



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

January 16, 2018

Via Electronic Filing

Sandy Opacich, Clerk of Court
Carl B. Strokes U.S. Court House
U.S. District Court of the Northern
District of Ohio
801 West Superior Avenue
Cleveland, OH 44113

Re: *Environmental Law & Policy Center et al. v. U.S. EPA et al.*, Case No. 17-cv-1514

Dear Ms. Opacich:

Plaintiffs write to inform the Court of the attached recent letter (“Withdrawal Letter”) provided by Defendant the U.S. Environmental Protection Agency (“U.S. EPA”) to Plaintiffs’ counsel on January 15, 2018 – the day before Plaintiffs’ Motion for Summary Judgment was due to be filed under the schedule set by the Court on November 29, 2017, and a federal holiday. In this letter, U.S. EPA essentially confesses error with regard to its prior approval of Ohio EPA’s failure to list the open waters of western Lake Erie as “impaired” by pollution under Section 303(d) of the Clean Water Act.

Plaintiffs have filed their summary judgment motion and memorandum by January 16, 2018 as scheduled. In light of Defendant U.S. EPA’s confession of error in its recent letter, Plaintiffs seek an expeditious resolution of their Motion for Summary Judgment along with an Order by the Court providing a fully sufficient remedy for U.S. EPA’s admitted legal violation.

As the Court is aware, this case involves Plaintiffs’ challenge to U.S. EPA’s legally flawed May 19, 2017 approval of the Ohio EPA’s failure to list western Lake Erie waters as “impaired” by phosphorus pollution under Section 303(d) of the Clean Water Act and 40 C.F.R. § 130.7. U.S. EPA’s recent letter, dated January 12, 2018 but not provided to Plaintiffs’ counsel until January 15, 2018, reverses position and effectively confesses error. The new letter from U.S. EPA to Ohio EPA now states, among other things, that:

- U.S. EPA is “withdrawing the May 19, 2017 approval specifically with respect to the open waters of Lake Erie.” Attachment at 1.
- “EPA has reevaluated the State’s [Ohio EPA’s] submission and determined that the submission is incomplete and thus not fully consistent with the requirements of Section 303(d) of the Clean Water Act and EPA’s regulations.” Attachment at 2.
- “[T]he State’s [Ohio EPA’s] submission did not demonstrate that it assembled and evaluated all available data and information regarding nutrients [including phosphorus] in the open waters of Lake Erie within the State’s boundaries.” Attachment at 2.

These statements make clear that U.S. EPA is conceding error in this case. As recounted in Plaintiffs’ Complaint, Section 303(d) of the Clean Water Act (“CWA”) and 40 C.F.R. § 130.7 require that, every two years, a state must evaluate the water quality of all waters within its jurisdiction and submit a list to U.S. EPA identifying each waterbody that is “impaired” by pollution. Pursuant to 40 C.F.R. § 130.7(d)(2), U.S. EPA “shall approve a list developed under § 130.7(b) . . . only if it meets the requirements of § 130.7(b),” including the requirement to “assemble and evaluate all existing and readily available water quality-related data and information” regarding water quality problems within a state’s jurisdiction. *See* 40 C.F.R. § 130.7(b)(5). If U.S. EPA disapproves a state’s Section 303(d) list, it is U.S. EPA that must then undertake the required impairment determination and the development of loading limits to adequately alleviate the underlying water pollution “not later than 30 days after the date of such disapproval.” 40 C.F.R. § 130.7(d)(2). *See* Complaint at 35.

In October 2016, Ohio EPA submitted its “Section 303(d)” list to U.S. EPA without either assembling all readily available information regarding phosphorus pollution that drives the growth of Harmful Algal Blooms in the open waters of western Lake Erie, or evaluating whether such Harmful Algal Blooms are impairing those waters, as required by the CWA and as admitted in the Withdrawal Letter. Despite this omission, on May 19, 2017, U.S. EPA illegally approved Ohio EPA’s Section 303(d) list. Plaintiffs subsequently filed this suit challenging U.S. EPA’s approval decision as a violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and not in accordance with the Clean Water Act.

The Withdrawal Letter recognizes that this approval was inconsistent with the CWA’s requirements. However, rather than fulfilling its legal obligation to list the waters itself, U.S. EPA in its Withdrawal Letter illegally passes the buck back to Ohio EPA for another try:

EPA requests that the State, consistent with its responsibilities and obligations under Section 303(d)(1)(A) of the Clean Water Act and 40 C.F.R. § 130.7(b)(5), “assemble and evaluate all existing and readily available water quality-related data and information” for the open waters of Lake Erie within its boundaries and submit the results of that evaluation to the EPA, including, if appropriate, an assessment of whether the waters are meeting the applicable water quality standards, by April 9, 2018, for the EPA's consideration.

Attachment at 2. It is worth noting that the next biennial iteration of Ohio's Section 303(d) list is already due on April 1, 2018, 40 C.F.R. § 130.7(d)(1), meaning that U.S. EPA is essentially giving Ohio EPA a “free pass” on its deficient 2016 listing.

Thus, the Withdrawal Letter merely underlines the need for swift and definitive judicial relief here. The letter plainly confesses error consistent with Plaintiffs' allegations that U.S. EPA's original approval of Ohio's Section 303(d) list violated the Clean Water Act and the Administrative Procedure Act. Complaint ¶¶ 1, 149-159. However, that confession of error does not adequately remedy U.S. EPA's violation. The relevant CWA regulation, 40 C.F.R. § 130.7(d)(2), requires U.S. EPA *itself* to act in the case of disapproval of a Section 303(d) list, not to send the matter back to the state that failed to develop an adequate list in the first place. Moreover, under the timeline mandated by 40 C.F.R. § 130.7(d)(2), U.S. EPA should have resolved this situation within 60 days of receiving Ohio EPA's Section 303(d) list (*i.e.*, by December 2016), rather than revisiting it only now, more than a year after the fact and on the eve of Plaintiffs' deadline to file for summary judgment. Once again, U.S. EPA appears to be merely delaying any remedy for Lake Erie, in violation of Congress's and the agency's own mandates to deal with polluted waterbodies promptly.

Therefore, while Plaintiffs are filing this letter in order to ensure the Court is apprised of all developments relevant to this case, the underlying facts and circumstances still require judicial resolution. As described in detail in Plaintiffs' Motion for Summary Judgment and admitted by U.S. EPA in the Withdrawal Letter, Ohio EPA's 2016 Section 303(d) list failed to meet the requirements of the CWA, and U.S. EPA should have disapproved it over a year ago. Accordingly, Plaintiffs continue to seek a remedy in the form of a court order directing U.S. EPA to comply with 40 C.F.R. § 130.7(d)(2), which requires U.S. EPA itself to assess the impairment status of a waterbody within 30 days of disapproving a state's Section 303(d) list and also develop appropriate pollution loading limits. Plaintiffs therefore respectfully request that the Court rule on our Motion for Summary Judgment and grant this relief, either in accordance with the existing case schedule or even sooner now that U.S. EPA has confessed error on the merits of the case and the only remaining question is the appropriate remedy.

Dated: January 16, 2018

Respectfully Submitted,

/s/Madeline Fleisher

MADELINE FLEISHER (91862)

Attorney for the Environmental Law & Policy
Center

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2018, a copy of the foregoing Letter was filed electronically using the CM/ECF system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Madeline Fleisher
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