

**American Bar Association
Section of Environment, Energy, and Resources**

**Great Lakes Legacy Act, Great Lakes Restoration Initiative, and Great Lakes – St.
Lawrence River Basin Water Resources Compact Issues**

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**State and EPA Perspectives on Environmental Issues in Region 5, ABA Section of
Environment, Energy, and Resources
Chicago, IL
July 8 – 9, 2009**

I. Abstract

Over the last decade, three significant programs/proposals have been put forward to address serious environmental issues in the Great Lakes. These are the Great Lakes Legacy Act, which addresses contaminated sediment in U.S. Great Lakes Areas of Concern, the Great Lakes Restoration Initiative, which is a \$475 million proposal in the President's fiscal year 2010 budget to address a variety of environmental issues in the Great Lakes, and the Great Lakes – St. Lawrence River Basin Water Resources Compact, which addresses water management and withdrawals from the Great Lakes Basin. Of the three, the Great Lakes Legacy Act has been implemented for the longest, while the Great Lakes Restoration Initiative is in its formative stage and has not been funded by Congress yet. Each of these programs/proposals has the potential to significantly change how Great Lakes residents, industries, and stakeholders interact with each other and with Great Lakes resources. An overview of each program/proposal is provided below.

II. Great Lakes Legacy Act

Congress enacted the Great Lakes Legacy Act (GLLA) in 2002¹ to accelerate the pace of sediment remediation in Great Lakes Areas of Concern (AOCs). In doing so, Congress recognized that Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)² and the Resource Conservation and Recovery Act (RCRA)³ were inadequate to address the magnitude of the contaminated sediments problem in the Great Lakes AOCs, which in 2005, was estimated to be 75 million cubic yards of contaminated sediment requiring remediation costing between \$1.5 billion and \$4.5 billion.⁴ Many Great Lakes AOCs contain sediment impacted by multiple contaminants and multiple sources, stemming from over 150 years of combined sewer overflows and industrial use. Many of the parties responsible for the contamination are long gone leaving large orphan shares at many of the sediment sites in the Great Lakes AOCs. These large orphan shares, combined with the great technical challenges and

¹ Pub. L. 107-303.

² 42 U.S.C. §9601 *et seq.*

³ 42 U.S.C. §6901 *et seq.*

⁴ Strategy to Restore and Protect the Great Lakes, Great Lakes Regional Collaboration, December 2005, p. 36.

resources required to address contaminated sediments, has made progress in addressing contaminated sediments slow.

A. Overview of the Great Lakes Legacy Act

The goals of the GLLA are to accelerate cleanups and to foster innovative solutions to the challenging technical issues posed by contaminated sediments. Under the GLLA, there are three categories of projects: (1) implement a plan to remediate contaminated sediment, which may include activities to restore aquatic habitat in conjunction with a sediment remediation project; (2) monitor or evaluate contaminated sediment; and (3) prevent further or renewed sediment contamination.⁵ To be eligible for GLLA funding, a project must be in a U.S. AOC. Priorities for funding include:

1. constitutes remedial action for contaminated sediment;
2. identified in a Remedial Action Plan and is ready to be implemented;
3. uses an innovative approach, technology, or technique that may provide greater environmental benefits, or equivalent environmental benefits at a reduced cost; or
4. includes remediation to be commenced not later than 1 year after the date of receipt of funds for the project.⁶

Projects may not be carried out under the GLLA:

1. if the Area of Concern is likely to suffer significant further or renewed contamination from existing sources of pollutants causing sediment contamination following completion of the project;
2. if an evaluation of remedial alternatives for the Area of Concern has not been conducted, including a review of the short-term and long-term effects of the alternatives on human health and the environment;
3. unless each non-Federal sponsor for the project has entered into a written project agreement with the EPA under which the party agrees to carry out its responsibilities and requirements, including a minimum 35% cost share, for the project; or
4. unless the EPA provides assurance that it has conducted a reasonable inquiry to identify potentially responsible parties connected with the site.⁷

Prior to its sunset at the end of fiscal year (FY) 2008, Congress amended and reauthorized the GLLA for two additional years.⁸ Notable changes to the amended and reauthorized GLLA include: (1) funding for habitat restoration projects performed in conjunction with a sediment remediation project; (2) ability to conduct one site characterization per discrete site at 100%

⁵ 33 U.S.C. §1268(c)(12)(B).

⁶ 33 U.S.C. §1268(c)(12)(C).

⁷ 33 U.S.C. §1268(c)(12)(D).

⁸ Pub. L. 110-365.

federal cost; (3) elimination of the maintenance of effort requirement; and (4) only crediting work performed after the project agreement is signed as part of the non-federal share.

The 2008 GLLA authorizes \$54 million/year for GLLA projects, research and a public information program (\$50 million,⁹ \$3 million,¹⁰ and \$1 million,¹¹ respectively). Although the 2002 GLLA authorized \$54 million/year for five years, Congress never appropriated the full authorization. Rather, appropriations ranged from a low of \$10 million in FY 2004 to a high of \$35 million in FY 2008.¹² Appropriations were level in FY 2009 (\$35 million), year one of the two-year extension. Congress has never appropriated funds for the research program or the public information program.

B. Applying for Great Lakes Legacy Act Funding

The United States Environmental Protection Agency's (U.S. EPA) Great Lakes National Program Office (GLNPO) administers the GLLA program. GLNPO accepts applications for GLLA projects on a rolling basis and strongly encourages applicants to discuss proposed projects with GLNPO prior to submitting a written application. Materials including GLNPO's request for proposals, evaluation forms, scoring sheet, and additional information are available at: http://epa.gov/greatlakes/sediment/legacy/glla_applicants.html.

C. Great Lakes Legacy Accomplishments

The GLLA has accelerated the pace of sediment remediation in the Great Lakes in two ways. First, through partnering with non-federal sponsors, including States, local governments, and industry, five remediation projects have been completed in four years. These include Black Lagoon, Trenton, MI, Hog Island Inlet and Newton Creek, Superior, WI, Ruddiman Creek and Pond, Muskegon, MI, St. Mary's River – Tannery Bay, Sault Ste Marie, MI, and Ashtabula River, Ashtabula, OH. Please see Figure 1. These dredging projects¹³ have collectively removed over 880,000 cubic yards of sediment containing over 1.7 million pounds of contaminants from Great Lakes AOCs. Moreover, GLLA has provided \$53 million of funds for cleanup projects while leveraging \$44 million in non-federal funding from States, industries, cities, businesses, and other organizations.

⁹ 33 U.S.C. §1268(c)(12)(H).

¹⁰ 33 U.S.C. §1271a(b).

¹¹ 33 U.S.C. §1268(c)(13)(B).

¹² FY 2004 - \$10 million; FY 2005 - \$22 million; FY 2006 - \$29 million; FY 2007 - \$30 million; FY 2008 - \$35 million; FY 2009 \$35 million.

¹³ Please note that the GLLA is not limited to dredging projects and that there are other sediment management techniques for addressing contaminated sediment.



Figure 1. Great Lakes Legacy Act Projects.

The second way in which the GLLA has accelerated the pace of sediment remediation is GLNPO's ability to conduct site characterization. This has "teed up" projects and contributed to the "project-ready" status of several sites. Site characterization/evaluation projects include: Buffalo River, NY, Ryerson Creek, MI, Riverview, MI, Eighteenmile Creek, NY, Ottawa River, OH, and Division St. Outfall, MI. Future site characterization/evaluation projects may be conducted at 100% federal cost under the 2008 amendments to the GLLA.

GLNPO continues to work with non-federal sponsors to develop GLLA projects. In 2009, GLNPO and its non-federal sponsors will conduct three remediation projects and two site characterization projects. The remediation projects include: Grand Calumet River, IN (a combination dredging and capping remedy), Kinnickinnic River, Milwaukee, WI (dredging remedy), and Ottawa River, OH (dredging project). The two site characterization projects are Buffalo River, NY and River Raisin, MI.

D. Great Lakes Legacy Act Case Studies in Michigan

The State of Michigan took early advantage of the GLLA by leveraging \$25 million raised as part of a 1998 \$625 million bond, the Clean Michigan Initiative, to provide the non-federal share for a number of remediation and site characterization/evaluation projects in Michigan. The remediation projects include: Black Lagoon, Ruddiman Creek, and St. Mary's River/Tannery Bay, while the site characterization/evaluation projects include two projects at Muskegon Lake as well as the Trenton Channel. On-going work includes Muskegon Lake and River Raisin. Two completed remediation projects are highlighted below.

1. Black Lagoon

GLNPO and the Michigan Department of Environmental Quality (MDEQ) conducted the first GLLA project at Black Lagoon, which is on the Detroit River in Trenton, MI. The \$9.3 million project removed approximately 115,000 cubic yards of sediment contaminated with polychlorinated biphenyls (PCBs), mercury, oil and grease, lead, and zinc. Dredging began in October 2004 and concluded 13 months later. Please see Figure 2. Contaminated sediment was staged and prepared for later disposal at the Pointe Mouille Confined Disposal Facility.

Following dredging, due to residual contaminants, GLNPO covered the bottom of the lagoon with approximately 6 inches of clean sand and 3 inches of stone to protect fish and wildlife. Black Lagoon has since been renamed Ellias Cove to celebrate the cleanup.



Figure 2. View of silt curtain surrounding Black Lagoon during remediation. Photo by Robert Burns, Detroit Riverkeeper.

2. St. Mary's River/Tannery Bay

The St. Mary's River/Tannery Bay GLLA project differed from the Black Lagoon project in that in addition to the MDEQ providing \$600,000 for the non-federal share, a corporation, Phelps Dodge Corporation, contributed \$2.6 million to the approximately \$8 million GLLA project. The remediation removed approximately 41,000 cubic yards of sediment contaminated with chromium and mercury from a historical tannery operation on the bay. Please see Figure 3. Dredging operations spanned two years, with a break for inclement winter weather.



Figure 3. Dredging in Tannery Bay.

E. Great Lakes Legacy Act Case Studies Outside of Michigan

Other states besides Michigan have found ways to partner with GLNPO on GLLA projects, although it has been a greater struggle for those states to find money. Michigan had an advantage over other states when the GLLA was originally enacted because it had funds available from its 1998 Clean Michigan Initiative Bond. Today, Michigan's money from the 1998 bond is essentially spent and all states are looking at creative ways to raise the funds for the non-federal share. Two examples of GLLA projects from outside of Michigan include the Hog Island Inlet project in Wisconsin and the Ashtabula River project in Ohio.

1. Hog Island Inlet and Newton Creek, Wisconsin

GLNPO and the Wisconsin Department of Natural Resources (WDNR) partnered to fund the \$6.3 million GLLA project at Hog Island Inlet and Newton Creek to excavate approximately 50,000 cubic yards of sediment contaminated with petroleum products, including polycyclic aromatic hydrocarbons (PAHs), and lead. Please see Figure 4. The goal of the project was to make the Hog Island Inlet area of the St. Louis River AOC safe for recreation and to protect ecological receptors, such as fish. Because the project was conducted as a dry excavation, WDNR conducted a fish rescue operation that relocated approximately 1,800 fish. The sediment remediation was completed in November 2005.



Figure 4. Hog Island Inlet is isolated to enable dry excavation of contaminated sediment.

2. Ashtabula River Project, Ashtabula, Ohio

The Ashtabula River project came out of a collaborative effort among GLNPO, Ashtabula City Port Authority, Ashtabula River Cooperation Group II (comprised of Cabot Corp., Detrex Corp., Elkem Metals Co., First Energy Corp., GenCorp, Inc., Mallinckrodt Inc., Millennium Inorganic Chemicals, Millennium Petrochemicals Inc., Ohio Power Co., Olin Corporation, Occidental Chemical Corporation, Pennsylvania Lines LLC, RMI Titanium Co., The Sherwin Williams Company, Union Carbide Corporation, and Viacom International Inc.), and the Ohio Environmental Protection Agency. The project cost \$60 million, with \$30 million from GLLA, \$23 million from the Ashtabula River Cooperation Group II, and \$7 million from the State of Ohio. The dredging project, which occurred from September 2006 through October 2007, removed approximately 500,000 cubic yards of sediment contaminated with PCBs, PAHs, metals

(mercury, chromium, lead, and zinc) and low level radionuclides. Please see Figure 5. As a result of the project, commercial navigation has returned to the Ashtabula River.



Figure 5. Area of Ashtabula River remediated by the GLLA.

F. Great Lakes Legacy Act Issues and Challenges

Over the last 6 years, several issues and challenges have arisen during implementation of the GLLA. These issues and challenges have impeded the GLLA's progress in achieving the goal of accelerating cleanups in Great Lakes AOCs and fostering innovative solutions to the challenging technical issues posed by contaminated sediments. Several of these issues are discussed below.

1. 100% Non-Great Lakes Legacy Act Funding for Operations and Maintenance

One issue that has stifled innovation and the use of remedial techniques besides dredging/excavation is the requirement that 100% of the funding for operations and maintenance come from non-GLLA sources. This has limited the ability of GLNPO to conduct capping projects or combination remedy projects (e.g., those that involve multiple sediment management options such as capping, monitored natural recovery, and dredging) because capping projects typically require operations and maintenance and partnering with a non-federal sponsor, which can provide funding for operations and maintenance, has been difficult. For example, states have extremely limited ability to fund operations and maintenance because of the way state funds are budgeted, allocated, and spent. Moreover, other issues, which are discussed below, have made it challenging to partner with industry, which potentially has greater ability to provide funding for operations and maintenance.

2. Minimum 35% Non-Federal Share

In the past, states and local governments have provided the non-federal share for many GLLA projects. This has changed recently due to the difficult financial conditions faced by state and local governments. While the non-federal share for some GLLA projects has been provided by industry, barriers exist to expanding partnerships with industry. These are discussed below.

3. Partnering with Industry

Partnering with industry comes with special challenges. Where there is an existing or pending enforcement action, GLNPO must consult with U.S. EPA enforcement staff to determine which activities are appropriately performed under enforcement versus which may be conducted under GLLA. The scope of what constitutes a pending enforcement is very broad in that it includes state enforcement actions. Not only does the existence of a pending enforcement action impact which activities are conducted under the GLLA, but it also increases the non-federal share percentage required by GLNPO of the non-federal sponsor based upon the status of the site in the context of its enforcement status.¹⁴

While GLNPO will not pay for activities required under an enforcement action, GLNPO will pay for the federal share of “betterment”. “Betterment” consists of those activities that are not required under the enforcement action, but that will use an innovative approach, technology, or technique that is anticipated to provide greater environmental benefits. GLNPO can use GLLA funds to pay for 50% - 60% of the betterment. For example, if the “base remedy” (e.g., the remedy required in the Record of Decision (ROD)) costs \$1,000,000 and a new technique, which is not required in the ROD and that provides greater environmental benefits, would add \$500,000 to the cost of the remedy, GLNPO can use up to \$300,000 ($\$500,000 \times 60\%$) of GLLA funds for the project. The non-Federal sponsor would pay the cost of the “base remedy” (\$1,000,000) plus its share of the betterment ($\$500,000 \times 40\% = \$200,000$) for a total of \$1,200,000.

Calculating what counts as part of the non-federal share can also be difficult. Although the GLLA explicitly allows “monies paid pursuant to, or the value of any in-kind contribution performed under, an administrative order on consent or judicial consent decree”¹⁵ to be considered part of the non-federal share, how the GLLA project’s scope is defined versus what is required in a record of decision or other settlement document and the new requirement that only post-project agreement monies or services may be counted toward the non-federal share significantly limit the applicability of that provision. This limitation increases the challenges in partnering with industry.

Unfortunately, many existing CERCLA sites are progressing slowly due to issues with large orphan shares. Congress recognized this issue when it enacted the GLLA in 2002 and provided for participation by potentially responsible parties.¹⁶ The U.S. Supreme Court’s May 4, 2009 decision regarding apportionment of liability under CERCLA in Burlington Northern & Santa Fe Railway Co. v. United States, 556 U.S. ____ (2009) may further slow progress as companies reevaluate whether they should be held jointly and severally liable for historic contamination from multiple sources. This decision could potentially increase the size of the orphan share at legacy sites, thus making them even more difficult to address. Thus, the need to derive maximum benefit from the GLLA may be greater than ever. Finding creative ways to partner with industry could partially address this problem.

¹⁴ Final Rule: Implementation of the Great Lakes Legacy Act of 2002. 71 Fed. Reg. 25504 (May 1, 2006).

¹⁵ 33 U.S.C. §1268(c)(12)(E)(iv)(I).

¹⁶ See 33 U.S.C. §1268(c)(12)(E)(iv) (providing that the non-federal share “may include monies paid pursuant to, or the value of any in-kind contribution performed under, an administrative order on consent or judicial consent decree”).

4. Prohibition Against GLNPO Disbursing Funds to the Non-Federal Sponsor

Under the GLLA, GLNPO cannot disburse funds to the non-Federal sponsor. This limitation may restrict the efficient and cost-effective implementation of remedial work. For example, if a non-Federal sponsor already has a contractor performing work at the site, this contractor cannot also perform the GLLA Federal share of the project without entering into a separate contract with GLNPO. If separate contractors are needed, this could result in double the mobilization and demobilization costs, loss of time, and coordination issues. Efforts to address this issue in the 2008 reauthorization and amendment by allowing GLNPO to disburse funds directly to the non-Federal sponsor or the non-Federal sponsor's contractor were unsuccessful.

III. Great Lakes Restoration Initiative

The genesis of the proposed \$475 million Great Lakes Restoration Initiative has its roots in the May 2004 Executive Order 13340, which established the Great Lakes Interagency Task Force (Task Force). The Task Force includes 11 agency and cabinet organizations including: U.S. EPA (chair), State, Interior, Agriculture, Commerce, Housing and Urban Development, Transportation, Homeland Security, Army, Council on Environmental Quality, and Health and Human Services. The Task Force's purpose is to achieve the goals of the Great Lakes Water Quality Agreement through increased collaboration, using existing programs and existing resource levels. The Task Force engaged stakeholders throughout 2005, which resulted in the Great Lakes Regional Collaboration Strategy to Restore and Protect the Great Lakes (Strategy) (December 12, 2005).¹⁷ The Task Force drew on the Strategy to develop the proposed 2010 Great Lakes Restoration Initiative Funding Plan¹⁸ for inclusion in the President's FY 2010 Budget.

As part of the Great Lakes Restoration Initiative Funding Plan, the Task Force undertook a provisional allocation of the \$475 million among focus areas and agencies. Final allocation will depend on actual appropriations and the development of interagency agreements that are consistent with the principles and criteria of the Great Lakes Restoration Initiative. Each agency's proposed actions are described in the Agency Actions document.¹⁹

Five focus areas and their preliminary allocations include:

- Toxic Substances and Areas of Concern - \$146.9M
 - Restore Areas of Concern/Remediate Contaminated Sediment
 - Strategic Pollution Prevention and Reduction Projects
 - Protect Human Health through Safer Fish Consumption
 - Measuring Progress and Assessing New Toxic Threats
- Invasive Species - \$60.3M
 - Develop Ballast Water Treatment that Protects Freshwater Ecosystems
 - Implement Early Actions to Address Water Pathways Vectors

¹⁷ Available at: <http://www.gllc.us/strategy.html>

¹⁸ Available at: <http://www.epa.gov/greatlakes/glri/GLRIProposed2010FundingPlan050509.pdf>

¹⁹ Available at: <http://www.epa.gov/greatlakes/glri/AgencyGLRIActions050609.pdf>

- Prevention by Broad Stakeholder Outreach and Education
- Develop and Demonstrate Innovative Control Technology
- Support States Role in Invasive Species Prevention and Control
- Control Key Invasive Species and Investigate Causal Mechanisms by which Invasives Impact Native Species
- Establish Early Detection and Rapid Response Capability
- Nearshore Health and Nonpoint Source Pollution – \$97.3M
 - Place-based Watershed Implementation
 - Identify Sources and Reduce Loadings of Nutrients and Soil Erosion
 - Improve Public Health Protection at Beaches
 - Generate Critical Information for Protecting Nearshore Health
- Habitat and Wildlife Protection and Restoration - \$105.3M
 - Enhancing Wetland Protection and Restoration
 - Improve Aquatic Ecosystem Resiliency
 - Strategic Restoration of Native Species and Habitat
 - Tracking Progress on Coastal Wetlands Restoration
- Accountability, Monitoring, Evaluation, Communication and Partnerships - \$65.2M
 - Develop Great Lakes Restoration Accountability System
 - Measure and Evaluate the Health of the Great Lakes Ecosystem Using the Best Available Science
 - Enhance Partnerships

Funds will be available for federal projects and for prioritized/competitive grants, but not for water infrastructure programs that are addressed under the Clean Water or Drinking Water State Revolving Fund program. Requests for proposals may be issued in summer of 2009 with the goal of being able to fund projects as soon as the FY 2010 budget and appropriations process is complete with respect to the Great Lakes Restoration Initiative. The timing and content of the requests for proposals will depend upon each agency's grant rules and programs.

IV. Great Lakes – St. Lawrence River Basin Water Resources Compact

The Great Lakes – St. Lawrence River Basin Water Resources Compact (Compact)²⁰ was born from the desire of all parties for the management of Great Lakes water to reside with the Great Lakes States (Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Pennsylvania, and Wisconsin) and Great Lakes Provinces (Ontario and Quebec) and not with the Federal Governments (United States of America and Canada). Before the Compact, the U.S. Congress had delegated its authority to the Great Lakes Governors through provisions in the Water

²⁰ Available at: http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf

Resources Development Act of 1986. The Great Lakes States viewed this delegation of authority as inadequate because Congress could withdraw its delegation via legislation. With the movement of people out of the Great Lakes States, the Great Lakes States' influence in Congress was diminishing, thus raising the concern that the Congressional delegation of authority would be withdrawn under pressure from water-thirsty states. An additional concern was that an individual state or province might unilaterally authorize large scale water withdrawals, which could harm the Great Lakes.

To address these concerns, a ten year process involving the eight Great Lakes States, the two Great Lakes Provinces, and the U.S. Congress resulted in the Great Lakes – St. Lawrence River Basin Sustainable Water Resources Agreement²¹ (Agreement), which is a good-faith agreement among the Great Lakes States, Ontario and Quebec. In Ontario and Quebec, the Agreement was implemented through enactment of provincial laws. In the Great Lakes States, the Agreement was implemented through the Compact, which was approved by the U.S. Congress and enacted into law by each Great Lakes State. The Compact prescribes water management policies and procedures to be followed by the 8 States and 2 Provinces and governs water withdrawals from the Great Lakes watershed.

The Compact's provisions cover "waters of the Basin", which are broadly defined to include all streams, rivers, lakes, connecting channels and other bodies of water, including tributary groundwater, within the Great Lakes Basin. Major provisions of the Compact include:

- Maintenance of riparian rights as opposed to western water law in administering Great Lakes water use;
- Prohibition of diversions of water out of the Great Lakes – St. Lawrence River Basin;
- Establishment of a uniform minimum water management standard that the States and Provinces must use to pursue Compact goals and objectives, which will be applied to both surface water and groundwater;
- Flexibility to give individual States and Provinces the ability to set critical criteria for implementing Compact provisions provided that they act within prescribed time constraints; otherwise, the Compact defaults will apply;
- Registration of all existing water withdrawals within the Basin;
- Reporting requirements regarding amounts of water withdrawn, returned, and consumed;
- New permitting processes for all new or increased withdrawals, above threshold levels set by each State and Province; and
- Mandates to States and Provinces to adopt and implement water conservation initiatives and programs, subject to periodic regional review of overall effectiveness.

To implement these provisions, States and Provinces may need amend their existing statutes and rules. Additionally, two interstate/international bodies were formed. One, the Great Lakes – St. Lawrence River Basin Water Resources Council (Council), which is comprised of the Governors

²¹ Available at: http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Sustainable_Water_Resources_Agreement.pdf

of the Great Lakes States, to implement the Compact. Governors may appoint alternates to attend and vote at meetings. Two, The Great Lakes – St. Lawrence River Basin Regional Body (Regional Body), which is comprised of the Council of Great Lakes Governors and the Premiers of Ontario and Quebec. The Council's/Regional Body's major duties include identifying priorities, developing plans, and setting policies related to Great Lakes Basin water resources; evaluating whether the States and Provinces are complying with the Compact and the Agreement; and reviewing and approving or rejecting withdrawal applications involving straddling communities or intra-basin diversions.

Recently enacted into law by all the Great Lakes States, implementation of the Compact is currently occurring at the State and Province level. Interested stakeholders should track statutory and regulatory changes

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