

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

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| Environmental Law and Policy Center, et al., |) | Case No. 3:17-cv-1514 |
| |) | |
| Plaintiffs, |) | Judge James G. Carr |
| |) | |
| v. |) | Joint Motion of the City of Toledo and the |
| |) | City of Oregon to Participate as Amici |
| United States Environmental Protection Agency, |) | Curiae and to file a Memorandum In |
| et al, |) | Support of Plaintiffs' Motion for Leave to |
| |) | File Supplemental Complaint, <i>Instante</i> |
| Defendants. |) | |
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Motion for Leave to File *Amicus* Memorandum

Pursuant to the Court's inherent authority and Fed. R. Civ. 7(b), the City of Toledo ("Toledo") and the City of Oregon ("Oregon), hereinafter collectively referred to as the "Cities,"

file this motion for leave to file a memorandum as *amici curiae* in the above-captioned case. For the reasons that will be stated *infra*, the Cities support the Plaintiffs' *Motion for Leave to File Supplemental Complaint*.

Toledo is well-positioned to submit an *amicus* memorandum in this case. Toledo is located on Lake Erie and is greatly affected by its water quality. Toledo operates a water treatment plant that provides water to about 500,000 customers throughout Northwest Ohio and Southeast Michigan. Lake Erie is the source of Toledo's water. Toledo is intimately familiar with the water quality of the lake. Toledo routinely tests the water quality of Lake Erie in order to determine what treatment processes are necessary to produce potable water for its customers.

Toledo also has National Pollutant Discharge Elimination System ("NPDES") permits as a regulated point-source under the Clean Water Act within the Western Basin of Lake Erie. After years of litigating with Defendant, the United States Environmental Protection Agency, Toledo entered into a consent-decree, which was approved by this Court, to enact a half-billion dollar infrastructure upgrade of its sewer system to reduce the amount of pollution being discharged into the waters of the U.S.

Oregon is also well-positioned to submit an *amicus* memorandum in this case. Oregon is located on Lake Erie and is greatly affected by its water quality. Oregon operates a water treatment plant that provides water to the citizens of Oregon, Genoa, Northwood, Lake Township, Millbury, Jerusalem Township, Harbor View and some other Lucas County local area pipelines. Oregon's water source is also Lake Erie.

Whether to permit *amicus* participation in the district court is in the sound discretion of the Court. This Court has historically permitted *amici* participation. See e.g. *Superior Dairy, Inc. v. Thomas Vilsack*, No. 5:11-cv-1979, (N.D. Ohio 2011), 2011 U.S. Dist. LEXIS 111892, 2011 WL 4565792 (granting Darigold, Inc., Guers Dairy, Galliker Dairy Company, Schneider-Valley Farms, and Dean Foods Company leave to make filings); *Project Vote v. Blackwell*, 455 F. Supp. 2d 694, 696 n.1 (N.D. Ohio 2006) (granting NAACP leave to file as *amicus curiae*).

The *amicus* memorandum follows this motion. If this motion is granted, there will be no delay in the proceedings. The oral argument in this matter is set for August 21, giving the parties plenty of time to consider the facts presented in this filing. Furthermore, the Cities are not raising new legal arguments, just the factual context surrounding this important issue.

Proposed Amicus Memorandum

The Cities submit this brief to support the Plaintiffs' *Motion to File a Supplemental Complaint*. The Memorandum is supported by Exhibit A, which is an affidavit from the City of Toledo's Director of Public Utilities, Edward Moore ("Moore Affidavit"), and Exhibit B, which is an affidavit from the City of Oregon's Superintendent of the Water Treatment Plant, Douglas Wagner ("Wagner Affidavit").

The U.S. Environmental Protection Agency is refusing to protect the environment by continuing to allow the State of Ohio to ignore the mandates of the Clean Water Act and create a TMDL for Lake Erie. The Clean Water Act's requirement to create a TMDL for an impaired waterway is a solution to pollution problem that involves many independent actors.

Eighty-eight percent of the phosphorus causing Harmful Algae Blooms (“HABs”) comes from various nonpoint sources such as agricultural runoff. Tom Henry, *Nonpoint sources again dominate nutrient pollution numbers in new statewide algae report*, THE BLADE (Apr. 17, 2018), <http://www.toledoblade.com/local/2018/04/17/Non-point-sources-such-as-farming-once-again-dominate-nutrient-pollution-numbers-in-new-statewide-algae-report.html>.

Nonpoint sources are currently largely unregulated by the NPDES system under the Clean Water Act. Controlling nonpoint sources of nutrient pollution will likely require new regulations to improve the water quality of Lake Erie. The U.S. and Ohio EPA’s intransigence in not allowing a TMDL to be created is delaying real solutions to the nutrient problem. Voluntary measures of reducing nonpoint sources of nutrients are not working. Without the guidance and accountability that a TMDL analysis would provide, it is highly doubtful that the political support will exist to hold nonpoint polluters accountable in a regulatory manner. Hence, the phosphorous loading will continue unabated and Lake Erie will continue to turn green every year.

The Defendants’ conduct is particularly galling to the Cities because of the costs their citizens and ratepayers have borne and will continue to bear.

Toledo is projected to spend \$527 million on the Toledo Waterways Initiative Program by 2020. Moore Affidavit at ¶ 3. The program is mandated by a consent decree between Toledo and the U.S. EPA and was the result of a settlement between the parties regarding an action brought before this Court under the Clean Water Act. *Id.* The program is 90% complete. *Id.* Toledo spent over half a billion dollars on infrastructure improvements to improve water quality,

yet there are no regulatory requirements on the vast majority of polluters who are responsible for the HABs that are a yearly occurrence on the lake.

Furthermore, as this Court has noted, in August of 2014, Toledo issued a do-not-drink advisory for three days due to microcystin contamination –a product of HABs in Lake Erie. Toledo has learned how to treat microcystin-contaminated water using existing technologies, however, the treatment costs have increased because of the additional required quantities of chemicals. Moore Affidavit at ¶ 4.

HABs have been very costly to Toledo. Some of those costs include, but are not limited to: chemical costs, infrastructure upgrades, early-warning technology and testing equipment. The chemical costs alone have increased approximately \$800,000 a year due to HABs. *Id.* Toledo invested \$5.7 million in chemical feed infrastructure upgrades. *Id.* Additionally, to provide an early warning system of potential microcystin-contamination, Toledo installed a buoy system near its water intake in 2014. *Id.* The cost of that system to date is approximately \$400,000. *Id.* Toledo also spent \$172,230 since 2014 on HAB testing equipment and reagents. *Id.*

But Toledo will continue to make additional upgrades at its water-treatment plant due to HABs. For example, Toledo plans on building an ozone treatment facility in 2020 at a projected cost of \$53 million to treat microcystin-contaminated water. Moore Affidavit at ¶ 5. In 2022, Toledo also plans on building biologically active filters at a cost of \$19 million. *Id.*

The citizens of Toledo are literally paying repeatedly for the poor water quality in Lake Erie. They paid to reduce the pollution into the watershed due to the antiquated sewer system.

Then, they paid (and will continue to pay even more) for chemicals and water treatment plant upgrades to ensure that the drinking water continues to be potable.

In 2015, Oregon upgraded its water treatment to allow for increased chemical feed capacity to effectively treat for algal toxins. Wagner Affidavit at ¶ 3. The powdered activated carbon system was previously limited to a 10 ppm (parts per million) and increased to capacities of 40 ppm and the potassium permanganate system was increased to from 1 ppm to 5 ppm. Id.

Further, in 2016, construction began on an Ozone treatment system in response to the harmful algae blooms and the City of Toledo's 2014 "No Drink Advisory". Oregon has also implemented a Biological Active Filtration (BAF) to further combat microcystin toxins, reduce disinfection byproducts, and improve water taste and odor. The Ozone system and BAF resulted in \$15 million dollar cost to the ratepayers, along with increased chemical costs associated with the continual operation of the Ozone system. Wagner Affidavit at ¶¶ 3 & 4.

The failure of the nonpoint polluters to change their behavior or share in any cost of the clean-up of Lake Erie will continue to burden the Cities and damage the environment. Despite the fact that it will take time to create a TMDL, it will provide the needed guidance and accountability to create real solutions to the problem of our contaminated lake. To that end, the Cities respectfully request that the Court grant the Plaintiffs' *Motion for Leave*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this date, August 10th, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system, which will simultaneously serve notice of such filing to counsel of record and the Court Monitor to their registered electronic mail addresses.

Respectfully submitted,

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