

FRITZ BYERS
ATTORNEY AT LAW

RE

2019 FEB 14 AM 11:51



414 N. Erie Street, 2nd Floor
Toledo, Ohio 43604
Phone: 419-241-8013
Telecopier: 419-241-4215
fritz@fritzbyers.com

January 22, 2019

Via Certified Mail

ANDREW WHEELER, Administrator
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(2) for the United States Environmental Protection Agency's Failure to Act on Ohio's Constructive Submission of No "Total Maximum Daily Load" for Western Lake Erie.

Dear Administrator Wheeler:

I write on behalf of the Board of Lucas County Commissioners (the "Board") to notify you of its intent to file suit against the Administrator of the U.S. Environmental Protection Agency ("U.S. EPA" or "Agency") in U.S. District Court in accordance with section 505 of the Clean Water Act ("CWA"), 33 U.S.C. § 1365, and 40 C.F.R. Part 135. The basis for this intent to sue is U.S. EPA's violation of the Clean Water Act by its failure to either approve or disapprove the State of Ohio's decision not to submit a "Total Maximum Daily Load" ("TMDL") for western Lake Erie. We request that U.S. EPA respond to this letter within 60 days - by March 25, 2019 - to provide its view as to whether the State of Ohio has failed to submit a TMDL "in accordance with its priority ranking" for western Lake Erie as required by section 303(d), 33 U.S.C. § 1313(d). If U.S. EPA does not offer a response approving or disapproving Ohio's decision not to submit a TMDL, the Board of Lucas County Commissioners intends to pursue declaratory and injunctive relief.

Respectfully,
[Signature]
[Name]
[Title]
[Address]

Andrew Wheeler, Administrator
January 22, 2019

I. Background

The factual, scientific, and legal background of this matter is set out in detail in the letter, dated November 30, 2018, sent to you by the Environmental Law & Policy Center. Rather than restate that background, the Board incorporates by reference the entirety of Section I of that letter.

II. The Clean Water Act Violations of the U.S. EPA and the Ohio EPA.

U.S. EPA has failed to perform its legal obligation to establish a TMDL for western Lake Erie, an obligation that falls on the U.S. EPA when, as here, Ohio has refused to perform its statutory obligation to establish a TMDL. Ohio's well-established pattern of laggard behavior regarding western Lake Erie by the Ohio EPA makes clear that the State has, in effect, determined it will not discharge its legal obligations to address the environmental degradation of Lake Erie. The U.S. EPA must take cognizance of that behavior and deem Ohio's unlawful dilatory approach to be "constructive submission" of no TMDL under Clean Water Act section 303(d).

In its 2014 list of impaired waters, Ohio EPA initially listed a portion of western Lake Erie as impaired by toxic algae. This listing was based on measurements of the algal toxin microcystin, which showed that algae outbreaks were impairing the public drinking-water use for the shoreline "assessment unit" of western Lake Erie. *See* Ohio EPA, 2014 Integrated Water Quality Monitoring and Assessment Report at H-14, (Mar. 25, 2014). After years of delay and nonfeasance, Ohio EPA eventually designated the full portion of western Lake Erie that is within its jurisdiction as impaired. The first such designation came in May 2018, when the agency amended its 2016 impaired waters list. The agency repeated the impairment designation in its final June 2018 Section 303(d) List. Ohio EPA, 2016 Integrated Water Quality Monitoring and Assessment Report – Amendment at 9 (May 2018); Ohio EPA, 2014 Integrated Water Quality Monitoring and Assessment Report, (June 2018).

While superficially reflecting agency attention to the impairment of western Lake Erie, these two documents in fact reflect the agency's systematic effort to evade its legal obligation to establish a TMDL for western Lake. In filings a matter of weeks apart, the agency expressed diametrically opposite administrative conclusions, purportedly based on the same scientific measurements, the same assignment of priorities, and the same qualitative factors. The May 2018 List Amendment States sets out the relevant considerations and concludes, unequivocally, that "the western basin in particular is one of the highest, if not the highest, priority for Ohio to address." 2016 Section 303(d) List Amendment at 9. In contrast, the June 2018 report asserts that agency action on the western basin is "a low priority." This flip is, in the agency's articulation, connected to its unexplained (and unwarranted) faith in the Great Lakes Water Quality Agreement. 2018 Section 303(d) List at J-3.

Andrew Wheeler, Administrator
January 22, 2019

While in some circumstances a state agency may eschew a TMDL in favor of alternative approaches, the agency may do so only when the adopted alternative constitutes an actual plan of sufficient breadth and depth to satisfy the legal requirement that the agency address impaired waters in a coherent and effective manner. Here, no such coherent alternative exists. Indeed, the Ohio EPA admits as much, acknowledging in its 2018 Report that the agency is refraining from establishing a TMDL to address western Lake Erie impairment in the hope that it can somehow concoct an alternative proposal that it can pass off as remedial action by the agency. *See* 2018 Section 303(d) List at D-35.

Ohio has avoided its obligation to establish a TMDL, and it has done so without approving, or even identifying, a credible alternative plan for meeting the applicable water-quality standards. All the while, the water quality of western Lake Erie continues to decline. Ohio knows it. The Ohio EPA knows it. And the U.S. EPA knows it. In this circumstance, Ohio's avoidance of any meaningful action to address western Lake Erie legally constitutes a refusal to undertake a TMDL in accordance with its priority ranking. That refusal violates section 303(d) of the Clean Water Act.

Ohio EPA in effect determined that no TMDL is necessary and none should be provided. The statement that Ohio may "someday" consider a TMDL, untethered to any factual predicate, scientific standard, or legal process, does nothing to alter the fact that, through its years of inaction, its flip-flopping, and its search for an alternative, the Ohio EPA has reached a legally effective determination not to issue a TMDL.

That determination, in turn, triggers, the U.S. EPA's mandatory duty to approve or disapprove the State's TMDL submission within 30 days. *See* CWA Section 303(d)(2), 33 U.S.C. § 1313(d)(2), as well as 40 C.F.R. § 130.7(d)(2). U.S. EPA has not discharged its duty, and instead has approved Ohio's Section 303(d) List and specifically the flawed priority ranking for western Lake Erie. Letter from Linda Holst, Acting Division Dir., Water Division, U.S. EPA, to Tiffani Kavalec, Chief, Division of Surface Water, Ohio EPA, Re: Approval of 2018 Clean Water Act (CWA) Section 303(d) List (July 9, 2018).

Section 505(a)(2) of the Clean Water Act authorizes a suit against U.S. EPA when the agency fails to carry out its mandatory duties. Accordingly, the Board provides this letter as notice of its intent to bring suit against U.S. EPA for such failure under the Clean Water Act.

Andrew Wheeler, Administrator
January 22, 2019

II. Identification of the Party Giving Notice and Counsel

The party giving notice of this claim is:

Board of Lucas County Commissioners
One Government Center, Eight Floor
Toledo, Ohio 43604
(419) 213-4500

The Board is represented by the legal counsel identified below:

Fritz Byers
414 N. Erie Street, 2nd Floor
Toledo, Ohio 43604
419-241-8013

We would to discuss the content of this letter with you in the hope of avoiding further legal action. But if this matter is not resolved amicably, the Board will file suit on or after the sixtieth day following the date of this letter.

Sincerely yours,



Fritz Byers
Counsel
Board of Lucas County Commissioners

Copy by certified mail to:

HON. MATTHEW G. WHITAKER
Acting Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530