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Client Alert: Court Puts U.S. EPA, Lake Erie Impairment on the Clock

Judge James J. Carr of the United States District Court for the Northern District of Ohio issued a decision today putting the U.S. Environmental Protection Agency (EPA) on the clock to decide in the next 30 days whether or not the Ohio EPA's 2016 Integrated Report should list the open waters of Lake Erie as impaired. In doing so, the court retained jurisdiction over the dispute in the case of *Environmental Law & Policy Center v. United States Environmental Protection Agency*, Case No. 3:17CV01514 (N.D. Ohio), in order to "undertake judicial review under the [Administrative Procedure Act], if needed, following whatever action the U.S. EPA takes."

The Court noted that the principal cause of algae blooms in Lake Erie is "phosphorous runoff from fertilizer, farmland manure, and to a lesser extent, industrial sources, and sewage treatment plant discharges." The Court expressed frustration with both the Ohio EPA's failure to list the open waters of Lake Erie as impaired and the U.S. EPA's acceptance of the state agency's inaction. Inclusion of these waters in the 2016 Report will trigger an administrative process known as a total maximum daily load (TMDL) determination.

"Moving sooner, even relatively slightly, rather than latter matters," Judge Carr wrote. "TMDL determination is but the first step; thereafter, restoration and remediation of Lake Erie to Ohio's water quality standards, could, according to the U.S. EPA counsel at oral argument, take from eight to *twenty-three* years. Remediation of farmland runoff, the primary source of the Lake's algae/microcystin problem, is vastly more difficult than remediation of point source pollution. Thus, for this reason, at least, the 2016 listing remains at issue."

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Judge Carr also opined that in his view state legislative action could shorten the remediation period and noted that prior Ohio laws imposed two-year periods for manufacturers to reduce phosphorous levels in laundry and dish-washing products.

“Just as science and industry appear to have worked together to meet the two-year deadlines set by the General Assembly for limiting phosphorous in household cleaning products,” Judge Carr wrote, “one would hope science and agriculture could also work together to reduce phosphorous in fertilizers, within a deadline the General Assembly with due deliberation could set.”

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