

**EXHIBIT A:**  
**PLAINTIFFS' FIRST**  
**SUPPLEMENTAL COMPLAINT**

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**FIRST SUPPLEMENTAL COMPLAINT**

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Plaintiffs Environmental Law & Policy Center (“ELPC”), Advocates for a Clean Lake Erie (“ACLE”), Michael Ferner, and Susan Matz, who bring this action on behalf of themselves and ELPC’s and ACLE’s members, allege the following:

**NATURE OF THE ACTION**

1. On May 10, 2018, Defendant the U.S. Environmental Protection Agency (“U.S. EPA”) approved Ohio’s illegal decision not to submit a “Total Maximum Daily Load” (“TMDL”) for western Lake Erie. While a TMDL is required by the Clean Water Act (“CWA”), Ohio decided it would not follow the law because it “believes” that a separate process under the Great Lakes Water Quality Agreement (“GLWQA”)—a legally unenforceable international agreement with no binding pollution reduction targets—is more “appropriate.” Defendants’ Status Report (May 11, 2018), Ex. 2, Ohio EPA, 2016 Integrated Water Quality Monitoring and Assessment Report – Amendment (May 2018) (“2016 Integrated Report Amendment”) at 9. But this belief is irrelevant. The Clean Water Act is not optional; it provides that a state “*shall*” prepare a TMDL for an impaired water body, or if the state fails to do so then U.S. EPA “*shall*” take on that task. 33 U.S.C. § 1313(d)(1)(C), (d)(2). Ohio EPA’s position that it may ignore that statutory command in favor of some other preferred approach is both illegal and wrong-headed, serving as an illegitimate roadblock to achieving the unique practical benefits that a TMDL would provide in reducing phosphorus loading into western Lake Erie.

2. Ohio raised a similar, equally invalid excuse when it refused to list the Lake Erie waters as impaired in the first place, asserting that it would not follow the CWA because it believed it would be more appropriate for U.S. EPA to carry out the CWA process while Ohio

worked under the auspices of the GLWQA. A.R. 2646-2647, Division of Surface Water, Ohio E.P.A., *Ohio 2016 Integrated Report* at D-5 to D-6 (May 4, 2018); *see also* Order at 11-12.

Ohio's belief that it may choose whether or not to comply with the CWA has not changed, and neither has its goal: to avoid developing any TMDL for western Lake Erie. This Court can—and must—put an end to such illegal delaying tactics by ordering the development of the required TMDL.

3. Formally, Plaintiffs seek judicial review of the May 10, 2018 “supplemental decision” by the Defendants U.S. EPA, U.S. EPA Administrator Scott Pruitt, and U.S. EPA Regional Administrator Cathy Stepp<sup>1</sup> to approve an Ohio EPA amendment to its 2016 “impaired waters” list and “Integrated Report” submitted pursuant to CWA Section 303(d), 33 U.S.C. § 1313(d).

4. Ohio EPA submitted this 2016 Integrated Report Amendment on May 4, 2018, in direct response to Plaintiffs' lawsuit and the Court's April 11, 2018 Order regarding Ohio EPA's years-long refusal to carry out its Clean Water Act duty to determine whether toxic algae blooms are preventing western Lake Erie from meeting Ohio water quality standards.

5. Ohio EPA's amended Section 303(d) list does finally and fully designate the western basin of Lake Erie within Ohio's jurisdiction as impaired by harmful algal blooms. However, it also sets forth Ohio EPA's explicit refusal to undertake the next required step of developing a TMDL to limit the phosphorus pollution that is driving these algal blooms, based on Ohio's belief that the GLWQA instead offers the “best approach.” 2016 Integrated Report Amendment at 9.

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<sup>1</sup> Since the filing of this lawsuit on July 18, 2017, Cathy Stepp has been confirmed as Regional Administrator of U.S. EPA Region 5. Plaintiffs therefore substitute her as a Defendant pursuant to Fed. R. Civ. P. 25(d).

6. Ohio EPA has already delayed implementing its initial impairment listing responsibilities under the CWA based on its belief that another approach was preferable. Order at 11-13. Ohio EPA's excuse failed to comply with the CWA the first time, as U.S. EPA itself recognized when it withdrew authorization of Ohio EPA's actions. However, rather than fulfill the next step of its CWA duties, Ohio EPA takes the *same approach*, claiming now that it will not establish a TMDL because the GLWQA process is more appropriate. U.S. EPA approved that abandonment of Ohio EPA's Clean Water Act duties with no objection. It is clear that Ohio EPA is not interested in implementing section 303(d) of the Clean Water Act, and that U.S. EPA is aiding and abetting Ohio's inaction.

7. Ohio EPA already has a detailed history of failing to carry out its obligations under the Clean Water Act regarding harmful algal blooms in western Lake Erie, dating back to 2012 when U.S. EPA provided it with water quality data showing the impacts of such blooms. Order at 10. Sizeable harmful algal blooms have recurred in western Lake Erie almost every year since. 2016 Integrated Report at 6. Nevertheless, Ohio EPA refused to conduct an impairment determination for the open waters of western Lake Erie in 2012 and 2014. Order at 10-13.

8. In the 2016 Integrated Report that included its Section 303(d) List, Ohio EPA stated that it would not carry out an impairment assessment for the open waters of Lake Erie pending development of an assessment methodology under Annex 4 of the Great Lakes Water Quality Agreement. A.R. 2646-2647, Division of Surface Water, Ohio E.P.A., *Ohio 2016 Integrated Report* at D-5 to D-6 (Oct. 2016). Ohio EPA also stated that it "believes that assessment and listing of the open waters under the CWA should be led by U.S. EPA in consultation with the states" while Ohio was "working towards the [GLWQA] nutrient reduction

goals for Lake Erie.” A.R. 2647, Division of Surface Water, Ohio E.P.A., *Ohio 2016 Integrated Report* at D-6 (Oct. 2016).

9. U.S. EPA has likewise repeatedly failed to hold Ohio EPA to its CWA obligations with respect to western Lake Erie. Order at 10-14.

10. U.S. EPA approved Ohio EPA’s 2016 decision not to assess the impairment status of the open waters of western Lake Erie in a May 19, 2017 letter, even though U.S. EPA recognized that Ohio EPA failed to assess the open waters of Lake Erie for impairment. U.S. EPA stated that it “is deferring to the State’s judgment not to assess these waters for the 2016 list.” U.S. EPA Approval at 9.

11. Plaintiffs filed this lawsuit on July 18, 2017, alleging that U.S. EPA violated the Administrative Procedure Act (“APA”) by acting arbitrarily, capriciously, and not in accordance with the law under CWA section 303(d) and 40 C.F.R. § 130.7 when the Agency approved Ohio EPA’s abandonment of its CWA obligation to assess the impairment status of the open waters of western Lake Erie.

12. In January 2018, on the eve of summary judgment briefing commencing in this lawsuit, U.S. EPA withdrew its May 19 approval and requested that Ohio EPA conduct an impairment evaluation for the open waters of western Lake Erie “consistent with its obligations” under the CWA.

13. On April 11, 2018, the Court ordered U.S. EPA to render a final decision on Ohio’s 2016 Section 303(d) List within thirty days.

14. Ohio EPA subsequently amended its 2016 Section 303(d) List to categorize the open waters of western Lake Erie as impaired. Ohio EPA also identified western Lake Erie as “one of the highest, if not the highest, priority for Ohio to address” among its impaired waters.

2016 Integrated Report Amendment at 9.

15. However, Ohio EPA is now refusing to take the next step required under the CWA, which is to develop a TMDL, a comprehensive plan to restore the waters of an impaired waterbody. 33 U.S.C. § 1313(d). The TMDL is mandatory. A state “shall” establish priority rankings for the waters it has listed as impaired, and “shall” establish a TMDL for each of those waters “in accordance with” those priority rankings. 33 U.S.C. § 1313(d)(1)(A), (C).

16. Upon submission of a TMDL, U.S. EPA must approve or disapprove the submission within thirty days. *Id.* § 1313(d)(2). Numerous courts have recognized that if a state decides not to develop a TMDL for an impaired water body, that refusal operates as a “constructive submission” of no TMDL and triggers U.S. EPA’s thirty-day review obligation under section 303(d)(2). *See, e.g., Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984).

17. If U.S. EPA disapproves a TMDL submission, the agency must act within thirty days to “establish such loads for such waters as . . . necessary to implement the water quality standards applicable to such waters.” 33 U.S.C. § 1313(d)(2).

18. Despite these clear obligations, Ohio EPA has flatly stated that it would not move forward with development of a TMDL. It asserts that “the best approach for solving the issues in western Lake Erie is through the collaborative process established under Annex 4 of the Great Lakes Water Quality Agreement and the Domestic Action Plans as they afford a holistic, multi-jurisdictional perspective that does not exist in a traditional TMDL process.” 2016 Integrated Report Amendment at 9.

19. Ohio EPA is again refusing to take action under the CWA to address harmful algal blooms, and U.S. EPA has again rubber-stamped the state’s refusal. On May 10, 2018, U.S. EPA approved Ohio EPA’s amended 2016 Integrated Report as satisfying CWA section

303(d) and 40 C.F.R. § 130.7(b), including “Ohio EPA’s discussion of its prioritization of Lake Erie” for preparation of a TMDL.

20. Ohio EPA’s refusal to undertake development of a TMDL is inconsistent with the Clean Water Act’s command that a state “shall” establish a TMDL for an impaired water body under 33 U.S.C. § 1313(d)(2), and “shall” do so “in accordance with the priority ranking” it has given that water body in its Section 303(d) List, as required by 33 U.S.C. § 1313(d)(1)(C). Having identified western Lake Erie as “one of the highest” priorities for the state, Ohio EPA is required under CWA Section 303 to begin developing a TMDL as a tool to address harmful algal blooms in that water body. Instead, Ohio EPA has explicitly decided not to submit a TMDL pursuant to the CWA—or even to begin developing a TMDL—in favor of an alternative approach.

21. The CWA does not allow a state to “opt out” of the statute in favor of an alternative approach. U.S. EPA was therefore required to disapprove Ohio EPA’s submission the same as if Ohio EPA had submitted an entirely inadequate TMDL. However U.S. EPA failed to disapprove Ohio’s action and instead summarily approved it, just as it had the last time Ohio EPA tried to “opt out” of the CWA.

22. Accordingly, U.S. EPA’s May 10, 2018 decision violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because U.S. EPA’s decision was arbitrary, capricious, an abuse of discretion, and not in accordance with the law under CWA section 303(d) and 40 C.F.R. § 130.7. U.S. EPA ignored a Congressionally-mandated mechanism for holistically addressing pollution in a water body. The Agency provided no rationale for doing so, nor could it have in light of the CWA’s clear legal requirements.

23. U.S. EPA’s illegal approval forecloses the application of a TMDL as a valuable

practical tool for putting Ohio on a path to successfully address algae outbreaks in western Lake Erie.

24. Alternatively, to the extent U.S. EPA's May 10, 2018 approval letter was not a "final agency action" reviewable under the APA pursuant to 5 U.S.C. § 704, U.S. EPA has failed to carry out a non-discretionary Clean Water Act duty and is subject to suit under 33 U.S.C. § 1365(a)(2). The 2016 Integrated Report Amendment plainly set forth Ohio EPA's decision not to undertake a TMDL for western Lake Erie and, as a "constructive submission" of no TMDL, therefore triggered U.S. EPA's obligation to review or approve the state's failure to establish a TMDL within thirty days of May 4, 2018 under 33 U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2).

25. Plaintiffs therefore seek declaratory and injunctive relief requiring U.S. EPA to disapprove Ohio EPA's submission of no TMDL and to itself establish a TMDL for western Lake Erie.

### **JURISDICTION AND VENUE**

26. On May 10, 2018, U.S. EPA approved Ohio EPA's decision not to develop or submit a TMDL to address phosphorus pollution in western Lake Erie.

27. U.S. EPA's approval of Ohio EPA's "non-submission" was a final agency action subject to judicial review pursuant to 5 U.S.C. § 704. This approval: (1) was the consummation of U.S. EPA's decision-making process regarding Ohio EPA's obligation to develop a TMDL for western Lake Erie; and (2) determined rights and obligations of the parties or caused legal consequences.

28. Plaintiffs bring this petition for judicial review of U.S. EPA's approval of Ohio's impaired waters list pursuant to 5 U.S.C. §§ 701 *et seq.* U.S. EPA's action was unlawful and



should be set aside because it was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law” under 5 U.S.C. § 706(2)(A).

29. Alternatively, the 2016 Integrated Report Amendment by Ohio EPA qualifies as a “constructive submission” of no TMDL, and triggered U.S. EPA’s obligation to review or approve the state’s failure to establish a TMDL within thirty days of May 4, 2018 under 33 U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2). Because U.S. EPA failed to carry out that non-discretionary duty by the statutory deadline, this court has jurisdiction under 33 U.S.C. § 1365(a)(2) to order U.S. EPA to conduct the required review.

30. This court also has jurisdiction pursuant to 28 U.S.C. § 1331 because this is a civil action arising under laws of the United States.

31. U.S. EPA’s failure to require that pollution in the open waters of Lake Erie be addressed through the development of a TMDL creates a continuing controversy that is actual and substantial.

32. A substantial part of the events or omissions giving rise to the claim occurred on or near Lake Erie, which is located in the Northern District of Ohio, Eastern Division, making venue proper under 28 U.S.C. § 1391(e). Alternatively, venue is proper in this Northern District of Ohio because Plaintiffs Michael Ferner and Susan Matz are residents of this district.

### **PARTIES**

33. Plaintiffs adopt and incorporate by reference Paragraphs 28-32 of the complaint filed in this case on July 18, 2017 (“Initial Complaint”), pursuant to Fed. R. Civ. P. 10(b) and (c).

34. Defendant Scott Pruitt is the Administrator of U.S. EPA and is being sued in his official capacity. The U.S. EPA Administrator is responsible for overseeing the agency, which in part includes overseeing its implementation of the CWA. This level of oversight extends to U.S.

EPA's decisions about whether to approve or disapprove states' CWA and TMDL submissions, which includes the May 4, 2018 submission by Ohio EPA setting forth its decision not to develop a TMDL for western Lake Erie.

35. Defendant Cathy Stepp is the Regional Administrator of U.S. EPA Region 5 and is being sued in her official capacity. She is responsible for overseeing Region 5 of the agency, which in part includes overseeing the Region's implementation of the CWA. The State of Ohio falls within the jurisdiction of Region 5. Ms. Stepp's level of oversight extends to decisions about whether to approve or disapprove states' CWA and TMDL submissions, which includes the May 4, 2018 submission by Ohio EPA setting forth its decision not to develop a TMDL for western Lake Erie.

### **STANDING**

36. Plaintiffs adopt and incorporate by reference Paragraphs 35-37 of the Initial Complaint, pursuant to Fed. R. Civ. P. 10(b) and (c).

37. The injuries in this case are directly traceable to U.S. EPA's unlawful approval of Ohio's decision not to develop a TMDL for western Lake Erie. Ohio EPA has determined that the waters of western Lake Erie within Ohio's jurisdiction do not meet state water quality standards and has designated them as impaired, but Ohio EPA has stated it will not develop or submit a TMDL for western Lake Erie. U.S. EPA was therefore required to disapprove Ohio non-submission, and develop a TMDL for western Lake Erie itself. 33 U.S.C. § 1313(d).

38. A TMDL for Lake Erie is key to actually restoring the water quality of the lake. A TMDL would set a cap on the amount of phosphorus pollution that is driving harmful algal blooms on western Lake Erie, and would allocate that total cap to limit pollution loads from particular sources. The development of such allocations would produce vital information

identifying specific “hotspot” regions of phosphorus discharges as targets for ongoing and future federal, state, and local efforts to reduce pollution.

39. A TMDL could include specific allocations to “point sources” that are directly subject to permit requirements and other regulations under the CWA. These would include allocations to concentrated animal feeding operations that are a source of phosphorus pollution in Lake Erie due to manure discharges. Such allocations would serve as a basis for more stringent limits on manure disposal practices and discharges through legally enforceable Clean Water Act permits.

40. Under existing U.S. EPA guidance, a TMDL would have to include “reasonable assurances” that planned efforts would sufficiently reduce phosphorus pollution to meet the overall phosphorus cap for western Lake Erie. To comply with that requirement, the TMDL would need to include information demonstrating that planned phosphorus reduction efforts would in fact be sufficient to meet the cap, as well as accountability mechanisms to provide specific consequences or further steps if those planned phosphorus reductions were not achieved.

41. A TMDL could also account for phosphorus loadings from multiple jurisdictions, including Indiana and Michigan, to ensure that phosphorus contributions from states other than Ohio are addressed through available legal and regulatory tools.

42. U.S. EPA would need to review and approve an Ohio TMDL, including any reasonable assurance mechanism, or develop a TMDL itself if Ohio fails to do so. This would result in a final U.S. EPA action subject to judicial review. That judicial review would provide a key venue for transparency and accountability regarding the merits of any plan to reduce phosphorus pollution in western Lake Erie.

43. However, as a result of U.S. EPA’s decision countenancing Ohio’s refusal to

develop or submit a TMDL, no comprehensive TMDL will be established to address harmful algal blooms in western Lake Erie, and no “reasonable assurances” will be made regarding the likely effectiveness of efforts to reduce phosphorus loading into western Lake Erie. Thus, phosphorus loading and the resulting harmful algal blooms will continue to harm Plaintiffs and their members.

44. U.S. EPA’s unlawful approval of Ohio EPA’s refusal to develop a TMDL for western Lake Erie inhibits the protection of water quality and thwarts important pollution regulation that would have reduced and abated the injuries to Plaintiffs and their members.

45. Plaintiffs and their members are also suffering informational and procedural injuries resulting from U.S. EPA’s unlawful approval of Ohio’s refusal to develop a TMDL for western Lake Erie. Through the pollution load allocation process, a TMDL would provide important information to the public, policymakers, and pollution sources themselves regarding specific sources of phosphorus pollution and key geographic areas for targeting efforts to reduce phosphorus loading. Additionally, Ohio’s process for developing a TMDL under Ohio Revised Code sections 6111.561-6111.563 would provide Plaintiffs and their members a formal legal process for participating and providing input in the development of a TMDL.

46. The injuries to Plaintiffs and their members can be redressed by the declaratory and injunctive relief sought herein, which would require U.S. EPA to disapprove Ohio EPA’s decision to submit no TMDL and would require the development of a TMDL to address harmful algal blooms in western Lake Erie.

47. As detailed above, a TMDL in this case will help prevent, extinguish, manage, and/or reduce the injuries alleged herein by providing important regulatory, informational, and procedural tools to reduce phosphorus pollution driving harmful algal blooms in western Lake

Erie.

## STATEMENT OF THE CASE

### Legal Background

#### Developing and Establishing a TMDL

48. Plaintiffs adopt and incorporate by reference Paragraphs 61-66 of the Initial Complaint, pursuant to Fed. R. Civ. P. 10(b) and (c).

49. Section 303(d) of the Clean Water Act provides that when a state identifies waters within its jurisdiction that are impaired by pollution, “[t]he State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.” 33 U.S.C. § 1313(d)(1)(A); *see also* 40 C.F.R. § 130.7(b)(4) (similar).

50. After identifying impaired waters and their respective priority rankings, “[e]ach State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation.” 33 U.S.C. § 1313(d)(1)(C); *see also* 40 C.F.R. § 130.7(c)(1) (similar). That “load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 33 U.S.C. § 1313(d)(1)(C).

51. U.S. EPA regulations specify that this TMDL requirement applies to all waters within a state’s boundaries for which existing pollution control mechanisms “are not stringent enough to implement any water quality standards (WQS) applicable to such waters.” 40 C.F.R. § 130.7(b)(1). Such existing mechanisms that may provide a basis for determining that a TMDL

is not required include not only “technology-based effluent limitations” on point sources, but also “[m]ore stringent effluent limitations (including prohibitions) required by either State or local authority preserved by section 510 of the Act, or Federal authority (law, regulation, or treaty),” and “[o]ther pollution control requirements (e.g., best management practices) required by local, State, or Federal authority.” *Id.*

52. U.S. EPA regulations define a TMDL as “[t]he sum of the individual WLAs [wasteload allocations] for point sources and LAs [load allocations] for non point sources and natural background.” 40 C.F.R. § 130.2(i).

53. A “wasteload allocation” is “[t]he portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution.” 40 C.F.R. § 130.2(h). Any Clean Water Act permit for a point source must include pollution limits “consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.” 40 C.F.R. § 122.44(d)(1)(vii)(B).

54. A “load allocation” is “[t]he portion of a receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources.” 40 C.F.R. § 130.2(g). Such allocations are “best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading.” *Id.*

55. U.S. EPA’s own regulations recognize that “[i]f Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then waste load allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.” 40 C.F.R. § 130.2(i).

56. The calculations underlying a TMDL “shall be subject to public review.” 40

C.F.R. § 130.7(c)(1)(ii). Ohio Revised Code sections 6111.561-6111.563 provide a specific process for public input and comment during the development of a TMDL.

57. Each state must submit TMDLs established for impaired waters to U.S. EPA for review. 33 U.S.C. § 1313(d)(2). U.S. EPA’s implementing regulations provide that “[s]chedules for submission of TMDLs shall be determined by the Regional Administrator and the State.” 40 C.F.R. § 130.7(d).

58. U.S. EPA “shall either approve or disapprove” a TMDL “not later than thirty days after the date of submission.” 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2).

59. A number of federal courts have endorsed the doctrine of “constructive submission,” which treats a state’s affirmative decision not to develop a TMDL as the equivalent of a submission of *no* TMDL, triggering U.S. EPA’s obligation to review that “non-submission” under 33 U.S.C. § 1313(d)(2). *See, e.g., Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984).

60. If U.S. EPA approves a TMDL, the state must incorporate the TMDL into its “continuing planning process” for implementing the Clean Water Act under section 303(e), also known as a “water quality management” plan. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2); 40 C.F.R. § 130.2(k) (definition of water quality management plan).

61. If U.S. EPA disapproves a submitted TMDL, the U.S. EPA Administrator “shall not later than thirty days after the date of such disapproval . . . establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such . . . establishment the State shall incorporate them into its current plan under subsection (e) of this section.” 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2) (similar).

U.S. EPA Guidance on TMDL Development and Review

62. Dating back to 1991, U.S. EPA has issued public guidance documents regarding the TMDL development and review process.

63. With respect to the applicability of the TMDL requirement under 40 C.F.R. § 130.7(b), U.S. EPA has stated that “[t]o exempt a water quality-limited [impaired] water from the TMDL process, the pollution control requirements cited in the regulation under 130.7(b)(i), ii), and (iii)” – *i.e.*, technology-based effluent limitations required by the CWA, more stringent effluent limitations required by state, local, or federal authority, and other pollution control requirements such as best management practices required under local, state, or federal authority – “must be established and enforced by Federal, State, or local laws or regulations and be stringent enough that, when applied, the receiving waterbody will meet water quality standards.” A.R. 4720 Assessment and Watershed Protection Division, U.S. E.P.A., *Guidance for Water Quality-based Decisions: The TMDL Process* at 11 (Apr. 1991).

64. U.S. EPA has also stated that “[i]f the State chooses not to develop the needed TMDLs for appropriate pollutants on a timely basis or, if the TMDLs are unacceptable to EPA, EPA has a role under the Act to develop the TMDLs in cooperation with the State.” A.R. 4740, Assessment and Watershed Protection Division, U.S. E.P.A., *Guidance for Water Quality-based Decisions: The TMDL Process* at 33 (Apr. 1991)..

65. U.S. EPA guidance also states that, “before approving a TMDL in which some of the load reductions are allocated to nonpoint sources in lieu of additional load reductions allocated to point sources, there must be specific assurances that the nonpoint source reductions will in fact occur.” A.R. 4712, Assessment and Watershed Protection Division, U.S. E.P.A., *Guidance for Water Quality-based Decisions: The TMDL Process* at 2 (Apr. 1991). “In order to allocate loads among both point and nonpoint sources, there must be reasonable assurances that



nonpoint source reduction will in fact be achieved. Where there are not reasonable assurances, under the CWA, the entire load reduction must be assigned to point sources.” A.R. 4724, Assessment and Watershed Protection Division, U.S. E.P.A., *Guidance for Water Quality-based Decisions: The TMDL Process* at 15 (Apr. 1999).

66. U.S. EPA’s 1999 Protocol for Developing Nutrient TMDLs recommends that minimum submittal information for a nutrient TMDL include a detailed “implementation plan” if “necessary to provide reasonable assurance that the load allocations contained in the TMDL will be achieved.” A.R. 6186, Assessment and Watershed Protection Division, U.S. EPA, *Protocol for Developing Nutrient TMDLs* 9-2 (Nov. 1999). The same document describes “reasonable assurance” as “a high degree of confidence that wasteload allocations and/or load allocations in TMDLs will be implemented by Federal, State or local authorities and/or voluntary action. . . . For nonpoint sources, reasonable assurance means that nonpoint source controls are specific to the pollutant of concern, implemented according to an expeditious schedule and supported by reliable delivery mechanisms and adequate funding.” A.R. 6177, Assessment and Watershed Protection Division, U.S. EPA, *Protocol for Developing Nutrient TMDLs* 7-5 (Nov. 1999).

67. The “reasonable assurances” provided in a TMDL may include substantive consequences and backstop measures if a state does not achieve projected non-point source reductions in accordance with the plan. For example, a TMDL established by U.S. EPA for Chesapeake Bay, an estuary along the Atlantic coast with a six-state watershed, includes an entire “Reasonable Assurance and Accountability Framework” that specifies actions that U.S. EPA may take within its federal authority if states fail to implement the TMDL. These include: (1) expanding CWA permit coverage more broadly to cover more sources and increasing oversight of permit development to ensure all permits meet CWA requirements; (2) establishing

finer-scale wasteload and load allocations to target more specific sources and regions; (3) requiring additional pollution reductions from point sources; (4) increasing and targeting federal CWA enforcement in the watershed; and conditioning or redirecting U.S. EPA grants for state CWA implementation. *See Section 7. Reasonable Assurance and Accountability Framework, Chesapeake Bay TMDL, 7-12 (2010), [https://www.epa.gov/sites/production/files/2014-12/documents/cbay\\_final\\_tmdl\\_section\\_7\\_final\\_0.pdf](https://www.epa.gov/sites/production/files/2014-12/documents/cbay_final_tmdl_section_7_final_0.pdf).*

### **Factual Background**

#### **Ohio's Failure to Implement Clean Water Act Protections for Lake Erie**

68. Plaintiffs adopt and incorporate by reference Paragraphs 53-60 of the Initial Complaint, pursuant to Fed. R. Civ. P. 10(b) and (c).

69. Ohio EPA has had credible information regarding the harmful effects of algal blooms in western Lake Erie since at least 2012. Nevertheless, Ohio EPA did not designate any part of western Lake Erie as impaired by harmful algal blooms and phosphorus until 2016, and did not designate the open waters of western Lake Erie as impaired by harmful algal blooms and phosphorus until 2018.

70. According to one scientist involved in the development in the methodology for designating the open waters of western Lake Erie as impaired, that methodology shows that western Lake Erie has been impaired since 2010. *See Tom Henry, Data shows Lake Erie impairment declaration was justified in 2010, THE BLADE (Apr. 13, 2018, 1:55 A.M.) <http://www.toledoblade.com/local/2018/04/13/Data-shows-Lake-Erie-impairment-declaration-was-justified-in-2010.html>.*

71. In its biennial 2012 Section 303(d) list, Ohio EPA deferred any impairment determination for western Lake Erie.

72. In its 2014 Section 303(d) list, Ohio EPA designated shoreline segments of western Lake Erie as impaired by harmful algal blooms, but again deferred any impairment determination for the rest of western Lake Erie.

73. In its 2016 Section 303(d) List, Ohio EPA once again deferred any impairment determination for the rest of western Lake Erie, citing the lack of numeric nutrient targets for Lake Erie under the Great Lakes Water Quality Agreement and asserting that “assessment and listing of the open waters under the CWA should be led by U.S. EPA in consultation with the states.” 2016 Integrated Report at D-6.

74. In the May 4, 2018 amendment to its 2016 Section 303(d) List, Ohio EPA finally designated all of the waters of western Lake Erie within its jurisdiction as impaired by harmful algal blooms.

75. Ohio EPA also stated that with respect to the priority of impaired waters on its revised list, “the western basin [of Lake Erie] in particular is one of the highest, if not the highest, priority for Ohio to address.” 2016 Integrated Report Amendment at 9.

76. In spite of this prioritization, Ohio EPA provided no timeline for beginning to develop, let alone completing, a TMDL for western Lake Erie.

77. In fact, Ohio EPA specifically indicated it would *not* develop a TMDL for western Lake Erie. Instead, Ohio EPA stated that “Ohio has been and plans to continue addressing its contribution to the problems in Lake Erie through: nutrient TMDLs on tributaries; numerous state initiatives to reduce nutrient loads from Ohio in accordance with the Domestic Action Plan; and active participation on Annex 4 (Nutrients) and other Great Lakes Water Quality Agreement (GLWQA) efforts.” 2016 Integrated Report Amendment at 9. According to Ohio EPA, the “binational governance framework is the appropriate process” and “the best

approach for solving the issues in western Lake Erie” because “Annex 4 of the Great Lakes Water Quality Agreement and the Domestic Action Plans . . . afford a holistic, multi-jurisdictional perspective that does not exist in a traditional TMDL process.” *Id.*

78. This position is consistent with the public statement by Ohio EPA official Karl Gebhardt, the Ohio EPA Deputy Director for Water Resources and Executive Director of Ohio’s Lake Erie Commission, that “[o]ur position is a TMDL still is not necessary for the lake” in the wake of the amended 2016 impairment determination. *See* Tom Henry, *State official: Confusion caused Kasich to hold off on impairment designation*, THE BLADE (Apr. 18, 2018, 12:38 A.M.), <http://www.toledoblade.com/Politics/2018/04/18/Confusion-caused-Kasich-to-hold-off-on-impairment-designation-state-official-says.html>.

79. Unfortunately, the outcome of the GLWQA and other ongoing efforts to address harmful algal blooms in western Lake Erie is uncertain at best.

80. Plaintiffs adopt and incorporate by reference Paragraphs 136-148 of the Initial Complaint, pursuant to Fed. R. Civ. P. 10(b) and (c).

81. The GLWQA lacks any mechanism for enforcement or accountability if targeted phosphorus reductions are not achieved.

82. Ohio EPA has itself acknowledged that efforts to date have not “moved the needle” in reducing phosphorus loading to western Lake Erie. Ohio EPA, 2017 Western Lake Erie Monitoring Study Shows High Phosphorus Levels, <http://www.epa.state.oh.us/News/OnlineNewsRoom/NewsReleases/TabId/6596/ArticleId/1302/language/en-US/2017-western-lake-erie-monitoring-study-shows-high-phosphorous-levels.aspx> (last visited May 3, 2018); *see also* Marion Renault, *Ohio has ‘long way to go’ to solve Lake Erie’s algae problem, state officials say*, THE COLUMBUS DISPATCH (Apr. 29, 2018),

<http://www.dispatch.com/news/20180429/ohio-has-long-way-to-go-to-solve-lake-eries-algae-problem-state-officials-say>.

83. Ohio Governor John Kasich and Ohio EPA Director Craig Butler have stated they are seeking the passage of legislation that would expand state authority to regulate agricultural phosphorus pollution, but no such bill has yet been introduced in the General Assembly. *See* Marion Renault, *Ohio has ‘long way to go’ to solve Lake Erie’s algae problem, state officials say*, THE COLUMBUS DISPATCH (Apr. 29, 2018, 6:51 P.M.),

<http://www.dispatch.com/news/20180429/ohio-has-long-way-to-go-to-solve-lake-eries-algae-problem-state-officials-say>; Tom Jackson, *Study: Little progress made in curbing nutrients feeding algal blooms*, SANDUSKY REGISTER (Apr. 17, 2018, 6:54 P.M.), <http://www.sanduskyregister.com/story/201804170041>.

#### The Value of a TMDL for Lake Erie

84. A TMDL for Lake Erie is vital to actually restoring the water quality of the lake. A TMDL would set a cap on the amount of phosphorus pollution that is driving harmful algal blooms on western Lake Erie, and would allocate that total cap to limit pollution loads from particular sources. The development of such allocations would produce important information identifying specific “hotspot” regions of phosphorus discharges as targets for ongoing and future state and federal efforts to reduce pollution.

85. A TMDL could include specific allocations to “point sources” that are directly subject to permit requirements and other regulations under the CWA. These would include allocations to concentrated animal feeding operations that are a source of phosphorus pollution in Lake Erie due to manure discharges. Such allocations would serve as a basis for more stringent limits on manure disposal practices and discharges through legally enforceable Clean Water Act

permits.

86. Under existing U.S. EPA guidance, a TMDL would have to include “reasonable assurances” that planned efforts would sufficiently reduce phosphorus pollution to meet the overall phosphorus cap for western Lake Erie. To comply with that requirement, the TMDL would need to include information demonstrating that planned phosphorus reduction efforts would in fact be sufficient to meet the cap, as well as accountability mechanisms to provide specific consequences or further steps if those planned phosphorus reductions were not achieved.

87. A TMDL could also account for phosphorus loadings from multiple jurisdictions, including Indiana and Michigan, to ensure that phosphorus contributions from states other than Ohio are addressed through available legal and regulatory tools.

88. U.S. EPA would need to review and approve an Ohio TMDL, including any reasonable assurance mechanism, or develop a TMDL itself if Ohio fails to do so. This would result in a final U.S. EPA action subject to judicial review. That judicial review would provide a key venue for transparency and accountability for any plan to reduce phosphorus pollution in western Lake Erie.

89. Establishment of a TMDL does not preclude Ohio’s continued involvement in the GLWQA process.

### **FIRST CLAIM FOR RELIEF**

#### **(Declaratory and Injunctive Relief Under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A))**

90. Plaintiffs re-allege and incorporate by reference all the allegations set forth above.

91. Section 303(d) of the CWA expressly requires that a “State *shall* establish for the waters identified in paragraph (1)(A) of this subsection, and *in accordance with the priority ranking*, the total maximum daily load, for those pollutants which the Administrator identifies

under section 1314(a)(2) of this title as suitable for such calculation.” 33 U.S.C. § 1313(d)(1)(C) (emphases added); *see also* 40 C.F.R. § 130.7(c)(1) (similar).

92. Ohio EPA has failed to comply with this legal requirement because it has definitively stated it will not develop a TMDL to address harmful algal blooms in western Lake Erie, instead asserting that it views the GLWQA as the more “appropriate process” for reducing phosphorus pollution in the lake.

93. Ohio’s position, as asserted in its May 4, 2018 submission to U.S. EPA amending the 2016 Integrated Report, is the equivalent of the submission of no TMDL at all, and is a transparent attempt to opt out of applying the Clean Water Act’s requirements to Lake Erie.

94. Ohio’s submission of no TMDL triggered U.S. EPA’s thirty-day review obligation under 33 U.S.C. § 1313(d)(2).

95. U.S. EPA was required by law to disapprove Ohio’s submission of no TMDL, since in the absence of TMDL the state has failed to establish a “load . . . at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 33 U.S.C. § 1313(d)(1)(C).

96. Alternatively, U.S. EPA was required by law to disapprove Ohio’s decision not to develop a TMDL because it was not “in accordance with the priority ranking” establishing western Lake Erie as “one of the highest, if not the highest” impairment priorities for Ohio EPA.

97. Alternatively, U.S. EPA was required by law to disapprove Ohio’s decision not to develop a TMDL for western Lake Erie as inconsistent with 40 C.F.R. § 130.7(d), which provides that “[s]chedules for submission of TMDLs *shall be* determined by the Regional Administrator and the State.” (Emphasis added.)

98. Instead, U.S. EPA approved Ohio's submitted amendment to its 2016 Integrated Report in a May 10, 2018 letter.

99. That approval lacked any analysis or discussion of any of the applicable legal requirements regarding Ohio EPA's obligation to prepare a TMDL for western Lake Erie in accordance with its priority ranking.

100. The fact that U.S. EPA approved the amendment to the 2016 Integrated Report, including Ohio EPA's decision not to develop or submit a TMDL, was therefore arbitrary, capricious, an abuse of discretion, and not in accordance with the law under CWA section 303(d) and 40 C.F.R. § 130.7.

101. Plaintiffs therefore seek relief from U.S. EPA's arbitrary, capricious, and illegal action under 5 U.S.C. § 706(2)(A)

## **SECOND CLAIM FOR RELIEF**

### **(Declaratory and Injunctive Relief Under the Clean Water Act, 33 U.S.C. § 1365(a)(2))**

102. Plaintiffs re-allege and incorporate by reference all the allegations set forth above.

103. The 2016 Integrated Report Amendment plainly set forth Ohio EPA's decision not to undertake development of a TMDL for western Lake Erie.

104. The 2016 Integrated Report Amendment therefore operated as a "constructive submission" of no TMDL to U.S. EPA, triggering the Agency's non-discretionary duty to review that submission within thirty days pursuant to 33 U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2).

105. To the extent the May 10, 2018 U.S. EPA letter was not an approval of Ohio EPA's May 4, 2018 submission of its 2016 Integrated Report Amendment, U.S. EPA failed to carry out its review of that submission within thirty days.



106. U.S. EPA has therefore failed to “perform any act or duty” under the Clean Water Act “which is not discretionary” and is subject to suit under 33 U.S.C. § 1365(a)(2).

### **RELIEF REQUESTED**

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

- A. A declaration that U.S. EPA violated the CWA and acted in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law when it unlawfully approved Ohio’s decision not to develop or submit a TMDL under Section 303(d) of the Clean Water Act;
- B. An order compelling U.S. EPA to disapprove of Ohio’s submission of no TMDL and to itself develop a TMDL for western Lake Erie in accordance with a judicially enforceable schedule; or, in the alternative, an order vacating and remanding the approval to U.S. EPA for a new determination that complies with the requirements of the Clean Water Act by providing a binding schedule for prompt development of a TMDL for western Lake Erie by a date certain;
- C. In the alternative, an order compelling U.S. EPA to carry out its non-discretionary duty under 33 U.S.C. § 1313(d)(2) to approve or disapprove Ohio EPA’s May 4, 2018 submission of no TMDL for western Lake Erie;
- D. An order retaining jurisdiction of this case to monitor compliance with the Clean Water Act’s requirements applicable to the establishment of a TMDL for western Lake Erie;
- E. An award to Plaintiffs of attorneys’ fees and costs for bringing this action; and
- F. Such other relief as this Court deems just and proper.