



Press Advisory

January 31, 2018

LAKE ADVOCATES RETURN TO FEDERAL COURT FOR IMPAIRED STATUS

Following the USEPA's admission that it illegally accepted Ohio's 2016 decision not to list the open waters of western Lake Erie impaired, environmentalists pressed in Federal Court again today for a decision requiring the USEPA to do so within 30 days.

The Environmental Law & Policy Center, together with Advocates for a Clean Lake Erie filed suit in July, 2017 and returned today with a supplemental Motion for Summary Judgment in an effort to compel a mandatory cleanup of Lake Erie, stating the USEPA's inaction "subverts the very purpose of the Clean Water Act: to promptly recognize and address the type of serious water quality problems currently plaguing Lake Erie."

The motion, filed by ELPC Senior Attorney, Madeline Fleisher, added that, "The remedy for an admittedly illegal delay is not more delay. The Clean Water Act and U.S. EPA's own regulations make this clear."

On January 15, USEPA provided a "Withdrawal Letter" in which it admitted its 2016 approval of OEPA's refusal to place the open waters of western Lake Erie on the "impaired" list was not consistent with the Clean Water Act. The Plaintiff's motion filed today stated in part (emphasis added):

When a state submits an "impaired waters list" to U.S. EPA, Congress demands that the federal agency "shall either approve or disapprove such listing and loadings not later than 30 days after the date of submission." The statute is mandatory and by its terms gives the agency only two options: approve or disapprove.

The law also provides only a single, mandatory remedy in case of disapproval: the Regional Administrator "shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards."

Congress provided for no other options under the law. Yet U.S. EPA's newly invented procedure (Withdrawal Letter) would render the action-forcing nature of the statute wholly ineffective by allowing U.S. EPA to hold a state's list in legal limbo, thereby circumventing the timelines established by Congress... **If the Court does not prevent such illegal delay in this case, there would be nothing to stop U.S. EPA from doing in future cases what it did here: knowingly approving a deficient state list, then "withdrawing approval" only if and when that action is challenged in court.**

It has taken U.S. EPA over a year, and apparently the prospect of this Court's intervention, to get to the point of acknowledging that Ohio EPA's approach is not consistent with the Clean Water Act.

U.S. EPA's chosen course of action in the Withdrawal Letter only continues this delay. U.S. EPA meekly "requests" that the state conduct an impairment assessment for those waters "if appropriate" and submit it to U.S. EPA by April 9, 2018 – presumably for yet another round of

review with no timetable and an indeterminate outcome. U.S. EPA is simply compounding its illegal delay with more of the same, since the CWA requires U.S. EPA to disapprove a Section 303(d) list that does not meet statutory requirements and to then conduct the impairment assessment itself within 30 days...After waiting more than fourteen months to effectually disapprove of Ohio EPA's deficient 2016 303(d) impaired waters list, **U.S. EPA seeks to evade its responsibilities under the Clean Water Act by once again passing the buck back to the state.**

Timeline:

2011

Environment Canada and USEPA report that "measurements of microcystin in Lake Erie were 50 times higher than the World Health Organization (WHO) recommendation for safe recreation, and 1,200 times higher than the WHO safe drinking water limit."

2014

March: Ohio EPA, in its federally-required, biannual "Integrated Report" to the USEPA, refuses to list western Lake Erie impaired, pending collection of additional data.

August: Elevated microcystin levels in Toledo's water supply prompt a "Do Not Drink" emergency for 400,000 people over three days.

2015

August: USEPA approves Ohio's March, 2014 impaired waters list, but "...expects Ohio EPA to fully assess...and to assemble and evaluate all existing and readily available data, including EPA data, for the 2016 Integrated Report and listing cycle."

2016

July: OEPA's draft Integrated Report says it will not assess the open waters of western Lake Erie, asserting that the USEPA should be responsible for doing so.

August: USEPA responds to OEPA's draft report, rejecting this proposed approach as inconsistent with the Clean Water Act.

September: OEPA repeats its position that it would not "unilaterally develop assessment methods" for its portion of Lake Erie, stating, "we will not discuss or propose further listings until there are [such] scientific tools" to assess impairment available

2017

March: USEPA sends OEPA a letter recognizing that "Ohio has yet to assess the open waters of Lake Erie for algal impairment."

May: Regardless of its March letter, USEPA formally approves Ohio's 2016 impairment list, stating it "has deferred to the State's judgment not to assess the open waters of the Western Basin of Lake Erie for the 2016 list," thereby delaying the assessment of the open waters for two more years.

July: Environmental Law & Policy Center, Advocates for a Clean Lake Erie, Michael Ferner, and Susan Matz file a complaint challenging USEPA's approval of OEPA's 2016 impairment list.

2018

January 15: One day before Plaintiffs' original Motion for Summary Judgment was due to be filed and on a federal holiday – USEPA provided Plaintiffs with its "Withdrawal Letter" in which it admits that its May 2017 approval of OEPA's refusal to list the open waters of western Lake Erie as impaired was not consistent with the Clean Water Act.