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CLEAN WATER IS OUR RIGHT!

Declaring Western Lake Erie Impaired: A Legal Timeline

Under the provisions of the Clean Water Act (CWA), state EPAs are required to put heavily polluted or “impaired” bodies of water on a “303.d” list sent biannually to the USEPA. Doing so begins an inventory of pollution sources and amounts, followed by mandatory timetables and pollution limits or Total Maximum Daily Loads (TMDLs). For several years prior to 2016, organizations like Lake Erie Waterkeeper submitted information to the Ohio and USEPA detailing why the lake’s western basin should be declared impaired. OEPA routinely refused and the USEPA refused to step in. In 2017, the Environmental Law & Policy Center and ACLE filed a complaint in U.S. District Court, asking the court to order the USEPA to list the open waters of western Lake Erie “impaired.”

2011

Environment Canada and USEPA report that “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.” Large blooms of microcystis bacteria and algae recur every summer.

2014

March: Ohio EPA, in its biannual “Integrated Report” to the USEPA, refuses to list western Lake Erie impaired, pending collection of additional data.

August: Elevated microcystin levels in Toledo’s water supply prompt a “Do Not Drink” emergency for 400,000 people for nearly three days.

2015

August: USEPA finally approves Ohio’s March, 2014 303.d list that omits western Lake Erie, but “...expects Ohio EPA to fully assess...and to assemble and evaluate all existing and readily available data, including EPA data, for the 2016 Integrated Report and listing cycle.”

2016

July: OEPA’s draft Integrated Report (due in April) refuses to assess the open waters of western Lake Erie, asserting that the USEPA should be responsible for doing so.

August: USEPA responds to OEPA’s draft report, rejecting it as inconsistent with the Clean Water Act.

September: OEPA responds, repeating that it will not “unilaterally develop assessment methods” for its portion of Lake Erie, stating, “we will not discuss or propose further listings until there are [such] scientific tools” available to assess impairment.

2017

March: USEPA sends OEPA a letter recognizing that “Ohio has yet to assess the open waters of Lake Erie for algal impairment.”

May: Regardless of its March letter, USEPA formally approves Ohio’s 2016 impairment list, stating 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,” thereby delaying the assessment of the open waters for two more years.

July: Environmental Law & Policy Center, Advocates for a Clean Lake Erie, Mike Ferner and Susan Matz file a complaint challenging USEPA’s approval of OEPA’s 2016 impairment list.

2018

January 15: One day before Plaintiffs’ Motion for Summary Judgment was due to be filed and on a federal holiday – USEPA provided Plaintiffs with its “Withdrawal Letter” in which it admits that its May 2017 approval of OEPA’s refusal to list the open waters of western Lake Erie as impaired was not consistent with the Clean Water Act.

January 31: Plaintiffs file a supplemental Motion for Summary Judgment, stating the USEPA’s inaction “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,” adding, “The remedy for an admittedly illegal delay is not more delay.”

March 6: Oral arguments scheduled before U.S. Judge James Carr, U.S. District Court in Toledo.

March 22: OEPA reverses itself and lists open waters of Western Lake Erie “impaired” in its draft Integrated Report to the USEPA with the peculiar statement that, “This first-time assessment of Lake Erie was completed because the Kasich Administration requested input from representatives from The Ohio State University Sea Grant College Program, Bowling Green State University, University of Toledo, National Oceanic and Atmospheric Administration (NOAA) and U.S. EPA to identify a science-based process for assessing impairment in Ohio’s Western Basin open waters for harmful algae. To date, no such process has existed, so Ohio has not been able to determine if the open waters of Lake Erie should be listed...”

This, despite all the evidence, including shutting off water for a half-million people and more than a decade of satellite photos like these:



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April 11: Judge Carr gives the U.S. EPA 30 days to reconsider its failure to challenge the Ohio EPA's controversial Oct. 20, 2016, finding that the open water of western Lake Erie did not meet criteria the state agency believed was necessary under the Clean Water Act to be designated as impaired.

April 13: OEPA Director, Craig Butler, tells the Blade he has requested Ohio Rep. Steve Arndt to introduce "[distressed watershed](#)" legislation, backing away from Clean Water Act provisions.

April 18: OEPA Dep. Director, Karl Gebhardt backs away from the "impaired watershed" provisions of the Clean Water Act, telling the Lake Erie Commission meeting, "Our position is a [TMDL still is not necessary](#) for the lake. It would take a considerable amount of time and would generate many lawsuits similar to what happened in the Chesapeake Bay."

April 19: ACLE responds, saying OEPA is a "[wholly-owned subsidiary of the Farm Bureau](#) and the factory 'farm' owners who destroy our lake to increase their profitability."

5/11/2018