

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

ENVIRONMENTAL LAW AND)	
POLICY CENTER, et al.,)	
)	
Plaintiffs,	)	CASE NO. 3:17-CV-1514
)	
v.)	
	)	JUDGE JAMES G. CARR
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
	)	Memorandum of Lake Erie Foundation as
Defendants.	)	<i>Amici Curiae</i> In Support of Plaintiffs’
	)	Motion for Leave to File Supplemental
	)	Complaint
)	
	)	Megan M. Hunter (0096035)
	)	Hunter & Hunter LLC
	)	640 Ardleigh Dr.
	)	Akron, Ohio 44303
	)	Telephone: 234-281-2528
	)	Fax: 330-805-4518
)	
	)	<i>Counsel for Amici Curiae Lake Erie</i>
	)	<i>Foundation</i>

Memorandum In Support of Plaintiffs’ Motion for Leave to File Supplemental Complaint

Lake Erie Foundation (“LEF”), as *Amici Curiae*, submits this memorandum in support of Plaintiffs’ *Motion to File a Supplemental Complaint*. For the reasons discussed *infra*, LEF urges this Court to grant Plaintiffs’ *Motion to File a Supplemental Complaint*.

For over a decade the Ohio Environmental Protection Agency (“Ohio EPA”) and the United States Environmental Protection Agency (“U.S. EPA”) have each pointed to the other as justification for the abrogation of their respective responsibilities in establishing a Total Maximum Daily Load (“TMDL”) for western Lake Erie. Indeed, deferral has consistently been a central tenet of correspondence between the two agencies, with Ohio EPA deferring to U.S.

EPA to take the lead regarding Lake Erie TMDL development since its first 303(d) list submission in 2002, and in all subsequent 303(d) list submissions. Likewise, U.S. EPA has continuously deferred to Ohio EPA's decision to not designate Lake Erie as impaired until the present lawsuit urged both agencies to finally attend to their Clean Water Act ("CWA") duties.

The most recent 303(d) submission by Ohio EPA, and US EPA's subsequent approval of that submission, demonstrates that Ohio EPA and U.S. EPA remain stuck in this pattern of deferral, and that, left to their own devices, these agencies will only further interminably delay the creation and implementation of a TMDL for western Lake Erie—which is not only required by the CWA, but is urgently needed by the Lake and all who use and rely on it, whose interests LEF represents.

I. Participation in a legally unenforceable binational executive agreement does not meet the statutory mandates of the Clean Water Act

In its 2014 Integrated Report, and again in its 2016 Integrated Report Amendment (submitted May 4, 2018), Ohio EPA has stated that the Great Lakes Water Quality Agreement ("GLWQA") is the appropriate process for addressing HABs in Lake Erie. 2016 Integrated Report Amendment at 9. In its most recent submission, Ohio EPA even acknowledges that a TMDL will "ultimately be required" "if the current collaborative processes fail." *Id.* However, Ohio EPA cannot indefinitely substitute action under a legally-nonbinding binational cooperative agreement for the explicit requirements of Federal law. The CWA explicitly states that a state must establish a TMDL for any impaired water in accordance with that water body's priority ranking. 33 U.S.C. §1313(d)(1)(C); 40 C.F.R. §130.7(c)(1). While "[s]tates may pursue reasonable courses to reducing pollution in addition to establishing TMDLs...nothing in the CWA provides that states may pursue these courses in place of, or as a means of indefinitely delaying, a TMDL." *Sierra Club v. McLerran*, No. 11-CV-1759-BJR, 2015 WL 1188522, at *12.

Yet predictably, U.S. EPA again deferred to Ohio's judgment, approving Ohio's clear and unambiguous decision to not submit a TMDL, or even a schedule for creating a TMDL, for western Lake Erie—a high priority, impaired water body. This decision was arbitrary, capricious, an abuse of discretion, and not in accordance with the law under CWA section 303(d) and 40 C.F.R. § 130.7—which require a state to establish a TMDL for any impaired water in accordance with that water body's priority ranking. Furthermore, courts have upheld the doctrine of “constructive submission” to ensure the CWA is not “reduced to empty formalism” and “rendered a dead letter by state subterfuge and recalcitrance.” *American Canoe Ass'n, Inc. v. U.S. E.P.A.*, 54 F.Supp.2d 621, 629 (1999). Ohio's behavior with regard to Lake Erie is precisely the type of “state subterfuge and recalcitrance” the constructive submission doctrine was intended to prohibit.

In addition to the fact that Ohio EPA cannot substitute its activities under the GLWQA for its statutorily required duty to create a TMDL for western Lake Erie, Ohio EPA's efforts under the GLWQA have clearly failed to reduce nutrient pollution in western Lake Erie, and there is not one scintilla of evidence suggesting that these previously ineffective efforts will somehow eventually lead to the 40% reduction of nutrient loading in western Lake Erie.

Lake Erie has had record algal blooms in five of the last seven years, and the algal blooms have only become increasingly extensive since the early 2000s. Jugal K. Patel and Yuliya Parshina-Kotas, *Miles of Algae Covering Lake Erie*, The New York Times, (Oct. 3, 2017), <https://www.nytimes.com/interactive/2017/10/03/science/earth/lake-erie.html>. A recent Ohio E.P.A. study determined the Maumee watershed had the highest phosphorous and nutrient loading in 2017 that has ever been reported and that there has been no discernible decrease in

phosphorous and nutrient loading to Lake Erie. Division of Surface Water, Ohio E.P.A., *Nutrient Mass Balance Study for Ohio's Major Rivers*, at 2 (April 16, 2018), http://epa.ohio.gov/Portals/35/documents/Nutrient%20Mass%20Balance%20Study%202018_Final.pdf.

The GLWQA is not comparable to a TMDL, let alone an adequate substitute for one. In addition to the unique and critical qualities of TMDLs outlined by Plaintiffs in their *Motion to File a Supplemental Complaint* (Mot. at 8), Lake Erie Foundation emphasizes that a TMDL is effective because a TMDL provides the accountability that is lacking in efforts under the GLWQA or under Ohio's recently proposed "Watershed in Distress" designation. See Executive Order 2018-09K Taking Steps to Protect Lake Erie (July 11, 2018), <http://governor.ohio.gov/Portals/0/executiveorders/Signed%20EO%202018-09K.pdf?ver=2018-07-11-160429-970×tamp=1531339482234>. Ohio currently has one designated "Watershed in Distress"—Grand Lake St. Marys—which was designated as such by the Ohio Department of Natural Resources in 2011. Since the designation, Grand Lake St. Marys has consistently been labeled as unsafe for recreational contact during the summer months, demonstrating that a "Watershed in Distress" designation does not provide the accountability necessary to restore and maintain our water bodies and is no substitution for a TMDL.

II. A TMDL is the only proven means of successfully addressing HABs in multijurisdictional waters

The only successful example of addressing HABs in multijurisdictional waters belies Ohio EPA's argument that unenforceable action under the GLWQA can address Lake Erie's nutrient and phosphorous loading problem.

From 1983 to 2010—twenty-seven years—Maryland, Pennsylvania, Virginia, the District of Columbia, the Chesapeake Bay Commission, and the U.S. EPA attempted to use

formal agreements containing plans for pollution reduction, goals, priorities, and even dates for pollution reduction, to address pollution problems in the Chesapeake Bay. *See* The Chesapeake Bay Agreement of 1983, https://www.chesapeakebay.net/documents/1983_CB_Agreement2.pdf; 1987 Chesapeake Bay Agreement, https://www.chesapeakebay.net/content/publications/cbp_12510.pdf; 2000 Chesapeake Plan, https://www.chesapeakebay.net/documents/cbp_12081.pdf. Each of these agreements failed to reduce pollution in the Chesapeake Bay.

December 29, 2010, U.S. EPA established the Chesapeake Bay TMDL, a comprehensive “pollution diet” that spans six states, including the District of Columbia. U.S. EPA, *Chesapeake Bay Total Maximum Daily Load for Nitrogen, Phosphorous, and Sediment* (Dec., 29, 2010), <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-tmdl-document>. The most recent assessment of the efficacy of the Chesapeake Bay TMDL demonstrates that the Bay is experiencing the highest water quality standards attained in over 30 years, that important biota is returning, and that considerable measurable progress has been made in reducing pollution to the Bay and its watershed. U.S. EPA, *Midpoint Assessment of the Chesapeake Bay Total Maximum Daily Load* (2017) at 1, <https://www.epa.gov/sites/production/files/2018-07/documents/factsheet-epa-midpoint-assessment-chesapeake-bay-tmdl.pdf>.

The effect of the Chesapeake Bay TMDL provides powerful evidence that the CWA’s requirement that a TMDL be established for all impaired waterbodies is not merely an exercise in fulfilling statutory and regulatory mandates. Rather, it is a critical component of achieving the CWA’s stated objective “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

This Court should not permit Ohio EPA and U.S. EPA to commit Lake Erie to indefinite

delay in addressing its urgent HAB problem when an effective means of addressing the problem—a TMDL— not only exists, but is required by law under CWA section 303(d) and 40 C.F.R. § 130.7. Denying Plaintiffs’ *Motion to File a Supplemental Complaint* would again resign Lake Erie to such a fate, further delaying this necessary and available step that is fully within the Court’s discretion to address at this time.

III. Granting Plaintiffs’ *Motion to File a Supplemental Complaint* promotes judicial economy and convenience by avoiding piecemeal litigation and permitting the prompt resolution of the entire controversy at issue

Without strong agency action, neither the HAB problem in western Lake Erie, nor users’ desire to address it, are going anywhere. The history of Ohio EPA and U.S. EPA’s inaction regarding designating Lake Erie as impaired, including Ohio EPA’s most recent submission and U.S. EPA’s approval of it, also suggests that, without Court intervention, neither agency is likely to timely work toward establishing a TMDL for Lake Erie. Thus, the central issue of whether U.S. EPA is required to establish a TMDL for Lake Erie is likely to be litigated in one form or another, either in the present matter or through subsequent piecemeal litigation.

“Leave to permit supplemental pleading is generally favored as it promotes the efficient resolution of disputes and avoids the cost and delay of filing a new action.” *Keith v. Volpe*, 858 F.2d 467, 473 (9th 1988). Granting Plaintiffs’ *Motion to File a Supplemental Complaint* promotes judicial economy and convenience given that this central controversy remains alive and ongoing and was in no way rendered moot by Ohio EPA 2018’s Integrated Report, which is only the latest iteration of this ongoing controversy.

Respectfully submitted,

/s/ Megan M. Hunter
Megan M. Hunter (0096035)
Hunter & Hunter LLC
640 Ardleigh Dr., Akron, OH 44303
Telephone: 234-281-2528
Fax: 330-805-4518
megan@hunterfirm.org

Counsel for Lake Erie Foundation