Shumaker

DECEMBER 6, 2019 | PUBLICATION

Client Alert: Non-Governmental Organizations (NGOs) Seek to Compel U.S. EPA to act on Ohio EPA's Submission of its List of Impaired Waters in Federal District Court

INDUSTRY SECTOR

Environmental & Energy

SERVICE LINE

Environmental & Energy

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

On April 25, 2017, the National Wildlife Federation, Alliance for the Great Lakes, Lake Erie Charter Boat Association, Lake Erie Foundation, Michigan United Conservation Clubs, and Ohio Environmental Council (NGOs) filed a complaint in the U.S. District Court for the District of Columbia against U.S. EPA over U.S. EPA's failure to act on Ohio EPA's submission of its list of impaired waters (303(d) list) within 30 days after submission as required by the Clean Water Act. The NGOs are concerned with nutrient loading of the lake and the formation of hazardous algal blooms. The NGOs are seeking (1) a declaratory judgment that U.S. EPA failed to approve or disapprove of Ohio's 303(d) list within 30 days; (2) injunctive relief compelling U.S. EPA to approve or disapprove Ohio's 303(d) list; (3) an order that the court retain jurisdiction until U.S. EPA complies with an injunction; and (4) Plaintiffs' cost of litigation.

Background

The State of Ohio consists of the Lake Erie Water Basin and the Ohio River Water Basin.[1] Ohio has 45 watersheds, more than 3,300 named rivers and streams, a large number of unnamed tributaries, and over 60,000 lakes, reservoirs, and ponds.[2] Of the approximately 26 million acres of land in Ohio, approximately 13.9 million acres are farmland.[3] There are also over 1,000 cities in Ohio, which are serviced by large and small publicly owned treatment works ("POTWs") and septic systems. Like many of the states in the Midwest, this landscape has contributed to nutrient loading in waters of the State, primarily through agricultural and fertilizer runoff, manure, POTW discharges, storm water runoff, and failing septic systems.

Nutrients produce algae, which is a food source for aquatic life; thus, some nutrients in the water support the ecosystem. However, excess nutrients can result in the development of algal blooms that can impair recreational use or even contain harmful toxins.[4] Toledo, Ohio made national news in 2014 when testing indicated an elevation in the algal toxin microcystin in the drinking water plant, which led to a "do not drink" advisory.[5] Excess algae can also interfere with the attainment status of biological criteria in Ohio.

Since 1978, Ohio EPA has had narrative Water Quality Standards (WQS) to address nutrients. Ohio Adm.Code 3745-1-04(E) requires waters to 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." In the statewide WQS, "(i)n areas where such nuisance growths exist, phosphorus discharges from point sources determined significant by the director shall not exceed a daily average of one milligram per liter as total P, or such stricter requirements as may be imposed by the director …."[6]

In addition, the regulations for individual National Pollution Discharge Elimination Permits ("NPDES") include the following nutrient regulations:

> (C) Phosphorus treatment.
>
> (1) Lake Erie basin. Any publicly owned treatment works (POTW) in the Lake Erie basin with a design flow of 1.0 million gallons per day or more, or designated as a major discharger by the director, must meet a total phosphorus discharge limit of 1.0 milligram per liter as a thirty-day average.
>
> (2) POTW and semi-public discharges to state lakes.Any POTW or semi-public discharger with a design flow of 0.2 million gallons per day or more that discharges to a publicly owned lake or reservoir must meet a total phosphorus discharge limit of 1.0 milligram per liter (thirty-day average).This limit also applies to discharges of this magnitude to a tributary of such lake or reservoir if the discharge would contribute significant loadings of phosphorus to the reservoir. This paragraph does not apply to discharges to upground reservoirs or privately owned lakes, or to point source discharges to Lake Erie.[7]

Ohio EPA has also been assessing the beneficial use designations of Ohio's waters and has identified areas that are impaired for nutrients. Ohio EPA has developed 241 Total Daily Maximum Loads (TMDLs) in targeted watersheds.[8] Until recently, Ohio EPA would use these TMDLs to develop NPDES permit limits to address the impairment. However, an Ohio Supreme Court decision has limited Ohio EPA's ability to impose permit limits based on approved TMDLs.[9] As a result of the Ohio Supreme Court decision, Ohio EPA is looking to propose legislation that would (1) allow the TMDLs that U.S. EPA previously approved to remain in place and (2) exempt any future TMDLs from the rulemaking process.[10] However, until this legislation is enacted, Ohio EPA must promulgate TMDLs as rules before imposing any permit limits on a point source.

What Is the Impact of this Lawsuit?

The initial decision of this lawsuit will not have an immediate impact on sources of nutrients. Instead, the lawsuit calls for declaratory and injunctive relief requiring U.S. EPA to approve or disapprove Ohio's 303(d) list of impaired waterbodies.

In its 2016 303(d) Report, Ohio EPA has listed the shoreline as impaired for the Public Drinking Water Supply Beneficial Use.[11] A listing of a water body as impaired requires Ohio EPA to develop TMDLs for point sources within the Lake Erie Basin. In developing a TMDL, Ohio EPA must assess what sources are contributing to impairment. Once contribution is assessed, Ohio EPA develops a waste load allocation (WLA) for each source, which limits the amount of nutrients that can be legally discharged through an NPDES permit. These limits could require a point source to install treatment controls to reduce the amount of nutrients the point source discharges.

Who would be impacted by an impaired status? Point sources within the Lake Erie Basin may be impacted including:

- Publicly Owned Treatment Works;
- Concentrated Feeding Operations that operate under an NPDES permit;
- Sources with storm water runoff;
- Septic systems; and
- Combined Sewer Overflow Systems.

While non-point source agriculture is exempt from regulation under the Clean Water Act, there have been some unique cases playing out at the federal level, which have attempted to regulate large agriculture activities under the Comprehensive Environmental Response, Compensation, and Liability Act. Thus, there is increasing pressure on the agricultural community to regulate nutrients. Despite this pressure, the burden will first be on traditional point sources of nutrients.

What Is the Solution to Reducing Nutrient Loads?

For point sources such as POTWs, implementation of pollution controls can be costly and technically infeasible. Many POTWs do not have the capital to install controls and ratepayers are not likely to welcome increased fees. Thus, there may be resistance by point sources in installing any additional controls for nutrient abatement.

The solution to this challenge may be as simple as a Nutrient Trading Program that utilizes Best Management Practices for non-point source trading. Ohio EPA has developed regulations that provide the framework for a voluntary Water Quality Trading Program. Ohio Adm.Code 3745-5. Several programs have been implemented in Ohio. For example, the Miami Conservancy District has partnered with many Agencies and Organizations and has set up a trading program in which it works with farmers to voluntarily change their farming practices. Each project generates credits, which can be used by POTWs to meet regulatory limits. The Miami Conservancy District ("MCD") reported that as of May 2014, there were 397 agricultural projects that generated more than 1.14 million credits and that $1.6 million have been paid to agricultural producers for these credits. The District estimates that there has been a 572 ton reduction in nutrient enrichment.[12] The Ohio River Valley Water Sanitation Commission ("ORSANCO") collaborated with the Electric Power Research Institute ("EPRI") to create a pilot trading program for nutrients, which generated about 90,000 credits for auction.[13]

While there is no doubt that there will be challenges to the development and implementation of a Nutrient Trading Program, this approach incentivizes participation by both point sources and non-point sources. Agricultural producers, whose participation is voluntary, are incentivized to change their farming practices

by receiving payment to produce credits. Point sources are incentivized to participate because the cost of credits is presumably much lower than the cost of installation of pollution controls. This approach also provides revenue to cover the cost of administrating the program. The only test to the success of a Trading Program is whether the implementation provides measurable reductions in impaired waters.

Shumaker, Loop & Kendrick, LLP will continue to follow this case and any development of TMDLs for nutrients in the Lake Erie Basin. If you have concerns about nutrient impairment in the watershed, please contact Cheri Budzynski.

---

[1] Ohio Department of Natural Resources ("ODNR"), *Ohio Watersheds & Drainage Basins Maps*, http://water.ohiodnr.gov/maps/watershed-drainage-basin-maps (last visited May 13, 2016).

[2] Ohio History Central, *Lakes, Rivers, and Canals*, http://www.ohiohistorycentral.org/w/Lakes,_Rivers_and_Canals?rec=1311 (last visited May 13, 2016).

[3] USDA, *2012 Census Volume 1, Chapter 2: State Level Data, Table 1*, p. 250, https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_001_001.pdf (last visited May 13, 2016).

[4] Great Lakes Water Quality Agreement Nutrients Annex Subcommittee, Recommended Binational Phosphorus Targets to Combat Lake Erie Algal Blooms, 2.17-2.19 (June 2015).

[5] Laura Arenschield, *Toledo Bearing Full Brunt of Lake Erie Algae Bloom*, The Columbus Dispatch (Aug. 4, 2014), http://www.dispatch.com/content/stories/local/2014/08/04/this-bloom-is-in-bad-location.html.

[6] Ohio Adm.Code 3745-01-07, Table 7-11, footnote c.

[7] Ohio Adm.Code 3745-33-06(C).

[8] Ohio EPA, Ohio Nutrient Reduction Strategy, p. 17 (June 28, 2013); Ohio EPA, Ohio Nutrient Reduction Strategy: 2015 Addendum, p. 8 (Jan. 2016).

[9] In Fairfield Cty. Bd. Of Comm'rs v. Nally, 143 Ohio St.3d 93 (Ohio 2015), the Supreme Court determined that TMDLs were rules that required Ohio EPA to provide notice to interested parties about the development of TMDLs, an opportunity to comment on the TMDLs, and an opportunity to appeal the TMDL once it is promulgated as a rule.

[10] Stephen P. Samuels, Guy M. Jamesson, and Elizabeth Toot-Levy, Nutrient Regulation in Ohio: The Path Forward EPA (Apr. 14, 2016). Presentation at the Ohio State Bar Association Meeting 31st Annual Ohio Environment, Energy and Resources Law Seminar.

[11] See, Ohio 2016 Integrated Report, Section H, available at http://epa.ohio.gov/Portals/35/tmdl/2016intreport/SectionH.pdf. (last visited Apr. 26, 2017). Many NGOs have urged U.S. EPA to find the entire Lake Erie as "impaired" for nutrients. Because Lake Erie is multi-jurisdictional, U.S. EPA is the administrative body to designate the entire lake as impaired.

[12] MCD, Water Quality Credit Trading Program: A Common Sense Approach to Reducing Nutrients (n.d.).

[13] ORSANCO, Nutrients Issues: Status of EPRI Trading Project. Presentation at the February 2015 Technical

Committee Meeting.

© 2026 Shumaker, Loop & Kendrick, LLP. All Rights Reserved. Privacy Policy/Disclaimer

Shumaker