

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’
SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

The remedy for an admittedly illegal delay is not more delay. The Clean Water Act (“CWA”) and the U.S. Environmental Protection Agency’s (“U.S. EPA”) own regulations make this clear. They both require swift and definitive action to address pollution that is “impairing” water quality, and the Court should enforce that requirement here.

Section 303(d) of the CWA requires each state to periodically submit a list to U.S. EPA identifying all waters within its jurisdiction that are impaired by pollution. 33 U.S.C. § 1313(d). The same provision demands that the federal agency “*shall either approve or disapprove such identification . . . not later than 30 days after the date of submission.*” 33 U.S.C. § 1313(d)(2) (emphasis added); *see also* 40 C.F.R. § 130.7(d)(2) (similar). 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.*” 33 U.S.C. § 1313(d)(2) (emphasis added); *see also* 40 C.F.R. § 130.7(d)(2) (similar). In other words, if U.S. EPA cannot approve a state’s list of impaired waters, it has a mandatory duty to identify such waters itself within 30 days.

In this case, Plaintiffs and Defendants agree that the impaired waters list submitted by the Ohio Environmental Protection Agency (“Ohio EPA”) in 2016 was deficient because Ohio EPA refused to assemble and evaluate information regarding phosphorus pollution that causes Harmful Algal Blooms in Lake Erie, as required by 40 C.F.R. § 130.7(b)(5). *See* Ex. A, Letter from David P. Ross, Assistant Administrator, U.S. EPA to Craig Butler, Director, Ohio EPA

(Jan. 12, 2018). In light of this refusal, U.S. EPA’s own regulations precluded approval of the list. 40 C.F.R. § 130.7(d)(2) (“The Regional Administrator shall approve a list developed under § 130.7(b) . . . *only* if it meets the requirements of § 130.7(b).”) (emphasis added). Nevertheless, U.S. EPA illegally approved Ohio EPA’s list in full. Only after delaying for nearly a year and a half, and only on the eve of Plaintiffs’ prior summary judgment motion deadline, has U.S. EPA finally admitted its action was illegal and withdrawn its approval. Meanwhile, phosphorus pollution has continued to accumulate in western Lake Erie and has set the stage for more Harmful Algal Blooms that threaten public health, the economy, and the environment. Yet U.S. EPA continues to seek delay by trying to rewrite the statute, attempting to “withdraw approval” rather than actually disapprove Ohio EPA’s list as an excuse for avoiding enforceable and expeditious timelines required under the Clean Water Act.

This approach – which U.S. EPA invents out of whole cloth – lacks any statutory basis and is inconsistent with Congress’ unambiguous and mandatory procedure. The Court should order U.S. EPA to follow the required procedure by making an impairment determination for the open waters of western Lake Erie within 30 days, thereby setting Lake Erie on the path toward healthy water as quickly as possible.

II. FACTS

A. Lake Erie’s History of Harmful Algal Blooms

As described in Plaintiffs’ original Motion for Summary Judgment,¹ Lake Erie, a water body that is one of Ohio’s “crown jewels in terms of economic impact, natural resource value

¹ Plaintiffs will not recapitulate the entire factual background laid out in our January 16, 2018 Motion for Summary Judgment and Memorandum in Support, given U.S. EPA’s confession of error regarding Plaintiffs’ substantive claims in the January 12, 2018 letter filed with the Court on January 16, 2018. However, Plaintiffs incorporate the January 16, 2018 Motion and

and water supply,” has for several years been suffering from extensive phosphorus pollution. Administrative Record (“A.R.”) at 2085, Ohio EPA, *Financial Incentives to Address Harmful Algal Blooms* 1 (Aug. 2014). That pollution, which stems primarily from manure and fertilizer runoff from agricultural sources, can drive excessive algae growth. This includes excessive growth of cyanobacteria, commonly known as blue-green algae. This form of toxic algae growth, which has indisputably occurred in the open waters of western Lake Erie, can produce toxins such as microcystin that harm human and animal health by affecting the skin, liver, or nervous system. A.R. at 2626, Ohio EPA, *Final Ohio 2016 Integrated Water Quality Monitoring and Assessment Report C-28* (Oct. 2016) [hereinafter *Final 2016 Ohio Integrated Report*]. Excessive algae growth in a waterbody can also lead to depleted dissolved oxygen levels, fish kills, unpleasant odors, and other adverse effects. *Id.* Algae blooms can furthermore have a dramatic negative impact on the aesthetic value of a water body:



A.R. at 6943, National Oceanic and Atmospheric Administration Great Lakes Environmental Research Laboratory (“NOAA GLERL”), *Algal Blooms*, flickr [hereinafter *NOAA Algal Blooms*

Memorandum by reference in this filing as necessary for the Court to fully consider the appropriate remedy for Plaintiffs’ claims in light of that confession of error.

Photos], https://www.flickr.com/photos/noaa_glerl/5842556457/in/album-72157639592150973

(September 3, 2009 Lake Erie photo from Ohio Department of Natural Resources).² These excessive growths are known as “Harmful Algal Blooms” (often referred to as HABs).

For the last several years, Harmful Algal Blooms have grown in western Lake Erie each summer and fall, with damaging and even catastrophic effects. Major Harmful Algal Blooms occurred in 2011, 2013, 2014 and 2015 as documented in the administrative record here. These Harmful Algal Blooms spread across the open waters of the western basin, at times covering hundreds of square miles, as depicted in this satellite image of the 2014 Harmful Algal Bloom from the National Oceanic and Atmospheric Administration:



² These and other images of Harmful Algal Blooms on Lake Erie are provided by NOAA’s Great Lakes Environmental Research Laboratory at the following website, included in the record through a placeholder link at A.R. 6943:

https://www.flickr.com/photos/noaa_glerl/sets/72157639592150973/with/8741968640. Note that this website URL is from the Certified Index to the Administrative Record at 10; the URL in the actual record appears to provide a link to just one image included in that album.

A.R. at 6943, *NOAA Algal Blooms Photos*,

https://www.flickr.com/photos/noaa_glerl/14853579995/in/album-72157639592150973 (NOAA satellite image, Aug. 2014).³

Such Harmful Algal Blooms undermine the aesthetic, ecological, recreational, and economic value of western Lake Erie. They can also seriously harm public health. In 2014, a Harmful Algal Bloom in western Lake Erie contaminated the water supply in Toledo with the algal toxin microcystin at such high levels that nearly half a million people had no access to safe drinking water for three days. A.R. at 2910, *Final 2016 Ohio Integrated Report* at H-4; A.R. at 2341, Letter from the Board of Lucas County Commissioners to Tinka Hyde, Director, Water Division, U.S. EPA Region 5 (Oct. 15, 2015).

Harmful Algal Blooms also regularly hinder recreation on western Lake Erie. A joint U.S. EPA report with Canada's federal environmental agency recognized as early as 2012 that "Lake Erie's ecosystem and economy are under threat from excess algal blooms that have become a regular occurrence throughout the Western basin of the lake during summer months, leading to poor aesthetics, recreational beach closures and reduced tourism revenue." A.R. at 948, U.S. EPA & Environment Canada, *Lake Erie Lakewide Management Plan: Annual Report 2012* 1 (Nov. 2012); *see also* A.R. at 2333, U.S. EPA & Environment Canada, *Lake Erie Lakewide Action and Management Plan: Annual Report 2015* 1 (Jan. 2016). According to the

³ The album contains similar images of Harmful Algal Blooms in 2011, 2013, and 2015. A.R. at 6943, *NOAA Algal Blooms Photos*, https://www.flickr.com/photos/noaa_glerl/11855895286/in/album-72157639592150973 (NOAA satellite image, Oct. 2011); *id.* at https://www.flickr.com/photos/noaa_glerl/14851138204/in/album-72157639592150973 (NOAA satellite image, Oct. 2013); *id.* at https://www.flickr.com/photos/noaa_glerl/23597606861/in/album-72157639592150973 (NOAA satellite image, July 2015).

Ohio Travel Association: “Losses [caused by algal blooms] are felt through customers leaving early, cancellations, decreased sales, and negative publicity that chase away potential customers.” A.R. at 2199, Ohio Travel Association, *Tourism and Algal Blooms: Economic Impact Fact Sheet 2015* 1 (Aug. 2015).

These harmful and damaging impacts have recurred numerous times in the last several years. In 2011, “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.” A.R. at 1352, Environment Canada & U.S. EPA, *State of the Great Lakes 2011* 10 (2014). The International Joint Commission, a binational U.S.-Canadian governmental organization, estimated that economic impacts from 2011 beach closures in Ohio caused by such Harmful Algal Blooms and associated impacts on recreational fishing could amount to millions of dollars. A.R. at 1932, International Joint Commission, *A Balanced Diet for Lake Erie: Reducing Phosphorus Loadings and Harmful Algal Blooms, A Report of the Lake Erie Ecosystem Priority 40* (Feb. 2014). Harmful Algal Blooms and excessive microcystin levels likewise led to public health advisories restricting use of beaches in Lake Erie’s western basin in 2013. A.R. at 2627-2628, *Final 2016 Ohio Integrated Report* at C-29 – C-30. Similarly extensive algae blooms then occurred in 2014 and 2015, along with continuing reports of impacts on recreation and tourism in the area. *See, e.g.*, A.R. at 2211, Jessica Denton, *Lake Erie’s 2015 Algal Bloom Effects Revealed*, Port Clinton News Herald, Oct. 8, 2015.

B. Ohio's Failure to Address Harmful Algal Blooms Under the Clean Water Act

1. Statutory and Regulatory Background

a. Impairment Determinations and Total Maximum Daily Loads

The Clean Water Act provides a straightforward regulatory framework designed “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Under the CWA, each state sets water quality standards for the waters within its boundaries. *Id.* § 1313(c)(2)(A). These standards include two components: (1) designated uses for the waters (such as for drinking water supply, recreational use, aquatic habitat, etc.); and (2) specific water quality criteria necessary to support those uses. *Id.*; *see also* OHIO ADMIN. CODE 3745-1-07(A).

Section 303(d) of the CWA requires each state to determine whether any water body within its jurisdiction does not support its designated uses. 33 U.S.C. § 1313(d)(1)(A). The statutory text is mandatory: “Each State *shall* identify those waters within its boundaries for which [pollution controls] are not stringent enough to implement any water quality standard applicable to such waters.” *Id.* (emphasis added). The state must develop a comprehensive list of all waterbodies identified during this evaluation, often called a “Section 303(d) list” or “impaired waters list.” (A state generally prepares this list in conjunction with required water quality reporting under 33 U.S.C. § 1315(b) as an “integrated report.”) U.S. EPA must then review and either approve or disapprove the impaired waters list. *Id.* § 1313(d)(2).

U.S. EPA may *only* approve the state’s Section 303(d) list if the state meets all the requirements, including the requirement for the state to assemble and evaluate relevant data. 40 C.F.R. § 130.7(d)(2). Otherwise, U.S. EPA must disapprove the list within 30 days. 33 U.S.C. § 1313(d)(2) (“The Administrator shall either approve or disapprove such identification [of

impaired waters] . . . not later than thirty days after the date of submission.”); *see also* 40 C.F.R. § 130.7(d)(2) (similar). If U.S. EPA disapproves the list, the federal agency has a nondiscretionary duty to list Section 303(d) impaired waterbodies itself: “If the Administrator disapproves such identification [of impaired waters] and load, he *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 applicable to such waters.” 33 U.S.C. § 1313(d)(2) (emphasis added); *see also* 40 C.F.R. § 130.7(d)(2) (similar). In short, the CWA requires U.S. EPA to take specific and rapid steps to remedy a state’s failure to recognize that pollution is contaminating a water body.

An impairment listing is significant because it triggers the requirement to establish a corresponding maximum pollution load, also known as a “Total Maximum Daily Load” (“TMDL”), sufficient to ensure the amount of pollution discharged into a water body does not prevent it from meeting applicable water quality standards. 33 U.S.C § 1313(d)(1)(c); A.R. at 4711, Assessment and Watershed Protection Division, U.S. EPA, *Guidance for Water Quality-based Decisions: the TMDL Process* 1 (Apr. 1991) [hereinafter *1991 TMDL Guidance*]. This pollution “cap” is implemented through specific limits on permissible discharges from individual sources. *Id.* at 6 (A.R. at 4716). These individual limits can be imposed through individual CWA permits required for “point” sources of pollution – those that discharge through a “discernable, defined and discrete conveyance” such as an outflow pipe. 33 U.S.C. §§ 1342, 1362(14). U.S. EPA also requires that for non-point sources, potentially including agricultural runoff, a TMDL must include “reasonable assurances” that state regulation or other mechanisms will in fact achieve the necessary non-point source reductions. *1991 TMDL Guidance* at 15 (A.R. at 4724). This aspect of a TMDL is especially important for reducing

phosphorus pollution into Lake Erie, which comes mainly from non-point sources such as fertilizer and manure runoff from agricultural fields. Complaint ¶ 41; Answer ¶ 41.

b. Water Quality Standards Applicable to Lake Erie

Ohio EPA considers Lake Erie to be the state’s “most valuable water resource.” A.R. at 1139, Division of Surface Water, Ohio EPA, *Ohio Nutrient Reduction Strategy 7* (June 28, 2013). That value is reflected in the state’s designated uses for the lake, which include “exceptional warmwater habitat, superior high quality water, public water supply, agricultural water supply, industrial water supply and bathing waters” OHIO ADMIN. CODE 3745-1-31(A). These designated uses are defined in Ohio Admin. Code 3745-1-7 to require Lake Erie’s water quality to support, among other things, “an exceptional or unusual community of warmwater aquatic organisms,” and heavy use for swimming along with other contact recreation activities during recreation season from May 1 through October 31. OHIO ADMIN. CODE 3745-1-7(B)(1)(c), (B)(3).

Ohio implements these designated uses through water quality criteria that are set forth in either numeric or non-numeric “narrative” form. OHIO ADMIN. CODE 3745-1-7(A). The primary criterion relevant to Harmful Algal Blooms on Lake Erie is a narrative requirement that “all surface waters of the state . . . [t]o every extent practical and possible . . . [be] [f]ree 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).

2. Ohio’s Delay in Addressing Impairment of Lake Erie by Harmful Algal Blooms

For almost four years, Ohio EPA has refused to apply relevant state water quality criteria to address whether Harmful Algal Blooms caused by phosphorus pollution are impairing the utilization of the open waters of western Lake Erie for recreation, aquatic habitat, and other

designated uses. In 2014, the state deferred an evaluation of the impacts of Harmful Algal Blooms offshore pending collection of additional data and the development of methodologies for applying the state’s narrative criteria regarding algae growths. A.R. at 4253-4254, Ohio EPA, *Ohio 2014 Integrated Water Quality Monitoring and Assessment Report* I-30 – I-31 (Mar. 25, 2014). At the time, U.S. EPA approved Ohio’s impaired waters list, but explicitly stated that “EPA will coordinate with Ohio EPA and expects Ohio EPA to fully assess the ten AUs [assessment units] for Lake Erie and to assemble and evaluate all existing and readily available data, including EPA data, for the 2016 integrated report and listing cycle.” A.R. at 2727, U.S. EPA, *Decision Document for the Partial Approval of Ohio’s Submission of the State’s Integrated Report with Respect to Section 303(d) of the Clean Water Act (Category 5 Waters)* 15 (Aug. 7, 2015). U.S. EPA also specifically directed that “in its future assessment of the new Lake Erie AUs, . . . Ohio consider the impacts of HABs and nuisance algal growth on aquatic life use, in addition to the impacts on recreational use.” *Id.* at 16 (A.R. at 2728).

Ohio ignored this directive. Ohio’s draft 2016 Integrated Report indicated that the Ohio EPA still would not assess the open waters of western Lake Erie. A.R. at 3450-3451, *Ohio EPA, Ohio 2016 Integrated Water Quality Monitoring and Assessment Report (Draft Report)* D-5 – D-6 (July 2016) [hereinafter *Draft 2016 Ohio Integrated Report*]. The agency instead asserted its belief that U.S. EPA itself should take on the task of that impairment determination: “assessment and listing of the open waters under the CWA should be led by U.S. EPA in consultation with the states” *Id.* at D-6 (A.R. at 3451).

On August 29, 2016, U.S. EPA submitted a comment letter regarding the draft Integrated Report, rejecting this proposed approach as inconsistent with the Clean Water Act:

Ohio EPA needs to assess all of its waters in the Western and Central Basins of Lake Erie for all applicable water quality standards as defined at 40 CFR

130.7(b)(3). Such standards include numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements. In particular, the state should assess against its narrative standard at 3745-1-04(E)

. . . . *Ohio EPA should assess the open water of Lake Erie* to determine whether or not the lake is meeting all applicable standards, and where it is not, list the appropriate impairments on its final 2016 303(d) list.

A.R. at 2469, Letter from Peter Swenson, Chief, Watersheds and Wetlands Branch, U.S. EPA Region 5, to Tiffani Kavalec, Chief, Division of Surface Water, Ohio EPA 2 (Aug. 29, 2016) [hereinafter “U.S. EPA Comment Letter”] (emphases added).

In a September 30, 2016 response, Ohio EPA reiterated its original position that it would not “unilaterally develop assessment methods” for its portion of Lake Erie under the CWA. A.R. at 2474, Letter from Tiffani Kavalec, Chief, Division of Surface Water, Ohio EPA to Peter Swenson, Chief, Watersheds and Wetlands Branch, U.S. EPA Region 5, at 2 (Sept. 30, 2016) [hereinafter “Ohio EPA Response Letter”]. Ohio EPA proposed that U.S. EPA should develop a uniform impairment assessment methodology for all of Lake Erie as “one ecological system in which the water flows regardless of state or national borders,” and stated that “*we will not discuss or propose further listings* until there are [such] scientific tools” to assess impairment available. *Id.* at 2, 3 (A.R. at 2474, 2475; emphasis added).

On March 31, 2017, U.S. EPA sent Ohio EPA a final letter recognizing that “Ohio has yet to assess the open waters of Lake Erie for algal impairment.” A.R. at 3349, Letter from Robert A. Kaplan, Acting Regional Administrator, U.S. EPA Region 5 to Craig Butler, Director, Ohio EPA (Mar. 31, 2017). Nevertheless, six weeks later, on May 19, 2017, U.S. EPA formally approved Ohio’s 2016 Section 303(d) impairment list, once again delaying the assessment of the open waters until Ohio’s next biennial listing process. A.R. at 3371, Letter from Christopher Korleski, Director, Water Division, U.S. EPA Region 5 to Craig Butler, Director, Ohio EPA

(May 19, 2017). U.S. EPA stated that 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.” *Id.* The decision document underlying the approval echoed that approach of “deferring to the State’s judgment not to assess these waters.” A.R. at 3358, U.S. EPA Region 5, *Approval of Ohio’s Submission of the State’s Integrated Report with Respect to Section 303(d) of the Clean Water Act (Category 5 Waters)* 9 (May 2017).

On July 18, 2017, Plaintiffs Environmental Law & Policy Center, Advocates for a Clean Lake Erie, Michael Ferner, and Susan Matz filed a complaint challenging U.S. EPA’s approval of the 2016 Ohio Section 303(d) impairment list under the Administrative Procedure Act and the Clean Water Act. Plaintiffs assert that U.S. EPA’s approval of Ohio’s Section 303(d) list was arbitrary, capricious, and not in accordance with the law under 33 U.S.C. § 1313(d) and 40 C.F.R. § 130.7.

On January 15, 2018 – the day before Plaintiffs’ original Motion for Summary Judgment was due to be filed under the schedule set by the Court on November 29, 2017, and a federal holiday – U.S. EPA provided a letter (“Withdrawal Letter”) to Plaintiffs’ counsel in which it admits that its prior approval of Ohio EPA’s failure to list the open waters of western Lake Erie as “impaired” by pollution was not consistent with the Clean Water Act. Ex. A.⁴ The letter, addressed to Ohio EPA and dated January 12, 2018, states:

- U.S. EPA is “withdrawing the May 19, 2017 approval specifically with respect to the open waters of Lake Erie.” Ex. A 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.” Ex. A at 2.

⁴ Plaintiffs filed the Withdrawal Letter in the docket along with our Motion for Summary Judgment on January 16, 2018, and are including it as an exhibit to this Motion for ease of reference.

- “[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.” Ex. A at 2.

The Withdrawal Letter then “requests” that, “if appropriate,” Ohio EPA conduct an assessment that Ohio EPA has already stated it would not do, and would not even “unilaterally develop assessment methods” for. Ex. A at 2. The Letter also “requests” that this assessment be completed by April 9, 2018, with no timetable given for U.S. EPA’s subsequent “consideration” of Ohio EPA’s submission:

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.

Id.

On January 22, 2018, the Court ordered that in light of the Withdrawal Letter, Plaintiffs should submit a Supplemental Motion for Summary Judgment regarding:

- (1) whether the USA EPA’s “withdrawal of approval” of Ohio’s 2016 “Section 303(d) list” or “impaired waters list” is legally equivalent to a “disapproval” of the same; and
- (2) if so, whether this court can order defendant USA EPA to complete its review pursuant to 33 U.S.C. § 1313(d)(2) and/or 30 C.F.R. § 130.7(d)(2) within thirty (30) days.

Dkt. No. 20, Order at 1 (Jan. 22, 2018). In accordance with that Order, Plaintiffs are filing this Motion to request that the Court: (1) rule that U.S. EPA’s “withdrawal of approval” is effectively a disapproval of Ohio EPA’s 2016 Section 303(d) List with respect to the open waters of western Lake Erie; and (2) order U.S. EPA to comply with the CWA’s requirements under both 33

U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2) by itself conducting an impairment assessment of those waters within 30 days.

III. STANDARD OF REVIEW

The Administrative Procedure Act (“APA”), 5 U.S.C. § 701 *et seq.*, authorizes judicial review of a claim that a person has been wronged by agency action. 5 U.S.C. § 702. Under the APA, a court must “hold unlawful and set aside agency action, findings, and conclusions” that are, *inter alia*, “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” based on the administrative record underlying the action. 5 U.S.C. § 706(2). When courts review an APA claim on a motion for summary judgment, “their standard of review is set by the terms of the APA” rather than Fed. R. Civ. P. 56. *Ohio v. U.S. Army Corps of Eng’rs*, 259 F. Supp. 3d 732, 744 (N.D. Ohio 2017).

IV. LAW AND ARGUMENT

As described above, western Lake Erie has been suffering serious impacts from widespread Harmful Algal Blooms for at least the last seven years, since 2011. Ohio EPA has delayed conducting the required CWA assessment of those impacts since early 2014, and in its 2016 listing process stated outright that it believed U.S. EPA should take over the job. U.S. EPA sat on that 2016 Section 303(d) list, which made no attempt to assess the impairment status of the open waters of western Lake Erie, for seven months. Then, nine months ago, U.S. EPA delayed even further when it approved what it recognized at the time, and now expressly admits, was a deficient Section 303(d) List from Ohio EPA.

Yet 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 plainly 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. The Withdrawal Letter thus 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.

A. U.S. EPA Must Itself Act Within Thirty Days to Address Harmful Algal Blooms in Lake Erie.

Congress established the Clean Water Act in order “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). The statute provides a specific process for achieving that aim: each state must determine whether pollution is impairing the quality of its waters, and if not, develop pollution limits to fully protect those waters. If a state does not undertake those steps, the Clean Water Act requires U.S. EPA to quickly step up to the plate and take action within 30 days. *Id.* § 1313(d)(2); 40 C.F.R. § 130.7(d)(2). U.S. EPA has no authority to ignore that legislatively mandated procedure.

1. Under the Clean Water Act, U.S. EPA’s “Withdrawal” of Its Approval of Ohio EPA’s Section 303(d) List Must Be Treated as a Disapproval.

In the face of Ohio EPA’s inaction, U.S. EPA’s duties are clear. When a state submits an “impaired waters list” to U.S. EPA, Congress demands that the federal agency “*shall either approve or disapprove* such identification and load *not later than 30 days* after the date of submission.” 33 U.S.C. § 1313(d)(2) (emphases added); *see also* 40 C.F.R. § 130.7(d)(2) (similar). The statute by its terms gives the agency only two options: approve or disapprove. *See Kingman Park Civic Ass’n v. U.S. EPA*, 84 F. Supp. 2d 1, 2 (D.D.C. 1999) (“Within thirty days after this submission, the Administrator *must take one of two actions.*”) (emphasis added).

Moreover, U.S. EPA's own regulations are clear that the agency may *only* approve a state's list if it meets the requirements of 40 C.F.R § 130.7(b). 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)") (emphases added). Here, U.S. EPA admits that Ohio did not fulfill the requirements of § 130.7(b), Ex. A at 1-2, and that it was wrong to have approved Ohio EPA's list. *Id.* at 1. Having ruled out the possibility of approving the list, U.S. EPA has effectively disapproved the list, its only other option under the plain language of 33 U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2).

The only way U.S. EPA can avoid issuing a disapproval is through an attempt to re-write the statute. Rather than formally disapproving the state's list, U.S. EPA purports to create a third category of response: a "withdrawn approval." Under this category, the state's list would exist in a legal limbo, being neither approved nor disapproved. The function of this legal limbo is to continue to subvert the Clean Water Act, as U.S. EPA takes the position that it may remand the matter back to Ohio EPA and give the state nearly three additional months to conduct a vague "assessment" of whether the waters meet the water quality standards "if appropriate," which would then be submitted for U.S. EPA's "consideration." No time frame for U.S. EPA's response is provided.

This procedure does grave violence to the Clean Water Act's statutory scheme. Section 303(d)(2) is designed to ensure the prompt establishment of impairment listings and corresponding TMDLs by forcing U.S. EPA to either approve a state's impaired waters list or disapprove it, and in case of disapproval, placing the burden on U.S. EPA to take action itself within 30 days. Congress provided for no other options under the law. Yet U.S. EPA's newly invented procedure 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. Courts have recognized the importance of these stringent timelines in implementing the parallel language of section 303(d)(2) regarding the review of state TMDL submissions. *See Scott v. Hammond*, 741 F.2d 992, 998 (7th Cir. 1984) (“We cannot allow the states’ refusal to act to defeat the intent of Congress that TMDL’s be established promptly – in accordance with the timetable provided in the statute.”); *Sierra Club v. Hankinson*, 939 F. Supp. 865, 871 (N.D. Ga. 1996) (“The tight deadlines for submission of TMDLs demonstrate a congressional intent that TMDLs be established promptly.”). 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.

U.S. EPA has already tried – and failed – to avoid its Congressional mandate when it made a similar attempt to evade the same statutory language regarding TMDL development. In *Scott v. Hammond*, 741 F.2d 992 (7th Cir. 1984), the Seventh Circuit rejected U.S. EPA’s argument that only a formal “disapproval” of a state’s inaction – in that case, with respect to development of a TMDL – could trigger its duty to act. The Court held that “the CWA . . . impose[s] a duty on the EPA to establish TMDL’s when the states have defaulted by refusal to act over a long period,” otherwise the statute would be rendered “wholly ineffective.” *Id.* at 998. This was “especially true in light of the short time limits both on a state’s action, and on the EPA’s required reaction to the state submissions, with respect to the promulgation of TMDL’s.” *Id.* at 997.

Perhaps recognizing that the statute gives it no legal authority to create a “withdrawn approval” procedure, U.S. EPA claims in its letter a vague “inherent authority” to do so. Ex. A

at 1. Not surprisingly, U.S. EPA cites nothing to support such authority. While agencies do possess some inherent authority to revisit prior decisions, such authority may not conflict with the directives of Congress. Courts are clear that “any inherent reconsideration authority does not apply in cases where Congress has spoken.” *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014). Thus, where Congress has provided a mechanism whereby EPA must either approve or disapprove a list within a definite time, and has provided that EPA disapproval of a list creates a mandatory duty for U.S. EPA to list the waters itself, EPA may not claim “inherent authority” to upend this statutory scheme. As the Supreme Court has recognized, “EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 485 (2001).

2. The Clean Water Act Requires U.S. EPA to Take Action After Disapproval of a Section 303(d) List.

The language of the Clean Water Act likewise determines the next step after disapproval of a Section 303(d) list: U.S. EPA must take action itself within 30 days. The statute is crystal clear on this point. 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.” 33 U.S.C. § 1313(d)(2) (emphasis added); *see also* 40 C.F.R. § 130.7(d)(2) (similar); *Kingman Park*, 84 F.Supp.2d at 2 (applying 33 U.S.C. § 1313(d)(2) to hold that if U.S. EPA disapproves a state’s TMDL submission, “the Administrator must devise her own binding TMDL for the state within thirty days of disapproval”). Just as with the disapproval itself, U.S. EPA lacks any authority to deviate from this statutory process. *Ivy Sports Med., LLC*, 767 F.3d at 86.

This Court should hold U.S. EPA to the letter of the law. U.S. EPA’s attempt to delay listing Lake Erie seriously undermines the statute. It also poses grave health and safety risks to

many Ohio residents. Because U.S. EPA has effectively disapproved Ohio's list, it must now take action to list the open waters of western Lake Erie itself.

B. Requiring U.S. EPA to Take Swift Action is Necessary to Remedy the Prior Four Years of Delay in Addressing Harmful Algal Blooms on Lake Erie Under the Clean Water Act.

As described above, U.S. EPA's approach of passing the buck back to Ohio EPA once again to determine the impairment status of the open waters of western Lake Erie is not permitted by the Clean Water Act. Importantly, it also poses the practical danger of even more intolerable delay in actually addressing the water quality problems that are harming Lake Erie and Ohio citizens. A Court order holding U.S. EPA to its statutory responsibilities, on the other hand, will ensure that Lake Erie is put back on the path to healthy water with the speed Congress demands.

The delay of an impairment assessment for the open waters of western Lake Erie has already lasted almost four years. In March 2014, Ohio EPA put off that required evaluation while awaiting the development of additional data and assessment methodologies, and U.S. EPA allowed that with an understanding that Ohio EPA would tackle this issue in 2016. *Supra* at 10. In October 2016, over six months after its Section 303(d) List was due under 40 C.F.R. § 130.7(d)(1), Ohio EPA again refused to assess the open waters, this time stating that it believed U.S. EPA should do so and that it would not undertake the task based on existing scientific tools and data. *Supra* at 10-11. 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. Meanwhile, Harmful Algal Blooms are continuing to occur on the open waters of western Lake Erie every year, with the ever-present threat of severe blooms such as the one that contaminated Toledo's drinking water in August 2014.

The only adequate remedy here is the one required by 33 U.S.C. § 1313(d) and 40 C.F.R. § 130.7(d)(2): U.S. EPA must, within 30 days, develop an impairment listing for the open waters of western Lake Erie. There is certainly sufficient record evidence available for that task, including:

- Satellite imagery from NOAA and other sources clearly establishing that Harmful Algal Blooms regularly extend well into the open waters of the lake within Ohio's jurisdiction. *See, e.g.*, A.R. at 6943, *NOAA Algal Blooms Photos*, https://www.flickr.com/photos/noaa_glerl/sets/72157639592150973/with/8741968640; A.R. at 2312-2317, Dr. Christopher J. Winslow, Interim Director, Ohio Sea Grant College Program, *A Close Look at Lake Erie HABS and Current Research Efforts* (Nov. 12, 2015); A.R. at 4694, Shauna Alex, *Nutrients and Algae*; A.R. at 2633, *Final 2016 Ohio Integrated Report* at C-35 (citing NOAA's Harmful Algal Blooms bulletin website, which contains well over 100 bulletins that incorporate satellite imagery to assess the extent and severity of blooms⁵);
- Research that the scientific community and U.S. EPA itself have developed over decades regarding the threats that algal blooms pose to these waters, and the data they have collected providing significant evidence that western Lake Erie is impaired. *See, e.g.*, A.R. at 2412-2413, Marni Nord, U.S. EPA Region 5 et al., *Technical Memorandum, 2010 National Coastal Condition Assessment, Great Lakes 12-13* (Apr. 2016) (concluding based on 2010 water sampling data that significant areas of western Lake Erie are in poor condition based on chlorophyll a and phosphorus concentrations indicative of excessive algae growth); and
- Dozens of water quality samples showing microcystin at levels well above Ohio's recreational health advisory level of 6 µg/l in locations including the open waters of western Lake Erie. A.R. at 4631, NOAA GLERL, *Lake Erie Microcystin Sampling Data*, https://www.glerl.noaa.gov/res/HABs_and_Hypoxia/WLEMicrocystin2015.html (last visited Jan. 8, 2018) (showing intermittent elevated concentrations of microcystin in western basin sampling locations since 2009); *see also* A.R. at 850,⁶ NOAA GLERL, *Particulate Microcystin Data, Western Basin of Lake Erie* (2017) (showing elevated concentrations of microcystin in western basin sampling locations all but one year from 2008 to 2016); A.R. at 4636,⁷ Stone Lab Algal and Water Quality Laboratory, *Charter*

⁵ Note that the link to this website included in the Integrated Report is <https://www.glerl.noaa.gov/res/Centers/HABS>. The link for this website appears to have been updated to https://www.glerl.noaa.gov/res/HABs_and_Hypoxia/lakeErieHABArchive.

⁶ See the website provided at A.R. 4631, https://www.glerl.noaa.gov/res/HABs_and_Hypoxia/WLEMicrocystin2015.html, for specific sample results and map showing sampling locations throughout western Lake Erie.

⁷ As indicated in the Certified Index to the Administrative Record at 10, this data is available for

Boat Captains Help Monitor Lake Erie Water Quality [hereinafter *Charter Boat Sampling Data*] (Ohio State University database providing 2013-2016 water quality sampling data including microcystin, chlorophyll, total phosphorus, and blue-green algae measurements); A.R. at 6944, U.S. EPA, *Lake Erie Charter Boat/Stone Labs—Total Microcystin Data* (2017) (graphing microcystin data from *Charter Boat Sampling Data*).

Moreover, U.S. EPA has substantial experience in conducting impairment evaluations for water bodies where a state has failed to do so adequately. Even a cursory search of the Federal Register provides dozens of examples of impairment listings conducted by U.S. EPA after disapprovals of state Section 303(d) Lists, dating back more than two decades. *See, e.g.*, Clean Water Act Section 303(d): Availability of List Submissions and Proposed Decisions, 58 Fed. Reg. 28,569 (May 14, 1993); Clean Water Act Section 303(d): Availability of List Decisions, 67 Fed. Reg. 76,404 (Dec. 12, 2002); Clean Water Act Section 303(d): Availability of List Decision, 73 Fed. Reg. 16,301 (Mar. 27, 2008); Clean Water Act: Availability of List Decisions, 81 Fed. Reg. 35,350 (June 2, 2016). These include listings based on impairment by nutrient pollution, and at least one prior listing after disapproval of an impairment determination by Ohio EPA. *See, e.g.*, Clean Water Act Section 303(d): Availability of List Decisions, 80 Fed. Reg. 9456 (Feb. 23, 2015); Clean Water Act Section 303(d): Availability of List Decisions, 74 Fed. Reg. 12,848 (Mar. 25, 2009); EPA Identification of Additional Waters to be Added to Virginia's 1998 Clean Water Act Section 303(d) List of Impaired Waters, 63 Fed. Reg. 71,919 (Dec. 30, 1998); Preliminary Listing of Additional Waters to Ohio's 2002 List of Waters Under Section 303(d) of the Clean Water Act, 68 Fed. Reg. 51,012 (Aug. 25, 2003).

Thus, U.S. EPA is fully equipped to swiftly carry out its legal obligations under 33 U.S.C. § 1313(d) and 40 C.F.R. § 130.7(d)(2). The same cannot be said for Ohio EPA. The

download in spreadsheet format from Ohio State University's website at <https://ohioseagrant.osu.edu/download/cvbb9> (last visited Jan. 8, 2018).

state has expressly stated that it believes it lacks the scientific tools to evaluate Harmful Algal Blooms on Lake Erie and prefers U.S. EPA to conduct an impairment assessment for the open waters. Ohio EPA Response Letter at 2, 3 (A.R. at 2474, 2475).

Only a court order holding U.S. EPA to fulfill its duty on the statutorily mandated timeline is sufficient to ensure (belated) compliance with the CWA. The approach proposed in the Withdrawal Letter offers no certainty or accountability. The letter merely “requests” that Ohio EPA belatedly conduct an impairment assessment for the open waters of western Lake Erie by April 9, 2018, and provides no timeframe for U.S. EPA’s further “consideration” of that submission or other necessary steps should it prove inadequate once again. Ex. A at 1-2. There is nothing enforceable in this letter, nor does it provide a basis for judicial intervention if Ohio EPA does not reverse course and comply with the CWA. A federal district court in Washington found a similarly informal “Memorandum of Understanding” to be inadequate to implement the Clean Water Act’s requirements with respect to state development of TMDLs, concluding “that standing alone the MOU will not secure faithful compliance with the CWA.” *Alaska Ctr. for Env’t v. Reilly*, 796 F. Supp. 1374, 1379 (W.D. Wash. 1992), *aff’d sub nom. Alaska Ctr. for Env’t v. Browner*, 20 F.3d 981 (9th Cir. 1994).

Fundamentally, the Withdrawal Letter does nothing to implement the requirements of the Clean Water Act or ensure that an impairment assessment will be quickly completed for the open waters of western Lake Erie (albeit four years later than it should have been). Only an order from this Court, providing an enforceable timeline for U.S. EPA to complete the necessary impairment evaluation within 30 days, will adequately carry out the statute’s mandates and put Lake Erie back on a course to achieve Ohio water quality standards. The Court has full authority to do so in order to faithfully implement the CWA. *Alaska Ct. for Env’t*, 20 F.3d at 987 (“In

enacting environmental legislation, . . . Congress can only act as a human institution, lacking clairvoyance to foresee the precise nature of agency dereliction of duties that Congress prescribes. When such dereliction occurs, it is up to the courts in their traditional, equitable, and interstitial role to fashion the remedy.”).

V. CONCLUSION

After waiting more than fourteen months to effectively disapprove of Ohio EPA’s deficient 2016 303(d) impaired waters list, U.S. EPA seeks to evade its consequent responsibilities under the Clean Water Act by once again passing the buck back to the state. U.S. EPA’s excuse for doing so – that it has not made a disapproval and instead has “withdrawn approval” – is wholly inconsistent with the language of both 33 U.S.C. § 1313(d)(2) and 40 C.F.R. § 130.7(d)(2), which offer no option besides approval or disapproval. Plaintiffs therefore respectfully request that the Court rule that U.S. EPA’s “withdrawal” of its approval in fact constitutes a disapproval of Ohio EPA’s impairment determination for the open waters of western Lake Erie, and order U.S. EPA to itself conduct an impairment assessment of those waters within 30 days. That remedy will finally put Lake Erie back on track to healthy water without any further unnecessary delay.

Respectfully Submitted,

/s/Madeline Fleisher

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2018, a copy of the foregoing, *Plaintiffs' Supplemental Motion for Summary Judgment*, 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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