



## **COMPLAINT**

### Overview

1. The Board of Lucas County Commissioners brings this action to redress a long-standing and indefensible failure on the part of the Defendant United States Environmental Protection Agency to discharge its obligations under the Clean Water Act (“CWA”).
2. The U.S. EPA’s inaction has abetted the equally long-standing failure of the Ohio Environmental Protection Agency to discharge its legal duties under the CWA.
3. The result of this governmental inaction has been catastrophic. While the regulatory agencies dallied, doing nothing of consequence, the water quality of western Lake Erie has declined alarmingly.
4. Despite actual knowledge of indisputable empirical information about the harmful effects of algal blooms in western Lake Erie, neither the Ohio EPA nor the U.S. EPA took even the minimal regulatory actions that under applicable federal laws are mandatory.
5. In particular, in the most recent in a long line of unlawful actions, the Ohio EPA declined to submit a basin-wide Total Maximum Daily Load (“TMDL”) for western Lake Erie, even though Ohio has declared, albeit belatedly, western Lake Erie to be impaired.
6. The U.S. EPA approved the State’s non-action.
7. The Clean Water Act requires a state to prepare a TMDL for an impaired body of

water. If, as it has here, the State violates this legal obligation, the Clean Water Act requires the U.S. EPA to assume that obligation.

8. The U.S. EPA has failed to do so, opting to “approve” the State’s unlawful failure.
9. This action seeks judicial review of the defendants’ knowing violations of their obligations under federal law and injunctive relief compelling the defendants to discharge their non-discretionary duties under federal law.

#### Parties

10. Plaintiff Board of Lucas County Commissioners is a body politic that under Ohio Revised Code Section 305.12 can sue in its own name.
11. Defendant United States Environmental Protection Agency is an agency of the United States, whose mission is to protect human health and the environment. It is responsible for maintaining and enforcing environmental standards under federal environmental laws, including the CWA, in coordination with and occasionally under the auspices of state and local governments.
12. Defendant Andrew Wheeler is the Administrator of the United States Environmental Protection Agency. He is sued in his official capacity.
13. Defendant Cathy Stepp is the Regional Administrator for EPA Region 5. She is sued in her official capacity. The State of Ohio is within the jurisdiction of U.S. EPA Region 5 and is therefore subject to Ms. Stepp’s oversight.

#### Jurisdiction and Venue

14. This Court has jurisdiction under 5 U.S.C. §701 *et seq.*, under 28 U.S.C. §1331, and

under 33 U.S.C. §1365(a)(2).

15. Venue is proper under 28 U.S.C. §1391(e)(1) because a substantial part of the events or omissions giving rise to the claim occurred in the Western Division of the Northern District of Ohio, and, alternatively, because the plaintiff resides in this judicial district and no real property is involved in the action.

#### Standing

16. Plaintiff has standing because (i) it has been distinctly and palpably injured by the degradation of water quality in western Lake Erie, (ii) the injuries it has suffered were and are fairly traceable to the defendants' acts and omissions as alleged in the complaint, and (iii) the injuries it has suffered will likely be redressed upon the issuance of the relief sought in this Complaint.
17. Under Ohio law, the Board is in general responsible for the health, welfare, and safety of the county's residents.
18. As a part of that role, the Board is authorized to, and obligated to, establish policies and rules regarding water-quality management within the county, either directly or through agencies in which the County is a participant.
19. The discharge of these responsibilities requires the Board to commit significant financial, personnel, and other resources to the maintenance and monitoring of water quality.
20. The defendants' unlawful acts and omissions have directly caused the plaintiff pecuniary injury by requiring expenditure of County resources that would have been

unnecessary, or at least substantially reduced, had the defendants acted in accordance with their legal obligations.

21. The Court's grant of the relief sought in this Complaint will likely redress these pecuniary injuries.
22. The development of a basin-wide TMDL, as sought in this Complaint, would in myriad ways substantially redress the injuries suffered by plaintiff.
23. An appropriate and lawful TMDL would focus attention and remedial measures, including permitting processes, on point-source water pollution from agricultural operations that contribute to and exacerbate the degradation of Lake Erie water quality.
24. An appropriate and lawful TMDL would focus on reducing nutrient pollution of western Lake Erie by establishing a phosphorous cap for western Lake Erie and providing ongoing methods of ensuring compliance with that cap, which would in turn address the harmful and costly algal blooms that blight western Lake Erie.

#### Facts

##### Core Environmental Facts

25. Phosphorous is a chemical element that is a necessary mineral for plant life, but when present in excessive amounts, is dangerous in aquatic systems.
26. When a body of water has an imbalance of certain minerals and nutrients - a process known as eutrophication - the result can be harmful algal blooms.
27. Algal blooms are harmful for a variety of reasons, including depletion of water

quality; alteration of the chemical composition and viability of the water body; destruction, and reduction of the viability, of fish life; and other environmental damage.

28. Algal blooms are transient and can be transported across water surfaces in many ways.
29. Harmful algal blooms are a universally recognized environmental hazard.
30. Western Lake Erie has been blighted by algal blooms consistently for at least seven years.
31. These algal blooms can be traced to certain point sources in Lake Erie, but are predominantly caused by non-point pollution sources.

#### Regulatory Framework - General

32. The CWA is the primary legal framework within which the federal government, in coordination with states, restores and maintains the integrity of the nation's waterways.
33. The CWA requires states to establish "water quality criteria" consistent with the designated uses for navigable waters.
34. The CWA requires states to identify when a body of water does not meet the water-quality criteria established for the designated uses and to list such bodies on an "impaired waters list."
35. A state subject to this regulatory process must, in turn, submit its impaired-waters list to the U.S. EPA, which must either approve or disapprove the list before it goes into effect.

36. Upon approval of the impaired-waters list, the state must establish a TMDL for each body of water on the list.
37. The CWA and the accompanying regulations give states substantial latitude in addressing deficient water quality, and they allow the U.S. EPA to show deference to states' decisions. But neither the statute nor the accompanying regulations allow the U.S. EPA to countenance a state's disdain for water quality, inattention to its environmental responsibility, or default on its legal obligations to monitor water quality and enforce water-quality standards.

Regulatory Framework - Federal

38. The U.S. EPA's rules related to impaired-waters listing are codified in the Code of Federal Regulations. 40 C.F.R. §130.7.
39. These regulations establish certain minimum activities states must undertake with respect to impaired waters, which include gathering and evaluating water-quality information.
40. States must submit to the U.S. EPA appropriate documentation reflecting the state's determinations regarding waters to place on the impaired-water list.
41. The U.S. EPA, through its Regional Administrator, must evaluate the list and may approve it only if it meets the standards set forth in federal regulations.
42. The state is legally obligated to prepare a TMDL for waters listed on the impaired-water list.
43. Federal regulations provide extensive guidance for a state's discharge of its first-level

obligations regarding monitoring, restoring, and maintaining water quality.

44. A state must submit an updated impaired-waters list every two years.

#### Regulatory Framework - State Functions

45. Ohio's regulatory framework for discharging its obligations under the CWA are set forth in the Ohio Administrative Code.
46. Those regulations focus on (i) designated beneficial uses and (ii) water-quality criteria designed to protect those uses.
47. As required by the regulatory framework, Ohio has established certain beneficial uses for Lake Erie that the water-quality standards of the Lake must meet.
48. In particular, Ohio has determined that the water quality of Lake Erie must be sufficient to provide "exceptional warmwater habitat, superior high quality water, public water supply, agricultural water supply, and bathing waters," objectives that are in turn further defined in the regulations.
49. Among the water-quality criteria set forth in Ohio law is one that focused on keeping Ohio surface waters "free from nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae." Ohio Admin Code. 3745-1-04(E).
50. In more particular, the Administrative Code focuses on limiting total phosphorous levels as a means of preventing harmful algal blooms.

#### Impairment of Lake Erie

51. In 2014, the Ohio EPA identified harmful algal blooms as "arguably the most serious



issue in Lake Erie at this time.”

52. The 2014 Ohio EPA Report set out the substance of impairment assessments the agency would undertake to address this issue.
53. The U.S. EPA partially approved the 2014 report and set out the federal agency’s expectations regarding further actions by the Ohio EPA.
54. In particular, the U.S. EPA directed the Ohio EPA to consider the effects of harmful algal blooms and related algal growth on aquatic life in, and recreational use of, Lake Erie.
55. In its next mandatory impaired-waters list, the Ohio EPA entirely defaulted on its legal obligations with respect to water quality.
56. The 2016 Report failed to address the impaired status of Lake Erie with respect to the subjects that the U.S. EPA directed attention to: aquatic life, drinking-water supplies, and recreational use.
57. The 2016 report likewise failed to evaluate the impaired status of Lake Erie with respect to the presence of nutrients that create algal growth.
58. The 2016 Report candidly admitted that the Ohio EPA does not intend to pursue development of open water assessment units and methods.
59. The U.S. EPA approved this report, despite its manifest legal inadequacy.
60. In January 2018, in response to a federal-court challenge to its unlawful action, the U.S. EPA withdrew its approval of the 2016 Ohio Report under circumstances that strongly support the inference that the U.S. EPA was intent on, and complicit with

- the State in intending to, defeat judicial review of the governments' unlawful actions.
61. The U.S. EPA replaced its approval of the report with a request that the Ohio EPA conduct an impairment evaluation for the open waters of western Lake Erie in accordance with the obligations of the CWA, acknowledging that theretofore the U.S. EPA had countenanced the State's failure to discharge its legal obligations.
  62. Under a time deadline set forth in the order of this Court, the Ohio EPA amended its 2016 Report to categorize the open waters of western Lake Erie as impaired and identified western Lake Erie as perhaps the highest priority among impaired Ohio waters.
  63. The Ohio EPA 2018 Integrated Report likewise designates western Lake Erie as a Category 5 impaired water. 2018 Integrated Report, at L-44.
  64. The 2018 Integrated Report states that "the western basin [phosphorus] load reductions are a priority for the agency and the State."
  65. But the Ohio EPA, having designated western Lake Erie as impaired, has refused to develop a TMDL for that impaired water, stating "our position is that a TMDL still is not necessary for the lake."
  66. The 2018 Integrated Report states that the Ohio EPA considers western Lake Erie to be a "low" priority for development of a TMDL.
  67. At the same time, in the 2018 Integrated Report the Ohio EPA states that it has not yet developed a formal alternative plan to address the impaired status of western Lake Erie.

68. In taking this position, the Ohio EPA has refused to follow its own established procedures.
69. There is no meaningful and lawful substitute for a basin-wide TMDL to address the impaired status of western Lake Erie.
70. The State's refusal to develop a TMDL is unlawful.
71. Equally unlawful is the U.S. EPA's acceptance of the State's unlawful action. Despite the Ohio EPA's (i) designation of western Lake Erie as impaired, (ii) assignment of a "low" priority to this impaired waterway, and (iii) admission that it had no alternative plan to address the impaired waterway, the U.S. EPA found the Ohio EPA's action to be reasonable and concluded that it had satisfied its legal obligations under federal law.
72. The defendant's blithe acceptance of the State's refusal is unlawful.
73. In the absence of this Court's issuance of the relief sought in this Complaint, the impaired status of western Lake Erie will continue unremedied, the impairments will broaden and deepen, and the many injuries - pecuniary and otherwise – visited on the plaintiff, on all of the residents of the County, all those who enjoy or hope to enjoy the open waters of western Lake Erie, and all the many life forms that depend on those waters, will continue unabated and will expand over time.

Claims for Relief

First Claim for Relief

*Equitable Relief under the Clean Water Act*  
*33 U.S.C. §1365(a)(2)*

74. Plaintiff incorporates the allegations of paragraphs 1 through 67, above.
75. The Ohio EPA has failed to timely submit a TMDL as legally required.
76. That failure constitutes an action by the state that triggers the defendants' legal obligation to review the action.
77. The defendants have failed to act in accordance with their legal obligations imposed by 33 U.S.C. §1313(d)(2) and the accompanying regulations, including 40 C.F.R. §130.7.
78. This failure to act is unlawful and subjects the defendants to the Court's equitable powers in the form of declaratory and injunctive relief.

Second Claim for Relief

*Equitable Relief under the Administrative Procedure Act*  
5 U.S.C. §706(2)(A)

79. Plaintiff incorporates the allegations of paragraphs 1 through 72, above.
80. The Ohio EPA has failed to perform its legal duties under Section 303(d) of the CWA.
81. The defendants have failed to perform their duties under the CWA and accompanying regulations by failing to disapprove the state's unlawful acts and omissions.
82. The defendants' legal failures with respect to their duties under federal law are arbitrary, capricious, an abuse of discretion, and unlawful.
83. Plaintiff seeks relief under 5. U.S.C. §706(2)(A).

PRAYER FOR RELIEF

A. Plaintiff seeks a declaration that the defendants violated their duties under the Clean Water Act.

B. Plaintiff seeks a declaration that the defendants' failure to disapprove the Ohio EPA's unlawful acts and omissions regarding the impaired status of western Lake Erie were arbitrary, capricious, an abuse of discretion, and otherwise unlawful.

C. Plaintiff seeks an injunction compelling the defendants to act in accordance with the Clean Water Act by developing a basin-wide TMDL for western Lake Erie, addressing all harmful nutrients, including phosphorous, sufficient to remedy the impairment of western Lake Erie; or, in the alternative, an order compelling the defendants to direct the Ohio EPA to develop and submit to the defendants by a date certain a basin-wide TMDL for western Lake Erie, addressing all harmful nutrients, including phosphorous, sufficient to remedy the impairment of Lake Erie.

D. Plaintiff seeks an order under which this Court retains jurisdiction to monitor the defendants' compliance with the Clean Water Act with respect to the establishment of an effective basin-wide TMDL for western Lake Erie.

E. Plaintiff seeks an award to Plaintiff of its reasonable attorney fees and costs incurred in this action.

F. Plaintiff seeks an order granting such further equitable relief as the Court determines is lawful.

/s/ Fritz Byers

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