



ENVIRONMENTAL LAW & POLICY CENTER
Protecting the Midwest's Environment and Natural Heritage

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Via electronic and priority mail

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RE: Request for Finding of a “Constructive Submission” of No TMDL in Response to Ohio’s Decision Not to Submit a “Total Maximum Daily Load” for Western Lake Erie

Dear Administrator Wheeler, Regional Administrator Stepp, and Attorney Dertke:

The Environmental Law & Policy Center, Advocates for a Clean Lake Erie, Michael Ferner, and Susan Matz (“ELPC, et al.”) are writing to request a formal determination by the U.S. Environmental Protection Agency (“U.S. EPA”) as to whether the State of Ohio, by its conduct and statements described below and in the attached documents, has made a “constructive submission” of no Total Maximum Daily Load (“TMDL”) for western Lake Erie, in violation of Clean Water Act (“CWA”) section 303(d), 33 U.S.C. § 1313(d).

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Ohio Environmental Protection Agency (“Ohio EPA”) has now twice determined that Lake Erie Assessment Units in western Lake Erie are “impaired” by phosphorus pollution that causes harmful algal blooms. Section 303(d)(1)(C) of the Clean Water Act requires that a state “shall establish” a total maximum daily load (“TMDL”) for such impaired waters “in accordance with the priority ranking” the state has assigned to those waters. 33 U.S.C. § 1313(d)(1)(C) (emphasis added); *see also* 40 C.F.R. § 130.7(c)(1) (similar). Ohio EPA has identified the impaired areas of western Lake Erie as “one of the highest, if not the highest, priority for Ohio to address” among its impaired waters. Ohio EPA, 2016 Integrated Water Quality Monitoring and Assessment Report – Amendment (May 2018) (“2016 Integrated Report Amendment”) at 9.

Nevertheless, in a variety of submissions to U.S. EPA, and through public statements, Ohio EPA has made clear that it intends to indefinitely postpone the mandatory development of a TMDL for western Lake Erie in favor of pursuing implementation of the Great Lakes Water Quality Agreement (“GLWQA”) as its preferred alternative. The GLWQA targets phosphorus loading reductions of 40% by 2025 – seven years from now. Thus, Ohio is effectively stating that it will not even consider beginning to develop a TMDL for western Lake Erie for years to come, a delay that could extend to decades if the state later concocts some new reason why it does not wish to implement the Clean Water Act. U.S. EPA can provide no reassurance as to whether or when Ohio may decide to begin developing a TMDL. Accordingly, the State of Ohio’s plainly articulated position constitutes a “constructive submission” of no TMDL, triggering U.S. EPA’s obligation to disapprove such a submission within 30 days pursuant to section 303(d)(2) of the CWA. *See Scott v. City of Hammond*, 741 F.2d 992 (7th Cir. 1984).

The facts supporting this assertion are described below and in the proposed supplemental complaint that ELPC et al. filed in the U.S. District Court for the Northern District of Ohio on June 8, 2018 (Attachment 1), as well as a CWA notice of intent to sue that ELPC et al. provided to U.S. EPA on July 18, 2018 (Attachment 2).

1. Ohio’s 2016 Integrated Report Amendment:

- 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, multijurisdictional perspective that does not exist in a traditional TMDL process.” 2016 Integrated Report Amendment at 9.
- States 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.” *Id.* (emphasis added).
- Explains Ohio EPA’s view that “working through the binational governance framework is the appropriate process and Ohio intends to aggressively pursue state measures that complement the process and are neither duplicative nor contradictory.” *Id.*

2. Ohio's 2018 Integrated Report:

- States that the Lake Erie Assessment Units (“AUs”), which are among “the AUs with higher priority points that include a PDWS impairment[,] . . . will be addressed through other means such as the Great Lakes Water Quality Agreement Annex 4 nutrient reduction efforts discussed in J3.” Ohio EPA, Ohio 2018 Integrated Water Quality Monitoring and Assessment Report at J-6 (June 2018) (“2018 Integrated Report”).
- Reiterates that: “Ohio is working to address 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. . . . For the open waters of Lake Erie, respecting and working through the binational governance framework is the appropriate process and Ohio intends to aggressively pursue state measures that complement the process and are neither duplicative nor contradictory.” *Id.* at J-10.
- In response to public comments urging development of a TMDL for western Lake Erie, states that “a TMDL is not being pursued immediately” and asserts that “a TMDL may ultimately be required” only if there is “no progress” under the Great Lakes Water Quality Agreement. *Id.* at D-31.
- Notes that existing TMDLs for tributaries to western Lake Erie “have established phosphorus targets and methods to address near-field impacts on rivers and streams” but “were not developed to address the excessive wet weather loads delivered to Lake Erie” as a whole. *Id.* at J-12.

3. Ohio's Domestic Action Plan 1.0 in Accordance with the GLWQA (Feb. 2018) (available at <https://lakeerie.ohio.gov/lakeerieplanning/ohiodomesticactionplan2018.aspx>):

- Fails to mention establishment of a TMDL for western Lake Erie as a mechanism for achieving the phosphorus loading reductions targeted under the GLWQA.
- Explains that: “There are six completed TMDLs for subwatersheds of the Maumee River and three in preparation. All the TMDLs contain phosphorus load allocations for some or all parts of the respective subwatershed, based on local impairments due to nutrient loading. As of the current publication of the Domestic Action Plan, these TMDLs have not factored in phosphorus load allocations based on proposed phosphorus targets for Lake Erie.” Ohio's Domestic Action Plan, Appendix A.

4. Public Statements by Ohio Public Officials:

- Ohio EPA official Karl Gebhardt, the Ohio EPA Deputy Director for Water Resources and Executive Director of Ohio's Lake Erie Commission, has stated that “[o]ur position is a TMDL still is not necessary for the lake.” Tom Henry, State official: Confusion caused Kasich to hold off on impairment designation, THE BLADE (Apr. 18, 2018, 12:38 AM), <http://www.toledoblade.com/Politics/2018/04/18/Confusion-caused-Kasich-to-hold-off-on-impairment-designation-state-official-says.html>.

U.S. EPA clearly recognizes the import of these statements as a plan to indefinitely postpone development of a TMDL in favor of applying the Great Lakes Water Quality Agreement, a legally unenforceable international agreement with no binding pollution reduction targets. In approving Ohio's 2018 Integrated Report, U.S. EPA referenced Ohio's adoption of an alternative approach to addressing Lake Erie impairment under the GLWQA while delaying a western Lake Erie TMDL indefinitely such that "a TMDL is not being pursued for the Lake immediately." U.S. EPA to Tiffani Kavalec, Ohio EPA, Re: Approval of 2018 Clean Water Act (CWA) Section 303(d) List, (July 9, 2018), APPROVAL OF OHIO'S SUBMISSION OF THE STATE'S INTEGRATED REPORT WITH RESPECT TO SECTION 303(d) OF THE CLEAN WATER ACT (CATEGORY 5 WATERS) at 18. Despite the Clean Water Act's command that a state "shall" undertake a TMDL as the required mechanism to address impaired waters like western Lake Erie, U.S. EPA has indicated that it "finds [Ohio's] responses to be reasonable, and concludes that Ohio EPA has satisfied the requirement to submit a priority ranking for Lake Erie consistent with the regulations at 40 C.F.R. §130.7(b)(4)." *Id.*

U.S. EPA thus appears to agree that Ohio EPA has in fact decided to indefinitely postpone the development of a TMDL for the impaired portions of western Lake Erie, despite Ohio's having designated the pollution in the lake as one of its highest priorities to address. Yet U.S. EPA has done nothing to carry out its responsibility to ensure that Ohio does establish a TMDL for western Lake Erie regardless of what alternative mechanisms it may also be pursuing. We therefore request that U.S. EPA make a determination that Ohio EPA's decision to indefinitely delay development of a TMDL for western Lake Erie does not comply with the State's obligation to establish a TMDL under section 303(d) of the Clean Water Act. We respectfully request a response to this letter by August 30, 2018, or as soon as possible thereafter.

Sincerely,

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