that include: Cleaning up toxics and areas of concern; Combating invasive species; protecting watersheds; and Restoring wetlands.

The Conference of Mayors is always supportive when agencies break down their silos and coordinate their efforts towards a more effective and efficient use of the taxpayers money. And the GLRI has some notable achievements. Perhaps one of the most dramatic examples is the cleanup of areas of concern (AOC) under the Great Lakes Water Quality Agreement with Canada. AOC's are designated areas around the Great Lakes where the contamination is especially serious and the quality of the resource so degraded that special attention is needed.

The United States has been working on the cleanup of 31 of these AOC's for over 20 years, and until the passage of funding for GLRI, only one had been cleaned up and removed from the list of AOC's. In the five years since GLRI was established, three additional AOC's have been removed from the list and all of the cleanup work needed to remove three more has been completed. For the six cities where this GLRI funded work has taken place, it will make a world of difference because being an AOC carries a stigma that is very difficult to overcome.

My neighbor up the shore of Lake Michigan, Mayor Mike Vandersteen of Sheboygan, Wisconsin is already seeing the benefits of having the cleanup work completed, as new development and more tourism, especially related to fishing, is already proceeding. One of my other neighbors, Mayor Tom Barrett of Milwaukee, had major work conducted on all three rivers running through his City and this is helping lay the foundation for major redevelopment in his Harbor District and other downtown areas.

Closer to home in Racine, we received $250,000 in GLRI funding to build green infrastructure and restore Samuel Meyers Park. We have utilized GLRI and multiple other state and federal agencies to clean up a contaminated beach, rebuild our marina and harbor to be environmentally friendly while providing access for worldwide fishermen to enjoy the largest inland fishing tournament in the world. Mayors do this because we are good at blending projects like these three into one project for peak efficiency and cost savings.

To date, there has been an 80 – 95% reduction in invasive species, creation of 0.34 acres of constructed wetland, installation of over 10,000 native plants, removal of a source of polluted runoff, and delineation of an offshore swim zone that meets USEPA standards for recreation about 90% of the time. Additional funding attracted as a result of the initial GLRI investment is about $439,000 in hard money (local, state and federal) and tens of thousands of dollars in in-kind/volunteer support. The multiple benefits of just one project are obvious, and what this means for the Great Lakes, the wildlife, and our community is a tremendous return on investment.

The advantage of investing in restoration projects in Great Lakes cities is that the funds can be turned into tangible projects on the ground and in the water quickly, to the benefit of the resource and to the people who live and visit in the area.

In addition, cities across the basin have received many GLRI grants over the years and these grants are contributing significantly to revitalization of the Great Lakes economy and the quality of life in the region, as well as the quality of this resource. The Great Lakes are the foundation of the 4th largest economy in the world. Millions of dollars in revenue to some of the communities around the basin help support some 35 million people and 1.5 million jobs with $62 billion in wages.

Recommendations

Looking longer term, it would be very beneficial to have a formal authorization for the Great Lakes Restoration Initiative. Both the Senate and House have introduced bills to do just that. In the Senate, the "Great Lakes Ecosystem and Economic Restoration Act (GLEEPA)" would formally authorize the institutions to help manage work by stakeholders and partners on the Unites States side of the Great Lakes and the funding under the Great Lakes Restoration Initiative for projects to protect and restore the resource.

Specifically, authorization of the Great Lakes Interagency Task Force to integrate the work of the Federal departments and agencies, the Great Lakes Advisory Board to bring the perspective of many partners and stakeholders to the decision making process, and the Great Lakes National Program Office at the Environmental Protection Agency to administer and coordinate much of the Great Lakes work.

GLEEPA is also the place to make a more formal link between all the work done by U.S. partners and stakeholders to the Great Lakes Water Quality Agreement, our formal, mutual commitment to Canada to work together to protect and enhance the chemical, physical, and biological integrity of the Great Lakes ecosystem. Having the framework and funding more formally in place for a more extended period of time will give greater certainty to all those working on protecting and restoring the Great Lakes, rather than starting and stopping programs and projects on a year to year basis.

Funding from GLRI has been exceedingly important over the past 5 years to keep the Asian carp from reaching Lake Michigan through the Chicago Area Waterway System. The electric barrier, comprehensive monitoring, intensive commercial fishing, education, and much more have been instrumental in blocking this key pathway. Federal agencies have built some of this work into their base budgets, but having these funds available to take more immediate action, which is so important in dealing with invasive species, has been invaluable. The focus of GLRI on invasive species should continue in the future.

As to suggestions for improvements to GLRI in the future, the Great Lakes Initiative has the following suggestions:

- Formally recognize the importance of applying the principles of adaptive management to guide the investments under GLRI to ensure investments that achieve the project specific, regional, and basin wide ecosystem and public health goals and objectives of the GLRI and the Great Lakes Water Quality Agreement;

- Provide adequate funding for monitoring and assessment so that managers can more effectively judge how well projects and programs are working, and make necessary adjustments and adaptation to make them more effective in the future;

- Make the link between GLRI and the Great Lakes Water Quality Agreement more explicit and clear, especially as it relates to the general objectives, lake ecosystem objectives, and substance objectives of the Agreement;

- Provide direction and adequate funding to establish a more effective way to integrate and manage the data, information, and knowledge collected and gained by the many federal, state, local, tribal, academic, and non-government institutions and agencies to provide the tools to apply the principles and practices of sound adaptive management for the long term sustainability of the Great Lakes resource.

I cannot emphasize enough that we all must be fully engaged and fully committed to water issues if we are to succeed. You cannot do this half way because we need to remain vigilant about protecting this natural resource and unfortunately, it only takes a short time for our waters to become impaired.

Brownfields

I also wanted to take this opportunity to mention two other critical programs that are important to Great Lakes communities. The first is the issue of brownfields. I know my colleague, the Mayor of Elizabeth, Chris Bollwage, testified before you in July regarding the importance of reauthorizing the Brownfields Law. I would also like to voice my support.

Like most cities along the Great Lakes, Racine had a rich, industrial past, which unfortunately has left us a legacy of brownfields properties. If you look at these Great Lakes cities, we would probably tally hundreds of thousands of brownfield sites that are relics of that industrial past.

But make no mistake, these issues are related. Many brownfield sites are located on the shores of the Great Lakes and their cleanup and revitalization will assist us in our greater efforts of protecting and restoring the Great Lakes. It is vitally important for you to reauthorize the brownfields program because it assists us with our comprehensive efforts to revitalize our communities and improve the health of the Great Lakes.

Appropriations Language on Overflows

Another issue that I would also like to express concern over is a provision inserted in the Senate's FY 16 Appropriations bill for the Environmental Protection Agency (Section 428 of S. 1645) that would eliminate all sewer discharges into the Great Lakes which I, and many of my colleagues, believe would actually set back and undermine municipalities' efforts to restore water quality throughout the Great Lakes.

I know that on its face, eliminating all discharges sounds like a good idea. However, if enacted, the proposed new requirements would require communities to go back to the drawing board, raise tens of billions of additional ratepayer dollars to make additional investments without regard to corresponding water quality or public health outcomes.

Preliminary data indicate that the price tag would exceed $65 billion for all Great Lakes communities; in Racine, the price tag would be $700 million. These forced investments would be required even though no evidence or data have been offered to suggest that doing so would achieve any improvements in water quality in the Great Lakes.

In addition, these expenditures would come at the expense of other critically important water quality challenges to the Great Lakes that have been discussed this morning. Basically, what I'm saying is that you can either force us to spend billions of dollars on something that will have negligible benefits or we can focus on spending our taxpayers limited money on actions that will have a bigger impact in improving water quality.

I would strongly urge you to oppose this language from the Appropriations bill. I have attached to my testimony two letters sent to appropriators from a number of organizations working with communities to address water quality challenges in the Lakes that are opposed to this proposal including a joint letter from the US Conference of Mayors, National League of Cities, and the National Association of Counties, and a letter from the Great Lakes St. Lawrence Cities Initiative.

Conclusion

Thank you again for this opportunity to speak before you today. I hope that I have demonstrated just how critical the Great Lakes are for this nation and how important the Great Lakes Restoration Initiative has had with our efforts to protect this national treasure.

NACO National Association of Counties

NATIONAL LEAGUE of CITIES

THE UNITED STATES CONFERENCE OF MAYORS

NARC
Building Regional Communities
National Association of Regional Councils

September 28, 2015

The Honorable Thad Cochran
Chairman, Appropriations Committee
United States Senate
Washington, DC 20510

The Honorable Barbara Mikulski
Ranking Member, Appropriations Committee
United States Senate
Washington, DC 20510

The Honorable Hal Rogers
Chairman, Appropriations Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Nita Lowey
Ranking Member, Appropriations Committee
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Cochran, Ranking Member Mikulski, Chairman Rogers and Ranking Member Lowey,

On behalf of the nation's counties, cities, mayors and regions, we write to express our concern over provisions in the Senate's proposed Fiscal Year (FY) 2016 Interior, Environment and Related Agencies Appropriations Bill that, if enacted, would have costly consequences for communities and ratepayers throughout the Great Lakes region. We are also concerned about the national implications and precedent setting nature of this language, and therefore urge you to strip Section 428 from any final appropriations package that Congress enacts.

Communities throughout the Great Lakes region care deeply about water quality and rely on the clean and safe water in the Great Lakes for drinking water supplies, recreational opportunities that promote tourism, and commercial activity that provides the economic engine for many local economies and jobs. Protecting water quality in the Great Lakes is a top priority for local officials throughout the region, which is why communities have invested billions of dollars over the past several decades to update and modernize their clean water infrastructure.

Local communities have made these investments in compliance with the 1994 Combined Sewer Overflow (CSO) Control Policy that Congress codified in 2001. Section 428 expressly contradicts and undermines that Policy by requiring communities to revise their Long Term Control Plans, developed in accordance with the 1994 CSO Control Policy, to achieve a near impossible goal of zero overflows—at an additional cost of tens of billions of dollars to communities and ratepayers. Additionally, the proposed provision would prohibit communities from utilizing an important

operations tool that safeguards the integrity of their wastewater treatment systems during periods of extreme wet weather, thereby imposing unnecessary additional costs by handcuffing communities as they attempt to comply.

This language sets an alarming precedent for all communities addressing CSO issues and negotiating compliance levels with the U.S. Environmental Protection Agency. Our concern is that communities across the country could be held to this near impossible standard of zero overflows into other sensitive or significant waterbodies. These considerations are already in place under the 1994 Policy and should not be rewritten in an appropriations bill.

Moreover, these costly provisions are included in a spending package that also proposes to cut funding for the Clean Water State Revolving Fund by nearly 30 percent. Imposing additional regulations on communities, while cutting vital infrastructure financing programs that assist with compliance, is tantamount to an unfunded federal mandate that ignores the current state of our nation's water infrastructure needs.

As representatives of local officials with the responsibility of allocating limited taxpayer dollars to address pressing public policy challenges, we strongly oppose Section 428 of the Senate's FY16 Interior, Environment and Related Agencies Appropriations Bill for the aforementioned reasons and urge you to strike these provisions from the final spending package.

If you have any questions, please contact any of our staff: Julie Ufner (NACo) at jufner@naco.org; Carolyn Berndt (NLC) at berndt@nlc.org; Judy Sheahan (USCM) at jsheahan@usmayors.org; Joanna Turner (NARC) at joanna@narc.org.

Sincerely,

Matthew D. Chase
Executive Director
National Association of Counties

Clarence E. Anthony
CEO and Executive Director
National League of Cities

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Joanna L. Turner
Executive Director
National Association of Regional Councils

Cc: The Honorable James Inhofe, Chairman, Senate Environment and Public Works Committee
The Honorable Barbara Boxer, Ranking Member, Senate Environment and Public Works Committee
The Honorable Bill Shuster, Chairman, House Transportation and Infrastructure Committee
The Honorable Peter DeFazio, Ranking Member, House Transportation and Infrastructure Committee

Great Lakes and St. Lawrence Cities Initiative
Alliance des villes des Grands Lacs et du Saint-Laurent

August 28, 2015

The Honorable Thad Cochran
Chairman
Appropriations Committee
United States Senate
Washington, D.C. 20510

The Honorable Barbara Mikulski
Ranking Member
Appropriations Committee
United States Senate
Washington, D.C. 20510

The Honorable Lisa Murkowski
Chairwoman
Appropriations Subcommittee on Interior,
Environment and Related Agencies
United States Senate
Washington, D.C. 20510

The Honorable Tom Udall
Ranking Member
Appropriations Subcommittee on
Interior,
Environment and Related Agencies
United States Senate
Washington, D.C. 20510

The Honorable Hal Rogers
Chairman
Appropriations Committee
United States House of Representatives
Washington, D.C. 20515

The Honorable Nita Lowey
Ranking Member
Appropriations Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Cochran, Chairwoman Murkowski, Chairman Rogers,
Senator Mikulski, Senator Udall, and Congresswoman Lowey:

The Great Lakes and St. Lawrence Cities Initiative (Cities Initiative) is a coalition of over 110 U.S. and Canadian cities representing over 17 million people, and is committed to the protection, restoration, and long term sustainability of the Great Lakes and St. Lawrence. As part of that commitment, its member cities have a strong record over many years of dramatically reducing combined sewer overflows (CSO) and releases of untreated wastewater to the Great Lakes, and will continue those reductions into the future. The ratepayers in our cities are investing billions of dollars in these efforts and in most instances are working under the Congressionally approved CSO Control Policy.

Section 428 of Senate Appropriations Bill 1645 to require elimination of CSO's is counter-productive and would lead cities and their ratepayers to expend billions of dollars to reach an unrealistic level of zero discharge of this type of pollution. It is well recognized that the cost effectiveness of these expenditures to reach zero discharge and the resulting water quality benefits are very limited. Reaching such a level is even more difficult because of climate change, with more intense rainfall events stressing already aged infrastructure more than ever before and at a time when funding for these investments is exceedingly scarce.

20 North Wacker Drive, Suite 2750, Chicago, Illinois 60606 ~ (312) 201-4213 phone ~ (312) 407-0038 fax
www.glcities.org / @GLSLCities
Linda Tucker, Mayor of Huron-Kinloss, Chair
Denis Coderre, Mayor of Montreal, Vice-Chair
Paul Dyster, Mayor of Niagara Falls, New York, Secretary-Treasurer

Great Lakes and St. Lawrence Cities Initiative
Alliance des villes des Grands Lacs et du Saint-Laurent

We urge you not to pass Section 428 of SB 1645. Cities are moving forward aggressively to reduce CSOs to the lowest possible level, and to implement many other programs to enhance one of the world's greatest freshwater treasurers, the Great Lakes.

Thank you for considering our comments on this very important matter and please contact me at david.ullrich@glslcities.org or 312-201-4516 with any questions you might have.

Sincerely,

David A. Ullrich

David A. Ullrich, Executive Director
Great Lakes and St. Lawrence Cities Initiative

cc. Great Lakes Congressional Delegation

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Great Lakes
Metro Chambers Coalition

U.S. House of Representatives
Transportation and Infrastructure Committee
Water Resources and Environment Subcommittee
September 30, 2015

Great Lakes Restoration Initiative
Testimony of the Coalition
Ed Wolking, Jr.
Executive Director

Mr. Chairman, Ranking member Napolitano, members of the Subcommittee:

Thank you for the opportunity to be here today to speak to the importance of the Great Lakes and the Great Lakes Restoration Initiative to our country and to North America.

I represent the Great Lakes Metro Chambers Coalition, a nearly 40-member voluntary group of chambers of commerce dedicated to the continuing revitalization of the Great Lakes trading region through federal policy in five arenas that are key to the region's future.

Together with the Great Lakes Manufacturing Council, the Coalition has pioneered the concept that this great bi-national region of twelve states and two provinces is the third largest economy in the world, behind only the United States and China. Our region is built upon advanced manufacturing and depends on some of the most highly regarded supply chains in the world. Those supply chains, in turn, depend on robust transportation infrastructure, including inland waterways like the Great Lakes.

That is one lens through which we view the lakes. There is another lens: the Great Lakes as our region's defining geographic asset and the most important body of fresh water in the world – with 22% of the world's surface fresh water and 84% of North America's surface freshwater.

In the view of the Coalition, the lakes are the center of the region's present and the key to its future. They provide the fresh water so important to the place-making opportunities that shape our economy in addition to a fuel-efficient, environmentally-friendly highway for the movement of the bulk commodities and heavy finished goods that are so essential to Midwest manufacturing and agriculture.

The preservation and enhancement of the quality of the Great Lakes is one of the Coalition's primary strategic issues for the region. The other elements include:

- Surface and water transportation infrastructure and funding
- Border crossings between the U.S. and Canada
- Base load energy development
- Immigration of highly-skilled talent

This session, the Coalition has three primary focal points related to the water quality in our region:

- The Great Lakes Restoration Initiative ("the GLRI", or "the Initiative")
- The Clean Water State Revolving Fund
- The prevention of Asian Carp in the Great Lakes, as well as their eradication from the Ohio and Mississippi watersheds

In prior generations, the place-making and commercial uses of the lakes were viewed by many as being mutually exclusive and conflicting. Today, it is widely acknowledged that we can have both clean, desirable waterways and economic growth. We have the technologies and the know-how, if we have the will.

The Coalition views the GLRI as one of the great environmental stories of our time. Fifteen federal agencies, as well as White House staff, coordinate projects and activities to restore the lakes. The Great Lakes Restoration Initiative Action Plan identifies five major focus areas:

- Toxic Substances and Areas of Concern — preventing pollution and cleaning-up the most polluted areas in the Great Lakes

- Invasive Species —instituting a "zero tolerance policy" toward new invasions and preventing the establishment of self-sustaining populations of invasive species such as Asian carp
- Nearshore Health and Nonpoint Source Pollution — targeting high-priority watersheds and polluted runoff reductions from urban, suburban and agricultural sources
- Habitat and Wildlife Protection and Restoration — bringing wetlands and other habitat back to life, including the first comprehensive assessment of the entire 530,000 acres of Great Lakes coastal wetlands to target restoration and protection efforts using the best science
- Accountability, Education, Monitoring, Evaluation, Communication and Partnerships — building goal- and results-based accountability measures, learning initiatives, outreach and partnerships

Since its inception in FY2010, the Initiative has provided $1.96 billion toward restoration efforts, and a recent Government Accounting Office report showed that, of the $1.68 billion allocated by Congress through FY2014, $1.66 billion (99%) had been obligated and $1.15 billion (69%) had been spent on 2,123 projects. In all, through August of 2014, the Initiative has supported over 2,500 restoration projects.

For a relatively new endeavor, the results have been impressive. They include:

- Areas of Concern (AOCs) – delisting of five AOCs, including Presque Ile Bay, compared to only one in the prior 25 years
- Invasive Species – an aggressive ramp-up to prevent new introductions, including support for the Asian Carp Regional Coordinating Committee
- Nearshore Health and Nonpoint Source Pollution – reduction of phosphorus run-off from agricultural lands and an increase of enrolled farmland in priority watersheds by more than 70%
- Habitat Wildlife Protection and Restoration – the protection, restoration and enhancement of more than 100,000 acres of wetlands and 48,000 acres of habitat, with the removal of over 500 barriers in tributaries
- Accountability, Education, Monitoring, Evaluation, Communication and Partnerships – outreach to more than 175,000 students

There are 5,300 miles of U.S. shoreline, this is complex work, and we are learning as we go. As we look forward to the second major phase of the Action Plan for the Initiative from FY 2015 to FY2019, we welcome the continued focus on these key areas, as well as the introduction of science-based adaptive management, improvements in prioritization, and better reporting on measures of progress and their impact.

Observers and analysts have sometimes tried to convert the Initiative into a Return on Investment model. Because of the complexity of the process and the long timelines for projects, it's a very difficult task and an inexact process. In September of 2007, however, a group of scientists, economists and other experts convened by the Brookings Institution projected the net benefits of pursuing proposed solutions in the *Great Lakes Regional Collaboration Strategy to Restore and Protect the Great Lakes*, otherwise known as the Great Lakes Restoration Strategy, which was a research project led by the U.S. Environmental Protection Agency. The results indicated that a present-value total investment of $26 billion in ecological restoration would yield over $50 billion in long-term benefits to the national economy and between $30 billion and $50 billion short-term benefits to the regional economy. Those were a combination of direct and indirect benefits.

It's hard to pin precise ROI numbers on the GLRI. We are aware of a Grand Valley State University estimate of a $66 million return on a $10 million federal investment on the south shore of Muskegon Lake, not including property value increases. We are confident that as individual Areas of Concern are resolved through remediation and restoration, the quality of our places will improve, and over time, that

will result in more attractive communities for living, working, and playing. After only five years of aggressive pursuit of AOCs, we are just beginning to see the results.

Beyond all the numbers, though, there is a visceral understanding throughout the region that the GLRI is the right thing to do - for our communities, our states, our nation and our generations to come.

The Coalition stands firmly in support of the continued pursuit of the GLRI and has advocated that Congress maintain the appropriations level at $300 million. We have strenuously objected when proposals to significantly reduce that level were considered, we have witnessed the restoration of funds by Congress to the higher, more effective levels, and we thank Congress for its vision in continuing to move the initiative forward.

We support HR 223, the Great Lakes Restoration Initiative Act of 2015, which would extend the authorization for the GLRI through Fiscal Year 2020 and make numerous improvements to the program authority. It had 41 cosponsors as of last week.

We also commend the federal government for its growing multidisciplinary, multi-agency approach to the initiative. That is indeed a strong-point that can serve as a benchmark for other federal programs, in addition to creating better solutions for the lakes. It was highlighted in the GAO's report.

In a word, our position is: Let's keep up the good work, and do it better.

How can we do better? We'll defer to the experts, but here are some general suggestions:

- Formal authorization of the GLRI; HR 223 can be that vehicle
- Improved consultation, collaboration and coordination - leading to better implementations
    - With other federal agencies and programs
    - With states and communities
    - With stakeholder groups
    - With public engagement
- Continued improvements in monitoring, measurement and reporting, from both the environmental viewpoint and the economic viewpoint
- Data, data, data, easily accessible and available to all

We believe that these improvements will accelerate both the performance and the outcomes of the Initiative.

Closing with the AOCs, it appears that we are about halfway home in total investment, and progress is accelerating. We have invested about $8 billion of a projected total of about $16 billion. We need to finish the job, take stock of where we stand, then identify how to maintain and leverage the great gains we have made with these precious assets. There is a consensus among nearly all groups in our region that the restoration and maintenance of these great waterways is fundamental to our region's economic and social future.

Thank you for the opportunity to present today.

Statement of
Douglass R. Busdeker
On Behalf of
Ohio Agribusiness Association (OABA) and The Andersons, Inc.

House Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment
Hearing on:
"The Great Lakes Restoration Initiative: A Review of the Progress and Challenges in Restoring the Great Lakes"
Wednesday, September 30

"The Great Lakes Restoration Initiative"
Subcommittee on Water Resources and Environment

Testimony by Douglas R. Busdeker
Representing: Ohio AgriBusiness Association and The Andersons, Inc.

Chairman Gibbs, Ranking Member Napolitano and distinguished members of this subcommittee, thank you for the opportunity to be here today.

I am Douglas Busdeker of Pemberville, Ohio in northwest Ohio. I serve as a board member of the Ohio AgriBusiness Association (OABA) and am employed by The Andersons, Inc. in Maumee, Ohio. The Ohio AgriBusiness Association represents the Ohio crop nutrient industry, along with grain, feed, seed and crop protection industries. The Andersons, Inc., my employer, was founded in 1947 by Harold Anderson and built the first grain elevator in Maumee, Ohio. We provide merchandising, production and distribution of products and services to the agribusiness community. We are organized into six business groups: Grain, Ethanol, Turf & Specialty, Plant Nutrient, Retail and Rail. Currently, I serve as Senior Manager for Northern Farm Centers consisting of Ohio, Indiana and Michigan locations.

I am pleased to be here today to relate the many positive agricultural activities occurring in the Western Lake Erie Basin (WLEB). During my career I have been engaged with farmers/customers as one of many agricultural retailers in the region. I have extensive experience with in-field nutrient application. Following the large algal bloom that occurred in 2011 in the WLEB, many in the agricultural community recognized that agricultural retailers and farmers would need to play a bigger role and in finding solutions to address these water quality challenges. Healthy water quality - clean, fishable and drinkable water, is important to everyone including all of agriculture and we recognize that agriculture must be part of the solution.

Following the algal bloom in 2011, The Nature Conservancy partnered with several key agricultural retailers in the WLEB to develop the 4R Nutrient Stewardship Certification program. This voluntary program was focused on agricultural retailers since agronomists, Certified Crop Advisors, sales personnel and applicators were recognized as having a strong influence on nutrient use. Currently, seventeen key agricultural retailers have been certified representing 1,200,000 acres of crop land and 3,200 farmers in Ohio and Michigan. Another ten agricultural retailers are awaiting confirmation. Since program launch March 18th, 2014, a total of seventy one agricultural retailers are in the process or have indicated interest in becoming certified. The 4R Nutrient Stewardship Certification Program was founded on the The Fertilizer Institute's 4R Nutrient Stewardship principles of the **Right Source, Right Rate, Right Time and Right Place** and includes social, economic and environmental best management practices. SCS Global a respected

independent audit development firm was hired to create the 4R Nutrient Stewardship Certification Standard.

Audits include 41 specific objectives that must be achieved to become certified.

1. Initial Training and Ongoing Education
2. Monitoring of 4R Implementation
3. Nutrient Recommendations and Application

The governing body is the Nutrient Stewardship Council consisting of the following:

1. Agricultural Business (5 members, including at least one active grower),
2. Government (2 members),
3. Environmental NGOs (2 members), and
4. Universities/Research (2 members).

Best Management Practices (BMP)

Many newer bmp's are already occurring within the WLEB. Cover crops of cereal rye, annual rye, Austrian winter peas, radish, turnip, crimson clover, buckwheat, oats and others are growing in popularity. Equipment manufacturers are offering several new strip tillage machines to inject crop nutrients below the surface. Strip tillage provide a system that places nutrients 4-6" below the soil surface while not disturbing the complete soil surface structure causing greater erosion. Application of gypsum is quickly being adopted for a calcium and sulfur nutrient source, and to sequester phosphorus reducing dissolved reactive phosphorus run-off.

Conservation Efforts

Use of nutrient management plans to precisely determine the required nutritional balance for each crop is common. Commercial fertilizer nutrients are one of the single largest expense for traditional growers and over-use leads to undesirable financial implications. Improving soil health resonates with all farmers. The number of buffer strips, grass waterways, blind inlets, field tile with control structures, and two stage ditches continues to increase each year. There is still much work to be accomplished but conservation activities advance each year.

Ohio Legislation

On April 2, 2015 the Ohio Governor John Kasich signed Senate Bill 1 into law. SB 1 prohibits manure and fertilizer applications when fields are frozen, snow cover, saturated, or if there is a greater than 50% chance of at least one inch of rainfall in the next 24 hours. In addition, Ohio Senate Bill 150 which requires anyone applying fertilizer on 50 acres or more to become certified was unanimously passed by the legislature and signed by the Governor in May of 2014. The Ohio AgriBusiness Association fully supported passage of SB 1 and SB 150.

Research

Research has shown that algal blooms in the Western Basin of Lake Erie are predominately the result of excess dissolved reactive phosphorus (DRP) in our rivers and streams. While the exact source and why the increasing amounts of DRP is not clearly understood, research has shown that transport from agricultural land plays a significant role. During 2011 and again in 2015, intense rainfall increased surface and subsurface "field tile" flows. As was the case in 1970-80's when Lake Erie was in serious trouble, through research, farmers widely adapted new tillage techniques such as no-till and conservations tillage. These new practices remain in place today and contributed greatly to a reduction in soil erosion and particulate phosphate run-off. Additional research is needed to identify new bmp's that support a reduction of dissolved reactive phosphorus during periods of extreme rainfall. To that end, the fertilizer industry has committed $7 million

dissolved reactive phosphorus during periods of extreme rainfall. To that end, the fertilizer industry has committed $7 million to help establish a 4R Research Fund. The goal of the fund is to establish sustainability indicators and environmental impact data for implementation of 4R nutrient stewardship across North America. The fund provides a much needed resource with a focus on measuring and documenting the economic, social and environmental impacts of 4R nutrient stewardship. This effort will help expand the 4Rs beyond being solely an industry effort and towards becoming a viable strategy embraced by other important stakeholders to address cropping system productivity and concerns for nutrient losses into the environment.

Our Challenge

The challenges to the agricultural community are very complex and involve adapting cultural and nutrient practices that will minimize nutrient loss and maximize crop production. Research "on-the-farm" such as Ohio State/USDA ARS's 'Edge of Field" study is critical to finding solutions. Updating the Ohio "P-Risk Index" will be very important for identifying which best management practices will minimize phosphorus transport in this new environment. Farms in our region are legacy farms that have been passed down through several generation and each farmer has the clear intent of leaving our soils and water in better condition for the next generation.

Thank you again for the opportunity to provide you with an update on the many positive activities and projects occurring in the Western Lake Erie Basin as we seek solutions to improve water quality. We all share the goal of having clean water for many generations to come. I would be happy to answer any questions.

Testimony of Chad W. Lord
Policy Director, Healing Our Waters-Great Lakes Coalition
Before the House Committee on Transportation and Infrastructure's
Subcommittee on Water Resources and the Environment
"The Great Lakes Restoration Initiative: A Review of the Progress and Challenges in Restoring the Great Lakes"

September 30, 2015

Chairman Gibbs, Ranking Member Napolitano, members of the subcommittee – thank you for the opportunity to share the views of the Healing Our Waters-Great Lakes Coalition with you on the progress we're seeing and the challenges that remain in restoring the Great Lakes.

As you may know, the Healing Our Waters-Great Lakes Coalition is comprised of more than 120 environmental, conservation, hunting, and fishing organizations; museums, zoos, and aquariums; and businesses representing millions of people whose goal is to restore and protect North America's greatest freshwater resource – our Great Lakes. The Great Lakes are a global resource. Over 30 million people depend on them for their drinking water, and millions more benefit from the business, industry and commerce that is connected to them. Today, the lakes suffer from a legacy of toxic pollution, the introduction and spread of invasive species, and the loss and degradation of habitat. Our Coalition's goal is to continue to implement our region's restoration blueprint[1] to stop sewage contamination that closes beaches and harms recreational opportunities; clean up toxic sediments that threaten the health of people and wildlife; prevent polluted runoff from cities and farms that cause harmful algal blooms which poison drinking water; restore and protect wetlands and wildlife habitat that filter pollutants, provide a home for fish and wildlife, and support the region's outdoor recreation economy; and prevent the introduction of invasive species, such as Asian carp, that threaten the economy and quality of life for millions of people.

I don't think it's too bold to say that the Great Lakes Restoration Initiative is working. Because of the GLRI, the region has been able to undertake one of the world's largest freshwater ecosystem restoration projects. Non-governmental groups, industries, cities, states, and federal agencies are forging public-private partnerships to clean up toxic hot spots, restore fish and wildlife habitat, and combat invasive species—partnerships that may never have come together had it not been for the GLRI. The GLRI's size and scope means it plays a central role in successfully restoring and protecting the Great Lakes. Rather than just accelerating progress, it has actually catalyzed critical restoration action that likely would have never happened otherwise. The GLRI has organized an enormous region of the country to protect one-fifth of the world's surface drinking water on which more than 30 million people depend. It is indeed the "largest investment in the Great Lakes in two decades."[2]

This work is being done because cleaning up the Great Lakes is critical for the health and quality of life of the region. It also drives economic development – and jobs – in communities all around the basin. Investments in Great Lakes restoration are creating jobs and leading to long-term economic benefits for the Great Lakes states and the country. A Brookings Institution report shows that every $1 invested in Great Lakes restoration generates at least $2 in return, making Great Lakes restoration one of the best

[1] GLRC. 2005. "Great Lakes Regional Collaboration Strategy to Restore and Protect the Great Lakes."
[2] Accessed at http://www.glri.us/priorities.html

investments on the dollar in the federal budget.[3] Research from Grand Valley State University shows that the return for some projects is closer to 6-to-1.[4] The University of Michigan has also demonstrated that over 1.5 million jobs are connected to the Great Lakes, accounting for more than $60 billion in wages annually.[5] According to the Great Lakes Commission, more than 37 million people boat, fish, hunt, and view wildlife in the region, generating over $50 billion annually.[6] Great Lakes businesses and individuals account for about 29 percent of the U.S. gross domestic product, according to Bureau of Economic Analysis data.[7]

Jobs are being created by the efforts to clean up the Great Lakes and restore fish and wildlife habitat. These jobs include wetland scientists, electricians, engineers, landscape architects, plumbers, truck drivers, and many others. While we do not know how many jobs have been created to clean up the Great Lakes, it is likely in the thousands. Consider:

- 125 jobs were created for a $10 million project to restore fish and wildlife habitat in Muskegon Lake, a Great Lakes Area of Concern in Michigan.
- 177 people are employed to control the invasive sea lamprey in the Great Lakes, which costs the U.S. government around $20 million annually.
- 174 jobs were created, some of which were filled by at-risk youth, to remove dams and other barriers in a 150-mile stretch of the Milwaukee River system.

Specifically, stories like that of business owner Jim Nichols of Carry Manufacturing are increasingly common. Jim tells of how GLRI projects are adding new orders for his manufacturing business. Carry Manufacturing has manufactured water control equipment since 1987. Their employees are being kept busy building submersible pumps for GLRI projects that flood duck habitat or drain areas to re-establish native habitat for sport fishing and waterfowl hunting. The jobs add up when you begin counting the men and women at other companies who manufacture the pipes for the pumps, the control structures in which the pumps are housed, and the hunters, anglers, and wildlife watchers that benefit from the improved environment the pumps help create.

And these projects aren't just economic drivers. Great Lakes restoration projects are producing results across the region[8]:

- Two Areas of Concern – Deer Lake, Mich. and White Lake, Mich. – were delisted in 2014. Areas of Concern are the most-polluted harbors, rivers, and waterways in the region. The Presque Isle, Pa., Area of Concern was delisted in 2013. The management actions necessary for delisting Waukegan Harbor, Ill., Sheboygan Harbor, Wis., and the Ashtabula River, Ohio, have also been completed. The GLRI has accelerated the cleanup of toxic hotspots by delisting three formerly contaminated sites—in the previous two decades before the GLRI, only one site had been delisted.
- Between 2010 and 2014, 42 beneficial use impairments (BUIs) at 17 AOCs were removed in Illinois, Indiana, Michigan, New York, Pennsylvania, and Wisconsin, more than quadrupling the total number of BUIs removed in the preceding 22 years. BUI's include drinking water restrictions, beach closings, and degradation of fish and wildlife habitat. More BUIs have been removed since the GLRI began than between 1987 and 2009.

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[3] Austin, J., et al. 2007. "Healthy Waters, Strong Economy: The Benefits of Restoring the Great Lakes Ecosystem."
[4] Isely, Paul, et al. 2011. "Muskegon Lake Area of Concern Habitat Restoration Project: Socio-Economic Assessment."
[5] Michigan Sea Grant. 2011. "The Great Lakes: Vital to our Nation's Economy and Environment."
[6] Great Lakes Commission. 2007. "Great Lakes Recreational Boating's Economic Punch."
[7] World Business Chicago. 2013. "Great Lakes & St. Lawrence Region: 2013 Economy Profile Update."
[8] Data from EPA's 2015 Congressional Budget Justification and July, 2015, report to Congress

- From 2004 to 2009, the Great Lakes region was the only area in the country to show a gain in wetland acreage. Now the GLRI is building on that foundation with a goal to restore one million acres in the basin. So far, the FWS, NPS, NRCS, and NOAA (among others) have restored, protected, or enhanced over 150,000 acres of wetlands and other habitat.
- Federal agencies used GLRI support to increase the number of acres of farmland enrolled in Farm Bill conservation programs in priority watersheds by more than 70 percent.
- More than 500 dams and barriers were removed, allowing fish to access more than 3,400 miles of rivers.

These numbers are impressive. The stories behind them illuminate the results and accomplishments we are seeing. The Coalition has documented more than 100 restoration success stories across the region.[9] Among them:

- Duluth, Minn. Removing 200,000 cubic yards of toxic mud from the bottom of Stryker Bay has made the bay safe to swim in once more and fish and wildlife are returning. Six acres adjacent to the bay have also been cleaned up and will be redeveloped into an office park hosting a fabrication shop and a warehouse.
- Duluth, Minn. Removing 11,000 cubic yards of wood waste from the wetland at Grassy Point created wildlife habitat that attracts dozens of bird species every spring. New trails provided public access to the site.
- Marysville, Mich. The city of Marysville replaced a failing seawall with a natural, sloping habitat and wetland area. The sloped shore has reduced the destructive power of the waves in the river while also addressing the loss of shoreline wetlands along the St. Clair River. The project, which provides valuable fish and wildlife habitat, received an award from the American Society of Civil Engineers.
- Near Green Bay, Wis. At the Brickstead Dairy, cover crops have been planted on 100 acres, reducing runoff and sedimentation into waterways and improving water quality. Over three miles of grassed waterways are planted and edge-of-field and in-stream monitoring stations have been installed to measure the water quality improvements.
- Near Green Bay, Wis. Restoring barrier islands in Green Bay is providing fish habitat that has allowed bluegill, largemouth bass, and pumpkinseed fish to return. On the island chain, nesting water birds, shorebirds, and other invertebrates are benefiting from the newly constructed land.
- Ashtabula, Ohio. At the Ashtabula River in Ohio, a sediment cleanup and habitat restoration project has restored the lower two miles of the river and advanced efforts to get it de-listed as a Great Lakes Area of Concern. The project has improved water quality and deepened the river channel, making the lower Ashtabula suitable again for maritime commerce, fishing, and recreation boating.
- Northwest, Indiana. The Grand Calumet River in Indiana, which flows through a heavily industrialized area south of Chicago, was for years considered America's most polluted river. Thanks to a major cleanup, a large wetland was restored and more than 575,000 cubic yards of toxic mud was removed from the Lake Michigan tributary. The restoration project addressed pollution that had led to fish consumption advisories, drinking water restrictions, beach closings, habitat destruction, and an array of other environmental problems.
- Freedom, N.Y. At Clear Creek in Freedom, New York, excess stream erosion and sediment, in-stream barriers, elevated water temperatures, and competition from invasive fish restricted brook trout to a few tributaries in the watershed. A Great Lakes Restoration Initiative project restored 1,200 linear feet of in-stream habitat and re-established fish passage over a sheet-pile grade control structure, reconnecting six miles of prime trout habitat.

[9] Found at www.healthylakes.org/successes/.

Even these results may not fully capture what is actually happening on the ground. In just one coastal wetland project in New York, one of our members was able to describe these results: 1) habitat modifications led to a remarkably positive response by fish. Diverse species of fish quickly returned to the restored site; 2) the restored sites led to increased muskrat populations; 3) wetland vegetation showed greater species diversity, richness, and evenness on habitat mounds compared to before; 4) the restored habitat was used by a greater diversity of indicator marsh birds, and observations suggest that marsh birds may have return to the restored sites within two years following restoration; 5) the restored sites supported the greatest diversity of reptiles and amphibians; 6) community, economic, and education outreach efforts were strong components of these projects, which provided opportunities for the local community to gain a better understanding of the Great Lakes system.

How the region is accomplishing all this work is as impressive as what has been done. The GLRI, which President Obama first proposed for fiscal year 2010, is a model for large, landscape-scale restoration. It ensures that the focus remains on the highest regional priorities that were identified through a large stakeholder process in 2005.[10] It could also provide an outlet for the United States to meet its obligations under the new Great Lakes Water Quality Agreement with Canada. The GLRI is a critical component towards ensuring that the goals we set for ourselves in both the agreement and comprehensive plan can be achieved.

Additionally, the GLRI sought to fix problems the Government Accountability Office identified in 2003 when it complained that, in general, there was inadequate coordination among federal agencies and between federal and non-federal stakeholders. Now, the EPA can quickly convert the funding it receives to supplement restoration activities by passing it through to other federal agencies like the Fish and Wildlife Service, NOAA, NRCS, and the National Park Service, so they can direct it through their existing, authorized programs at the region's highest needs. This structure allows for funds to move quickly from EPA through the interagency agreements EPA has with the other agencies and onto the ground to complete important restoration work. This model also ensures accountability through the establishment of an "orchestra leader" (EPA), helps accelerate progress, and avoids potential duplication, all of which help save taxpayers money while focusing efforts on the highest, consensus-based priorities.

The Government Accountability Office seemed to recognize these benefits too in its most recent report.[11] GAO found that the EPA and the other federal agencies had "allocated almost all of the $1.68 billion available for the GLRI" in the reporting period examined.[12] It also highlighted how the GLRI has changed how the federal agencies plan for their work. In the past, each agency identified its own GLRI work. Now, through the use of subgroups, agencies meet and agree on strategies for dealing with restoration issues before identifying the work each agency will undertake to achieve common goals.[13]

Even with the tremendous strides the region has made in addressing many of the issues it faces in implementing an effective and efficient Great Lakes restoration program, we know that there is still work to be done to improve program delivery. No program is perfect. The GLRI should be continuously reviewed and changes made to reflect the changes to the lakes, deficiencies that have arisen or have yet to be addressed, or new threats that have emerged.

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[10] Great Lakes Regional Collaboration

[11] GAO. 2015. "Great Lakes Restoration Initiative: Improved Data Collection and Reporting Would Enhance Oversight."

[12] GAO report. 2015. Pg. 18. GAO used an obligation benchmark versus an outlay benchmark. It is important to note the reasons GAO highlighted for why federal agencies may not have expended all their GLRI funds: 1) Many projects take several years to complete; 2) GLRI funds are available for obligation two fiscal years (the year the appropriation was made and the following year); 3) GLRI funds can be used for 7 additional years to liquidate and adjust those obligations; 4) final payments are made from the agencies to recipients after projects are completed; 5) lastly, weather events caused some GLRI projects to be completed later than planned

[13] GAO report. 2015. See page 34.

Making these adjustments is important because the health of the Great Lakes continues to be seriously threatened by problems such as sewage overflows that close beaches, toxic pollution that poses a threat to the health of people and wildlife, algal blooms that harm local drinking water supplies, and invasive species that hurt fish and wildlife populations and our outdoor recreation economy. While we have cleaned up four AOCs, there are still 27 more to go. Algal blooms in Lake Erie and other lakes still result in cancelled charter boat tours and closed beaches. Communities are still dealing with legacy pollutants that have led to drinking water restrictions, beach closings, and fish consumption advisories. Our work is not done. Maintaining federal support is needed.

The Coalition's scientific advisers also point to emerging concerns that we are just now beginning to understand. These concerns join a long list of multiple stresses that the Great Lakes continue to face, even though the GLRI is working to protect the lakes:

- Habitat loss, including loss of coastal wetlands
- Nutrient loadings (both point and nonpoint source) and impacts, such as harmful algal blooms and hypoxia or dead zones
- Toxic chemical loadings (both point and nonpoint source) and impacts, including chronic exposures and potential effects in certain fish and wildlife
- Hydrological changes such as hardening of shorelines, damming of tributaries, and lake level regulation
- Fishery pressures, including overfishing
- Nonnative species introductions, including inadvertent introductions of species such as zebra and quagga mussels with significant ecological implications
- Land use changes, including from forest or grassland to silviculture and agriculture, and resulting impacts due to changes to flow regimes, nutrients and sediment loads
- Coastal development, which cuts across several aforementioned stresses, including habitat loss, land use changes, and hydrological changes.[14]

Perhaps no other emerging issue is as serious as climate change. There is already evidence of climate change impacts in the region, including surface water temperatures and changes in the frequency and intensity of storm events. Ongoing, human-induced climatic changes will only bring additional changes to the lakes with implications for existing stresses. Increased storm intensity and frequency can lead to increased loads of nutrients and other contaminants such as sediment, pathogens, and chemicals of emerging concern. This pollution can come from both nonpoint sources like agricultural fields and point sources like combined and sanitary sewer overflows in urban areas. These changes will challenge infrastructure in both rural and urban areas. The general warming of waters due to climate change also has implications for both new aquatic invasive species threats (e.g. *Hydrilla*, water lettuce) as well as existing aquatic invasive species that will have new potential to expand their range northward. Species already present in the lower lakes such as water chestnut, European frog-bit, and flowering rush all are poised to spread northward. Other climate impacts include alterations to lake stratification with implications for hypoxia/anoxia, organismal health/behavior, and internal nutrient cycling. Finally, climate change has implications for water levels and supplies with ongoing questions about likely overall impacts decades in the future (e.g., generally greater or lesser basin supplies throughout the basin and implications for lake levels and system connectivity). How these changes impact the people living in the basin is of great concern.

The Great Lakes are also facing a new host of chemicals little understood just a decade ago. Nanoparticles, pharmaceuticals, personal care products, and brominated flame retardants are being

[14] See for example Bails et al. 2005, " "Allan et al. 2013. Joint Analysis of Stressors and Ecosystem Services to Enhance Restoration Effectiveness. "Proceedings of the National Academy of Sciences of the United States of America." 110: 372-377.

detected with increasing frequency. There are ongoing questions that remain unanswered about these new pollutants like their sources, cycling (including levels in different media), and exposures and effects, including potential implications of multiple chemical exposures.[15]

So, what changes should be made to the GLRI so the people in Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania and Wisconsin can continue to protect and restore the Great Lakes?

To begin with, this Congress should remove all doubt that the region is on the right path and pass H.R. 223, the Great Lakes Restoration Initiative Act. Currently, EPA uses its existing authority and the legislative language provided by appropriators as the basis for its coordinating role. Passing legislation creates greater certainty for the program and allows us to see the job through to the end.

In particular, without an authorization, Great Lakes restoration efforts are at risk from changing administrative and congressional priorities. Congress has not passed legislation to make the Great Lakes Restoration Initiative and other Great Lakes programs a long-term priority. Authorizing legislation will provide a legislative vehicle for Congress to make the necessary investments in the Great Lakes annually for years to come.

The GLRI Act helps ensure future success by targeting resources efficiently and effectively to improve water quality, protect the health of people and wildlife, create jobs, and uphold the region's quality of life. It helps invest resources in the right areas and the right places. It facilitates continued regional collaboration. It helps better monitor restoration progress and ensure that restoration efforts are guided by science so that efforts can be adjusted to make them as effective as possible. It ensures that restoration efforts are transparent and allow for citizen input.

While H.R. 223 authorizes the GLRI for five years at current funding levels, it does not cover a few key priority areas that were in past bills and this difference should not be ignored by Congress. For example, the Great Lakes National Program Office (GLNPO) needs reauthorization. GLNPO is the primary office within EPA for handling Great Lakes matters, including the GLRI, the Great Lakes Water Quality Agreement (GLWQA), the Great Lakes Legacy Program, Remedial Action Plans for Areas of Concern and Lakewide Management Plans. The Great Lakes Legacy Program also needs to be reauthorized. The Great Lakes Legacy program was first authorized in 2002 and has been extremely successful at removing contaminated sediment from U.S. Areas of Concern (AOC). The Legacy program was last reauthorized through 2010; however, appropriators have continued to fund the program, currently as a subset of the GLRI. We believe the authorization of the Legacy program should be extended.

Lastly, while these don't necessarily demand congressional action, we want to highlight both the Federal Great Lakes Interagency Task Force and the Great Lakes Advisory Board. The Great Lakes Interagency Task Force (IATF) brings together eleven U.S. Cabinet and federal agency heads to coordinate restoration of the Great Lakes among the different agencies. The IATF was created by President George W. Bush under Executive Order 13340 in 2004 and is unique in that it asks the federal agencies to coordinate more regularly on Great Lakes matters. The advisory board was put together in order to represent a broad range of interests to provide EPA and the other federal agencies with stakeholder input on Great Lakes protection and restoration priorities.

The administration can also take important steps in addressing deficiencies.

[15] Further research on these issues (including more systematic monitoring for numerous CECs, potential human health and ecological impacts, and potential for green chemistry-type approaches to address the issue in a more proactive manner) is needed in the basin.

First, we believe that the investments of the GLRI must not be undermined by poor policy choices made as part of any regulatory process. Congress has graciously provided more than $1.9 billion for over 2,500 projects to clean up toxic hot spots, restore wildlife habitat, and keep beaches open, among many other important activities. Poor policy choices on a range of activities – either new or ongoing – can undercut restoration activities, delay results, and lead to inefficient uses of the limited resources entrusted to the region. For example, continuing to dispose of dredge material in the open waters of Lake Erie can undermine attempts to end algal blooms there. Unchecked energy development can lead to water impairments that reverse water quality or habitat improvements. Inadequate ballast water regulations could lead to new aquatic invasive species, dealing a blow to the ongoing work of managing and controlling impacts from existing invasive species throughout the region. We view policy setting to be a part of the restoration agenda and affects the success or failure of us reaching our goals.

Second, we have supported the GLRI Action Plan's consolidation of the Great Lakes Regional Collaboration Strategy to Restore and Protect the Great Lakes' eight priorities into the current Action Plan's five focus areas: cleaning up toxics and Areas of Concern, combating invasive species, promoting nearshore health, restoring wetlands and other habitat, and tracking progress.

We also supported the federal Task Force's further refinement of the focus areas into three key priorities under them: accelerating the cleanup of Areas of Concern, reducing harmful algae in three priority watersheds, and preventing the introduction of new invasive species.

We support the new Action Plan continuing its focus on these three priority areas. These areas continue to be the biggest sources of stress for the lakes contributing to what scientists have described as "ecosystem breakdown…where intensifying levels of stress from a combination of sources have overwhelmed the natural processes that normally stabilize and buffer the [Great Lakes] system from permanent change."[16] The three priority areas reflect the causes of this ecosystem breakdown because they either represent the severe historic damage caused to the lakes nearshore (AOCs) or the new stresses from human-induced sources (invasive species or nutrient pollution). We believe that it is appropriate for the GLRI to continue prioritizing them in the next plan, especially since the problems they represent took decades to develop and will take decades more of focused attention to solve.

Specifically, for these priority areas:

AOCs. We believe that the implementation of the current Action Plan has generally struck the right balance between focusing on completing all management actions in some AOCs to delist them while at the same time investing in others that may not be taken off the cleanup list for several years. We need to take advantage of getting work done in targeted AOCs where it is possible to move quickly in taking all the actions necessary to delist. However, we must get ready in future years to take similar action in other AOCs. Supporting some projects in all AOCs helps ensure we are lining up future progress.

Nutrients. We support greater targeting of priority watersheds for nutrient reduction work with GLRI and other conservation funds. Our Coalition's Technical Advisory Committee identified five areas that are particularly important because they represent areas that suffer from multiple assaults.[17] Our own work demonstrates our willingness to invest in targeting priority areas for restoration and protection and we continue to believe in that approach. We believe that given how long it will take to have an impact on the problem we need to continue prioritizing areas to make meaningful progress. Importantly, how we measure progress in these areas will be critical. We would like to see a tighter link to water quality

[16] Bails, et.al. 2005. "Prescription for Great Lakes Ecosystem Protection and Restoration." P. 1

[17] The five focus areas the Coalition identified are St. Louis Bay and St. Louis River; Chicagoland (which includes Northwest Indiana; Saginaw Bay, Western Lake Erie; Eastern Lake Ontario. Accessed on June 27, 2013: http://healthylakes.org/press-releases/coalition-targets-5-great-lakes-restoration-priority-areas-2/

indicators as measures of progress in this focus area. We also want to see the best practices used in these priority areas identified and shared with the wider region so everyone can take advantage of the best methods to reduce nutrient runoff. Recent research suggests that the current suite of best management practices may not be sufficient for tackling the current drivers of dissolved phosphorus loads, so an investment in on-the-ground testing and modeling of new approaches will be key.

We would also like to see clear agreement between U.S. EPA and the U.S. Department of Agriculture toward the achievement of a common set of water quality objectives in priority watersheds. This must include a clear understanding of anticipated timeframes for achieving these objectives.

Invasive Species. We believe that this priority should focus on the control and management of invasive species within the region. Prevention should be addressed through robust regulatory action, which is outside the purview of the Action Plan, but, as is highlighted above, must be coordinated with the goals and actions being identified over the next five years so as to not undermine the GLRI's investments. We also acknowledge that funding for prevention activities is available through other agency programs and does not have to be funded out of the GLRI. This is particularly true for Asian carp activities where prevention funds have been provided in the Army Corps and Fish and Wildlife Service's budgets. We believe that future carp prevention activities should increasingly be funded through the base budgets of the federal agencies leaving the GLRI to focus on other priorities.

However, while focusing on the three priorities is important, they are not the only problems or stresses facing the lakes. We expect the GLRI to also continue investing in all five focus areas and to fund activities in all these areas as a prescription for recovery[18] and are glad that the Interagency Task Force will be creating additional subgroups to discuss and agree on scope and funding for agency work in the other focus areas.

Third, the selection and prioritization process within the GLRI for projects outside of AOCs is well rounded and has functioned well. In particular, HOW supports project selection criteria that emphasize projects that are able to advance applicable ecological priorities of existing plans. Such comprehensive planning has been done throughout the Great Lakes ecosystem that linking the goals of the new GLRI Action Plan to those of existing plans is a smart and efficient use of federal dollars and will ensure sufficient coordination between efforts.

We also continue to believe that project selection criteria should include a project's ability to adequately incorporate climate smart practices. Projects that accomplish goals from multiple focus or priority areas should be prioritized. Selection criteria should also favor projects that include approaches to monitor and assess outputs and outcomes and when working in under-served communities, project selection criteria should include a project's ability to adequately address environmental justice and human health issues as well as a description of how the local community will be meaningfully engaged. We have seen progress in the integration of these criteria for some request for proposals (most notably in monitoring requirements from NOAA and the National Fish and Wildlife Foundation). The new action plan also calls for incorporating climate resiliency criteria for GLRI projects.

In addition, the GLRI should prioritize a portion of funding for new and innovative projects that have the ability to translate to other locations throughout the basin if successful. There are many restoration problems we know how to solve, but there are many we do not. We must be willing to invest in innovative approaches that have the potential to greatly benefit the system in the future. We must also be willing to assess the success of these new approaches through coupled research and monitoring and be equally willing for them to fail and learn lessons from that failure.

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[18] Bails. Pp. 11-15

Lastly, to the extent possible, we'd like to see more consistency when request for proposals are released each year. A consistent, annual date will assist non-governmental organizations and their partners with their long-term planning.

Fourth, improving how we report on success is vital. Generally, coalition groups appreciate and support the integration of monitoring requirements for projects that are being undertaken. Successful monitoring at the local project scale has assisted HOW groups in documenting short- and long-term successes of their projects (see discussion about New York project above). It allowed them to evaluate the lessons learned and then apply those lessons to other projects. However, while monitoring exists at a very local level, and some evaluation is occurring, it's far from clear how comprehensive this system is and how these local efforts add up to a well-monitored, scientifically-assessed system. In other words, we remain worried that we aren't as effective on larger lake-wide scales at monitoring, scientific assessment, and project evaluation.

Indeed, monitoring projects is a key element of tracking success. To target federal dollars effectively, we must know how existing projects are impacting the system. We do not believe that every project must be monitored, but more monitoring and scientifically evaluating a careful subset of them will help ensure we understand whether we are achieving the ecological outputs (e.g., number of acres restored or toxic sediment remediated) and outcomes (e.g., water quality improvements), and allow us to learn as we restore. Even with appropriate monitoring and evaluation at the project (short term) scale, there remains a critical gap between these efforts and the long-term, lake-wide indicators. There needs to be greater support for scientific monitoring and assessment at sub-basin (medium term) scales (i.e. smaller than entire lakes). These assessments should be able to tell us if the collection of projects in that region are improving ecological conditions on time scales appropriate for adaptive management.

This work requires additional GLRI resources. It also requires, to the extent possible, a stronger commitment that funds for monitoring will be available beyond just a couple of years. This work must also not be driven completely be the federal agencies. The region is rich in institutions of higher learning and strong non-governmental partners with incredible science capability. Federal agencies must demonstrate that they value this expertise and consult more deliberatively with these partners in accomplishing related science-based and research goals.

Our bottom line: we want to see the incorporation of a robust science-based restoration framework that involves all stakeholders in GLRI implementation. Our Coalition has called for this since 2010 when we said:

> Although we believe that the majority of GLRI funds should be targeted towards restoration work, we acknowledge that some GLRI funds must be used for basic research and monitoring to ensure the Initiative is successful. However, GLRI-funded research should be part of a detailed research agenda that illustrates a direct connection to improving the health of the Great Lakes ecosystem. This knowledge must also be applied to future projects and programs.[19]

In 2011, we wrote the following:

> Although the bulk of Federal GLRI investments should continue to be focused on the highest priority on-the-ground, in-the-water activities that produce the greatest measurable restoration results, some funding should be set aside for basic science, research, and monitoring. Investments in these areas are important because they tell us how to adapt plans. They make sure

[19] Healing Our Waters-Great Lakes Coalition. August 30, 2010. Written communication to Cameron Davis and Gary Gulezian.

> we are continuing to prioritize the most needed projects and are using the most effective implementation methods. Because research and on-the-ground work go hand in hand, it is important that both receive resources. It is also important that funding for grants goes to colleges, universities, and other groups that are also doing important research and does not just stay at Federal agencies.[20]

This research and monitoring agenda can be accomplished through a strategy that addresses two efforts: first, integrate science support for adaptive management through comprehensive project assessment and evaluation; and second, provide scientific support that guides and improves restoration efforts. Any adaptive management framework must:

- Help the region understand and assess the cumulative impacts of the hundreds of restoration projects funded by the GLRI at sub-basin, individual lake, and basin-wide scales.
- Increase the efficiency and cost-effectiveness of restoration activities.
- Lead to understanding the actions necessary to facilitate implementation of effective adaptive management approaches in future years.
- Maximize the success of restoration projects by implementing science-guided corrective actions.
- Advance restoration science by improving techniques and methods.
- Identify key knowledge gaps associated with each focus area.
- Provide a single clearinghouse that integrates project results and enables resource managers to better analyze and prioritize subsequent restoration actions.
- Include every stakeholder with an interest in the entire program to maximize buy in and to help shape monitoring and modeling choices around the framework.

There are several examples of this science integration that can serve as models. Some are external and focused at the program scale, such as those associated with restoration efforts in the Chesapeake Bay, Everglades, and Puget Sound. Others can be found within the region at the project scale, such as the multi-sector effort to restore native fish spawning habitat in the Lake Huron to Lake Erie Corridor connecting channels. The key features of these efforts are:

- Science and action that are coupled, iterative, and incorporated directly into restoration
- Successive projects that build on knowledge developed from previous projects
- Projects consider multiple stressors (i.e., wetland loss and climate change)
- Projects are based on existing restoration plans and considers impacts beyond the individual project site
- Successive projects are both more cost-efficient and effective
- Project teams are comprised of federal, state, tribal, academic, private sector and non-governmental partners, all as appropriate, with each contributing their expertise

Fifth, accountability has been a major theme of the GLRI since its inception. The original action plan clearly stated:

> The Initiative is an unprecedented opportunity to heal the ecosystem. With this unprecedented opportunity comes unprecedented responsibility, however, for *all of us* to demonstrate we are achieving the results intended in the Action Plan. We will use transparent means of demonstrating how public dollars are being invested as directed by the best available science.[21] (Emphasis in original.)

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[20] Healing Our Waters-Great Lakes Coalition. August 12, 2011. Written communication to Cameron Davis and Susan Hedman.
[21] White House Council on Environmental Quality, et al. "Great Lakes Restoration Initiative Action Plan: FY2010-FY2014." P. 5

Congress also instructed EPA to "Establish a mechanism for monitoring and reporting on progress."[22] Originally, EPA created the Great Lakes Accountability System (GLAS) to fulfill this responsibility. GLAS was designed to be the "primary mechanism for collecting information to monitor and report on GLRI progress" and present the "'big picture' of who is receiving GLRI funds and what they are doing with the money."[23] For a long time GLAS did not effectively track how the GLRI was being invested in the region. GLAS was subsequently updated to reflect the breadth of funded projects from all government sources. It also included a useful map detailing the location of where the project is taking or has taken place. However, as the July 2015 GAO report pointed out, GLAS still had problems. Some information was inaccurate and there weren't sufficient data controls. A new system was recently inaugurated to take the place of GLAS. We haven't evaluated the new system, but we will be looking at it critically to see if it adequately tracks project data to ensure that we are measuring project outcomes that can tell us what impact Great Lakes restoration efforts are having on the lakes. We will also look to see if the data being collected is such that it can be used by all restoration stakeholders in planning future projects.

Lastly, although we believe that having consistent priorities to invest in over time is critical to realizing tangible progress, buy-in from the Great Lakes community is also critical to the overall success of the GLRI program. Therefore, the federal agencies – in the spirit of the Great Lakes Regional Collaboration that brought 1,500 people together to produce our restoration blueprint – must consistently engage the public on an annual basis to understand what progress has been made the previous year and whether the restoration priorities of the Great Lakes community, and therefore the GLRI, should change based on those assessments. It's doubtful that significant modifications will be required on such a short time scale. However, it's important to fully engage the non-federal stakeholder community on a regular basis to ensure that not only federal agencies but state, local, non-governmental, tribal, agricultural, and commercial interests subscribe to restoration priorities as well. This will assist in aligning resources at all levels of government and ensuring well-coordinated implementation. It will also ensure that the federal agencies stay open to better ways of doing things. There are different ways to achieve this goal, such as creating coordinating committees for each focus area modeled on the existing Asian Carp Coordinating Committee, or leveraging the work of the Great Lakes Water Quality Lakewide Management Plans (LaMPs). The federal agencies do not have all the answers, and the best way for the region to feel invested in the implementation of Great Lakes agenda is for all stakeholders – Tribes, states, cities, NGOs, etc. – to assist in developing the GLRI work plan each year.

The Great Lakes Restoration Initiative is working, and with ongoing adjustments it will stay focused on the most pressing problems facing the Great Lakes today. This simple initiative has given the region an opportunity to protect and restore the world's largest freshwater ecosystems. It has spurred public-private partnerships between non-governmental groups, industries, cities, states, and federal agencies. Their work is resulting in cleaned up toxic hot spots, restored fish and wildlife habitat, and prevented fertilizer runoff. The GLRI's size and scope gives it a central, albeit not the only, role in our region's success for restoring and protecting the Great Lakes. It's a good program for which this subcommittee should be proud. We hope you will join us in our work, if only because the longer we wait the more difficult and expensive the work becomes.

Thank you again for inviting me to share the HOW Coalition's views with you.

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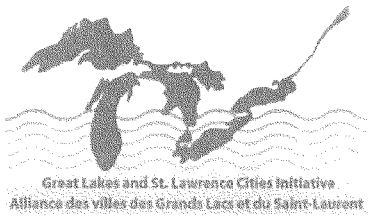
[22] H.Rpt. 111-180, P. 102

[23] U.S. EPA, "Great Lakes Restoration Initiative Accountability System User Guide," V. 1.11, P. 2



August 28, 2015

The Honorable Thad Cochran
Chairman
Appropriations Committee
United States Senate
Washington, D.C. 20510

The Honorable Barbara Mikulski
Ranking Member
Appropriations Committee
United States Senate
Washington, D.C. 20510

The Honorable Lisa Murkowski
Chairwoman
Appropriations Subcommittee on Interior,
Environment and Related Agencies
United States Senate
Washington, D.C. 20510

The Honorable Tom Udall
Ranking Member
Appropriations Subcommittee on
Interior,
Environment and Related Agencies
United States Senate
Washington, D.C. 20510

The Honorable Hal Rogers
Chairman
Appropriations Committee
United States House of Representatives
Washington, D.C. 20515

The Honorable Nita Lowey
Ranking Member
Appropriations Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Cochran, Chairwoman Murkowski, Chairman Rogers,
Senator Mikulski, Senator Udall, and Congresswoman Lowey:

The Great Lakes and St. Lawrence Cities Initiative (Cities Initiative) is a coalition of over 110 U.S. and Canadian cities representing over 17 million people, and is committed to the protection, restoration, and long term sustainability of the Great Lakes and St. Lawrence. As part of that commitment, its member cities have a strong record over many years of dramatically reducing combined sewer overflows (CSO) and releases of untreated wastewater to the Great Lakes, and will continue those reductions into the future. The ratepayers in our cities are investing billions of dollars in these efforts and in most instances are working under the Congressionally approved CSO Control Policy.

Section 428 of Senate Appropriations Bill 1645 to require elimination of CSO's is counter-productive and would lead cities and their ratepayers to expend billions of dollars to reach an unrealistic level of zero discharge of this type of pollution. It is well recognized that the cost effectiveness of these expenditures to reach zero discharge and the resulting water quality benefits are very limited. Reaching such a level is even more difficult because of climate change, with more intense rainfall events stressing already aged infrastructure more than ever before and at a time when funding for these investments is exceedingly scarce.

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www.glslcities.org / @GLSLCities
Mitch Twolan, Mayor of Huron-Kinloss, Chair
Denis Coderre, Mayor of Montréal, Vice-Chair
Paul Dyster, Mayor of Niagara Falls, New York, Secretary-Treasurer

We urge you not to pass Section 428 of SB 1645. Cities are moving forward aggressively to reduce CSOs to the lowest possible level, and to implement many other programs to enhance one of the world's greatest freshwater treasurers, the Great Lakes.

Thank you for considering our comments on this very important matter and please contact me at david.ullrich@glslcities.org or 312-201-4516 with any questions you might have.

Sincerely,

David A. Ullrich

David A. Ullrich, Executive Director
Great Lakes and St. Lawrence Cities Initiative

cc. Great Lakes Congressional Delegation

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Mitch Twolan, Mayor of Ha[illegible]ckfess, Chair
Denis Coderre, Mayor of M[illegible]al, Vice-Chair
Paul Dyster, Mayor of Niagara Falls, N[illegible]ork, Secretary/Treasurer

NACo National Association of Counties

NATIONAL LEAGUE of CITIES

THE UNITED STATES CONFERENCE OF MAYORS

NARC
Building Regional Communities
National Association of Regional Councils

September 28, 2015

The Honorable Thad Cochran
Chairman, Appropriations Committee
United States Senate
Washington, DC 20510

The Honorable Barbara Mikulski
Ranking Member, Appropriations Committee
United States Senate
Washington, DC 20510

The Honorable Hal Rogers
Chairman, Appropriations Committee
U.S. House of Representatives
Washington, DC 20515

The Honorable Nita Lowey
Ranking Member, Appropriations Committee
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Cochran, Ranking Member Mikulski, Chairman Rogers and Ranking Member Lowey,

On behalf of the nation's counties, cities, mayors and regions, we write to express our concern over provisions in the Senate's proposed Fiscal Year (FY) 2016 Interior, Environment and Related Agencies Appropriations Bill that, if enacted, would have costly consequences for communities and ratepayers throughout the Great Lakes region. We are also concerned about the national implications and precedent setting nature of this language, and therefore urge you to strip Section 428 from any final appropriations package that Congress enacts.

Communities throughout the Great Lakes region care deeply about water quality and rely on the clean and safe water in the Great Lakes for drinking water supplies, recreational opportunities that promote tourism, and commercial activity that provides the economic engine for many local economies and jobs. Protecting water quality in the Great Lakes is a top priority for local officials throughout the region, which is why communities have invested billions of dollars over the past several decades to update and modernize their clean water infrastructure.

Local communities have made these investments in compliance with the 1994 Combined Sewer Overflow (CSO) Control Policy that Congress codified in 2001. Section 428 expressly contradicts and undermines that Policy by requiring communities to revise their Long Term Control Plans, developed in accordance with the 1994 CSO Control Policy, to achieve a near impossible goal of zero overflows—at an additional cost of tens of billions of dollars to communities and ratepayers. Additionally, the proposed provision would prohibit communities from utilizing an important

operations tool that safeguards the integrity of their wastewater treatment systems during periods of extreme wet weather, thereby imposing unnecessary additional costs by handcuffing communities as they attempt to comply.

This language sets an alarming precedent for all communities addressing CSO issues and negotiating compliance levels with the U.S. Environmental Protection Agency. Our concern is that communities across the country could be held to this near impossible standard of zero overflows into other sensitive or significant waterbodies. These considerations are already in place under the 1994 Policy and should not be rewritten in an appropriations bill.

Moreover, these costly provisions are included in a spending package that also proposes to cut funding for the Clean Water State Revolving Fund nearly 30 percent. Imposing additional regulations on communities, while cutting vital infrastructure financing programs that assist with compliance, is tantamount to an unfunded federal mandate that ignores the current state of our nation's water infrastructure needs.

As representatives of local officials with the responsibility of allocating limited taxpayer dollars to address pressing public policy challenges, we strongly oppose Section 428 of the Senate's FY16 Interior, Environment and Related Agencies Appropriations Bill for the aforementioned reasons and urge you to strike these provisions from the final spending package.

If you have any questions, please contact any of our staff: Julie Ufner (NACo) at jufner@naco.org; Carolyn Berndt (NLC) at berndt@nlc.org; Judy Sheahan (USCM) at jsheahan@usmayors.org; Joanna Turner (NARC) at joanna@narc.org.

Sincerely,

Matthew D. Chase
Executive Director
National Association of Counties

Clarence E. Anthony
CEO and Executive Director
National League of Cities

Tom Cochran
CEO and Executive Director
The U.S. Conference of Mayors

Joanna L. Turner
Executive Director
National Association of Regional Councils

Cc: The Honorable James Inhofe, Chairman, Senate Environment and Public Works Committee
The Honorable Barbara Boxer, Ranking Member, Senate Environment and Public Works Committee
The Honorable Bill Shuster, Chairman, House Transportation and Infrastructure Committee
The Honorable Peter DeFazio, Ranking Member, House Transportation and Infrastructure Committee

September 23, 2015

The Honorable Harold Rogers
Chair
Appropriations Committee
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Nita Lowey
Ranking Member
Appropriations Committee
U.S. House of Representatives
Washington, D.C. 20510

The Honorable Ken Calvert
Chair
Appropriations Subcommittee on Interior,
Environment and Related Agencies
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Betty McCollum
Ranking Member
Appropriations Subcommittee on Interior,
Environment and Related Agencies
U.S. House of Representatives
Washington, D.C. 20515

Dear Representatives:

The American Water Works Association (AWWA) urges the committee to remove Section 428 from S.1645, a provision that would require Clean Water Act primacy agencies to re-write permits for publicly owned treatment works. By establishing a new and immediate standard for treatment of wet weather flows, and by setting a new and immediate deadline for combined sewer overflow abatement, this legislation will undo decades of federal, state, and local government planning, design, and construction. These provisions will throw into upheavel local water infrastructure investment strategies throughout the Great Lakes Basin.

AWWA's members are deeply committed to protecting our sources of drinking water, protecting the environment and addressing the infrastructure challenges to achieve those goals. To that end, communities across America are prioritizing investments that balance public health protection, levels of service and affordability of water service. This legislative directive, if retained, would upend the current financial balance endorsed by Congress, states, and the courts, and in doing so, have severe impacts on rate payers in the affected communities. The resulting impacts on wastewater rates would translate into less

opportunity to make other needed investments, including drinking water infrastructure; fewer resources for green infrastructure solutions; less capital to advance regionally significant investments; and reduced capacity for plant expansions to promote economic development. Each of these impacts will have secondary consequences for communities in and adjacent to affected water basins.

In some instances, setting a lofty goal is necessary to advance a cause. In this instance, the necessary work to protect water quality is under way. It must occur at a pace that communities can afford to bear, particularly when water service is already a challenge for many households. AWWA asks that the committee remove this section from S. 1645 and work with the committees of jurisdiction on water policy to advanced water infrastructure solutions which meet recognized needs and enjoy broad support.

Thank you for your attention to AWWA's concerns. If we can be of assistance in this or other matters please contact me or Tommy Holmes, AWWA Director of Legislative Affairs at (202) 326-6128 or tholmes@awwa.org.

Best regards.

G. Tracy Mehan, III
Executive Director for Government Affairs

cc: The Honorable Bill Shuster, Chair, House Committee on Transportation & Infrastructure
The Honorable Pete DeFazio, Ranking Member, House Committee on Transportation & Infrastructure

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September 15, 2015

The Honorable Harold Rogers
Chairman
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

The Honorable Nita M. Lowey
Ranking Member
Committee on Appropriations
U.S. House of Representatives
Washington, DC 20515

RE: ***Great Lakes Water Protection Act***

Dear Chairman Rogers and Ranking Member Lowey:

We appreciate the opportunity bring to your attention some of the serious issues involved with consideration of the bill styled, *Great Lakes Water Protection Act* ("Amendment"). The proposed bill would be a major substantive amendment of the Federal Water Pollution Control Act (commonly known as the Clean Water Act, "CWA" or "Act"). The bill, H.R. 2809, was referred to the House Subcommittee on Water Resources and Environment; an identical bill in the Senate, S. 1589, has been attached to the Interior, Environment Appropriations bill (S. 1645).

What the Bill Does: The Act works by assuring compliance with applicable and enforceable pollutant discharge requirements ("effluent limitations") through the National Pollutant Discharge Elimination System ("NPDES") permit program. The Act does not contain provisions that would allow EPA to dictate or prohibit the type of treatment process or technology used to achieve such limitations. The Amendment, however, would fundamentally alter the Act by to prohibiting use of a widely recognized, cost-effective method of wastewater operation and treatment; a prohibition neither directed by Congress, nor part of ongoing federal oversight. In fact, a 2004 Report to Congress praised the type of wet weather treatment processes this amendment seeks to prohibit. *See, Report to Congress: Impacts and Control of CSOs and SSOs* (EPA 833-R-04-001) (Aug. 2004). Consequently, for the reasons discussed below, we respectfully assert that considering this radical prohibition (the first of its kind) as part of the appropriations process is inappropriate as well as inadvisable, given its substantially different direction than is provided by existing environmental law.

The Center for Regulatory Reasonableness: The Center is a multi-sector, and national, coalition of municipal and industrial entities. The Center was originally created to address the full range of Clean Water Act compliance, permitting, and regulatory issues facing these entities. Its dedication is to ensure that regulatory requirements applicable to such entities are based on sound scientific information, allow for flexible implementation, and require only attainable, cost-effective compliance options. The Center also closely follows federal agency "rule" changes, to help guarantee that the government rules are not adopted until public comments as to the need for further rules, and their efficacy, are fully sought, and considered.

The Amendment is New Legislation: House and Senate rules expressly prohibit legislation on an appropriations bill. See, e.g., House Rule XXI, cl. 2; House Rule XXII, cl. 5; Senate Rule XVI. The Amendment represents substantive legislative amendment in a number of ways, including: by adding an entirely new prohibition to the Act, one based on the techniques of wastewater treatment management, not the character of a discharge; by substantially enhancing the level of civil penalty; by mandating new rulemaking; and by mandating revision to the NPDES permitting process to accommodate the new and intrusive federal regulatory oversight. At the very least, we request that the House Parliamentarian closely review this likely violation of House rules, as well as other areas of concern, such as germaneness.

Amendment Conflict with Recent Appellate Precedent Confirming Blending Is Authorized by the Act: In *Iowa League of Cities v. EPA, 711 F.3d 844* (8th Cir. 2013) ("*League of Cities*") (Attachment A), the Eighth Circuit Court of Appeals vacated an earlier EPA attempt to prohibit *blending* as exceeding its statutory authority under the Act. The key concern of the Court was that EPA would use the blending rule to dictate internal wastewater treatment facility operation and design, rather than limit its authority to the "end of the pipe" discharge of pollutants permitted by the Act. The Court, citing decades of precedent and EPA's own interpretation of Clean Water Act authority (discussed below) confirmed that the existing law simply does not permit EPA to prohibit "blending" or any other form of wet weather flow processing.

The new Clean Water Act Section 402(s)(5) proposed to be added by the Amendment would grant the permission of Congress to engage in the same type of internal wastewater treatment design and management expressly *rejected by the Court.* This amendment stands in stark contrast to prior Great Lakes legislation which was based on demonstrated ecological concerns – none of which are presented here as the prohibition applies regardless of any actual environmental need. *See, e.g.*, the *Water Quality Act of 1987* (33 U.S.C. § 1268) (amending the CWA), which among other things, set, as its purpose, "to achieve the goals embodied in the Great Lakes Water Quality Agreement of 1978."

Amendment Expands EPA Regulatory Power Beyond Scope of Clean Water Act: The Amendment creates an entirely new design for federal, and delegated State, regulatory authority far beyond that envisioned by Congress. The simple, but very effective, structure of the present CWA calls for a prohibition on the discharge of pollutants, unless this is done consistently with

an NPDES permit. End-of-the-pipe limitations on the quantities, concentrations, and rates of discharged pollutants are known as "effluent limitations". Such effluent limitations can be based on technology, or water quality, standards. For publicly owned treatment works, technology-based effluent limitations called *secondary treatment* are generally used. An excellent summary of applicable EPA regulations and CWA provisions can be found in the *League of Cities* decision, 711 F.3d, at 855-857.

The mode of treatment selected by local communities – permittees that can suffer up to $37,500 per day for NPDES permit violations – *is left up to them by the CWA*. This type of decision, in addition to being one of constitutional necessity, is only fair, given local knowledge of their influent conditions, and of the cost involved with treatment technology decisions. EPA policy clearly reflects this reality by stating that "[e]ach facility has the discretion to select any technology design and process changes necessary to meet the performance-based discharge limitations and standards specified by the effluent guidelines." *NPDES Permit Writers Manual,* 5-14, 5-15 (2010). See also, *In re Borden, Inc.,* Decision of the General Counsel (Feb. 19, 1980), cited in *League of Cities,* 711 F.3d, at 856, "The EPA has interpreted this regime as 'preclud[ing] [it] from imposing any particular technology on a discharger." (Attachment B.)

The Amendment changes this entire approach. Now, EPA, through rulemaking and NPDES permit issue, can impose a limitation, or prohibition of treatment technology philosophy, design, and operation *by controlling the use of blending*. Municipal governments will be at risk for future non-compliance, particularly as many such facilities have included blending type infrastructure in their treatment plant design and construction. Eliminating, or modifying, these treatment processes will be expensive and take considerable time, even if economically feasible.

Recall that blending is not an effluent limitation, but its prohibition directs how wastewater is processed in a treatment facility. No one suggests that using blending justifies present-day NPDES permit violations. But use of blending, on its own, should also not act as a permit violation. This is particularly the fact in the amendment now imposes a $100,000 per day penalty for each violation.

Amendment Raises Commerce Clause Issues: The Amendment, beyond recreating the federal role under the CWA, also raises Commerce Clause issues. The Amendment's restriction on facility design has no demonstrable effect on interstate commerce. The CWA receives its operational authority from the interstate commerce clause of the U.S. Constitution as "its legislative history show[s] that the United States Congress was convinced that uncontrolled pollution of the nation's waterways is a threat to the health and welfare of the country, as well as a threat to its *interstate commerce*." *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974); *see also Hodel v. Va. Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 282 (1981) (Commerce Clause is broad enough to permit congressional regulation of air and water pollution that may affect multiple states). EPA's statutory and constitutional authority, however, *does not extend to mandating facility design*, though it may identify best available

control technology. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 996 (1997) ("Congress clearly intended to allow the permittee to choose its own control strategy"); *League of Cities*, 711 F.3d at 877 (8th Cir. 2013) ("[T]he blending rule clearly exceeds the EPA's statutory authority"); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 162 (2001) ("Where an administrative interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to Congress' intent").

Congress and EPA are given a grant of constitutional authority to control pollutant limitations through permit issuance for dischargers, yet specified requirements for particular methods to achieve such reductions fall squarely outside the scope of their authorities. Through regulation of the particularities of how a wastewater treatment facility processes its waste, EPA and Congress would be regulating *solely intrastate activity*. *Am. Iron & Steel Inst.*, 115 F.3d at 996 (1997).

For the reasons discussed, the Center respectfully requests that the Appropriations Committee not consider the Amendment within the appropriations process. The bill will upset the careful structure of the CWA and the helpful partnership that exists with States and local permittees as they seek to achieve cost-effective compliance with important environmental goals.

Respectfully submitted,

John C. Hall, Executive Director

Christopher L. Rissetto, General Counsel

Enclosures (A-B)

cc: Hon. Lisa Murkowski, Chairman
Hon. Tom Udall, Ranking Member
[Senate Interior, Environment, and Related Agencies Subcommittee]

ATTACHMENT – A

Iowa League of Cities v. EPA

United States Court of Appeals for the Eighth Circuit

November 13, 2012, Submitted; March 25, 2013, Filed

No. 11-3412

Reporter
711 F.3d 844; 2013 U.S. App. LEXIS 5933; 43 ELR 20069; 76 ERC (BNA) 1495; 2013 WL 1188039

Iowa League of Cities, Petitioner v. Environmental Protection Agency, Respondent

Subsequent History: Rehearing denied by, Rehearing, en banc, denied by *Iowa League of Cities v. EPA, 2013 U.S. App. LEXIS 14034 (8th Cir. July 10, 2013)*
Related proceeding at *Hall & Assocs. v. United States EPA, 2014 U.S. Dist. LEXIS 178571 (D.D.C., Dec. 31, 2014)*

Prior History: [**1] Petition for Review of an Order of the Environmental Protection Agency.

Core Terms

EPA, mixing, zones, regulations, secondary, effluent limitation, letters, binding, blending, agency's, requirements, promulgated, agency's action, procedures, legislative rule, bacteria, notice, parties, bypass, biological, facilities, flows, authorities, discharges, judicial review, pollutant, NPDES, treatment process, water quality, water quality standards

Case Summary

Procedural Posture

Petitioner municipal association sought direct appellate review of two letters sent by respondent Environmental Protection Agency (EPA) to a U.S. Senator. The association argued that these letters effectively set forth new regulatory requirements under the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., with respect to water treatment processes at municipally owned sewer systems.

Overview

The association asserted that the EPA lacked the statutory authority to impose the regulations, and violated the Administrative Procedures Act (APA), 5 U.S.C.S. § 500 et seq., by implementing them without first proceeding through the notice and comment procedures for agency rulemaking. The EPA insisted there was no procedural impropriety because the letters were general policy statements or, at most, interpretative rules. The court ruled that the letters could be considered "promulgations" for the purposes of establishing jurisdiction under 33 U.S.C.S. § 1369(b)(1)(E) because they had a binding effect on regulated entities. The first letter reflected a binding policy with respect to bacteria mixing zones. The second letter presented a binding policy on blending. The court ruled that, in the first letter, the EPA eviscerated state discretion to incorporate mixing zones into their water quality standards with respect to waters designated for primary contact recreation. Because the second letter had the effect of announcing a legislative rule with respect to blending peak wet weather flows, the EPA violated the APA's procedural requirements by not using notice and comment procedures.

Outcome

The court granted the petition for review and vacated both the mixing zone rule in the June 2011 letter and the blending rule in the September 2011 letter. The matter was remanded to the EPA for further consideration.

LexisNexis® Headnotes

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Notice & Comment Requirements

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial Review > Standards of Review > Unlawful Procedures

HN1 The Administrative Procedures Act (APA), 5 U.S.C.S. § 500 et seq., empowers federal courts to hold unlawful and set aside agency action, findings, and conclusions if they fail to conform with any of six specified standards. Inter alia, a reviewing court may set aside agency action that has failed to observe those procedures required by law. 5 U.S.C.S. § 706(2)(D). Agencies must conduct "rule making" in accord with the APA's notice and comment procedures. 5 U.S.C.S. § 553(b), (c). However, only new "legislative" rules are required to be created pursuant to notice and

comment rulemaking. 5 U.S.C.S. § 553(b), (c). Interpretative rules and general statements of policy are statutorily exempt from the procedural requirements applicable to rule making. 5 U.S.C.S. § 553(b)(3)(A).

Administrative Law > Judicial Review > Standards of Review > Exceeding Statutory Authority

HN2 5 U.S.C.S. § 706(2)(C) authorizes federal courts to set aside agency action that is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN3 The Clean Water Act, 33 U.S.C. § 1251 et seq., forbids the "discharge of any pollutant"—defined as the addition of any pollutant to navigable waters from any point source—unless executed in compliance with the Act's provisions. 33 U.S.C.S. §§ 1311(a), 1362(12). A permit program called the National Pollution Discharge Elimination System (NPDES) plays a central role in federal authorization of permissible discharges. 33 U.S.C.S. § 1342. The Environmental Protection Agency (EPA) may issue an NPDES permit, but states also are authorized to administer their own NPDES programs. § 1342(b). The vast majority elect to do so. If a state chooses to operate its own permit program, it first must obtain EPA permission and then ensure that it issues discharge permits in accord with the same federal rules that govern permits issued by the EPA. § 1342(a); *40 C.F.R. § 122.41*.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

HN4 A "point source" is any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. 33 U.S.C.S. § 1362(14). Municipal wastewater treatment facilities are point sources.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN5 Effluent limitations restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources. The National Pollution Discharge Elimination System (NPDES) permit system serves to transform generally applicable effluent limitations into the obligations of the individual discharger. The Environmental Protection Agency (EPA) applies effluent limitations at the point of discharge into navigable waters, known as "end-of-the-pipe," unless monitoring at the discharge point would be impractical or infeasible. *40 C.F.R. § 122.45(a), (b)*. The baseline effluent limitations are technology-based, 33 U.S.C.S. § 1311(b); *40 C.F.R. § 125.3(a)*, in that they set a minimum level of effluent quality that is attainable using demonstrated technologies. The EPA has interpreted this regime as precluding it from imposing any particular technology on a discharger.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN6 The technology-based effluent limitations applicable to publicly-owned treatment works, such as municipal sewer authorities, are based on a special set of rules known as the secondary treatment regulations. § 1311(b)(1)(B); *40 C.F.R. § 125.3(a)(1)*. The secondary treatment regulations also do not mandate the use of any specific type of technology to achieve their requisite levels of effluent quality. *48 Fed. Reg. 52,258, 52,259 (Nov. 16, 1983)*. When technology-based effluent limitations would fall short of achieving desired water quality levels, the EPA is authorized to devise additional, more stringent water quality-based effluent limitations for those particular point sources. 33 U.S.C.S. § 1312(a).

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN7 Publicly-owned treatment works are any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature that are owned by a state or municipality. *40 C.F.R. § 403.3(q)*.

Environmental Law > Water Quality > Clean Water Act > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN8 The Clean Water Act, 33 U.S.C.S. § 1251 et seq., is a program of state and federal cooperation, but state discretion is exercised against a backdrop of significant Environmental

Protection Agency (EPA) authority over state-run National Pollution Discharge Elimination System (NPDES) programs. The EPA dictates the effluent limitations applicable to all permits, while states are in charge of categorizing their waterways in terms of designated uses and setting forth water quality standards for each type of waterway. 33 U.S.C.S. § 1313(c)(2). These standards supplement effluent limitations to ensure that overall water quality remains at an acceptable level. A major component of a state's water quality standards is the set of water quality criteria sufficient to support the designated uses of each waterbody. At least every three years, states must submit their water quality standards to the EPA for approval. § 1313(c)(1). The EPA must approve the standards within sixty days or disapprove them within ninety days. *66 Fed. Reg. 11,202, 11,215 (Feb. 22, 2001)*. States are also required to forward a copy of each permit application they receive to the EPA, which is afforded an opportunity to block the issuance of the permit. § 1342(d); *40 C.F.R. § 123.29*.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN10 Water quality criteria are the threshold values against which ambient concentrations are compared to determine whether a waterbody exceeds the water quality standard. National Pollution Discharge Elimination System permits must establish limits on any pollutant, where necessary to attain and maintain applicable water quality standards.

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN9 States evaluate discharge permit applications under a mixture of federal regulations and their own water quality standards, crafted subject to federal approval.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN11 One element of state water quality standards are policies regarding "mixing zones." The Environmental Protection Agency (EPA) has defined mixing zones as a limited area or volume of water where initial dilution of a discharge takes place and where numeric water quality criteria can be exceeded. In effect, a mixing zone allows the permit holder to create a higher concentration of pollutants in navigable waters near the immediate point of discharge, as long as the discharge is sufficiently diffused as it moves through the larger body of water. The requisite water quality criteria, then, need not be met at the end of the pipe. It is undisputed that in at least some instances, states are allowed to approve discharge permit applications that incorporate mixing zones. *40 C.F.R. § 131.13*. But as one of its water quality standards, a state's policy on mixing zones remains subject to the triennial review of the EPA. 33 U.S.C.S. § 1313(c)(1). In addition, the EPA has the authority to veto any permit application incorporating what it views as an inappropriate mixing zone. 33 U.S.C.S. § 1342(d)(2).

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN12 Mixing zones are addressed in one of the regulations of the Environmental Protection Agency (EPA), *40 C.F.R. § 122.44(d)(1)*. Subparagraph (ii) of that regulation describes the procedures a state should apply when determining whether a discharge would cause—or contribute to causing—a body of water to deviate from the state's water quality criteria, thereby necessitating the imposition of water-quality based effluent limitations on that discharge (in addition to the default technology-based effluent limitations already in effect). *54 Fed. Reg. 23,868, 23,872 (June 2, 1986)*. In particular, state permitting authorities should consider any dilution of the effluent in the receiving water, after considering mixing zones if applicable.

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

HN13 All issued permits must comply with federal regulations regarding "bypass," which is the intentional diversion of waste streams from any portion of a treatment facility. *40 C.F.R. § 122.41(m)(1)*. Bypass is generally prohibited unless there are no feasible alternatives. *§ 122.41(m)(4)*. The bypass rule is not itself an effluent standard, but instead it merely piggybacks existing requirements. *53 Fed. Reg. 40,562, 40,609 (Oct. 17, 1988)*. The rule's purpose is to ensure that users properly operate and maintain their treatment facilities pursuant to applicable underlying technology-based standards, by requiring incoming flows to move through the facility as it was designed to be operated. Like the more general secondary treatment regulations, the bypass rule does not require the use of any particular treatment method or technology.

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Environmental Law > Water Quality > Clean Water Act > General Overview

Governments > Courts > Authority to Adjudicate

Governments > Federal Government > Claims By & Against

HN14 The Administrative Procedures Act, 5 U.S.C.S. § 500 et seq., waives sovereign immunity for suits seeking judicial review of an agency action made reviewable by statute. 5 U.S.C.S. § 704. The Clean Water Act, 33 U.S.C.S. § 1251 et seq., establishes a bifurcated jurisdictional scheme whereby courts of appeals have jurisdiction over some categories of challenges to Environmental Protection Agency action, and the district courts retain jurisdiction over other types of complaints.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

HN16 The Administrative Procedures Act, 5 U.S.C.S. § 500 et seq., does not create federal subject matter jurisdiction. Rather, a federal court has federal question jurisdiction under 28 U.S.C.S. § 1331 over challenges to federal agency action.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN15 Section 509(b)(1)(E) of the Clean Water Act, 33 U.S.C.S. § 1251 et seq., (33 U.S.C.S. § 1369(b)(1)(E)) vests the courts of appeals with exclusive jurisdiction to review the Environmental Protection Agency's action in approving or promulgating any effluent limitation or other limitation under 33 U.S.C.S. § 1311, 1312, 1316, or 1345.

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

Governments > Legislation > Statute of Limitations > Time Limitations

HN17 The existence of subject-matter jurisdiction is a question of law that the court reviews de novo. In order to be timely filed, interested parties must file for review within 120 days from the date of the promulgation of an effluent limitation or other limitation. 33 U.S.C.S. § 1369(b)(1). The 120-day window to challenge promulgations begins two weeks after a document is signed. *40 C.F.R. § 23.2*.

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN18 When an agency raises a factual challenge to the United States Court of Appeals for the Eighth Circuit's jurisdiction under *Fed. R. Civ. P. 12(b)(1)*, no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the court from evaluating the merits of the jurisdictional claims.

Administrative Law > Judicial Review > Reviewability > General Overview

Environmental Law > Water Quality > Clean Water Act > General Overview

HN19 The U.S. Supreme Court has recognized a preference for direct appellate review of agency action pursuant to the Administrative Procedures Act, 5 U.S.C.S. § 500 et seq. Moreover, the U.S. Supreme Court has interpreted broadly the direct appellate review provision in 33 U.S.C.S. § 1369(b)(1)(F), which authorizes review of agency action in issuing or denying a permit.

Administrative Law > Judicial Review > Reviewability > General Overview

HN20 An agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding. Thus, the court's functional analysis of whether an agency action constitutes a promulgation encompasses those words and deeds that bind legally or as a practical matter.

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

HN21 Even if there were an implicit finality requirement applicable to agency actions made reviewable by statute, this would not affect federal jurisdiction; the requirements of the Administrative Procedures Act, 5 U.S.C.S. § 500 et seq., are part of a party's cause of action and are not jurisdictional.

Administrative Law > Judicial Review > Reviewability > General Overview

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

Environmental Law > Water Quality > Clean Water Act > General Overview

Governments > Legislation > Statutory Remedies & Rights

HN22 The Administrative Procedures Act (APA), 5 U.S.C.S. § 500 et seq., allows judicial review in two situations: Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court. 5 U.S.C.S. § 704. The word "final" modifies the second use of "agency action," but not the first. While some courts have interpreted the phrase "agency action made reviewable by statute" as including an implied finality requirement, the United States Court of Appeals for the Eighth Circuit declines to conjure up a finality requirement for "agency actions made reviewable by statute" where none is located in the text of the APA, particularly where the U.S. Supreme Court has implied that the two phrases incorporate distinct requirements. The Clean Water Act, 33 U.S.C.S. § 1251 et seq., expressly makes specified agency actions reviewable, and the court's task therefore is to determine whether the asserted agency action falls within the statutory terms.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

HN23 If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or state permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes binding.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

HN24 The mandatory language of an agency document alone can be sufficient to render it binding.

Administrative Law > Judicial Review > Administrative Record > General Overview

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Standard of Review

HN25 When applying the arbitrary and capricious standard of review under 5 U.S.C.S. § 706(2)(A), the focal point for judicial review should be the administrative record already in existence. Therefore, if there is a contemporaneous administrative record and no need for additional explanation of the agency decision, the court will permit supplementation of the administrative record only where there is a "strong showing of bad faith or improper behavior. The rationale for this rule is that judicial review of the reasonableness of an agency's actions should concentrate upon the evidence available to the agency when making its decision. But where rulemaking masquerading as explication is alleged, the informality of the agency's decisionmaking process makes the possibility of a sparse "contemporaneous administrative record" more likely.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

Administrative Law > Judicial Review > Reviewability > Reviewable Agency Action

HN26 The time to seek direct appellate review begins to run not when the agency first floats its proposal to the public, but rather when the agency promulgates that announcement—in other words, when they make its substance binding.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

HN27 The Clean Water Act, 33 U.S.C.S. § 1251 et seq., defines effluent limitations as any restriction established by a state or the Environmental Protection Agency on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters. 33 U.S.C.S. § 1362(11). The U.S. Supreme Court has referred to effluent limitations as direct restrictions on discharges. Other circuits have held that the expansiveness of the phrase "any restriction" encompasses both numerical and non-numerical effluent limitations.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN28 An agency action is a "limitation" within the meaning of 33 U.S.C.S. § 1369(b)(1)(E) if entities subject to the permit requirements of the Clean Water Act, 33 U.S.C.S. §

1251 et seq., face new restrictions on their discretion with respect to discharges or discharge-related processes.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > General Overview

HN29 The Environmental Protection Agency's position that bacteria mixing zones in waters designated for primary contact recreation should not be permitted is a restriction that directly affects the concentration of discharge from a point source and therefore is an effluent limitation.

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > General Overview

Civil Procedure > ... > Justiciability > Case & Controversy Requirements > Immediacy

Civil Procedure > ... > Justiciability > Ripeness > Imminence

Civil Procedure > ... > Justiciability > Ripeness > Tests for Ripeness

HN30 The judicially created doctrine of ripeness flows from both the Article III cases and controversies limitations and also from prudential considerations for refusing to exercise jurisdiction. Ripeness is peculiarly a question of timing and is governed by the situation at the time of review, rather than the situation at the time of the events under review. A party seeking review must show both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. Both of these factors are weighed on a sliding scale, but each must be satisfied to at least a minimal degree. Fitness rests primarily on whether a case would benefit from further factual development, and therefore cases presenting purely legal questions are more likely to be fit for judicial review. The hardship factor looks to the harm parties would suffer, both financially and as a result of uncertainty-induced behavior modification in the absence of judicial review. The court does not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them, but the injury must be certainly impending. The immediacy and the size of the threatened harm will also affect the interplay of these factors.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Judicial Review > Reviewability > Ripeness

HN31 Whether an agency guidance document is a legislative rule is largely a legal, not a factual, question, turning primarily upon the text of the document. As primarily legal questions, such challenges tend to present questions fit for judicial review. On the other hand, postponing a procedural challenge to an agency guidance document may be appropriate where further factual development regarding the agency's application of the document would aid the court's decision. This is so because the purpose of the ripeness doctrine is to prevent courts from entangling themselves in abstract disagreements over administrative policies.

Administrative Law > Judicial Review > Reviewability > Standing

Constitutional Law > ... > Case or Controversy > Standing > Elements

Evidence > Burdens of Proof > Allocation

HN32 If a litigant lacks U.S. Const. art. III standing to bring his claim, then the United States Court of Appeals for the Eighth Circuit has no subject matter jurisdiction over the suit. To show standing under Article III of the U.S. Constitution, a plaintiff must demonstrate (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury. When an association, rather than an individual permit applicant, is filing suit, it also must prove associational standing. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The association need not establish that all of its members would have standing to sue individually so long as it can show that any one of them would have standing.

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

HN33 Standing is to be determined as of the commencement of the suit. The party seeking judicial review bears the burden of persuasion and must support each element with the manner and degree of evidence required at the successive stages of litigation. Therefore, at the pleading stage a petitioner can move forward with general factual allegations of injury, whereas to survive a summary judgment motion, he must set forth by affidavit or other evidence specific facts.

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

HN34 Parties seeking direct appellate review of an agency action must prove each element of standing as if they were moving for summary judgment in a district court. When parties seek the type of relief available on a motion for summary judgment, they correspondingly should bear the responsibility of meeting the same burden of production, namely specific facts supported by affidavit or other evidence.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Judicial Review > Reviewability > Standing

Civil Procedure > ... > Justiciability > Standing > Burdens of Proof

Evidence > Burdens of Proof > Preponderance of Evidence

HN35 When an agency raises a factual challenge to subject matter jurisdiction by attacking the facts asserted by the plaintiff with respect to standing, the plaintiff must establish standing without the benefit of any inferences in its favor. Parties seeking to litigate in federal court have the burden of establishing jurisdiction, including standing, by a preponderance of the evidence.

Civil Procedure > ... > Justiciability > Standing > General Overview

HN36 Causation for standing purposes requires that the harm asserted be fairly traceable to the challenged action of the defendant.

Civil Procedure > ... > Justiciability > Standing > Injury in Fact

HN37 The violation of a procedural right can constitute an injury in fact so long as the procedures in question are designed to protect some threatened concrete interest of the petitioner that is the ultimate basis of his standing.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Notice & Comment Requirements

Environmental Law > Water Quality > Clean Water Act > General Overview

HN38 Notice and comment procedures for Environmental Protection Agency rulemaking under the Clean Water Act, 33 U.S.C.S. § 1251 et seq., are undoubtedly designed to protect the concrete interests of such regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation.

Administrative Law > Judicial Review > Reviewability > Standing

HN39 Where a challenger is the subject of agency action, there is ordinarily little question that the action has caused him injury, and that a judgment preventing the action will redress it. This is particularly true for individuals asserting violations of procedural rights. If a petitioner is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant. Correspondingly, redressability in this context does not require petitioners to show that the agency would alter its rules upon following the proper procedures.

Administrative Law > Judicial Review > Reviewability > Questions of Law

Administrative Law > Judicial Review > Standards of Review > De Novo Standard of Review

HN40 Much of the rationale for granting deference to administrative decisions is simply not applicable where the topic of review—compliance with Administrative Procedures Act, 5 U.S.C.S. § 500 et seq., procedural requirements—is not a matter that Congress has committed to the agency's discretion. In other words, whether and when an agency must follow the law is not an area uniquely falling within its own expertise, and thus the agency's decision is less deserving of deference. Furthermore, because the categorization of an agency's action as a legislative or interpretative rule is largely a question of law, a de novo standard of review is consistent with the standard of review the United States Court of Appeals for the Eighth Circuit generally applies to questions of law in similar contexts.

Administrative Law > Judicial Review > Standards of Review > Rule Interpretation

HN41 An agency's characterization of its rule is a relevant component of review and is a factor entitled to some deference.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

HN42 The critical distinction between legislative and interpretative rules is that, whereas interpretative rules simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties, a legislative rule imposes new rights or duties. When an agency creates a new legal norm based on the agency's own authority to engage in supplementary lawmaking, as delegated from Congress, the agency creates a legislative rule. Expanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created, is the hallmark of legislative rules. It follows from this distinction that interpretative rules do not have the force of law. Whether or not a binding pronouncement is in effect a legislative rule that should have been subjected to notice and comment procedures thus depends on whether it substantively amends or adds to, versus simply interpreting the contours of, a preexisting rule.

Administrative Law > Agency Adjudication > Informal Agency Action

HN43 An agency's policy statements are not binding, either as a legal or practical matter.

Administrative Law > Agency Rulemaking > Informal Rulemaking

HN44 Notice and comment procedures secure the values of government transparency and public participation, compelling the United States Court of Appeals for the Eighth Circuit to agree that the Administrative Procedures Act, 5 U.S.C.S. § 500 et seq., notice and comment exemptions must be narrowly construed.

Business & Corporate Compliance > ... > Water Quality > Clean Water Act > Water Quality Standards

HN45 The long-standing policy of the Environmental Protection Agency (EPA) toward bacteria mixing zones has been that states should exercise their discretion—as set forth in *40 C.F.R. § 131.13*—to adopt a definitive statement in their water quality standards on whether or not mixing zones are allowed. States are authorized to consider mixing zones in determining the types of standards necessary to preserve water quality. *40 C.F.R. § 122.44(d)(1)(ii)*. States do not enjoy complete discretion in creating a mixing zone policy because they operate within the shadow of EPA-crafted effluent limitations.

Administrative Law > Agency Rulemaking > General Overview

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

HN46 The hallmark of an interpretative rule or policy statement is that they cannot be independently legally enforced. It is the underlying legislative rules that drive compliance, and thus when an agency applies a newly announced interpretative rule or policy statement, there must be some external legal basis supporting its implementation.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

HN47 If a second rule repudiates or is irreconcilable with a prior legislative rule, the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Validity

Administrative Law > Judicial Review > Standards of Review > Exceeding Statutory Authority

HN48 5 U.S.C.S. § 706(2)(C) authorizes courts to strike down as ultra vires agency rules promulgated without valid statutory authority.

Administrative Law > Judicial Review > Standards of Review > General Overview

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

HN49 Appellate review under 5 U.S.C.S. § 706(2)(C) proceeds under the familiar Chevron framework. The court must first conduct an independent review of the statute and of its legislative history. Deference to the agency is appropriate only when a court finds the statute to be ambiguous. If confronted with an ambiguous statute, the court looks to whether the agency's construction of the statute is reasonable. Agency rules will survive ultra vires allegations so long as the court can reasonably conclude that the grants of authority in the statutory provisions cited by the government contemplate the issuance.

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Discharges

Environmental Law > ... > Clean Water Act > Coverage & Definitions > Point Sources

Environmental Law > ... > Enforcement > Discharge Permits > General Overview

Environmental Law > ... > Enforcement > Discharge Permits > Effluent Limitations

HN50 The Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., permits the Environmental Protection Agency (EPA) to set effluent limitations based upon secondary treatment. 33 U.S.C.S. § 1311(b)(1)(B). But effluent limitations are restricted to regulations governing discharges from point sources into navigable waters. 33 U.S.C.S. § 1362(11). The EPA is authorized to administer more stringent water quality related effluent limitations, but the CWA is clear that the object of these limitations is still the discharges of pollutants from a point source. 33 U.S.C.S. § 1312(a). In turn, "discharge of pollutant" refers to the addition of any pollutant to navigable waters. § 1362(11).

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

Environmental Law > Administrative Proceedings & Litigation > General Overview

Environmental Law > ... > Clean Water Act > Enforcement > General Overview

HN51 33 U.S.C.S. § 1369(b)(3) authorizes courts, whenever appropriate, to award litigation costs to any prevailing or substantially prevailing party. To be a prevailing party entitled to attorneys' fees, a plaintiff must achieve at least some relief on the merits that effectuates a material alteration of the legal relationship of the parties. An award of litigation costs under 33 U.S.C.S. § 1369(b)(3) must also be "appropriate." Statutory provisions authorizing an award of litigation costs often serve to incentivize the achievement of statutory objectives, and therefore an award is usually appropriate when a party has advanced the goals of the statute invoked in the litigation.

Environmental Law > Water Quality > Clean Water Act > General Overview

HN52 The goals of the Clean Water Act (CWA), 33 U.S.C.S. § 1251 et seq., involve the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C.S. § 1251(a).

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Judges: Before SMITH, BEAM, and GRUENDER, Circuit Judges.

Opinion by: GRUENDER

Opinion

[*854] GRUENDER, Circuit Judge.

The Iowa League of Cities ("League") seeks direct appellate review of two letters sent by the Environmental Protection Agency ("EPA") to Senator Charles Grassley. The League argues that these letters effectively set forth new regulatory requirements with respect to water treatment processes at municipally owned sewer systems. According to the League, the EPA not only lacks the statutory authority to impose these regulations, but it violated the Administrative Procedures Act ("APA"), 5 U.S.C. § 500 *et seq.*, by implementing them without first proceeding through the notice and comment procedures for agency rulemaking. We find that we have subject matter [**2] jurisdiction over the [illegible]d we vacate under APA section 706(2)(C), (D).

I. Background

The League previously sought our review in 2010 of six EPA documents, consisting of letters, internal memoranda, and a Federal Register notice, that allegedly constituted new regulatory requirements for water treatment processes. The EPA moved to dismiss, arguing that judicial review was premature because the documents were part of an ongoing agency decisionmaking process. An administrative panel of this court granted the EPA's motion to dismiss for lack of subject matter jurisdiction.

The League continued to perceive a conflict between the agency's official written policies and the expectations it was transmitting to the state entities that served as liaisons between the EPA and municipal wastewater treatment facilities. Consequently, the League enlisted the assistance of Senator Charles Grassley to obtain clarification from the EPA. The EPA sent two letters ("June 2011 letter" and "September 2011 letter") in response to Senator Grassley's inquiries. According to the EPA, these guidance letters merely discuss existing regulatory requirements. The League disagrees, viewing the letters as contradicting [**3] both the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, and the EPA's lawfully promulgated regulations. As it did in 2010, the EPA moved to dismiss for lack of subject matter jurisdiction. This time an administrative panel denied the

motion but requested that the parties address the merits of all relevant jurisdictional and substantive arguments.[1]

[*855] *HN1* The APA "empowers federal courts to 'hold unlawful and set aside agency action, findings, and conclusions' if they fail to conform with any of six specified standards." *Marsh v. Or. Natural Res. Council, 490 U.S. 360, 375, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989)* (quoting 5 U.S.C. § 706(2)). *Inter alia*, a reviewing court may set aside agency action that has failed to observe those "procedure[s] required by law." § 706(2)(D). Agencies must conduct "rule making" in accord with the APA's notice and comment procedures. 5 U.S.C. § 553(b), (c). However, only new "legislative" rules are required to be created pursuant to notice and comment rulemaking. *See id.;* [**4] *see also Minnesota v. Ctrs. for Medicare & Medicaid Servs., 495 F.3d 991, 996 (8th Cir. 2007)*. "Interpretative rules"[2] and "general statements of policy" are statutorily exempt from the procedural requirements applicable to "rule making." *See* § 553(b)(3)(A); *see also Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 99, 115 S. Ct. 1232, 131 L. Ed. 2d 106 (1995)*. The crux of the League's procedural claim is that the EPA's letters announced new legislative rules for water treatment processes at municipally owned sewer systems, thereby modifying the EPA's existing legislative rules. The EPA admits it did not engage in notice and comment procedures, but it insists there has been no procedural impropriety because the letters should be considered general policy statements or, at most, interpretative rules.

The League asks us to find not only that the EPA's actions are procedurally invalid but also to go one step further and set aside the rules as imposing regulatory requirements that surpass the EPA's statutory authority. *See HN2* § 706(2)(C) (authorizing federal courts to set aside agency action that is "in excess of statutory jurisdiction, [**5] authority, or limitations, or short of statutory right").

The two areas of regulation addressed in the challenged EPA letters are "mixing zones" and "blending." Our analysis first requires a discussion of the CWA's regulatory scheme and the water treatment processes at issue.

A. The Clean Water Act

HN3 The CWA forbids the "discharge of any pollutant"—defined as the "addition of any pollutant to navigable waters from any point source"[3] —unless executed in compliance with the Act's provisions. 33 U.S.C. §§ 1311(a), 1362(12). A permit program called the National Pollution Discharge Elimination System ("NPDES") plays a central role in federal authorization of permissible discharges. *See* 33 U.S.C. § 1342. The EPA may issue an NPDES permit, but states also are authorized to administer their own NPDES programs. § 1342(b). The vast majority elect to do so.[4] If a state chooses to operate its own permit program, it first must obtain EPA permission and then ensure that it issues discharge permits in accord with the same [*856] federal rules that govern permits issued by the EPA. § 1342(a); *40 C.F.R. § 122.41*.

Many of these rules are in the form of *HN5* "effluent limitations," which "restrict the quantities, rates, and concentrations of specified substances which are discharged from point sources." *Arkansas v. Oklahoma, 503 U.S. 91, 101, 112 S. Ct. 1046, 117 L. Ed. 2d 239 (1992)* (citing §§ 1311, 1314). The NPDES permit system "serves to transform generally applicable effluent limitations . . . into the obligations . . . of the individual discharger." *EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 205, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976)*. The EPA applies effluent limitations at the point of discharge into navigable waters, known as "end-of-the-pipe," unless monitoring at the discharge point would be "impractical or infeasible." [**7] *40 C.F.R. § 122.45(a), (b)*. The baseline effluent limitations are "technology-based," § 1311(b); *40 C.F.R. § 125.3(a)*, in that they set "a minimum level of effluent quality that is attainable using demonstrated technologies." EPA, NPDES Permit Writers' Manual 5-1

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[1] Our ability to make a final decision on jurisdiction is unaffected by the rulings of either this administrative panel or the 2010 administrative panel. *See In re Rodriguez, 258 F.3d 757, 758-59 (8th Cir. 2001)* (per curiam).

[2] Some courts also use the phrase "interpretive" rules interchangeably with "interpretative" rules.

[3] *HN4* A "point source" is "any discernible, confined and discrete conveyance, including but not limited [**6] to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). This case involves municipal wastewater treatment facilities, which both parties agree are point sources.

[4] Iowa is one of forty-six states approved to administer an NPDES program. EPA, State Program Status, http://cfpub1.epa.gov/npdes/statestats.cfm (last visited Feb. 14, 2013).

(2010).[5] The EPA has interpreted this regime as "preclud[ing] [it] from imposing any particular technology on a discharger." *In re Borden, Inc.*, Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. § 125.36(m), No. 78 (Feb. 19, 1980), at *2; *see also* NPDES Permit Writers' Manual 5-14, 5-15 ("Therefore, each facility has the discretion to select any technology design and process changes necessary to meet the performance-based discharge limitations and standards specified by the effluent guidelines."). ***HN6*** The technology-based effluent limitations applicable to publicly-owned treatment works ("POTWs"),[6] such as municipal sewer authorities, are based on a special set of rules known as the "secondary treatment" regulations. § 1311(b)(1)(B); *40 C.F.R. § 125.3(a)(1)*; *see generally 40 C.F.R. § 133.102* (describing average monthly and weekly "minimum level[s] of effluent quality attainable by secondary treatment"). The **[**8]** secondary treatment regulations also do not mandate the use of any specific type of technology to achieve their requisite levels of effluent quality. *See 48 Fed. Reg. 52,258, 52,259 (Nov. 16, 1983)*. When technology-based effluent limitations would fall short of achieving desired water quality levels, the EPA is authorized to devise additional, more stringent water quality-based effluent limitations for those particular point sources. 33 U.S.C. § 1312(a).

Thus, ***HN8*** the CWA is a program of state and federal cooperation, but state discretion is exercised against a backdrop of significant EPA authority over state-run NPDES programs. The EPA dictates the effluent limitations applicable to all permits, while states are in charge of categorizing their waterways in terms of designated uses and setting forth "water quality standard[s]" for each type of waterway. 33 U.S.C. § 1313(c)(2). These standards supplement effluent limitations **[**9]** to ensure that overall water quality remains at an acceptable level. *Arkansas, 503 U.S. at 101*. A major component of a state's water quality standards is "the set of water quality criteria sufficient to support the designated uses of each waterbody."[7] NPDES Permit Writers' Manual 6-4. **[*857]** At least every three years, states must submit their water quality standards to the EPA for approval. § 1313(c)(1). The EPA must approve the standards within sixty days or disapprove them within ninety days. *66 Fed. Reg. 11,202, 11,215 (Feb. 22, 2001)*. States are also required to forward a copy of each permit application they receive to the EPA, which is afforded an opportunity to block the issuance of the permit. § 1342(d); *40 C.F.R. § 123.29*. In sum, ***HN9*** states evaluate discharge permit applications under a mixture of federal regulations and their own water quality standards, crafted subject to federal approval.

B. Bacteria Mixing Zones

HN11 One element of state water quality standards are policies regarding "mixing zones." The EPA has defined mixing zones as "[a] limited area or volume of water where initial dilution of a discharge takes place and where numeric water quality criteria can be exceeded." EPA, Water Quality Handbook Ch. 5.1 (1994) ("Handbook"); *see also* NPDES Permit Writers' Manual 6-15. In effect, a mixing zone allows the permit holder to create a higher concentration of pollutants in navigable waters near the immediate point of discharge, as long as the discharge is sufficiently diffused as it moves through the larger body of water. The requisite water quality criteria, then, need not be met at the end of the pipe. It is undisputed that in at least some instances, states are allowed to approve discharge permit applications that incorporate mixing **[**11]** zones. *See 40 C.F.R. § 131.13* ("States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones . . . ."). But as one of its water quality standards, a state's policy on mixing zones remains subject to the triennial review of the EPA. *See* § 1313(c)(1). In addition, the EPA has the authority to veto any permit application incorporating what it views as an inappropriate mixing zone. *See* § 1342(d)(2).

HN12 Mixing zones are addressed in one of the EPA's regulations, *40 C.F.R. § 122.44(d)(1)*. Subparagraph (ii) of that regulation describes the procedures a state should apply when determining whether a discharge would cause—or contribute to causing—a body of water to deviate from the state's water quality criteria, thereby necessitating the imposition of water-quality based effluent limitations on that discharge (in addition to the default technology-based effluent limitations already in effect). *See 54 Fed. Reg. 23,868, 23,872 (June 2, 1989)*. In particular, state permitting authorities should consider "any dilution of the effluent in

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[5] *Available at* http://www.epa.gov/npdes/pubs/pwm_2010.pdf.

[6] ***HN7*** POTWs are "any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature" that are "owned by a State or municipality." 40 C.F.R. § 403.3(q).

[7] ***HN10*** "Water **[**10]** quality criteria are the threshold values against which ambient concentrations are compared to determine whether a waterbody exceeds the water quality standard. . . . NPDES permits must establish limits on any pollutant, where necessary to attain and maintain applicable water quality standards." 54 Fed. Reg. 23,868, 23,872 (June 2, 1989).

the receiving water, after considering mixing zones if applicable." *Id.* [**12] Although some commentators responded to the proposal of subparagraph (ii) by requesting that the EPA prohibit mixing zones, the EPA subsequently reiterated that the "use of mixing zones raises issues that are more appropriately addressed in the state water quality standards adoption process," and therefore it would retain "the reference to mixing zones in paragraph (d)(1)(ii)." *Id.* The League portrays 40 C.F.R. § 122.44(d)(1)(ii) as channeling any federal objections to mixing zones, including mixing zones for bacterial effluents ("bacteria mixing zones"), through the EPA's process of approving or rejecting state water quality standards.

The June 2011 letter admits that, pursuant to 40 C.F.R. § 131.13, states "may, at [*858] their discretion, include mixing zone policies in their state water quality standards." Citing a 2008 memorandum from the Director of the EPA's Office of Science and Technology to a regional EPA director ("the King memorandum"), however, the June 2011 letter then recites "the EPA's long-standing policy" that all bacteria mixing zones in waters designated for "primary contact recreation" carry potential health risks and flatly states that they "should not be permitted." [**13] The letter further acknowledges that the EPA "does not have additional regulations specific to mixing zones," but it then refers the reader to the additional "recommendations regarding the use of mixing zones" in policy guidance such as the Handbook. The Handbook encourages states to incorporate a "definitive statement" into their water quality standards regarding "whether or not mixing zones are allowed" and, if they are, to "utilize a holistic approach to determine whether a mixing zone is tolerable." Ch. 5.1, 5.1.1. The Handbook cautions, however, that mixing zones must be utilized in ways that "ensure . . . there are no significant health risks, considering likely pathways of exposure." Ch. 5.1. Additionally, mixing zones "should not be permitted where they may endanger critical areas," such as "recreational areas." *Id.* From the League's perspective, states are able to approve bacteria mixing zones, even in waters designated as "primary contact recreation," so long as site-specific factors create scenarios in which there are no health risks and recreational areas are not endangered. The EPA argues that the June 2011 letter is consistent with the Handbook, which explicitly envisioned [**14] limitations on mixing zones in recreational areas.

C. Blending

The second contested regulatory area involves "blending." POTWs typically move incoming flows through a primary treatment process and then through a secondary treatment process. Most secondary treatment processes are biological-based, but the secondary treatment regulations do not "specify the type of treatment process to be used to meet secondary treatment requirements nor do they preclude the use of non-biological facilities."[8] 68 Fed. Reg. 63,042, 63,046 (Nov. 7, 2003). At many POTWs, primary treatment capacity exceeds secondary treatment capacity. Biological-based processes in particular are sensitive to deviations in volume of flow and pollutant level. Correspondingly, during periods of rain and snow, large influxes of stormwater can overwhelm a facility's standard biological secondary treatment processes, potentially rendering them inoperable. *Id.* Blending can prevent this, by channeling a portion of "peak wet weather flows" around biological secondary treatment units and through non-biological units, recombining that flow with its counterpart that traveled through the biological units, and then discharging the combined [**15] stream. *Id.* at 63,045. Just like non-blended streams, the combined output must still comply with all applicable effluent limitations, including the water quality levels specified in the secondary treatment regulations. *Id.* at 63,047.

Some members of the League wish to incorporate a method of treatment called ACTIFLO into the secondary treatment procedures at their wastewater treatment facilities. ACTIFLO units employ non-biological processes and are used as auxiliary secondary treatment units for peak wet weather flows.[9] The parties disagree [*859] on the circumstances in which the CWA and EPA regulations permit the use of ACTIFLO. The League views ACTIFLO as a permissible technology within a POTW facility, as long as the overall output from the secondary treatment phase meets the effluent limitations imposed by the secondary treatment regulations. The EPA, on the other hand, views ACTIFLO as an impermissible "diversion" from traditional [**16] biological secondary treatment facilities.

HN13 All issued permits must comply with federal regulations regarding "bypass," which is the "intentional

[8] Biological-based systems use microorganisms to treat incoming flows. A facility can be designed to use non-biological treatment processes, such as chemical additives or physical filtration equipment, instead of or in conjunction with biological facilities.

[9] ACTIFLO is a physical/chemical process that uses ballasted flocculation. "In ballasted flocculation or sedimentation, a metal salt coagulant is added to the excess wet weather flows to aggregate suspended solids. Then, fine-grained sand, or ballast, is added along with a polymer. The polymer acts like glue which bonds the aggregated solids and sand. The process increases the particles' size and mass which allows them to settle faster." EPA, Report to Congress: Impacts and Control of CSOs and SSOs 2 (2004).

diversion of waste streams from any portion of a treatment facility." 40 C.F.R. § 122.41(m)(1). Bypass is generally prohibited unless there are "no feasible alternatives." § 122.41(m)(4). The bypass rule "is not itself an effluent standard," but instead it "merely 'piggybacks' existing requirements." 53 Fed. Reg. 40,562, 40,609 (Oct. 17, 1988). The rule's purpose is to "ensure that users properly operate and maintain their treatment facilities . . . [pursuant to applicable] underlying technology-based standards," by requiring incoming flows **[**17]** to move through the facility as it was designed to be operated. *Id.* Like the more general secondary treatment regulations, the bypass rule does not require the use of any particular treatment method or technology. *Id.*; *see also* NRDC v. EPA, 822 F.2d 104, 123, 261 U.S. App. D.C. 322 (D.C. Cir. 1987).

In 2003, the EPA offered "a proposed interpretation of the bypass provision (40 CFR [§] 122.41(m)) as it applies to . . . blending." 68 Fed. Reg. at 63,049. Prior to this proposal, the EPA had "not established a national policy (either through rulemaking or through non-binding guidance to assist in the interpretation of the bypass regulation) regarding whether and under what circumstances wet weather blending at a POTW plant would not constitute a bypass." Id. at 63,052. The 2003 proposed policy would have "provide[d] guidance to EPA Regional and State permitting authorities . . . on how EPA intends to exercise its discretion in implementing the statutory and regulatory provisions related to discharges from POTWs where peak wet weather flow is routed around biological treatment units and then blended with the effluent from the biological units prior to discharge." Id. at 63,051. Going forward, blending "would **[**18]** not be a prohibited bypass and could be authorized in an NPDES permit" so long as certain enumerated conditions were met. Id. at 63,049-50. These conditions primarily focused on ensuring that the discharge met all applicable effluent limitations and water quality standards, that it passed through a primary treatment unit prior to discharge, and that a "portion of the flow [w]ould only be routed around a biological or advanced treatment unit when the capacity of the treatment unit is being fully utilized." *Id.* The EPA posted the proposed policy on its website and declared its consistency with the CWA. Implicitly, the 2003 policy seemed to view the secondary treatment phase as encompassing both traditional biological secondary treatment units and auxiliary non-biological treatments for peak wet weather flows, such as ACTIFLO. Accordingly, flows sent through ACTIFLO were not being intentionally "diverted" from a process they should have gone through; instead, these excess flows were simply designated to receive a different **[*860]** type of secondary treatment. The focus was on whether the water quality of the resulting combined discharge at the end of the secondary treatment phase met all applicable **[**19]** effluent limitations.

Two years later, the EPA abandoned the 2003 proposal. 70 Fed. Reg. 76,013, 76,015 (Dec. 22, 2005). The EPA acknowledged recent "confusion regarding the regulatory status of peak wet weather flow diversions around secondary treatment units at POTW treatment plants" and observed that they were treated only intermittently as bypasses. Id. at 76,015. The 2005 policy announced that this type of "diversion" was now considered a bypass and would be allowed only if there were "no feasible alternatives." Id. at 76,016. As of the creation of the EPA letters in 2011, the 2005 policy had not been finalized or otherwise officially adopted. As late as June 2010, the EPA continued to solicit input on the 2005 policy through notices in the Federal Register. *See* 75 Fed. Reg. 30,395, 30,401 (June 1, 2010).

During the spring of 2011, the League asked the EPA whether it could use "physical/chemical treatment processes, such as Actiflo . . . to augment biological treatment and recombine the treatment streams prior to discharge, without triggering application of [the bypass rule]." The June 2011 letter responded by summarizing the EPA's 2005 proposed policy without specifically addressing **[**20]** how the application of that policy would impact the use of ACTIFLO or similar processes. The League sought additional clarification on whether this response meant that ACTIFLO could be used only if there were no feasible alternatives, which the September 2011 letter answered in the affirmative. According to the EPA, ACTIFLO units fail to "provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." Because ACTIFLO by itself is not considered a satisfactory secondary treatment unit, the EPA views the practice of intentionally routing flows away from a facility's traditional biological secondary treatment units and through ACTIFLO as a bypass that would only be allowed upon a showing of no feasible alternatives.

The League argues that by prohibiting the use of ACTIFLO internally, as one element of a facility's secondary treatment procedures, the EPA is effectively dictating treatment design, despite the agency's acknowledgment that the bypass rule and secondary treatment regulations do not allow for such determinations at the federal level. The League also claims that the EPA is effectively applying secondary treatment effluent **[**21]** limitations within a treatment facility; that is, it is applying effluent limitations to the individual streams exiting peak flow treatment units, instead of at the end of the pipe. The EPA responds that using ACTIFLO to process peak wet weather flows diverts water from biological

secondary treatment units, and therefore subjecting its use to a no-feasible-alternatives analysis comports with the plain language of the bypass rule.

II. Jurisdiction

A. Direct appellate review

The League challenges the EPA's positions on bacteria mixing zones and blending, as set forth in the two letters, as new rules promulgated in violation of APA notice and comment requirements and as in conflict with the CWA. ***HN14*** The APA waives sovereign immunity for suits seeking judicial review of an "[a]gency action made reviewable by statute."[10] 5 U.S.C. § 704. **[*861]** "The CWA establishes a bifurcated jurisdictional scheme whereby courts of appeals have jurisdiction over some categories of challenges to EPA action, and the district courts retain jurisdiction over other types of complaints." *Nat'l Pork Producers Council v. EPA, 635 F.3d 738, 755 (5th Cir. 2011)*. The League invokes ***HN15*** CWA section 509(b)(1)(E), which vests the courts **[**22]** of appeals with exclusive jurisdiction to review the EPA's "action . . . in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." 33 U.S.C. § 1369(b)(1)(E). The EPA counters that we have no jurisdiction to review guidance letters and that, in any event, its positions are consistent with the CWA.

HN17 "The existence of subject-matter jurisdiction is a question of law that this court reviews de novo." *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters, 645 F.3d 954, 958 (8th Cir. 2011)*. In order to be timely filed, interested parties must file for review within 120 days from the date of the promulgation. § 1369(b)(1). The 120-day window to challenge promulgations begins two weeks after a document is signed. *40 C.F.R. § 23.2*. Here, the letters were signed **[**23]** on June 30, 2011, and September 14, 2011, and therefore the time period to challenge the letters—should they be found to be promulgations—began on July 14, 2011, and September 28, 2011, respectively. The League filed for review on November 4, 2011, and thus its petition is timely.

We must consider, then, whether the act of sending the letters constituted an action "promulgating any effluent limitation or other limitation."[11] The EPA urges us to dismiss the case for lack of subject matter jurisdiction, disputing the factual basis for the League's characterization of the letters. ***HN18*** Because the EPA raises a factual challenge to our jurisdiction under *Federal Rule of Civil Procedure 12(b)(1)*, "no presumptive truthfulness attaches to the [League's] allegations, and the existence of disputed material facts will not preclude [us] from evaluating . . . the merits of the jurisdictional claims." *Osborn v. United States, 918 F.2d 724, 729-30 & n.6 (8th Cir. 1990)* (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977)*).

1. "[P]romulgating"

Neither the Supreme Court nor this court has defined the circumstances in which an agency action can be considered a promulgation. Black's Law Dictionary defines "promulgate" as "(Of an administrative agency) to carry out the formal process of rulemaking by publishing the proposed regulation, inviting public comments, and approving or rejecting the proposal." (8th ed. 2004). This narrow interpretation would allow direct appellate review only of rules formally promulgated through notice and comment procedures. Yet, ***HN19*** the Supreme Court has recognized a preference for direct appellate review of agency action pursuant to the APA. *See, e.g., Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 745, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985)* ("Absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts, we will not presume that Congress intended to depart from the sound policy of placing initial APA review in the courts of appeals."); *see also Nat'l Auto. Dealers* **[*862]** *Ass'n v. FTC, 670 F.3d 268, 399 U.S. App. D.C. 303, 305 (D.C. Cir. 2012)*; *Jaunich v. Commodity Futures Trading Comm'n, 50 F.3d 518, 521 (8th Cir. 1995)*. Moreover, the Supreme Court has interpreted **[**25]** broadly the direct appellate review provision in CWA section 509(b)(1)(F), which authorizes review of agency "action . . . in issuing or denying a permit." The Court viewed an EPA veto of a state-issued permit to be "functionally similar" to a direct denial of a permit application by the EPA itself, and therefore held that the petitioner could bring his challenge directly to a court of appeals under section 509(b)(1)(F). *Crown Simpson Pulp Co. v. Costle, 445 U.S. 193, 196, 100 S. Ct. 1093, 63 L. Ed. 2d 312 (1980)* (per curiam). By

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[10] ***HN16*** The APA does not create federal subject matter jurisdiction. *Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789, 792 (8th Cir. 1996)*. Rather, a federal court has federal question jurisdiction under 28 U.S.C. § 1331 over challenges to federal agency action. *Ochoa v. Holder, 604 F.3d 546, 549 (8th Cir. 2010)*; *see also Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 56, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993)*.

[11] The League did not contend that the EPA's letters were "actions . . . approving" effluent or other limitations, rather than promulgating them, and therefore **[**24]** we did not consider the matter.

analogy, we are persuaded that it would be more appropriate to interpret "promulgating" to include agency actions that are "functionally similar" to a formal promulgation. *See Modine Mfg. Corp. v. Kay, 791 F.2d 267, 271 (3d Cir. 1986)* (finding jurisdiction to review directly "the agency's interpretation of pretreatment standards applicable to indirect dischargers" because they constituted an action "promulgating any effluent . . . pretreatment standard" under CWA section 509(b)(1)(C)); *see also NRDC v. EPA, 673 F.2d 400, 405, 218 U.S. App. D.C. 9 (D.C. Cir. 1982)* ("Our decision . . . follows the lead of the Supreme Court in according section 509(b)(1) a practical rather than a cramped construction.").

In considering **[**25]** jurisdictional statutes similar to section 509(b)(1)(E), our colleagues on the District of Columbia Circuit have adopted a practical conception of whether an agency action constitutes a promulgation. That court has explained, "To determine whether a regulatory action constitutes promulgation of a regulation, we look to three factors: (1) the Agency's own characterization of the action; (2) whether the action was published in the Federal Register . . . .; and (3) whether the action has binding effects on private parties or on the agency." *Molycorp, Inc. v. EPA, 197 F.3d 543, 545, 339 U.S. App. D.C. 73 (D.C. Cir. 1999)* (internal citation omitted). *Molycorp* identifies the third factor as the "ultimate focus" of this test, and we agree that whether an agency announcement is binding on regulated entities or the agency should be the touchstone of our analysis. To place any great weight on the first two *Molycorp* factors potentially could permit an agency to disguise its promulgations through superficial formality, regardless of the brute force of reality. *See also Cement Kiln Recycling Coal. v. EPA, 493 F.3d 207, 227-28, 377 U.S. App. D.C. 234 (D.C. Cir. 2007)* (holding that it lacked jurisdiction to consider a purported agency "promulgation" **[**27]** because the document was not binding).

HN20 "[A]n agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding." *GE v. EPA, 290 F.3d 377, 383, 351 U.S. App. D.C. 291 (D.C. Cir. 2002)* (citations omitted). Thus, our functional analysis of whether an agency action constitutes a promulgation encompasses those words and deeds that bind legally or as a practical matter. *Cf. South Dakota v. Ubbelohde, 330 F.3d 1014, 1031 (8th Cir. 2003)* ("Agency statements can be binding upon the agency absent notice-and-comment rulemaking in certain circumstances."); *Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021, 341 U.S. App. D.C. 46 (D.C. Cir. 2000)* ("[W]e have also recognized that an agency's other pronouncements can, as a practical matter, have a binding effect."). This includes statements prospectively restricting the agency's discretion, *see Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1111, 302 U.S. App. D.C. 38 (D.C. Cir. 1993)*, or having a "present-day binding effect" on regulated entities, thereby "conclusively disposing of certain issues," *see McLouth [*863] Steel Prods. Corp. v. Thomas, 838 F.2d 1317, 1321, 267 U.S. App. D.C. 367 (D.C. Cir. 1988)*.[12]

Here, the letters can be considered "promulgations" for the purposes of establishing our jurisdiction under section 509(b)(1)(E) because they have a binding effect on regulated

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[12] The **[**28]** EPA argues that no federal court has jurisdiction over this claim because these letters are not "final agency actions." ***HN21*** Even if there were an implicit finality requirement applicable to "[a]gency actions made reviewable by statute," this would not affect federal jurisdiction; the APA's requirements are part of a party's cause of action and are not jurisdictional. *Air Courier Conference v. Am. Postal Workers Union, 498 U.S. 517, 523 n.3, 111 S. Ct. 913, 112 L. Ed. 2d 1125 (1991)* ("The judicial review provisions of the APA are not jurisdictional."); *see also Ochoa, 604 F.3d at 549 (8th Cir. 2010)*; *Trudeau v. FTC, 456 F.3d 178, 183-84, 372 U.S. App. D.C. 335 (D.C. Cir. 2006)*. In this case, analyzing whether an agency pronouncement is binding evokes considerations of finality. However, they arise not from the APA, but rather from the conditions placed on the CWA's grant of direct appellate jurisdiction. ***HN22*** The APA allows judicial review in two situations: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704. The word "final" modifies the second use of "agency action," but not the first. While some courts have interpreted the phrase "[a]gency action made reviewable **[**29]** by statute" as including an implied finality requirement, *see, e.g., Appalachian Energy Grp. v. EPA, 33 F.3d 319, 322 (4th Cir. 1994)*; *Carter/Mondale Presidential Comm., Inc. v. Fed. Election Comm'n, 711 F.2d 279, 285 n.9, 229 U.S. App. D.C. 1 (D.C. Cir. 1983)*, we decline to conjure up a finality requirement for "[a]gency actions made reviewable by statute" where none is located in the text of the APA, particularly where the Supreme Court has implied that the two phrases incorporate distinct requirements, *see Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)* ("When, as here, review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"); *id. at 891* ("Some statutes permit broad regulations to serve as the 'agency action,' and thus to be the object of judicial review directly, even before the concrete effects normally required for APA review are felt."); *see also Yankton Sioux Tribe v. Podhradsky, 606 F.3d 994, 1012 (8th Cir. 2010)* ("[T]he 'cardinal canon' of statutory interpretation is 'that a legislature says in a statute what it means and means in a statute **[**30]** what it says there.'" (quoting *Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)*)).

entities. ***HN23*** "If an agency acts as if a document issued at headquarters is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document, if it leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply with the terms of the document, then the agency's document is for all practical purposes 'binding.'" *Appalachian Power Co., 208 F.3d at 1021*. In particular, the court in *Appalachian Power* found that the contested agency guidance before it was binding because it reflected "a position [the EPA] plans to follow in reviewing State-issued permits, a position it will insist **[**31]** State and local authorities comply with in settling the terms and conditions of permits issued to petitioners, a position EPA officials in the field are bound to apply." *Id. at 1022*. This reasoning persuades us that the June 2011 and September 2011 letters are binding as well.

First, the June 2011 letter reflects a binding policy with respect to bacteria mixing zones. In response to the League's 2010 challenge to the EPA's policy on mixing zones, the EPA submitted to this court a motion to dismiss, which described the King memorandum as nothing but "one office director's view of a regulatory **[*864]** requirement." But in the June 2011 letter to Senator Grassley, the EPA characterized the King memorandum as reflecting "the EPA's position." Although the EPA coyly continues to insist that the letter is the "consummation of nothing," something apparently was consummated between 2010 and June 2011. Furthermore, the language used to express "the EPA's position"—"should not be permitted"—is the type of language we have viewed as binding because it "speaks in mandatory terms." *Ubbelohde, 330 F.3d at 1028*; *see also Gen. Elec. Co., 290 F.3d at 383* (***HN24*** "[T]he mandatory language of a document alone can be **[**32]** sufficient to render it binding . . . ."); *cf. Catawba Cnty., N.C. v. EPA, 571 F.3d 20, 34, 387 U.S. App. D.C. 20 (D.C. Cir. 2009)* (per curiam) (finding that an agency memo was not binding because it "'encouraged' states to address all nine factors EPA identified, but did not require them to do so"). The League's appendix includes several affidavits from representatives of municipal wastewater treatment facilities and the Iowa Department of Natural Resources, the state permitting authority.[13] These individuals averred that they indeed have taken the June 2011 letter at face value, interpreting it as establishing a new prohibition on bacteria mixing zones, one by which they must abide in the permit application process. We agree that private parties have "reasonably [been] led to believe that failure to conform will bring adverse consequences," which tends to make the document binding as a practical matter. *See Gen. Elec. Co., 290 F.3d at 383* (quoting Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like—Should Federal Agencies Use Them to Bind the Public?*, *41 Duke L.J. 1311, 1328 (1992)*).

The EPA asks us to believe that the June 2011 letter did not flatly prohibit the use of bacteria mixing zones in waters designated for primary contact recreation because although it intoned that states "should not" permit bacteria mixing zones in primary contact recreation areas, it nonetheless mentioned that under *40 C.F.R. § 131.13*, states "may, at their discretion, include mixing zone policies in their state water quality standards." With respect to bacteria mixing zones in primary contact recreation areas, we struggle to spot the surviving state discretion. The **[*865]** letter instructs state permitting authorities to reject certain permit

The CWA expressly makes specified agency actions reviewable, and our task therefore is to determine whether the asserted agency action falls within the statutory terms.

[13] The League provided these affidavits in an unopposed appendix supplementing the EPA's **[**33]** administrative record. After oral argument, the League filed a motion to further supplement the record with additional affidavits from the Iowa and Kansas water permitting authorities. The EPA objects to the League's attempt to further supplement the record at this stage. The Supreme Court has explained that ***HN25*** when applying the arbitrary and capricious standard of review under APA section 706(2)(A), "the focal point for judicial review should be the administrative record already in existence." *Camp v. Pitts, 411 U.S. 138, 142, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973)*. Therefore, if "there is a contemporaneous administrative record and no need for additional explanation of the agency decision," we will permit supplementation of the administrative record only where there is a "strong showing of bad faith or improper behavior." *Newton Cnty. Wildlife Ass'n v. Rogers, 141 F.3d 803, 807 (8th Cir. 1998)* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)*). The rationale for this rule is that judicial review of the reasonableness of an agency's actions should concentrate upon the evidence available to the agency when making its decision. *See Robinette v. Comm'r, 439 F.3d 455, 459 (8th Cir. 2006)*. **[**34]** But where, as here, rulemaking masquerading as explication is alleged, the informality of the agency's decisionmaking process makes the possibility of a sparse "contemporaneous administrative record" more likely. While we question whether the *Camp* standard would necessarily apply to such challenges under APA section 706(2)(D), we need not decide the matter because we reached our conclusions without resort to the League's proposed supplementary materials. Therefore, we deny the League's motion to supplement the record.

applications, regardless of the state's [**35] water quality standards. The EPA's protestations to the contrary are particularly unavailing where, as here, Iowa's water permitting authority has received communications from the EPA indicating that it would object to any permits that were inconsistent with the policy outlined in the EPA letters. In effect, the EPA asks us to agree that when it couches an interdiction within a pro forma reference to state discretion, the prohibition is somehow transformed into something less than a prohibition. We decline to accept such Orwellian Newspeak.

Second, the September 2011 letter presents a binding policy on blending. Although the June 2011 letter describes the "2005 draft Policy" on blending as merely "a viable path forward" that "has not been finalized," the September 2011 letter applies the 2005 policy to the League's proposed use of ACTIFLO.[14] In requiring ACTIFLO to pass a no-feasible-alternatives analysis, the EPA made clear that it "plans to follow [the 2005 policy] in reviewing State-issued permits," and "it will insist State and local authorities comply with [the 2005 policy] in settling the terms and conditions of permits issued to petitioners." *See Appalachian Power Co., 208 F.3d at 1022.* [**36] Just as it did in *Appalachian Power*, the EPA dissembles by describing the contested policy as subject to change. *See id. at 1022-23.* Yet, all regulations are susceptible to alteration. Hedging a concrete application of a policy within a disclaimer about hypothetical future contingencies does not insulate regulated entities from the binding nature of the obligations and similarly cannot serve to inoculate the agency from judicial review.

Accordingly, we hold that the June 2011 and September 2011 letters were promulgations for the purposes of CWA section 509(b)(1)(E).

2. "[A]ny [38] effluent limitation or other limitation"**

HN27 The CWA defines effluent limitations as "any restriction established by a State or the [EPA] on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11).

[*866] The Supreme Court has referred to effluent limitations as "direct restrictions on discharges." *EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200, 204, 96 S. Ct. 2022, 48 L. Ed. 2d 578 (1976).* Other circuits have held that the expansiveness of the phrase "any restriction" encompasses both numerical and non-numerical effluent limitations. *See, e.g., Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 502 (2d Cir. 2005)* ("[W]e believe that the terms of the nutrient management plans constitute effluent limitations"); *NRDC v. EPA, 656 F.2d 768, 775, 211 U.S. App. D.C. 179 (D.C. Cir. 1981)* (finding an effluent limitation where, "[a]s a practical matter," agency action "restrict[s] the discharge of sewage by limiting the availability of a variance to a class of applicants").

The phrase "other limitation" leaves much to the imagination. The Fourth Circuit explained that it "construe[s] that term as a restriction on the [**39] untrammeled discretion of the industry . . . [as it existed] prior to the passage of the [CWA]." *Va. Elec. & Power Co. (VEPCO) v. Costle, 566 F.2d 446, 450 (4th Cir. 1977).* *VEPCO* found jurisdiction under section 509(b)(1)(E) because although the challenged regulations involved "structures," rather than "discharges of pollutants into the water," and therefore were not "effluent limitations," they were nonetheless "other limitations" because they "refer[red] to information that must be considered in determining the type of intake structures that individual point sources may employ." *Id. at 449-50.* Many of our sister circuits have adopted the *VEPCO* approach. *See, e.g., Friends of the Everglades v. EPA, 699 F.3d 1280, 1287 (11th Cir. 2012)* (finding no jurisdiction under section 509(b)(1)(E) because challenged rule did the opposite of

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[14] League Question: "Is the permitted use of ACTIFLO or other similar peak flow treatment processes to augment biological treatment subject to a 'no feasible alternatives' demonstration?" EPA Response: "Yes." The EPA insists that this challenge is time-barred because the proper time to raise the challenge was in 2005. We find this contention unpersuasive because prior to the September 2011 letter, the EPA never indicated that the 2005 policy became final. For example, the June 1, 2010 Federal Register notice explained that the EPA was continuing to "solicit[] input from the general public concerning the impact of the proposed rule." 75 Fed. Reg. 30,395, 30,401 (June 1, 2010). Even the June 2011 letter explained that the agency was "continu[ing] to consider [**37] whether the 2005 Policy should be finalized or incorporated into the EPA's other potential wet weather rulemaking effort announced June 1, 2010 in the Federal Register." In contrast, the September 2011 letter simply applies the 2005 Policy to the regulated entities as if it had already been finalized. The EPA's approach to the period for seeking appellate review would eviscerate the direct appellate review provisions of the CWA by enabling an agency to announce consideration of a proposal and then wait 121 days before treating the proposal as binding. *Cf. CropLife Am. v. EPA, 329 F.3d 876, 884, 356 U.S. App. D.C. 192 (D.C. Cir. 2003)* (refusing to find that the petitioners' claim was time-barred "because the new rule clearly represents the first time that the agency has adopted an unequivocal, wholesale ban"). ***HN26*** The time to seek direct appellate review begins to run not when the agency first floats its proposal to the public, but rather when the agency promulgates that announcement—in other words, when they make its substance binding.

restricting industry discretion, by "free[ing] the industry from the constraints of the permit process"); Nw. Envtl. Advocates v. EPA, 537 F.3d 1006, 1015-16 (9th Cir. 2008) (finding no jurisdiction under section 509(b)(1)(E) because the challenged regulations created "categorical and permanent exemptions" from "any limit imposed by" CWA permit requirements); [**40] NRDC, 673 F.2d at 402, 405 (finding jurisdiction under section 509(b)(1)(E) to review "a complex set of procedures for issuing or denying NPDES permits" that restricted industry discretion). We agree that ***HN28*** an agency action is a "limitation" within the meaning of section 509(b)(1)(E) if entities subject to the CWA's permit requirements face new restrictions on their discretion with respect to discharges or discharge-related processes.

Applying this definition, we find that the contested letters involve "effluent or other limitations." ***HN29*** The EPA's position that bacteria mixing zones in waters "designated for primary contact recreation . . . should not be permitted" is a restriction that directly affects the concentration of discharge from a point source and therefore is an effluent limitation. *See* Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 986, 325 U.S. App. D.C. 76 (D.C. Cir. 1997) (per curiam) (finding jurisdiction under CWA section 509(b)(1)(E) to review "the prohibition in Guidance Procedure 3.C against using mixing zones for new and existing BCC discharges"). The rule regarding the use of blending is an "other limitation" because, as in *VEPCO*, it restricts the discretion of municipal sewer treatment plants [**41] in structuring their facilities.

As a result, both requirements for direct appellate review are satisfied here.[15]

[*867] **B. Ripeness**

HN30 The judicially created doctrine of ripeness "flows from both the Article III 'cases' and 'controversies' limitations and also from prudential considerations for refusing to exercise jurisdiction." Neb. Pub. Power Dist. v. MidAm. Energy Co., 234 F.3d 1032, 1037 (8th Cir. 2000) (citing Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n.18, 113 S. Ct. 2485, 125 L. Ed. 2d 38 (1993)). "'Ripeness is peculiarly a question of timing' and is governed by the situation at the time of review, rather than the situation at the time of the events under review." Id. at 1039 (quoting Anderson v. Green, 513 U.S. 557, 559, 115 S. Ct. 1059, 130 L. Ed. 2d 1050 (1995) (per curiam)). A party seeking review [**42] must show both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." Pub. Water Supply Dist. No. 10 of Cass Cnty. v. City of Peculiar, 345 F.3d 570, 572-73 (8th Cir. 2003) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). Both of these factors are weighed on a sliding scale, but each must be satisfied "to at least a minimal degree." Neb. Pub. Power Dist., 234 F.3d at 1039.

Fitness rests primarily on whether a case would "benefit from further factual development," and therefore cases presenting purely legal questions are more likely to be fit for judicial review. Pub. Water Supply, 345 F.3d at 573. The hardship factor looks to the harm parties would suffer, both financially and as a result of uncertainty-induced behavior modification in the absence of judicial review. Neb. Pub. Power Dist., 234 F.3d at 1038. We do not require parties to operate beneath the sword of Damocles until the threatened harm actually befalls them, but the injury must be "certainly impending." Pub. Water Supply, 345 F.3d at 573 (quoting Paraquad, Inc. v. St. Louis Hous. Auth., 259 F.3d 956, 958-59 (8th Cir. 2001)). "The immediacy and the [**43] size of the threatened harm" will also affect the interplay of these factors. Neb. Pub. Power Dist., 234 F.3d at 1038.

This case hinges upon whether the EPA's letters constitute legislative rules. We agree with our colleagues who have commented that ***HN31*** "whether [a] Guidance Document is a legislative rule is largely a legal, not a factual, question, turning . . . primarily upon the text of the Document." Gen. Elec. Co. v. EPA, 290 F.3d at 380; *see also* Warder v. Shalala, 149 F.3d 73, 79 (1st Cir. 1998); Chief Probation Officers of Cal. v. Shalala, 118 F.3d 1327, 1330 (9th Cir. 1997). As primarily legal questions, such challenges tend to present questions fit for judicial review. On the other hand, postponing a procedural challenge to an agency guidance document may be appropriate where further factual development regarding the agency's application of the document would aid our decision. Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803, 812, 123 S. Ct. 2026, 155 L. Ed. 2d 1017 (2003). This is so because the purpose of the ripeness doctrine is to prevent courts "from entangling themselves in abstract disagreements over administrative policies." Abbott Labs., 387 U.S. at 148.

In this case, we are not wading into [**44] the abstract because the disagreements before us are quite concrete.

[15] The EPA insists that as a result of finding its conduct here reviewable, there will be a chilling effect on the informal channels of communication between agencies and regulated entities. We acknowledge the great value in such modes of communication and encourage agencies to continue to utilize them. However, when agencies veer from merely advisory statements or interpretations into binding proclamations, they become susceptible to judicial review.

Nothing about the proclamation that "the EPA's position, as stated in the [King] memorandum, is that [bacteria mixing **[*868]** zones in primary contact recreation waters] should not be permitted" indicates that the EPA's posture will vary based on each applicant's specific factual circumstances. Similarly, when asked if the use of "peak flow treatment processes" such as ACTIFLO would be subject to a "no feasible alternatives" demonstration, the EPA responded "Yes."[16] The question is whether the statements are simply reminders of preexisting regulatory requirements or whether they create new regulatory obligations. Because such inquiries do not implicate contingent factual circumstances, this controversy is ripe for our review. *See* CropLife Am. v. EPA, 329 F.3d 876, 884, 356 U.S. App. D.C. 192 (D.C. Cir. 2003) (finding that petitioners presented a "purely legal question" that was ripe for review where "the EPA directive states unequivocally that the agency will not consider *any* third-party human studies").

The second ripeness factor, hardship to parties, is also present. Although the EPA portrays the harm as lurking, if at all, on the distant horizon, the threatened harm is more immediate, and it is certainly not speculative. League members must either immediately alter their behavior or play an expensive game of Russian roulette with taxpayer money, investing significant resources in designing and utilizing processes that—if these letters are in effect new legislative rules—were viable before the publication of the **[**46]** letters but will be rejected when the letters are applied as written. *See* Neb. Pub. Power Dist., 234 F.3d at 1039 ("Delayed judicial resolution would only increase the parties' uncertainty, and would require [petitioners] to gamble millions of dollars on an uncertain legal foundation."). Postponing our review until the EPA has denied a permit application in accord with the letters renders a hardship on municipal water authorities, who already would have invested irretrievable funds into their applications. *Cf.* Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 164, 87 S. Ct. 1520, 18 L. Ed. 2d 697 (1967) (finding a challenged agency action not ripe for review where "no irremediable adverse consequences [would] flow from requiring a later challenge to this regulation"). Therefore, we find that denying judicial review would be a hardship to the parties and that this case evinces the requisite degree of ripeness. *See* Abbott Labs., 387 U.S. at 153 ("Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure **[**47]** Act . . . must be permitted, absent a statutory bar or some other unusual circumstance . . . ."); Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201-02, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983) (finding a challenge to an as-yet unimplemented statute ripe because "requir[ing] the industry to proceed without knowing whether the moratorium is valid would impose a palpable and considerable hardship"); *see also* **[*869]** Hett v. EPA, 566 U.S. , 132 S. Ct. 1367, 1374, 182 L. Ed. 2d 367 (2012) ("[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review . . . .").

C. Article III Standing

HN32 If a litigant lacks Article III standing to bring his claim, then we have no subject matter jurisdiction over the suit. Miller v. Redwood Toxicology Lab., Inc., 688 F.3d 928, 934 (8th Cir. 2012). "To show standing under Article III of the U.S. Constitution, a plaintiff must demonstrate (1) injury in fact, (2) a causal connection between that injury and the challenged conduct, and (3) the likelihood that a favorable decision by the court will redress the alleged injury." Young Am. Corp. v. Affiliated Computer Servs. (ACS), Inc., 424 F.3d 840, 843 (8th Cir. 2005) **[**48]** (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Because the League, rather than an individual permit applicant, is filing suit, it also must prove associational standing. "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 181, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). The League need not establish that all of its

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[16] The September 2011 letter acknowledged that if ACTIFLO independently met secondary treatment requirements, then flows moving through ACTIFLO units **[**45]** instead of the facility's biological secondary treatment units would not be considered a bypass. However, the letter also stated that ACTIFLO failed to meet these requirements and that the EPA would "continue to explore in what circumstances use of [ACTIFLO-type] technologies is consistent with a determination that there are 'no feasible alternatives.'" During oral argument, counsel for EPA informed us that the use of newer, modified versions of ACTIFLO units "may well satisfy the secondary treatment regulations." This type of belated backpedaling is insufficient to render these challenges so intertwined with hypothetical future conditions that they are unripe for review.

members would have standing to sue individually so long as it can show that "any one of them" would have standing. *See Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)*. The EPA concedes that the League meets the second and third elements of the associational standing test, and we agree. The only remaining element is whether any individual member would have standing to sue in its own right, which requires any League member to satisfy the three components that encompass the "irreducible constitutional minimum of standing." *See Am. Library Ass'n v. FCC, 406 F.3d 689, 696, 365 U.S. App. D.C. 353 (D.C. Cir. 2005)* **[**49]** (quoting *Lujan, 504 U.S. at 560*).

HN33 "[S]tanding is to be determined as of the commencement of the suit." *Lujan, 504 U.S. at 570 n.5*. The party seeking judicial review bears the burden of persuasion and must support each element "with the manner and degree of evidence required at the successive stages of litigation." *Id. at 561*. Therefore, at the pleading stage a petitioner can move forward with "general factual allegations of injury," whereas to survive a summary judgment motion, he "must set forth by affidavit or other evidence specific facts." *City of Clarkson Valley v. Mineta, 495 F.3d 567, 569 (8th Cir. 2007)* (quoting *Lujan, 504 U.S. at 561*). The Supreme Court has not addressed "the manner and degree of evidence required" when a petitioner is seeking appellate review of an administrative action, nor has this circuit addressed the matter. The District of Columbia Circuit has equated such a petition with a motion for summary judgment, in that both request a final judgment on the merits. *Sierra Club v. EPA, 292 F.3d 895, 899, 352 U.S. App. D.C. 191 (D.C. Cir. 2002)*. Accordingly, ***HN34*** parties seeking direct appellate review of an agency action must prove each element of standing as if they were moving for summary **[**50]** judgment in a district court. *Id.* Our colleagues on the Seventh Circuit have also taken this approach. *See Citizens Against Ruining the Env't v. EPA, 535 F.3d 670, 675 (7th Cir. 2008)*. This reasoning is sound; because parties in the League's position seek the type of relief **[*870]** available on a motion for summary judgment, they correspondingly should bear the responsibility of meeting the same burden of production, namely "specific facts" supported by "affidavit or other evidence." *See Lujan, 504 U.S. at 561*.

HN35 The EPA raises a factual challenge to our subject matter jurisdiction by attacking the facts asserted by the League with respect to standing, and therefore the League must establish standing "without the benefit of any inferences in [its] favor." *Defenders of Wildlife, Friends of Animals & Their Env't v. Lujan, 911 F.2d 117, 120 (8th Cir. 1990), rev'd on other grounds, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)*. Parties seeking to litigate in federal court "have the burden of establishing jurisdiction," including standing, "by a preponderance of the evidence." *Yeldell v. Tutt, 913 F.2d 533, 537 (8th Cir. 1990)*. *But see Sierra Club, 292 F.3d at 899* (imposing a burden of proof to establish elements of standing **[**51]** to a "substantial probability" (quoting *Am. Petroleum Inst. v. EPA, 216 F.3d 50, 63, 342 U.S. App. D.C. 159 (D.C. Cir. 2000)*)). The League seeks to assert both a procedural and a substantive challenge to the letters. We address separately its standing to make each claim. *See Int'l Bhd. of Teamsters v. Pena, 17 F.3d 1478, 1483-84, 305 U.S. App. D.C. 125 (D.C. Cir. 1994)*.

With respect to the substantive challenges, as the foregoing discussion regarding hardship has indicated, the League members' affidavits evince the type of "concrete" and "actual or imminent" harm necessary to establish an injury in fact. *See Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138-39 (9th Cir. 1999)* (en banc) ("[I]n many cases, ripeness coincides squarely with standing's injury in fact prong."). At least some members are currently operating under permits that allow them to utilize blending and bacteria mixing zones in circumstances inconsistent with the EPA letters, which they must imminently rectify. *Cf. CropLife Am., 329 F.3d at 884* ("The disputed directive concretely injures petitioners, because it unambiguously precludes the agency's consideration of . . . studies that petitioners previously have been permitted to use to verify the safety **[**52]** of their products."). Moving into compliance will be costly. The League has therefore articulated an injury in fact. *See City of Waukesha v. EPA, 320 F.3d 228, 234, 355 U.S. App. D.C. 100 (D.C. Cir. 2003)* (per curiam) ("The administrative record shows that the City of Waukesha would face substantial costs if it was required to comply with the . . . regulations. EPA has not disputed that record evidence. This is sufficient for injury-in-fact."). ***HN36*** Causation for standing purposes requires that the harm asserted be "fairly traceable to the challenged action of the defendant." *Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 591 (8th Cir. 2009)* (quoting *Lujan, 504 U.S. at 560*). The EPA disputes causation because it argues that the letters are not binding. Because we have ruled otherwise, we find that the League has established causation. Finally, the League has shown that it is "'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision.'" *Lujan, 504 U.S. at 561* (quoting *Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38, 43, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)*). If the rules were vacated as substantively unlawful, it is indeed likely that the members' injuries would be redressed.

With respect to **[**53]** the procedural challenge, namely that the EPA dodged the APA's notice and comment procedures

and *de facto* implemented new legislative rules regulating members' activities under the CWA, ***HN37*** the violation of a procedural right can constitute an injury in fact "so long as the procedures in question are [*871] designed to protect some threatened concrete interest of [the petitioner] that is the ultimate basis of his standing." Lujan, 504 U.S. at 573 n.8; *see also* Sierra Club v. Glickman, 156 F.3d 606, 616 (5th Cir. 1998). The League's members have a concrete interest not only in being able to meet their regulatory responsibilities but in avoiding regulatory obligations above and beyond those that can be statutorily imposed upon them. ***HN38*** Notice and comment procedures for EPA rulemaking under the CWA were undoubtedly designed to protect the concrete interests of such regulated entities by ensuring that they are treated with fairness and transparency after due consideration and industry participation. *See, e.g.*, Chrysler Corp. v. Brown, 441 U.S. 281, 316, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) ("In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions [**54] be made only after affording interested persons notice and an opportunity to comment."). Thus, the League has established an injury in fact related to the EPA's purported procedural deficiencies.

Causation and redressability, and therefore standing to assert this procedural challenge, follow from these conclusions. ***HN39*** Where a challenger is the subject of agency action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." Lujan, 504 U.S. at 561-62. This is particularly true for individuals asserting violations of procedural rights. Id. at 572 n.7 ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). If a petitioner "is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." Massachusetts v. EPA, 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007); *see also* Sierra Club v. EPA, 699 F.3d 530, 533, 403 U.S. App. D.C. 61 (D.C. Cir. 2012) ("Having shown its members' [**55] redressable concrete interest, [a petitioner association] can assert violation of the APA's notice-and-comment requirements, as those procedures are plainly designed to protect the sort of interest alleged. As to such requirements, [the petitioner association] enjoys some slack in showing a causal relation between its members' injury and the legal violation claimed."). Correspondingly, redressability in this context does not require petitioners to show that the agency would alter its rules upon following the proper procedures. Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 95, 351 U.S. App. D.C. 214 (D.C. Cir. 2002) ("If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter."); *see also* Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 247 n.4 (3d Cir. 2011) ("Even if the [U.S. Forest Service is correct on the merits], the Agreement nevertheless establishes—in violation of appellees' notice and comment rights—a new substantive rule . . . . This suffices for standing purposes."); [illegible] v. United States, 269 F.[illegible]9, 471 & n.7 (4th Cir. 2001). The League's [**56] remaining burden as to standing is met because "there is some possibility that the requested relief," namely remanding to the EPA for application of notice and comment procedures, would "prompt the [EPA] to reconsider the decision that allegedly harmed" League members. *See* Massachusetts, 549 U.S. at 518.

We conclude that the League has standing to assert its claims. Having resolved [*872] all jurisdictional questions, we now turn to the merits of the League's petition for review.

III. Merits of Procedural Challenge

A. Standard of Review

The parties disagree over the appropriate standard of review to be applied where, as here, an appellate court reviews challenges to agency procedural compliance under § 706(2)(D). The League urges us to follow the Ninth Circuit, which "reviews de novo the agency's decision not to follow the APA's notice and comment procedures . . .[,] because complying with the notice and comment provisions when required by the APA 'is not a matter of agency choice.'" Reno-Sparks Indian Colony v. EPA, 336 F.3d 899, 909 n.11 (9th Cir. 2003) (quoting Sequoia Orange Co. v. Yeutter, 973 F.2d 752, 757 n.4 (9th Cir. 1992)). The EPA argues its characterization of the letters is entitled [**57] to a deferential abuse of discretion review. Our prior decisions have not clearly announced a standard of review, other than to note that the agency's characterization of its rule as legislative or interpretative, "while not dispositive, is entitled to deference." Drake v. Honeywell, Inc., 797 F.2d 603, 607 (8th Cir. 1986). *But see* United States v. Hacker, 565 F.3d 522, 524 (8th Cir. 2009) (stating in dicta that challenges to procedural compliance under the APA present "a question of law, which we review de novo"), *abrogated on other grounds by* Bond v. United States, 564 U.S. ___, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011); South Dakota v. Ubbelohde, 330 F.3d 1014, 1028 (8th Cir. 2003) ("Where a policy

statement purports to create substantive requirements, it can be a legislative rule regardless of the agency's characterization.").

We agree with our colleagues on the Ninth Circuit that ***HN40*** much of the rationale for granting deference to administrative decisions is simply not applicable where the topic of our review—compliance with APA procedural requirements—is not a matter that Congress has committed to the agency's discretion. In other words, whether and when an agency must follow the law is not an area **[**58]** uniquely falling within its own expertise, and thus the agency's decision is less deserving of deference. *Cf.* Campanale & Sons, Inc. v. Evans, 311 F.3d 109, 120 n.14 (1st Cir. 2002) ("We are unaware of any line of cases that allows an agency to make a binding determination that it has complied with specific requirements of the law. . . . As to the so-called 'specialized experience' of the agency, it would appear that it is the courts that qualify for such a title on an issue of legislative interpretation."). Furthermore, because the categorization of an agency's action as a legislative or interpretative rule is largely a question of law, a *de novo* standard of review is consistent with the standard of review we generally apply to questions of law in similar contexts. *See* Qwest Corp. v. Minn. PUC, 427 F.3d 1061, 1064 (8th Cir. 2005).

At least two circuits in addition to the Ninth Circuit have expressly announced a *de novo* standard of review when distinguishing between legislative rules and other types of agency action. *See* Meister v. Dep't of Agric., 623 F.3d 363, 370 (6th Cir. 2010); Warder, 149 F.3d at 79. We adopt a *de novo* standard of review as well. This is not to **[**59]** say that the agency's label is to be ignored. As discussed above, ***HN41*** an agency's characterization of its rule is a relevant component of our review and is a factor entitled to some deference. Our posture in this regard mirrors similar comments made by other courts of appeals. *See* Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565, 239 U.S. App. D.C. 408 (D.C. Cir. 1984) ("[T]he agency's own label, while relevant, is not dispositive.") (en **[*873]** banc); *accord* Prof'ls & Patients for Customized Care v. Shalala, 56 F.3d 592, 595 (5th Cir. 1995); La Casa Del Convaleciente v. Sullivan, 965 F.2d 1175, 1178 (1st Cir. 1992); Metro. Sch. Dist. of Wayne v. Davila, 969 F.2d 485, 489 (7th Cir. 1992); Friedrich v. HHS, 894 F.2d 829, 834-35 (6th Cir. 1990); Lewis-Mota v. Sec'y of Labor, 469 F.2d 478, 481-82 (2d Cir. 1972).

HN42 The critical distinction between legislative and interpretative rules is that, whereas interpretative rules "simply state what the administrative agency thinks the statute means, and only 'remind' affected parties of existing duties," a legislative rule "imposes new rights or duties." Nw. Nat'l Bank v. U.S. Dep't of the Treasury, 917 F.2d 1111, 1117 (8th Cir. 1990) (quoting Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n, 874 F.2d 205, 207 (4th Cir. 1989)). **[**60]** When an agency creates a new "legal norm based on the agency's *own authority*" to engage in supplementary lawmaking, as delegated from Congress, the agency creates a legislative rule. Syncor Int'l Corp. v. Shalala, 127 F.3d 90, 95, 326 U.S. App. D.C. 422 (D.C. Cir. 1997). Expanding the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created, is the hallmark of legislative rules. *See* Ubbelohde, 330 F.3d at 1028; Martin v. Gerlinski, 133 F.3d 1076, 1079 (8th Cir. 1998); Syncor Int'l Corp., 127 F.3d at 94-95. It follows from this distinction that interpretative rules do not have "the force of law."[17] Shalala v. St. Paul-Ramsey Med. Ctr., 50 F.3d 522, 527 n.4 (8th Cir. 1995). Whether or not a binding pronouncement is in effect a legislative rule that should have been subjected to notice and comment procedures thus depends on whether it substantively amends or adds to, versus simply interpreting the contours of, a preexisting rule. *See* U.S. Telecom Ass'n v. FCC, 400 F.3d 29, 34-35, 365 U.S. App. D.C. 149 (D.C. Cir. 2005).

Identifying where a contested rule lies on the sometimes murky spectrum between legislative rules and interpretative rules can be a difficult task, but it is not just an exercise in hair-splitting formalism. As agencies expand on the often broad language of their enabling statutes by issuing layer upon layer of guidance documents and interpretive memoranda, formerly flexible strata may ossify into rule-like rigidity. An agency potentially can avoid judicial review through the tyranny of small decisions. ***HN44*** Notice and comment procedures secure the values of government transparency and public participation, compelling us to agree with the suggestion that "[t]he APA's notice and comment exemptions must be narrowly construed." Prof'ls & Patients for Customized Care, 56 F.3d at 596

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[17] The EPA insists the letters are neither legislative nor interpretative rules but rather constitute policy statements. **[**61]** ***HN43*** Policy statements are not binding, either as a legal or practical matter. *See* NRDC v. EPA, 643 F.3d 311, 321, 395 U.S. App. D.C. 397 (D.C. Cir. 2011) ("To begin with, because the Guidance binds EPA regional directors, it cannot, as EPA claims, be considered a mere statement of policy; it is a rule."). Because we have determined that the letters evince binding rules regarding bacteria mixing zones and blending, neither can be characterized as a policy statement.

[**62] (quoting *United States v. Piccioto, 875 F.2d 345, 347, 277 U.S. App. D.C. 312 (D.C. Cir. 1989)*; *see also City of New York v. Permanent Mission of India to United Nations, 618 F.3d 172, 201 (2d Cir. 2010)*.

B. Bacteria Mixing Zones

Since at least 1994, ***HN45*** the EPA's long-standing policy toward bacteria mixing zones has been that states should exercise their "discretion"—as set forth in *40 C.F.R. § 131.13*—to adopt a "definitive statement" in their water quality standards "on whether or not mixing zones are [*874] allowed." Handbook Ch. 5.1, 5.1.1. States are authorized to consider mixing zones in determining the types of standards necessary to preserve water quality. *40 C.F.R. § 122.44(d)(1)(ii)*. States do not enjoy complete discretion in creating a mixing zone policy because they operate within the shadow of EPA-crafted effluent limitations. The Handbook interprets certain instances of mixing zones as inconsistent with EPA regulations: states should not draft water quality standards that allow point source dischargers to utilize mixing zones in ways that "may endanger critical areas," such as recreational areas, or pose "significant health risks." Ch. 5.1. Notably, no preexisting regulation establishes that *all* bacteria [**63] mixing zones in recreational areas necessarily "may endanger critical areas" or create "significant health risks."[18] In fact, under the Handbook, whether a mixing zone causes such a state of affairs was to be determined based on a "holistic approach." *Id.*

Yet, when now asked if a state "[m]ay . . . approve a bacteria mixing zone for waters designated for body contact recreation," the EPA flatly proclaims that such mixing zones "should not be permitted." The June 2011 letter tells state permitting [**64] authorities that mixing zones in primary contact recreation areas are necessarily inconsistent with achieving the water quality levels required by federal regulations. The EPA eviscerates state discretion to incorporate mixing zones into their water quality standards with respect to this type of body of water. In effect, the EPA has created a new effluent limitation: state permitting authorities no longer have discretion to craft policies regarding bacteria mixing zones in primary contact recreation areas. Instead, such mixing zones are governed by an effluent limitation that categorically forbids them. To be sure, in 1994 the EPA stated that as its "understanding of pollutant impacts on ecological systems evolves, cases could be identified where no mixing zone is appropriate." Handbook Ch. 5.1.1. It seems that the EPA's understanding of pollutant impacts has so evolved, and it has now identified an entire class of cases "where no mixing zone is appropriate." However, the effect of the EPA applying its more developed understanding of pollutant impacts is to promulgate a new effluent limitation that state permitting authorities must follow. *See Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 235, 298 U.S. App. D.C. 288 (D.C. Cir. 1992)* [**65] ("Thus, a rule is legislative if it attempts 'to supplement [a statute,] not simply to construe it.'") (alteration in original). In short, the June 2011 letter creates a new legal norm for bacteria mixing zones based on the EPA's authority to promulgate effluent limitations.

HN46 The hallmark of an interpretative rule or policy statement is that they cannot be independently legally enforced. It is the underlying legislative rules that drive compliance, and thus when an agency applies a newly announced interpretative rule or policy statement, there must be some external legal basis supporting its implementation. *See St. Paul-Ramsey Med. Ctr., 50 F.3d at 528 n.4*; *Prof'ls & [*875] Patients for Customized Care, 56 F.3d at 596*. The EPA has not cited any preexisting effluent limitation or lawfully promulgated legislative rule that supplies the basis for the prohibition on bacteria mixing zones in primary contact recreation areas. This reinforces our conclusion that this new legal norm is a legislative rule and that the EPA violated the APA when it bypassed notice and comment procedures. Accordingly, we vacate the EPA's new rule banning bacteria mixing zones in all waters designated for primary contact [**66] recreation as promulgated "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

C. Blending

The EPA contends that the letters simply reflect an interpretation of the bypass rule, which it has been considering since 2005. *See 70 Fed. Reg. at 76,015* (describing the 2005 policy as "the Agency's interpretation"

[18] The EPA's own guidance also belies any interpretation of its preexisting legislative rules as categorically prohibiting the use of mixing zones in waters designated for primary recreational contact. *See* EPA, Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews 5 (2001) (describing how states may alter their water quality standards to apply bacteria water quality criteria "at the beach or at the point of contact rather than at the end-of-pipe or at the edge of the mixing zones"); EPA, Guidance on Application of State Mixing Zone Policies in EPA-Issued NPDES Permits 1 (1996) ("Thus, individual state law and policy determine whether or not a mixing zone is permitted.").

of the bypass rule). To be sure, a legislative rule is not created simply because an agency "supplies crisper and more detailed lines than the authority being interpreted." *Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1112, 302 U.S. App. D.C. 38 (D.C. Cir. 1993)*. Nevertheless, the EPA's new blending rule is a legislative rule because it is irreconcilable with both the secondary treatment rule and the bypass rule. *See Nat'l Family Planning & Reprod. Health Ass'n, 979 F.2d at 235* (***HN47*** "If a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative." (alteration in original) (quoting Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform, 1985 Duke L.J. 381, 396 (1985)*)).

The September 2011 letter simply applies the 2005 **[**67]** draft Policy to the proposed use of ACTIFLO as if the 2005 draft were an existing obligation of regulated entities. However, the record indicates that prior to 2005, the EPA had not viewed the use of a process such as ACTIFLO as an inevitable trigger of a no-feasible-alternatives requirement. The 2005 draft Policy characterized itself as "significantly different" from the EPA's 2003 proposal on blending. *70 Fed. Reg. at 76,014*. The 2003 proposal, in turn, corresponds to what the record indicates is the reality on the ground: widespread use by POTWs of blending peak wet weather flows. The 2005 draft Policy acknowledges that blending previously had been "permitted at [POTWs] without consideration of the bypass regulation criteria." *70 Fed. Reg. at 76,015*. In a response to a 2002 Freedom of Information Act ("FOIA") request, the EPA admitted to "the use of federal funds under the Construction Grants Program to build facilities that were designed to blend effluent from primary treatment processes with effluent from biological treatment processes during peak wet weather events."[19] In a 2004 report to Congress, the EPA praised the use of blending processes like ACTIFLO to deal with peak wet **[**68]** weather flows with no reference to a no-feasible-alternatives requirement. Various Iowa municipal water authorities have averred that the Iowa Department of Natural Resources has approved permits—with no objection from the EPA and no imposition of a no-feasible-alternatives requirement—allowing cities to construct facilities utilizing non-biological peak flow secondary treatment processes.

Municipalities chose to use ACTIFLO and analogous blending methods as an exercise **[*876]** of their discretion under the bypass rule, *see 53 Fed. Reg. at 40,609*, and secondary treatment rule, *see 48 Fed. Reg. at 52,259*, to select the particular technologies they deemed best suited to achieving the applicable secondary treatment requirements. However, the September 2011 letter severely restricts the use of "ACTIFLO systems that do not include a biological component" because the EPA does not "consider[] [them to be] secondary treatment units." The effect of this letter is a new legislative rule mandating certain technologies as part of the secondary treatment phase. If a POTW designs a secondary **[**69]** treatment process that routes a portion of the incoming flow through a unit that uses non-biological technology disfavored by the EPA, then this will be viewed as a prohibited bypass, regardless of whether the end of pipe output ultimately meets the secondary treatment regulations.

The EPA's new blending rule further conflicts with the secondary treatment regulations because the EPA has made clear that effluent limitations apply at the end of the pipe unless it would be impractical to do so. *40 C.F.R. § 122.45(h)*. There is no indication that the secondary treatment regulations established situations in which it would be impractical to apply effluent limitations at the end of the pipe or otherwise altered the application of this default rule. *See 40 C.F.R. § 133.100-102*. But the blending rule applies effluent limitations within facilities' secondary treatment processes. The September 2011 letter rejected the use of ACTIFLO because these units "do not provide treatment necessary to meet the minimum requirements provided in the secondary treatment regulations at 40 CFR 133." If streams move around traditional biological secondary treatment processes and through a non-biological unit that **[**70]** "is itself a secondary treatment unit," then the system would not need to meet the restrictive no-feasible-alternatives requirement. In other words, under the September 2011 blending rule, if POTWs separate incoming flows into different streams during the secondary treatment phase, the EPA will apply the effluent limitations of the secondary treatment regulations to each individual stream, rather than at the end of the pipe where the streams are recombined and discharged.

Because the September 2011 letter had the effect of announcing a legislative rule with respect to blending peak wet weather flows, the EPA violated the APA's procedural requirements by not using notice and comment procedures. We also vacate this new rule because it is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

IV. Merits of substantive challenge

[19] FOIA request submitted by John Hall to the EPA on October 25, 2001; response dated April 5, 2002, No. HQ-RIN-00459-02.

Even if the EPA's legislative rules had been promulgated through the proper procedural channels, the League argues they nonetheless should be "set aside . . . [as] in excess of statutory jurisdiction, authority, . . . or short of statutory right." 5 U.S.C. § 706(2)(C). ***HN48*** This subsection of the APA authorizes courts to strike down as ultra vires agency [**71] rules promulgated without valid statutory authority. *United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F.3d 1252, 1257 (8th Cir. 1998)*. The League urges us to find that the EPA exceeded its statutory authority under the CWA by prohibiting mixing zones outside the state water quality standard adoption process and by using the blending prohibition to dictate facility treatment design and apply effluent limitations internally, rather than at the end of the pipe. ***HN49*** Appellate review under APA section 706(2)(C) proceeds under the familiar *Chevron* framework. *See Clark v. U.S. Dep't of Agric., 537 F.3d 934, 939 (8th Cir. 2008)*. We first "conduct an independent review of the statute and of its legislative history." *Ark. AFL-CIO v. [*877] FCC, 11 F.3d 1430, 1441 n.9 (8th Cir. 1993)* (en banc). "Deference to the agency is appropriate only when a court finds the statute to be ambiguous." *Id.*; see also *Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n.9, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)* ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). If confronted with an ambiguous statute, we look to whether [**72] the agency's construction of the statute is reasonable. *Ark. AFL-CIO, 11 F.3d at 1441*. Agency rules will survive ultra vires allegations so long as we can "reasonably conclude that the grants of authority in the statutory provisions cited by the government contemplate the issuance." *O'Keefe, 132 F.3d at 1257*.

We find our circuit in the same position as the District of Columbia Circuit, which recently observed that its "case law provides little direction on whether, having determined to vacate on procedural grounds, we should nonetheless address substantive claims." *NRDC v. EPA, 643 F.3d 311, 321, 395 U.S. App. D.C. 397 (D.C. Cir. 2011)* (*U.S. Steel Corp. v. EPA, 649 F.2d 572, 577 (8th Cir. 1981)*). The decision implicates competing tensions, both [illegible]elling. If we choose to vacate solely on procedural grou[illegible] regulated entities who have already spent considerable time crossing the hot shoals of regulatory uncertainty must continue to do so. On the other hand, should we move to the merits of whether the EPA's legislative rules reflect an arbitrary and capricious interpretation of the CWA, we short-circuit the APA's notice and comment procedures and preclude interested parties from participating in the agency's [**73] analytic process. *Cf. Smiley v. Citibank, N.A., 517 U.S. 735, 741, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996)* ("[T]he notice-and-comment procedures of the Administrative Procedure Act [are] designed to assure due deliberation.").

In a recent case, the District of Columbia Circuit found the "interest in preserving the integrity of the notice and comment process" outweighed "concern[s] about delay" where the EPA's rule was not "obviously preclude[d]" by the relevant enabling act. *See NRDC, 643 F.3d at 321*. Here, too, we conclude that the EPA's new mixing zone rule is not obviously precluded by the plain meaning of any applicable CWA provisions. Therefore, should the EPA wish to institute this rule, it may seek to do so using the appropriate procedures.

However, the blending rule clearly exceeds the EPA's statutory authority and little would be gained by postponing a decision on the merits. As discussed above, the September 2011 letter applies effluent limitations to a facility's internal secondary treatment processes, rather than at the end of the pipe. ***HN50*** The CWA permits the EPA to set "effluent limitations based upon secondary treatment." 33 U.S.C. § 1311(b)(1)(B). But effluent limitations are restricted to regulations governing [**74] "discharges from point sources into navigable waters." 33 U.S.C. § 1362(11). The EPA is authorized to administer more stringent "water quality related effluent limitations," but the CWA is clear that the object of these limitations is still the "discharges of pollutants from a point source." 33 U.S.C. § 1312(a). In turn, "discharge of pollutant" refers to the "addition of any pollutant to navigable waters." § 1362(11). The EPA would like to apply effluent limitations to the discharge of flows from one internal treatment unit to another. We cannot reasonably conclude that it has the statutory authority to do so. *See also Am. Iron & Steel Inst. v. EPA, 115 F.3d 979, 996, 325 U.S. App. D.C. 76 (D.C. Cir. 1997)* ("The statute is clear: The EPA may regulate the pollutant levels in a waste stream that is discharged directly into the navigable waters of the United States through a [*878] 'point source'; it is not authorized to regulate the pollutant levels in a facility's internal waste stream."). Therefore, insofar as the blending rule imposes secondary treatment regulations on flows within facilities, we vacate it as exceeding the EPA's statutory authority.

V. Conclusion

For the foregoing reasons, we deny the EPA's motion [**75] to dismiss and grant the League's petition for review. We vacate both the mixing zone rule in the June 2011 letter and the blending rule in the September 2011 letter as procedurally invalid. Further, we vacate the blending rule as

in excess of statutory authority insofar as it would impose the effluent limitations of the secondary treatment regulations internally, rather than at the point of discharge into navigable waters. We remand to the EPA for further consideration.[20]

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[20] The League also requested attorneys' fees under ***HN51*** CWA section 509(b)(3), which authorizes courts, "whenever . . . appropriate," to award litigation costs to any "prevailing or substantially prevailing party." To be a prevailing party entitled to attorneys' fees, a plaintiff must achieve at least some relief on the merits that effectuates a "material alteration of the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. West Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989)); *see also Sierra Club v. City of Little Rock*, 351 F.3d 840, 845 (8th Cir. 2003) (applying *Buckhannon* to a claim for attorneys' **[**76]** fees under the CWA). The League is clearly a prevailing party, even on the basis of its procedural challenge alone. *See Chem. Mfrs. Ass'n v. EPA*, 885 F.2d 1276, 1279 (5th Cir. 1989) (describing "substantive significance" of a remand on procedural grounds). An award of litigation costs under section 509(b)(3) must also be "appropriate." Statutory provisions authorizing an award of litigation costs often serve to incentivize the achievement of statutory objectives, and therefore "an award is usually 'appropriate' when a party has advanced the goals of the statute invoked in the litigation." *Id.; see also Saint John's Organic Farm v. Gem Cnty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1061 (9th Cir. 2009); *NRDC v. EPA*, 512 F.2d 1351, 1357, 168 U.S. App. D.C. 111 (D.C. Cir. 1975). ***HN52*** The CWA's goals involve the restoration and maintenance of the "chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The League, however, was largely vindicating its own rights, rather than the purposes of the CWA, and it has neglected to brief us on why an award of attorneys' fees would otherwise be "appropriate." Therefore, we decline to award litigation costs under CWA section 509(b)(3).

ATTACHMENT – B

1 of 1 DOCUMENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DECISION OF THE GENERAL COUNSEL

HEADING:

In Re Borden, Inc.

February 19, 1980

EPA GCO 78

TEXT:

In the matter of National Pollutant Discharge Elimination System Permit for Borden, Inc. Geismar, Louisiana, No. LA 0000281, the Presiding Officer has certified three issues of law to the General Counsel for decision pursuant to 40 CFR § 125.36(m). The parties have submitted briefs in support of their respective positions on the following issues:

ISSUE OF LAW NO. I

QUESTION PRESENTED

Are disposal wells which predate the NPDES program and which are permitted by the state in which they are located a form of control technology under § 304(b)(1)(B) of the Clean Water Act for the point source that owns and operates them?

ISSUE OF LAW NO. II

QUESTION PRESENTED

With regard to an NPDES permit issued November 16, 1978, and written to implement BPT effluent limitations calculated upon production based effluent guidelines, what statutory authority does EPA have to base its calculations upon less than the total wastewater generated by the facility if a portion of the wastewater is disposed of by a means which does not result in a surface discharge but the remainder of the wastewater does proceed through a surface discharge into the waters of the United States?

ISSUE OF LAW NO. III

QUESTION PRESENTED

Is the answer to No. 2 any different if the NPDES permit in question is based upon best engineering judgment as opposed to BPT guidelines?

CONCLUSION

Whether or not disposal wells constitute a "control technology" is irrelevant when effluent limitations guidelines apply. In such cases, the effluent limitations in the regulations may be met by the permittee through any lawful means. The presiding officer has discretion, but is not required, to apply EPA's new regulations to this discharge. The effect of these regulations would be to reduce applicable effluent limitations to reflect reduced raw waste flow remaining after a portion is disposed into a well. Otherwise, the only means available for the permit to be made more stringent is the "fundamentally different factor" variance clause in the applicable effluent limitations guidelines.

Where guidelines are not applicable, the Regional Administrator must develop effluent limitations for the discharge on a case-by-case basis under 40 CFR § 125.3. I need not decide whether the Regional Administrator could lawfully have selected well injection as a control technology on which to base effluent limitations. It is clear he did not, and the discharger does not contend that he should have, but rather argues that it should be free to meet the resulting effluent limitations by whatever means it chooses. The permit issuer has discretion under § 125.3 to consider the reduced raw waste flow remaining after well injection in setting effluent limitations, and may set a lower allowable mass limitation or a concentration limitation which will assure the degree of effluent reduction which would be attained at the discharger's facility were it to install the technology selected as the "best practicable control technology currently available."

DISCUSSION

Borden, Inc. operates a chemical plant near Geismar, Louisiana which discharges an effluent in part subject to the Fertilizer Industry Guidelines, 40 CFR Part 418. A portion of the total raw waste load produced at the facility is disposed by injection into a subsurface disposal well. The remainder is discharged to navigable waters.

This is the second time this matter has been before the General Counsel. Decision of the General Counsel No. 56 concluded that the Regional Administrator was obligated to establish limits controlling well injection associated with a surface water discharge requiring an NPDES permit. Decision No. 56 also identified the variance provision in effluent limitations guidelines as the means by which effluent limits on surface discharges could be adjusted to reflect well injection of a portion of the waste load.

Subsequently, on June 7, 1979, revised NPDES regulations were published. In the preamble to these rules, the Administrator disavowed authority to control well injection through NPDES permit conditions, whether or not the injection is associated with a surface water discharge. The rules themselves (§ 122.41) require effluent limitations on surface water discharges based on effluent limitations guidelines to be reduced by the proportion that injected wastes bear to total raw waste load. However, the rules are applicable only to permits issued after August 13, 1979 (§ 122.15). Thus, they do not control here.

Borden argues that under the Clean Water Act the choice of an appropriate control technology to meet effluent guidelines must be left to the regulated industry. I agree. When EPA writes an effluent guideline it identifies a control technology, based on the factors delineated in § 304(b) of the Act, upon which limits are based. The Regional Administrator, in setting a permit limitation based on best engineering judgment under 40 CFR § 125.3, also identifies an appropriate technology based on § 304(b), then sets effluent limitations based on the degree of effluent reduction achieved by the identified technology. But EPA is precluded from imposing any particular technology on a discharger.

The Fertilizer Industry Guidelines, 40 CFR Part 418, apply to part of the effluent stream from this facility. As to that part, the regulations specify a weight limitation, e.g., 16 lbs./1000 lbs. of manufactured product, which the permittee is required to meet without regard to the fact that a portion of the raw waste is disposed into a deep well without treatment. However, the Presiding Officer also has the discretion to apply the new rule regarding deep well injection, 40 CFR § 122.41, if that requirement would be appropriate to carry out the purpose of the Act and would not prejudice any party. 40 CFR § 122.86(c).

Turning now to that part of the waste stream to which effluent guidelines do not apply, the permit writer must consider the factors set out in § 304(b) of the Clean Water Act, *cf. United States Steel Corp. v. Train*, 556 F. 2d 822 (7th Cir. 1977). These factors include the "process employed, . . . nonwater quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate."

In considering these factors, the effect of well injection on the amount of raw waste remaining to be treated is relevant. Therefore, the permit writer may develop mass limits for this plant based on its actual raw waste flow after deep well injection. The permit writer may also, for the portion of the plant not covered by the guidelines, issue a supplemental concentration limit which would help ensure the degree of effluent reduction attainable by application of best practicable technology. n1

n1 Such a limit could be set for the portion covered by guidelines through a fundamentally different factor variance. See Decision of the General Counsel No. 56 at 5.

The initial decision as to the effect of well injection on permit limitations must be made by the Regional Administrator. This permit predates the currently applicable regulations (40 CFR § 122.41). Thus, the proper means of applying effluent limitations to this permit is a policy matter, not directly controlled by applicable law.

NACWA
A Clear Commitment to America's Waters

September 30, 2015

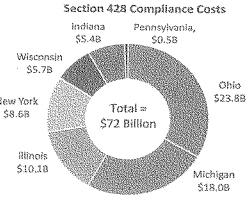
The Honorable Bob Gibbs
Chairman
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Grace Napolitano
Ranking Member
Committee on Transportation and Infrastructure
Subcommittee on Water Resources and Environment
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Gibbs and Congresswoman Napolitano:

On the occasion of your Subcommittee's oversight hearing on the Great Lakes Restoration Initiative, I am writing to share with you data gathered by the National Association of Clean Water Agencies (NACWA) estimating the cost of compliance for Great Lakes communities should Congress enact Section 428 in the Senate's proposed Fiscal Year (FY) 2016 Interior, Environment and Related Agencies Appropriations Bill regarding combined sewer overflows (CSO) in the Great Lakes. We ask that this letter be included in the hearing record.

NACWA estimates that compliance costs for Section 428 would exceed $72 billion (plus associated costs for operations and maintenance) and result in potentially catastrophic rate increases for a region already struggling economically. The provision's requirements would especially have a severe impact on small and rural utilities who are already struggling with existing requirements - 118 of the impacted communities have populations below 25,000. If enacted, the provision would represent one of the largest unfunded clean water mandates in the history of the Clean Water Act (CWA). These cost numbers are calculated from a survey of approximately 180 Great Lakes utilities that would be directly impacted by these provisions, along with detailed engineering analyses. Below is a chart showing the cost distribution among the Great Lakes States.



National Association of Clean Water Agencies
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One example of a utility that would be hard hit is the Northeast Ohio Regional Sewer District serving Cleveland and surrounding communities which estimates that its compliance costs would be as much as $16.5 billion and result in monthly sewer bills of over $300 for the average residential and business customer.

Section 428 of the Senate's proposed spending package not only represents a $72 billion unfunded clean water mandate, but it also directly contradicts and undermines clean water legislation Congress enacted in 2001 codifying the 1994 Combined Sewer Overflow (CSO) Control Policy with which the majority of Great Lakes dischargers are currently complying. It would do so without any hearing or debate as to the necessity of such a policy shift, nor the ultimate water quality benefits that would allegedly be derived from it.

The proposed provisions contained in Section 428 require communities to spend limited taxpayer resources on eliminating CSO discharges at the expense of addressing the numerous other water quality challenges facing the Great Lakes, setting back overall efforts to improve water quality by decades. As this hearing makes clear, the Great Lakes face water quality challenges that go far beyond CSOs to include toxic algal blooms, stormwater run-off, and invasive species. For these reasons, a number of national and regional organizations representing local elected officials and water quality professionals have written in opposition to this ill-conceived policy prescription, including the U.S. Conference of Mayors, the National League of Cities, the National Association of Counties, the National Association of Regional Councils, the Great Lakes St. Lawrence Cities Initiative, the American Water Works Association and the Water Environment Federation. All of these organizations represent important stakeholders working toward improving water quality in the Great Lakes and all of these organizations are opposed to this proposal.

The water quality challenges faced by the Great Lakes are far too serious, and require more thoughtful and effective use of limited taxpayer dollars, to allow proposals such as the one outlined in S. 1645 to become law. We urge your Subcommittee's leadership in helping to ensure this proposal is not enacted.

I would also like to submit for the record a letter sent to House and Senate Appropriators by the American Water Works Association and is attached to this letter.

Thank you for your consideration of this matter and please do not hesitate to contact me or Patricia Sinicropi, NACWA Senior Legislative Director, at psinicropi@nacwa.org.

Sincerely,

Adam Krantz
NACWA CEO

UNLIMITED

Steve Moyer
Vice President of Government Affairs

October 14, 2015

The Honorable Bob Gibbs, Chairman
Subcommittee on Water Resources and Environment
House Transportation and Infrastructure Committee
Washington, DC 20515

The Honorable Grace Napolitano, Ranking Member
Subcommittee on Water Resources and Environment
House Transportation and Infrastructure Committee
Washington, DC 20515

Dear Chairman Gibbs and Ranking Member Napolitano,

I write on behalf of Trout Unlimited (TU) and its 155,000 members nationwide in support of the Great Lakes Restoration Initiative. Please include this letter in the official hearing record.

Great Lakes fisheries are a multi-billion dollar industry, and are a major part of the lives of many of the region's residents, including Trout Unlimited members throughout the Great Lakes states. Investments in the health of the Great Lakes and their watersheds are benefiting fisheries, from the trout streams in the hills to the lakes themselves.

One of the strengths of the Great Lakes Restoration Initiative is that it fosters partnerships among state, federal and local governments, nonprofits, businesses, and other stakeholders. The average TU chapter donates 1,000 hours of volunteer time each year, and when these volunteer hours are contributed as part of a broader partnership they can have a meaningful impact on local waters. For example, support through the GLRI is enabling TU to restore trout habitat in partnership with national forests in Michigan and Wisconsin.

I would like to thank the subcommittee for its attention to the Great Lakes Restoration Initiative (GLRI). TU supports the authorization and continuation of this important program, and looks forward to working with members of this subcommittee toward that end.

Sincerely,

Steve Moyer

A mission to conserve, protect, & restore North America's coldwater fisheries and their watersheds.
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