

GREAT LAKES LEGACY ACT PROJECTS: PUTTING REMEDIATION AHEAD OF LITIGATION

A little more than one year ago, in February 2009, President Obama announced his Great Lakes Restoration Initiative. The Initiative sought to strengthen state and federal cooperation to bring targeted resources to some of the more challenging environmental problems impacting the Great Lakes watershed. To advance the initiative, in July 2009, the US Environmental Protection Agency (EPA) established a multiyear restoration plan for the Great Lakes watershed. That plan identified several priorities, one of which was the need to address toxic substances and contaminated sediments throughout the Great Lakes watershed. EPA's plan also set some ambitious restoration goals, calling for the remediation of seven million cubic yards of contaminated sediment by the year 2014.

EPA has some non-traditional tools available to address contaminated sediments in the Great Lakes and their tributaries. Perhaps the most important of those non-traditional tools is the Great Lakes Legacy Act (GLLA). Under the Great Lakes Legacy Act, EPA can partner with private entities to undertake cooperative sediment remediation projects. EPA provides 50 to 65 percent of the funding for such projects. These partnerships offer an intriguing alternative to traditional Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) enforcement and litigation—one which may have real advantages for the government, industry, the public, and the environment. This advisory explains how Great Lakes Legacy Projects work. It answers some of the most common questions surrounding how these projects are selected, who may be eligible to participate, and the levels of funding required for participation.

Under the GLLA, Congress appropriated between US\$10 million and US\$35 million annually for sediment projects in the Great Lakes watershed from 2004 through 2008. In 2008, the GLLA was reauthorized for fiscal years 2009 and 2010 and Congress appropriated US\$54 million per year. Given the general success of the program, President Obama's Great Lakes Restoration Initiative, and the current political climate, we would expect the GLLA to be reauthorized for fiscal years 2011 and 2012.¹

GLLA sediment projects are coordinated through the Great Lakes National Program Office of the EPA. These projects are cooperative efforts between EPA and a "Non-

Brussels
+32 (0)2 290 7800

Denver
+1 303.863.1000

London
+44 (0)20 7786 6100

Los Angeles
+1 213.243.4000

New York
+1 212.715.1000

Northern Virginia
+1 703.720.7000

San Francisco
+1 415.356.3000

Washington, DC
+1 202.942.5000

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¹ In Fiscal Year 2010, Congress appropriated US\$475 million to the Great Lakes Restoration Initiative, a substantial increase over prior years appropriations. Although much of that money was allocated to other government initiatives, US\$75 million of that money was available for sediment remediation projects, including public/private cooperative projects under the Great Lakes Legacy Act. See 2010 Great Lakes Restoration Initiative Summary of Proposed Programs and Projects Sorted by Focus Area, United States Environmental Protection Agency, June 25, 2010.

Federal Sponsor”, which may be a wide range of non-federal entities, including a private corporation, a state or local government, a non-governmental organization (NGO), or even a consortium of parties. As a result, the sediment projects thus offer an opportunity for industry to work cooperatively with EPA and other stakeholders to address sediment contamination, natural resource restoration, and other problems confronting the Great Lakes watershed. They provide a framework that is radically different from the ordinary “regulator” and “regulated community” command and control framework that has become all-too-familiar to many in the private sector within the Superfund context. In so doing, these public/private ventures often align regulatory and private interests around an environmentally protective and efficient result that might not otherwise occur in a more traditional framework.

We believe that GLLA sediment projects offer an opportunity for the private sector to forge a new model for sediment remediation. If GLLA projects continue to be highly successful over the next few years, one could envision those projects as a model to address sediment remediation issues in other large and complex watersheds, such as the Chesapeake Bay, the Mississippi River, or waterways surrounding New York City.

For the remainder of this advisory, we (a) first review the eligibility requirements for funding under the GLLA; and (b) briefly discuss our experience with sediment projects under that Act.

I. ELIGIBILITY REQUIREMENTS

GLLA projects are implemented through project agreements, which are binding, cost-sharing agreements between the EPA’s Great Lakes National Program Office and a cooperating entity.

A. Where do the sediment projects have to be located?

Sediment projects anywhere within the 31 Great Lakes Areas of Concern (as defined in the Great Lakes Water Quality Agreement between the United States and Canada) that are located entirely in the United States are eligible for GLLA funding. For example, the Great Lakes National Program Office (GLNPO) has conducted GLLA projects on the Ashtabula River in Ohio, the Kinnikinnic River in Wisconsin, and the St. Mary’s River in Michigan.

B. Who may enter a project agreement?

The Great Lakes Legacy Act places very few restrictions on the type of non-federal entities that may enter into a Project Agreement. GLNPO’s Final Rule governing the Great Lakes Legacy Act provides: “Legacy Act authorizing language places only limited restrictions on the types of entities (Non-Federal sponsors) that may potentially enter into a Project Agreement with GNLPO. This provides the potential for entering into agreements with public and private entities, including not-for-profit organizations.” Recognizing this statutory flexibility, GLNPO has partnered with private corporations (including those traditionally thought of as potentially responsible parties under Superfund), state and local government entities, and NGOs.

C. What must a cooperating party contribute?

Under the GLLA, a cooperating party must contribute at least 35 percent and up to 50 percent of the funding for the project, as well as 100 percent of any operations and maintenance costs of the project. There are many creative ways to fund the cooperating party’s share. For example, cooperating parties may contribute certain “in-kind services” as part of their share of the costs. Similarly, in some circumstances, monies paid or in-kind services provided under an administrative consent order or a judicial consent order may count as part of the cooperating party’s share.

D. What kinds of work are covered by a project agreement?

To be eligible for funding, a sediment project must monitor or evaluate contaminated sediment, implement a remediation plan, or prevent further or renewed sediment contamination. In other words, remedial investigation projects are eligible for funding, as is the remedy itself. A party pursuing GLLA funding need not commit to the entire trajectory of investigation, interim remedial measures, feasibility study, and implementation of final remediation. Instead, the GLLA project can be approached in phases, with GLLA funding sought for one or more phases.

There are some limits to the potential scope of GLLA sediment projects. Although the regulations do not preclude GLNPO from entering into a cooperating agreement to fund projects on CERCLA sites or sites subject to similar state

programs, those projects are less favored, and GLNPO will generally not provide funding in situations where the Office believes other programs, like CERCLA, are more appropriate. Thus, for example, where a group of potentially responsible parties (PRPs) has already entered into a consent order with EPA to perform a remedial investigation under CERCLA, GLNPO funding for that investigation will be difficult to obtain.

E. How does GLNPO select sediment projects?

Assuming a proposed project meets the basic requirements outlined above, GLNPO refers a proposal to an inter-agency technical review committee, which evaluates both (a) the extent to which a project might overlap with ongoing enforcement or regulatory obligations; and (b) the technical merits or strength of the proposal. GLNPO coordinates the comments of the technical review process and provides them, in writing, to the cooperating party who has proposed the project. The cooperating party is then required to provide both an oral presentation on the project and to revise the project to respond to the technical review committee's comments. Upon the conclusion of the review, GLNPO will assign a numerical score to the project based on the project's strength, its success in meeting GLLA priorities, and other factors. Higher scoring projects receive funding first. At any point in this review process, a cooperating party may choose to withdraw its application.

During the review process, GLNPO places proposed projects into four categories. GLNPO then generally seeks a **minimum** level of funding from the cooperating party depending on the category into which the project falls. The four categories are:

Category 1: This category covers projects for which no regulatory or enforcement action is anticipated and there are no restrictions on GLNPO implementation. Cooperating party funding must be **at least 35 percent**.

Category 2: This category covers projects where no regulatory action or enforcement is pending or planned (although enforcement has not been ruled out) and the cooperating party is not a potentially responsible party under CERCLA. It also covers CERCLA sites, if

EPA determines that the project is more appropriate under the GLLA rather than under CERCLA. Again, for projects in this category, the cooperating party's level of funding must be **at least 35 percent**.

Category 3: This category applies to projects at Superfund (or state regulatory) sites where *the project is not covered by* an existing CERCLA consent order or other remedial decision. Thus, the project might, for example, cover an area of sediments outside of the geographical scope of a CERCLA order, or it might cover an enhancement or supplement to a CERCLA remedial decision. For projects in this category, the cooperating party's level of funding must be **at least 40 percent**.

Category 4: This category covers projects where CERCLA response actions, or other enforcement or regulatory actions are pending. Here, the cooperating party must provide **at least 50 percent** of the funding.

II. PRACTICAL LESSONS REGARDING GLLA SEDIMENT PROJECTS

For parties who may be considering negotiating a cooperating agreement with GLNPO, here are some of the practical lessons we have learned:

A. Pre-Application Discussions With GLNPO

In our experience, parties considering submitting a Great Lakes Legacy Act application benefit from having informal, pre-application discussions with GLNPO. Such discussions aid in determining whether there is an alignment of interest, and how GLNPO may view different approaches to and aspects of a potential project.

B. Project Planning Before an Application is Filed is Critical

Given that GLLA funds are finite and Non-Federal Sponsor participation is voluntary, it is not uncommon for GLLA projects to begin with a narrow scope and to expand by amendment as the project evolves. Thus, rather than agreeing to an open-ended remedial investigation or an open-ended remedy, GLLA project agreements often have focused scopes. As the project proceeds, the parties may jointly elect to increase the scope based on the results of earlier phases. This is

very different than the way administrative consent orders are drafted under CERCLA. Under CERCLA, for example, an administrative consent order will often require a PRP to conduct a remedial investigation, with the full understanding that such an investigation might be conducted in phases-- with each phase of data gathering shaped by the results of the previous phase. In a GLLA agreement for a remedial investigation, it is important to define fully what the scope of the covered data gathering activities that will be. This makes it critical, for example, to think through as many contingencies as possible *before* negotiating the agreement to try to anticipate exactly what data will be critical for remedial decisions.

C. Select an Appropriate Geographic Scope

GLLA projects may also be more limited in geographic scope than traditional CERCLA investigations. Under CERCLA, EPA generally takes the position that a CERCLA site includes not only the facility from which a release has occurred, but anywhere to which that release has migrated. For contaminated sediments, CERCLA sites can be (and often are) quite large. In contrast, GLLA agreements may be more geographically focused. There might be an area of sediments in which defunct or orphan parties have contributed an identifiably larger share of the contamination, for example. Or there might be particularly sensitive natural resources in certain areas that might make those areas attractive for a unique remedial approach. Or there might be areas where navigational dredging and environmental dredging might overlap. These kinds of geographic boundaries may be helpful ways to frame a GLLA project.

D. Explore Creative Opportunities for Contributions

There may be creative ways that cooperating parties can make valuable in-kind contributions, whether it is the use of an NGO's boat or a state's personnel for sampling or a municipality's contribution of landfill space (each of which GLNPO has valued as an in-kind contribution in previous agreements.). These in-kind contributions can add real value.

E. Building Coalitions

GLLA agreements offer an opportunity to work together. Each party who participates has an interest in seeing that project's funding is wisely spent and that the project is successful. This alignment of incentives places a premium on cooperative and

collaborative negotiation and a search for common solutions. Such incentives for cooperation are often critical when dealing with urban rivers where a wide variety of parties, both public and private, often have potential nexuses to and potential liability for historic contamination.

Depending upon the site, it is possible that different members of a coalition may be able to access different forms of funding. For example, local governments and NGOs may have access to brownfields grants or other sources of funding that can contribute to a project.

F. Consideration of Restoration as Well as Remediation Issues

The Great Lakes Legacy Act permits funding of aquatic habitat restoration where such restoration is performed "in conjunction with" sediment remediation. Synching remediation and restoration efforts may often be beneficial, depending upon site-specific facts. At certain sites, non-federal natural resource damages (NRD) trustees have taken settlement funds and applied as the Non-Federal Sponsor.

G. No Program is Perfect

While the GLLA offers many benefits for the right project, the program, not surprisingly, has certain limitations. First, the mechanisms for accounting are not as flexible as they might be. Second, to date, GLNPO has not issued covenants not to sue in connection with its project agreements. Thus, parties considering a GLLA project should evaluate whether appropriate covenants not to sue can be obtained from other government entities or whether the benefits of proceeding under GLLA outweigh the risks of proceeding without a covenant not to sue.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

Michael D. Daneker
+1 202.942.5177
Michael.Daneker@aporter.com

Daniel A. Cantor
+1 202.942.5765
Daniel.Cantor@aporter.com