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## Academic & NGO Panel

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## ACADEMIC & NGO PANEL

*Moderator: Stephen J. Petras, Jr.*

*Speakers: Todd Brennan, Dr. Diane Dupont & Howard Learner*

MR. PETRAS: We have three panelists today. We have Todd Brennan, Senior Policy Director, Alliance for the Great Lakes. He's located in Green Bay, Wisconsin. We have Diane Dupont, Scientific Director, Water Economics, Policy and Governance Network at Brock University. And we have Howard Lerner, Executive Director of the Environmental Law and Policy Center. I've asked of them, as well, to provide their comments within three to five minutes, and then hopefully we'll have time for questions and answers from that panel.

The first presenter is Todd Brennan, Senior Policy Director, Alliance for the Great Lakes. So, Todd, the floor is yours.

MR. TODD BRENNAN: Great. Thanks, Stephen. It's interesting, I just went to find my screen and it disappeared, but I got these little prompts that I can turn my video on, and I can turn . . . So, I can't see myself, but hopefully you can all see me.

MR. PETRAS: We can see you, yes.

MR. BRENNAN: Great. Well thank you for inviting me to this, and I also want to say thank you to Kate and Irena for the very thought-provoking approach to this, which I think we all need.

So, as Stephen said, my name is Todd Brennan, and I am from the Alliance for the Great Lakes, where I work primarily on nutrient pollution and harmful algal blooms, and a number of policy issues, but also the Great Lakes [Water] Quality [Agreement] and the Great Lakes [-St. Lawrence River Basin Water Resources] Compact. And I'm usually going from one presentation to another presenting or discussing those topics completely separately, so I give great credit to Irena and Kate. I never thought I'd actually see a panel discussion where those two topics came together, conjoined in their paper. So, that's kind of an interesting approach for me.

But harmful algal blooms and nutrient pollution are preeminent among the issues that the Alliance for the Great Lakes deals with. Naturally, as you'd imagine with our name, we are dedicated to ensuring a healthy Great Lakes for future generations of both people and wildlife forever. And given the pervasive nature, and growing issue with nutrient pollution and the result of harmful algal blooms, it's of great concern to us. It's being dealt with now in every lake, as we've seen from the prior presentations, and in lakes like Lake Superior where, historically, up until very recently, that was never an issue. And so, this is concerning both because it's growing in its scale and its spatial reach, and also its unique—it's hitting different parts of the lakes unlike it has before.

And then you can pan to western Lake Erie, where you have nearly twelve million people plagued by their drinking water issues. And nothing was more evidence than the city of Toledo in 2014, when the water was shut off because of cyanotoxins produced by harmful algal blooms for nearly three days.

So, with that as a preface, obviously this is of very much importance to us, and I appreciate the thought exercise. And it needs work, right? Because it's been well-established, even from the prior presentations, that this is an issue that's not going away. It's growing in its extent, as I mentioned, and in some cases its extremity. We don't seem to be moving the needle, necessarily. But worse yet, we don't seem to be knowing where the needle is pointing us. And I think what this paper proposes is a mechanism by which we could think about how to, sort of, gain ground on that part, which is assessment, evaluation, and then funneling that back into actual meaningful policy change that we'll see on the landscape, that will ultimately try to ameliorate this problem.

At issue for me, primarily, is accountability and enforcement. It was actually mentioned sixth, or last, among the critical sub-federal elements that the paper proposed. But, I felt like if you put that to number one, it would then be the lens by which you could look at the other five to assess their effectiveness. As we've heard from previous presenters on the regulator panel, we do have a lot of these elements, and I think you could argue any one of these things, in and of itself. But when you take them as a whole, does it sort of systemically represent what we need to fix this problem? And I think that's what the paper obviously argues, and puts good thought into.

Without an effort towards accountability and enforcement, I think any new government effort would be akin to rearranging deck chairs on the Titanic. We know it would be—unfortunately, not intentionally—but it would be a boondoggle. It probably wouldn't get us where we need to go. So, thinking this through is really critical. And I feel like we've heard that from the previous panelists as well.

I think what we see in every jurisdiction is that this accountability and enforcement issue is a tripping block for all jurisdictions. Therefore, the premise of having a sort of compact that cuts across all Great Lake states might have some merit. When we think of it geographically in terms of Green Bay, western Lake Erie, Hamilton Harbor, it doesn't always make sense to us because we're so used to dealing with those issues specifically in their geographic locations. But, the idea that we know that this is happening in all states, it's happening in all Great Lakes. And it's also an issue that's happening throughout the state, and arguably, maybe even worse in some inland waterways.

I think if you do make comparisons to things like the Great Lakes [-St. Lawrence River] Basin [Water] Resources Compact, it's interesting because you think about, when that was implemented, it came with implementing legislation so that laws, policies, and management actually changed to implement that, and it changed across the entire state. There were obviously policies that dealt with the Great Lakes watershed aspect. But largely—I spend a lot of time on the Great Lakes [-St. Lawrence River Basin Water Resources] Compact—policies changed across the entire state, and actually lifted water management and water policy up for the entire state, and improved it. So, one of the things that the Great Lakes [-St. Lawrence River Basin Water Resources] Compact did for us was that. And when it comes to nutrient pollution, everyone also has this in common. Thinking more largely in that way might be beneficial.

Secondly, on that point, the [Great Lakes-St. Lawrence River Basin Water Resources] Compact changed water management, as I mentioned. So, what I would say, it's a mixed review on whether it's a doctrine of interstate nuisance, as Kate referenced, because I would say it's more driven by a "what's in it for me?" principle. It's driven by the fact that if we lose water, that's going to directly impact my state, my people, our jurisdictions. Whereas nutrient pollution deals with the externality of what is largely an economic-driven function. And so, therein lies what could be missing from this approach that we need to take into account, and I think it was touched on today by some of the different folks presenting.

The [Great Lakes-St. Lawrence River Basin Water Resources] Compact really lacks a role of the marketplace. It deals primarily with water and water distribution, which you could argue is largely owned by public-based utilities and entities. So, it's much easier to hardwire it in that way. What you keep out of it is the fact that there is this financial aspect to the economic parts that need to be focused on. So, I always remind people that, in this case with agriculture, farmers or producers are at the short end of a long train where everyone takes their pieces along the way. And so, their places are largely fixed and non-negotiable.

Therefore, while I'm not letting farmers off the hook by any means, the market and supply, the supply chain, food and energy industries, have to help internalize the external costs to this business as well. So, they would need to be enveloped into this approach to a new way of thinking about an interstate compact or agreement that takes into account—that I think is largely missing, somewhere in the nuance between the accountability and enforcement, and the marketplace providing force on this. I think this could be part of an implementing policy and funding, and could come in the form of the way that the states actually internalize this, but being guided by sort of a collective effort around the basin.

Now, so all that said, we should try this and if we were to try this, it would need to include federal Clean Water Act based tools. So, I know it said sub-federal, but obviously a lot of this is predicated upon the interaction, the power, the resources that exist within the federal government.

And one of those would be a TMDL. We've seen how this has played out in western Lake Erie—most recently with Ohio voluntarily taking on a TMDL-based process that's getting underway as we speak. However, meaning in western Lake Erie that we need now to link—we have Annex 4, we have the 2015 [Western Basin of Lake Erie] Collaborative Agreement, and then we have TMDLs at mixed levels throughout the different states that are actually contributing to the problem. So, linking this process through the TMDL is pretty critical. And building off of what Ohio has done—and another panelist will probably present on the Environmental Law and Policy Center that pushed very hard to get that—I think would be a pretty key process there.

I think at the very least, if you could expand the Western Lake Erie 2015 Collaborative Agreement to include Indiana would be important, because it doesn't. And, typically, with watershed management you start at the top and you work your way down, because any investment done lower than that usually can be impacted, or sort of erased, by what happens above it. So, at the very least, taking that step coming out of this would be very important.

Lastly, I'll just say, I disagree that we just need more money. Certainly, we do, and risks need to be mitigated in very concerted ways, but we also need a better mechanism to actually assess progress and performance for our existing funding and action. And then we need to communicate that learning. And then, next, we would need to entrain that learning by improving coordination. And lastly, we need to create those guiding principles that force that learning back into policy change via adaptive management. I feel like sometimes we talk about adaptive management as if it exists in its own vacuum. The reality is that adaptive management has to be telling us to go somewhere, and that needs to actually be put back into action. We can measure progress all we want every year, but if you don't look at the holistic sense of how we're changing over time, and how the actions put on the landscape and the money put on the landscape is factored into this, then you won't actually understand what our trend is.

But, we argue right now that none of us are moving the needle. So, we don't need a lot of science to tell us that the performance is lacking. And so, ultimately, this needs to be linked to, I think, public health, and the economy, and those metrics and progress-based metrics need to be brought into that framework so that we can assess our effectiveness and therefore mitigative action.

So, basically, I'm in favor of thinking about this approach. And I think that most importantly, we need to consider how we do not focus on downstream solutions to upstream problems, and to take them into account when we build these sort of infrastructures and agreements, and the enforcement and accountability that's a part of that. And that's all I have to say.

MR. PETRAS: Great. Thank you very much, Todd. I appreciate those comments. And, again, I remind everyone to get your questions ready, and please put them into the Q&A, as opposed to the Chat, put them into the Q&A, and we'll be ready to go for the question and answer session.

Our next presenter on the academic/NGO panel is Diane Dupont. Again, Diane is Scientific Director, Water Economics, Policy and Governance Network at Brock University. Diane, the floor is yours.

DR. DIANE DUPONT: Thanks very much. I want to thank you, first of all, Stephen, for the invitation to participate in this workshop. I'd say, judging by the breadth and scope of both the author and the panel expertise, I'm very hopeful that the issue of mitigating HABs will be greatly moved forward.

So, I have to first start off by saying, as an economist, I've used a particular framework to think about the question of whether it's time for a binational, sub-federal approach. And I would argue that this is a policy assignment question. Namely, which set of economic agents—and, by that, I broadly define it to include all levels of government, with the traditional consumer-supplier decision-making agents—so, which set of economic agents should be responsible for mitigating hazardous algal blooms to achieve the optimal outcome? Now, I'd say there is a related question which is, how should policies around mitigating HABs be decided? And I would argue that's more of a governance issue, and I want to speak to both of those two things.

So, let me turn back to the first one—who should be responsible for achieving an optimal outcome? And I'm an economist, so we have to think about the

assumptions. And that's assuming that the desired outcome is clearly defined and measurable. So, I want to discuss four criteria, and they are effectiveness, feasibility, efficiency, and evaluation.

So, when I think about effectiveness, this is really looking at who has the legal authority to undertake actions to achieve the desired goal. While feasibility looks at whether there's a matching of capacity and resources to achieve that goal. And so, the question here is, is there sufficient authority already vested in the sub-federal level? Now, the paper provides some evidence that this might be the case. But now I want to think about the following: namely, when we've got all of these sub-federal agents involved in this issue, they're going to need to participate in a type of coalition. And so, the question here is, are the enabling conditions for a successful coalition in place?

Now, crises often prompt coalition formation. So, it appears that the HAB issue may, in fact, be a window of opportunity. Now, while this might be a necessary condition, it's not sufficient. Individual coalition members are going to need to have capacity—specifically, leadership and budgetary resources. But it's also important that the coalition has a common culture that fosters trust and sensitivity to power differentials within the group members. So, to the extent that the actors at the sub-federal level have already successfully worked together in the past, I would say that bodes well for future collaborations. But I think it bears repeating that there's need for a common and clear goal to which all members subscribe, and—I know a number of folks have already spoken about this—as well as the willingness and ability to enforce any commitments by contributing both financial and human resources, and undertaking the necessary actions to achieve the goal.

Now, let me turn to efficiency. So, efficiency speaks to whether the goal is achieved using the least amount of resources, least cost. And this is where it gets tricky, because where do the resources come from? They come from, essentially, tax dollars. So, if tax dollars are collected, to some extent, at the federal level, and then transferred to the sub-federal level, we've got costly transactions that are going to be introduced to the process, and these can lead to inefficiencies.

And, as someone else mentioned, an additional problem lies with the very nature of water resources themselves. They're common property with free access, they provide benefits to many—it's a type of externality, and we know that the presence of externalities give rise to inefficient outcomes.

While there's been quite a bit of success, I would argue, in terms of reducing the point source effluents that may lead to HABs, huge challenges—and a number of people have mentioned this—huge challenges remain when trying to reduce nonpoint source effluents.

And I think there are kind of two key questions that I'd like to see Kathryn and Irena address when they're looking at this is, can a sub-federal approach devise methods that deal more efficiently with these types of nonpoint source effluents? But then secondly, and related, can the sub-federal approach secure the resources that would be necessary to implement monitoring, enforcement and, most importantly, I think, evaluation of progress towards the stated goal? And a bit related to this is whether the sub-federal management can, kind of, pivot more

easily to adapt to changing conditions—as a number of the other panelists have mentioned—can they adapt more easily and more efficiently than a federal-federal kind of approach?

So, I want to touch briefly on the second question, which is more the governance one—how should mitigation policies be decided? And I want to highlight two different criteria here. One is fairness in terms of the public process for choosing the target, and the second is more applicability and sensitivity to local conditions.

I would argue that the current efforts of the province of Ontario and the states of Ohio and Michigan to work on the 40% phosphorus runoff reduction target provides an example. Now, each of those agencies has undertaken a collaborative process to develop their own domestic action plans by engaging stakeholders, and I would argue the stated goal is the same. However, we do see differences in the stakeholders who express interest in the process, as well as the nature of conversations and the ultimate plans that emerge from those processes. A fair process needs to ensure that all relevant stakeholders are given an opportunity to provide input, but I think what's really important here is, we need to keep in mind that there is a potential inequality of resources and capacity amongst stakeholders. And so, this can manifest itself in either a greater or lesser emphasis upon certain interests in the conversations and, ultimately, in the policy documents and the implementation measures that emerge.

Obviously, this can also happen at a federal-federal level, but I would argue that disparity of influence and power is more often observed at the lower levels of government. And so, I think these differences may tend to have a greater impact upon policy implementation at the sub-federal level, as opposed to the goal-setting. And I think we need to keep those two apart—there's the goal-setting, and then there's the implementation. So, I would argue that any kind of mechanism that will involve the sub-federal level—and there's some examples out there—should also be dealing with mechanisms to mitigate any kind of power differentials that exist. And it needs to be part of the policy implementation discussions at the outset.

I just conclude by saying I think the authors have put forward a very thought-provoking, worthwhile challenge. I think, actually, reframing the HABs problem at the sub-federal level, whether or not it formally becomes that, is a step closer to the kind of framework that economists espouse for efficient decision-making. Namely, a more direct link between who is making the decisions and paying the costs for the decisions, and then who will ultimately benefit from those decisions. And I look forward to further discussion with everyone on the panel and the authors. Thank you.

MR. PETRAS: Great. Thank you very much, Diane, for that outstanding presentation. Our next, and final, panelist is Howard Learner, executive director of the Environmental Law and Policy Center. Howard.

MR. HOWARD LEARNER: Thank you, Steve, for convening this, and for inviting me to join the panel. And one of the nice things is, when you follow people like Todd and Diane, you can sort of refer to, “and what they said.”

(Laughter.)

Todd's good point on the importance—and I would double down on that, with regard, Kathryn, Irena, to your paper—to move up the accountability and enforcement point to a principal position at the top. And Diane's point about economics. Right now, what we are seeing is CAFO [Concentrated Animal Feeding Operation] owners who are producing tremendous amounts of manure that go into western Lake Erie, causing toxic algae blooms—not internalizing the costs, but rather externalizing the costs onto the public.

So, thank you, Stephen, for pulling this together. Thank you to the institute and to my fellow panelists.

I'm Howard Learner. I'm a public interest attorney who serves as the executive director of the Environmental Law and Policy Center, which is the Midwest's leading environmental legal advocacy and eco-business innovation organization. I'm also an adjunct professor at the University of Michigan Law School and Northwestern University Law School, teaching advanced seminars on energy law, environment, and climate change policy.

I'm the lead attorney for the plaintiffs, Environmental Law and Policy Center and Advocates for a Clean Lake Erie, in our joint lawsuit with Lucas County, Ohio, against the U.S. EPA to clean up western Lake Erie from the recurring toxic algae outbreaks that impair safe, clean water, harm fisheries and the northern Ohio economy, and deter enjoyable outdoor recreation for so many people.

U.S. District Court Judge James Carr has twice ruled in the plaintiffs' favor, concluding that the U.S. EPA violated the Clean Water Act, and that TMDLs are legally required remedies to reduce the pollution causing the recurring toxic algae outbreaks. And to differ just slightly with Todd, who referred to the Ohio EPA moving forward with voluntary TMDLs, the on the ground reality here is they weren't doing TMDLs. Ohio EPA refused to do them until Judge Carr ordered that as a remedy. I'm glad to see they're moving forward with TMDLs right now, but it was as a result of enforcement—the key point that Todd made earlier—and the agency then following what the court said.

As Tricia Mitchell pointed out, in western Lake Erie, there is an existing binational, sub-national, regional framework, and that's the Great Lakes Water Quality Agreement, Annex 4. So, we ought to, sort of, look at how that's working or not working, hopefully, Kathryn and Irena, in terms of providing some guidance for your paper, because what you're suggesting in terms of a framework is actually in place when it comes to western Lake Erie.

In the litigation, plaintiffs have asked the court to enter a remedial order that would require the State of Ohio and the U.S. EPA to adopt enforceable, regulatory standards—a point that was made earlier by Todd, it's not just money—enforceable, regulatory standards sufficient to achieve a reduction of phosphorus in western Lake Erie of 40% by 2025. To be clear, that's not just a number and a deadline that we pulled out of a hat. That is exactly what's provided by the Great Lakes Water Quality Agreement, Annex 4, which the U.S. EPA and the State of Ohio committed to do in signing, and have since recommitted to do. In short, the federal and state agencies would take the actions that they've committed to do, to achieve what they committed to do in signing Annex 4, and have since committed and recommitted to do.



It's been established that voluntary actions are not enough. Both panelists have made that point. And that payments to agricultural operators—that they will only reduce if they're paid—is not consistent with the structure of, at least American, environmental law. Think about it in the following analogy: a large, industrial facility is emitting hazardous and toxic chemicals into Lake Erie, causing public health and environmental harms. That industrial polluter says, "But aha, we're not gonna comply with the Clear Water Act and reduce our chemical emissions that are leading to those sorts of problems, unless we are paid to not do so." That, of course, isn't correct when it comes to the Clear Water Act and industrial facilities. And with regard to toxic algae outbreaks in western Lake Erie—we'll get into the data in a minute—it's principally a problem—90%, according to the Ohio EPA—coming from agricultural runoff.

The paper here offers an elegant solution that's complicated, and across the region will take many years to accomplish while, in effect, the lakes are burning or, more accurately, are poisoned and contaminated.

We appreciate, Kathryn and Irena, you've included accountability and enforcement in your solutions metrics. As Todd suggested, it needs to go up in terms of priority. The lack of enforcement and accountability—or, here, a failure of political accountability and responsibility—is what's being shown in the place where we do have a binational, sub-national framework operating. Namely, Annex 4 of the Great Lakes Water Quality Agreement.

The direct, not simple, but the direct solution is for the political leadership of Ohio, and the other states, and Ontario, to belly up to the bar, have a stiff drink, and do what they've signed up and committed to do.

(Laughter.)

Namely, take the necessary actions, as determined and validated by sound science, to reduce phosphorus pollution into western Lake Erie by 40% by 2025. That's what the commitment has been.

In short, we're facing a problem of political will under the existing Annex 4 of the Great Lakes Water Quality Agreement, and a new elegant governance framework won't fix that problem. Courts acting to require enforcement help fix the problem because, quite frankly, they give the governors sometimes cover to do, politically, what they otherwise don't want to do on their own.

The science here is largely known and largely agreed upon. And I'll turn here to the State of Ohio's own *Nutrient Mass Balance Study [for Ohio's Major Rivers]*, a comprehensive piece of science, and its 2020 *Integrated [Water Quality Monitoring and Assessment] Report*. Jeff Reutter, a prominent scientist who led the science team working with policy makers on Annex 4, has described a suite of actions that Ohio can take to achieve its commitment to pollution reductions.

Let me, if you will, sound a little bit here like *Marketplace* on NPR and do it "by the numbers." I'm going to pull up one slide. Let's see, hopefully, if this comes up, it's pretty easy to follow. Can somebody just tell me, "Yup, the slide is up." Thank you, Todd.

So, here are the numbers, folks. At least 60%, 90%, 54% or more, and 40%. At least 60% of the phosphorus pollution in western Lake Erie comes from Ohio. That's been pretty firmly established. Some say 70%.

90% of the phosphorus pollution entering western Lake Erie from Ohio comes from agricultural runoff pollution. That's the Ohio EPA's numbers. Fertilizers from corn and soy fields, and manure from CAFOs. The fastest-growing part of this is CAFOs and manure, alright? If CAFOs and the manure runoff continues to go up, then in effect we're chasing our tails. One of the solutions in that is to begin to regulate CAFOs much more intensively than they are now. Right now, a CAFO with less than 2,500 animals doesn't even have to get a permit. So, not surprisingly, there are a lot of CAFOs operating with 2,400 animals, below the 2,500 limit.

If you do the math, 60% times 90% means that 54% or more, 54% to 60% of the phosphorus pollution entering western Lake Erie comes from Ohio agricultural runoff, okay? Some of you may know the famous bank robber, Willie Sutton. As a public interest attorney, I follow the Willie Sutton Rule. Willie Sutton was asked, why did he rob banks. He famously responded, "Because that's where the money is." The answer here is, where's the pollution? More than 54% of pollution that's leading to western Lake Erie's recurring toxic algae outbreaks problems is coming from Ohio's agricultural runoff, and that is coming, indeed, from CAFOs, and manure, and from fertilizers.

So, you simply can't, as a matter of math, reduce phosphorus pollution by 40% by 2025 unless you reduce the amount that's coming in from the agricultural sector in western Lake Erie from Ohio. That's where the pollution is. That's simply math. It's not all that complicated, we don't need to desperately seek data. That's where the pollution is.

What's required to reduce it, accountability and enforcement, is the political will to do so. With 2025 coming up, Ohio's political leaders can no longer kick the can down the road if the State of Ohio and the U.S. EPA want to live up to their pollution reduction commitments under Annex 4.

The challenge is legal—the willingness of the federal courts to enforce compliance. The challenge is political—the willingness of Governor DeWine, Ohio EPA to live up to their commitments as the deadlines close in. And action is required, and can no longer be deferred.

This is a long-standing political science problem and issue. When you have a binational, sub-federal framework in place, where the commitments to reduce pollution are down the road, it is relatively easy for a governor in 2016 to commit to do something that won't have to really be done until 2025, and avoid making tough decisions—kick the can. So, what's the State of Ohio doing right now? With 2025 coming around, the State of Ohio is saying, "Give us another two, three years to try to figure out the TMDLs." Which, in effect, then kicks the can to the next governor.

So, the answers now are, "Do your job now" —that's the accountability and enforcement piece. The governors need to step up and live up to their promises and commitments. The costs of inaction are literally billions of dollars to the northern Ohio economy, public health threats, ecological harms, loss of enjoyable fishing, canoeing, kayaking, boating, and swimming, and nice beaches for millions of people. Lake Erie should be fishable and swimmable as the Clean Water Act requires.

My suggestions, then, to Kathryn and Irena, on your paper, are bump up the accountability and enforcement piece of what you're looking at. And at least take a look at the one place where there is a binational, sub-national framework, and figure out how to help us solve that accountability and enforcement challenge, which is both political with the governors, and involves the courts stepping up as well, to act where the political figures have not.

Thank you for your time, and I'd be glad to join Todd and Diane in addressing questions and suggestions.

MR. PETRAS: Okay. Thank you very much, Howard, for that provocative review. Much appreciated.