

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

ENVIRONMENTAL LAW & POLICY)
CENTER and BOARD OF LUCAS COUNTY)
COMMISSIONERS,)

Plaintiffs,)

v.)

UNITED STATES ENVIRONMENTAL)
PROTECTION AGENCY, et al.,)

Defendants.)

Case No. 3:19-cv-00295
and consolidated case
Hon. James G. Carr

CONSENT DECREE

WHEREAS, the Parties to this Consent Decree are Plaintiffs Environmental Law & Policy Center, and Board of Lucas County Commissioners (“Lucas County Board”) (collectively, “Plaintiffs”), Defendants the United States Environmental Protection Agency (“U.S. EPA”), Michael S. Regan in his capacity as Administrator of the U.S. EPA, and Debra Shore in her official capacity as Regional Administrator of the U.S. EPA, Region 5 (collectively, “Defendants”), and Intervenor-Defendant the State of Ohio (“Ohio”);

WHEREAS, Ohio’s revised 2016, 2018, and 2020 lists of impaired waters under Section 303(d) of the Clean Water Act identified Lake Erie’s western basin shoreline, western basin open water, and islands shoreline assessment units as impaired for public drinking water supply and recreation uses due to algae, and Lake Erie’s western basin shoreline and islands shoreline assessment units as impaired for aquatic life use due to nutrients;

WHEREAS, Plaintiffs Environmental Law & Policy Center and Advocates for a Clean Lake Erie filed Case No. 03:19-cv-00295 in the United States District Court for the Northern District of Ohio (Judge James G. Carr) alleging violations of the Administrative Procedure Act (5 U.S.C. § 706(2)(A)), and the Clean Water Act (33 U.S.C. § 1313(d)(2)). Among other relief, Plaintiffs sought a declaration that Ohio made a “constructive submission” of no Total Maximum Daily Load (“TMDL”) for the Western Basin of Lake Erie, and a compliance schedule for U.S. EPA to address the Western Basin of Lake Erie’s impairment under Section 303(d) of the Clean Water Act.

WHEREAS, Plaintiff Lucas County Board filed identical claims against Defendant U.S. EPA in Case No. 03:19-cv-00873, which was consolidated into Case No. 3:19-cv-00295 by the Court’s Order dated June 21, 2019;

WHEREAS, the Court denied the Defendant U.S. EPA's motion to dismiss Plaintiffs' claims in the Court's Opinion and Order dated November 13, 2019;

WHEREAS, Ohio then issued its 2020 Integrated Report on February 13, 2020, which assigned a high priority for establishing a TMDL to address certain Lake Erie assessment units for impairments to public drinking water supply and recreation uses due to algae;

WHEREAS, Ohio has since begun development of a TMDL for the Maumee Watershed to address these impairments;

WHEREAS, with permission from the Court, Ohio filed an *amicus curiae* brief and participated in status conferences;

WHEREAS, on September 20, 2021, and on March 28, 2022, Plaintiffs, Defendants, and representatives of Ohio and the City of Toledo participated in a mediation conducted by Judge Dan Aaron Polster of the United States District Court for the Northern District of Ohio;

WHEREAS, on March 7, 2023, Ohio intervened as an Intervenor-Defendant to become a Party to this Consent Decree and to be bound by its terms;

WHEREAS, on January 27, 2023, U.S. EPA issued a letter offering a technical meeting with Plaintiffs to discuss Ohio's implementation of the National Pollutant Discharge Elimination System with respect to concentrated animal feeding operations; and

WHEREAS, the Parties consider this Consent Decree to be a fair, reasonable, and equitable resolution of the Plaintiffs' claims raised in the above-captioned lawsuit.

NOW, THEREFORE, the Parties agree as follows:

1. **Jurisdiction and Venue.** The Court has subject matter jurisdiction under 28 U.S.C. § 1365 and 33 U.S.C. § 1331. Venue is appropriate under 28 U.S.C. § 1391(e).
2. **Preparation of TMDL.** By no later than December 31, 2022, Ohio shall prepare and release for public notice and comment a draft TMDL for the Maumee River Watershed that is designed to address nutrient and algae impairments for drinking water, aquatic life, and recreational uses in Ohio's Western Lake Erie Assessment Units (Shoreline, Open Waters and Island Shorelines) ("Maumee Watershed Nutrient TMDL") and accompanying implementation plan as required by Ohio Administrative Code § 3745-2-12(E).
3. **Submission of TMDL.** By no later than June 30, 2023, Ohio shall submit its final Maumee Watershed Nutrient TMDL to U.S. EPA for its review and action pursuant to 33 U.S.C. § 1313(d)(2), and as part of that package Ohio shall also submit its final TMDL implementation plan referred to in Paragraph 2 (Preparation of TMDL).
4. **U.S. EPA Review of TMDL.** Under 33 U.S.C. § 1313(d)(2), U.S. EPA must approve or disapprove Ohio's Maumee Watershed Nutrient TMDL within 30 days after its submission by Ohio to U.S. EPA. Plaintiffs agree that they will not object to U.S. EPA

taking up to an additional 60 days to issue such approval or disapproval, and U.S. EPA agrees to issue its approval or disapproval within that time period.

5. **U.S. EPA Disapproval of TMDL.** If U.S. EPA disapproves Ohio's Maumee Watershed Nutrient TMDL, and if within 30 days of that disapproval U.S. EPA does not establish a federal TMDL that is designed to address nutrient and algae impairments for drinking water, aquatic life, and recreational uses in Ohio's Western Lake Erie Assessment Units (Shoreline, Open Waters, and Island Shorelines), Plaintiffs agree that they will not object to U.S. EPA taking up to five additional months from the date of its disapproval to establish such a federal TMDL, and U.S. EPA agrees to establish a federal TMDL within that time period.
6. **Failure of Ohio to Submit TMDL on Time.** If Ohio fails to submit a Maumee Watershed Nutrient TMDL to U.S. EPA by June 30, 2023, U.S. EPA shall establish a federal TMDL that is designed to address nutrient and algae impairments for drinking water, aquatic life, and recreational uses in Ohio's Western Lake Erie Assessment Units (Shoreline, Open Waters, and Island Shorelines) by no later than six months after the expiration of Ohio's deadline for submitting its final Maumee Watershed Nutrient TMDL.
7. **Extension of Deadlines.** Except as provided in Paragraph 18 (Force Majeure), the deadlines in Paragraphs 2 through 6 of this Consent Decree may be extended only upon the Court's written finding of good cause in response to a motion for an extension of time filed in conformance with Local Rule 7.1.
8. **Ohio's Obligations.** The obligations of Ohio under this Consent Decree shall solely be limited to the preparation and submission of the Maumee Watershed Nutrient TMDL and accompanying implementation plan as set forth in Paragraphs 2 and 3 of this Consent Decree. No provision of this Consent Decree shall be deemed to alter Ohio's obligations under federal or state law.
9. **Finding of Constructive Submission.** A court order denying Ohio's motion to extend Ohio's deadline to submit a Maumee Watershed Nutrient TMDL, filed under Paragraph 7 (Extension of Deadlines), shall be deemed a finding that Ohio has constructively submitted no Maumee Watershed Nutrient TMDL, which will trigger U.S. EPA's obligation under Paragraph 6 (Failure of Ohio to Submit TMDL on Time).
10. **Reporting.** Every six months until the termination of this Consent Decree, U.S. EPA and Ohio shall file a joint status report with the Court describing: (a) the current status of the Maumee Watershed Nutrient TMDL, including tasks completed during the six-month reporting period and plans for the next six-month reporting period; and (b) progress made on efforts to achieve water quality standards for Western Lake Erie. The first such report is due six months after the Effective Date of this Consent Decree.
11. **Status Conferences.** Simultaneous with the filing of each joint status report required by Paragraph 10 (Reporting), U.S. EPA and Ohio shall file a motion for a status hearing. U.S. EPA and Ohio shall consult with Plaintiffs and the Court regarding scheduling prior to filing the motion required by this Paragraph.

12. **Attorneys' Fees and Costs.** Plaintiffs are "prevailing parties" in this lawsuit as defined by 33 U.S.C. § 1365 (d), and thus are each entitled to recover from the United States their reasonable attorneys' fees and costs in bringing the above-captioned lawsuit. Plaintiffs may file with the Court any request for attorneys' fees and costs at any time after the Effective Date of this Consent Decree. Defendants shall have forty-five (45) days to file a response to Plaintiffs' fee request. Payment of fees and costs pursuant to this Paragraph shall constitute payment in full of any and all attorneys' fees, costs, and expenses to which Plaintiffs may be entitled in these consolidated cases through the date of payment of such fees, costs, and expenses.
13. **Retention of Jurisdiction.** The Court shall retain jurisdiction over this case after entry of this Consent Decree solely for purposes of enforcing the terms and conditions of this Consent Decree, or modifying the terms of this Consent Decree pursuant to Paragraph 26.
14. **Scope of Consent Decree.** The Parties agree that the TMDL obligations in Paragraphs 2 through 6 are intended to culminate in Ohio's submission of, and U.S. EPA's approval or establishment of, a TMDL designed to address nutrient and algae impairments for drinking water, aquatic life, and recreational uses in Ohio's Western Lake Erie Assessment Units (Shoreline, Open Waters, and Island Shorelines). The Parties agree that the legal sufficiency or adequacy of that TMDL – or of U.S. EPA's approval or establishment thereof – is not limited by this Consent Decree. Plaintiffs reserve all rights to challenge any such approval or establishment outside the above-captioned case under applicable law, and Defendants and Ohio reserve all defenses to any such challenge.
15. **No Admissions.** Except as expressly provided herein, nothing in this Consent Decree shall be construed as an admission by any Party of any issue of fact or law.
16. **Effect of Consent Decree.** Except as expressly provided herein, nothing in this Consent Decree is meant to change the obligations of U.S. EPA and Ohio under the existing laws or regulations, or to change U.S. EPA's existing guidelines for review of TMDLs.
17. **Appropriated Funds.** No provision of this Consent Decree shall be interpreted as or constitute a commitment or requirement that Defendants obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. §§ 1341, et seq., or any other applicable federal statute.
18. **Force Majeure.** A Party's failure to comply with its obligations under this Consent Decree may be excused only if, and to the extent, the failure is caused by circumstances or events entirely beyond the non-complying Party's control ("Force Majeure Event"). Such situations include, but are not limited to, a federal government shutdown due to a lapse in appropriations. If a Party's performance is delayed by a Force Majeure Event, the deadline for performance will be extended one day for each day of delay caused by the Force Majeure Event. A Party intending to invoke this paragraph shall give the other Parties notice of that intention, and any dispute regarding such invocation shall be resolved in accordance with the dispute resolution process set forth in Paragraph 19 (Dispute Resolution).

19. **Dispute Resolution.** In the event of a dispute among the Parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing Party shall provide the other Parties with a written notice outlining the nature of the dispute and requesting informal negotiations. If the Parties cannot reach an agreed-upon resolution within thirty (30) days after receipt of the notice, any Party may move the Court to resolve the dispute.
20. **Effective Date.** This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court does not enter this Consent Decree, the obligations set forth in this Consent Decree are null and void.
21. **Termination.** When Ohio's and U.S. EPA's obligations under Paragraphs 2 through 6 have been fully discharged and U.S. EPA has paid Plaintiffs' Attorneys' Fees under Paragraph 12 (Attorneys' Fees and Costs), this Consent Decree shall terminate. The Parties shall file the appropriate notice with the Court so that the Clerk may close the file.
22. **Notices.** Any notices required or provided for by this Consent Decree shall be made in writing, via electronic mail, or if electronic mail is infeasible due to the nature of the notice, by U.S. mail, and sent to the following:

For Plaintiffs Environmental Law & Policy Center:

Howard A. Learner
Robert Michaels
Environmental Law & Policy Center
35 E. Wacker Dr., Suite 1600
Chicago, IL 60601
hlearner@elpc.org
rmichaels@elpc.org

For Plaintiff Lucas County Board:

Fritz Byers
414 N. Erie St., 2nd Floor
Toledo, OH 43604
fritz@fritzbyers.com

For Defendants:

MailProcessing_EDS.ENRD@usdoj.gov
Re: DJ # 90-5-1-4-21402

and

Guillermo J. Rojas
U.S. Attorney's Office
Four Seagate, 3rd Floor

433 N. Summit St., Suite 308
Toledo, OH 43604-2624
grojas@usa.doj.gov

For Ohio:

Amber Wootton Hertlein
Principal Assistant Attorney General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Amber.Hertlein@OhioAGO.gov

23. **Successors and Assigns.** This Consent Decree shall be binding upon the successors and assigns of the Parties. No assignment or delegation by a Party of its obligations under this Consent Decree will release the assigning Party without the prior written consent of the other Parties and the Court's approval.
24. **Advice of Counsel.** Each Party represents and warrants that this Consent Decree has been negotiated in good faith and that it has sought and obtained any appropriate legal advice it deems necessary prior to entering into this Consent Decree.
25. **Necessary Authorizations.** Each Party represents and warrants to each other Party that it has all necessary authorizations and all other actions have been taken such that execution, delivery and performance of this Consent Decree and all other actions taken or to be taken in connection with this Consent Decree have been fully authorized.
26. **Modification.** The names and contact information in Paragraph 22 (Notices) may be modified by the written agreement of the Parties. All other provisions of this Consent Decree may be modified only by the written agreement of the Parties and the approval of the Court.
27. **Counterparts.** This Consent Decree may be signed in counterparts and such counterpart signature pages shall be given full force and effect.
28. **Entire Agreement.** This Consent Decree embodies the entire agreement and understanding of the Parties with respect to the subject matter herein, and supersedes any and all prior agreements, arrangements and understandings entered into with respect to the subject matter herein.

29. **Judgment.** Entry of this Consent Decree by the Court shall constitute a final judgment in the above-captioned lawsuit, and a complete and final settlement of all claims that were or could have been asserted by Plaintiffs in their Complaints.

SO ORDERED this ____ day of _____, 2023

BY THE COURT:

Honorable James G. Carr
United States District Judge

For Environmental Law & Policy Center:

By: Howard LEARNER

Title: Executive Director

Dated: October 4, 2022

For Board of Lucas County Commissioners:

By: Tracy Brown

Title: General Counsel

Dated: 4 OCTOBER 2022

For Defendants:

By: 

Title: Trial Attorney
Environmental Defense Section

U.S. Department of Justice

Dated: March 20, 2023

For the State of Ohio:

By: 

Title: Assistant Attorney General

Dated: March 8, 2023