

**THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
OHIO**

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ENVIRONMENTAL LAW AND POLICY  
CENTER  
35 East Wacker Drive, Suite 1600  
Chicago, IL 60601

MICHAEL S. FERNER

SUSAN M. MATZ

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, D.C. 20460

SCOTT PRUITT, in his official capacity as  
Administrator of the United States Environmental  
Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Avenue, N.W.  
Mail Code: 1101A  
Washington, D.C. 20460

Case No. **3:17 CV 1032**

**JUDGE JAMES G. CARR**

Judge \_\_\_\_\_

**MAG. JUDGE JAMES R. KNEPP II**

ROBERT KAPLAN, in his official capacity as  
Acting Regional Administrator of United States  
Environmental Protection Agency, Region 5,  
77 West Jackson Boulevard  
Mail Code: R-19J  
Chicago, Illinois 60604-3507

\_\_\_\_\_  
Defendants. /

**THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
OHIO**

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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Plaintiffs Environmental Law & Policy Center (“ELPC”), Michael Ferner, and Susan Matz, who bring this action on behalf of themselves and ELPC’s members, allege the following:

**NATURE OF THE ACTION**

1. Plaintiffs initiate this action against Defendants U.S. Environmental Protection Agency, Administrator Scott Pruitt, and Acting Regional Administrator Robert Kaplan (collectively, “U.S. EPA”) for their failure to perform their nondiscretionary duty under the Clean Water Act (“CWA”), 33 U.S.C. § 1251 *et seq.*, to approve or disapprove the list of impaired waters (“303(d) List”) submitted to U.S. EPA by the Ohio Environmental Protection Agency (“Ohio EPA”) on October 20, 2016, within 30 days after the submission of the list.

2. For years Lake Erie has been, and continues to be, plagued by phosphorus pollution that decreases the lake’s water quality, leading to adverse conditions that make Lake Erie unsafe for drinking water and recreation, among other uses. One of these adverse conditions from which Lake Erie has suffered and can continue to suffer is the growth of algal blooms, including toxic algal blooms.

3. In one instance in August 2014, a toxic algal bloom caused by excessive phosphorus enveloped Toledo’s drinking water intake. Public officials warned approximately 500,000 people in the Toledo area not to consume the affected tap water for three days due to this toxic contamination. Citizens in Toledo and elsewhere in the western Lake Erie watershed

are now paying increased costs to water utilities for water quality monitoring and testing and treatment systems for toxins from algae blooms caused by phosphorus pollution, and will continue to do so in the future.

4. Establishing a cap on the amount of phosphorus pollution that enters Lake Erie, however, could restore the lake's water quality and reduce the threat posed by the lake's adverse conditions. Pursuant to CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C), Ohio EPA can establish such a cap by creating a "Total Maximum Daily Load" ("TMDL") for phosphorus pollution in Lake Erie. The precursor for developing a TMDL is the listing of a water body to be addressed by a TMDL as impaired by pollution under CWA § 303(d)(1)(A). Ohio EPA's 303(d) List does not designate the open waters of the western basin of Lake Erie as impaired by phosphorus pollution.

5. Although Ohio EPA is responsible for preparing the 303(d) List, 33 U.S.C. § 1313(d)(2) requires U.S. EPA to approve or disapprove this list, and its disapproval of the omission of a waterbody from a 303(d) List would cause that waterbody to be added to the 303(d) List. It is therefore within U.S. EPA's control to trigger the process that leads to the development of a phosphorus TMDL for the western Lake Erie basin, which would cap the amount of pollution loaded into the waterbody. A phosphorus loading cap would potentially restore water quality and decrease the threat posed by algae blooms, especially toxic algae blooms, in Lake Erie.

6. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2) requires U.S. EPA to approve or disapprove a state's 303(d) List within 30 days after the state's submission of its list to U.S. EPA. On October 20, 2016, Ohio EPA submitted its 303(d) List to U.S. EPA, triggering a

November 19, 2016 deadline by which U.S. EPA needed to approve or disapprove the list.

However, U.S. EPA failed to meet this deadline and still has not approved or disapproved Ohio's 303(d) list.

7. By failing to comply with the CWA requirement that it approve or disapprove the 303(d) List by 30 days after its submission, U.S. EPA extended and continues to extend the amount of time before a decision that might trigger the restoration of Lake Erie's water quality through the establishment of a TMDL, which could abate the harms caused by excessive phosphorus pollution into Lake Erie's waters.

8. U.S. EPA's ongoing failure to approve or disapprove Ohio EPA's 303(d) List has harmed and continues to harm ELPC members in their use and enjoyment of Lake Erie.

9. Among other forms of relief, Plaintiffs seek (a) a declaratory judgment that U.S. EPA has failed to perform its nondiscretionary duty under CWA § 303(d), 33 U.S.C. § 1313(d) to approve or disapprove Ohio EPA's 303(d) List within 30 days after the date of submission of the list to U.S. EPA and (b) an injunction compelling U.S. EPA to promptly approve or disapprove Ohio EPA's 303(d) List.

#### **JURISDICTION AND VENUE**

10. Pursuant to 33 U.S.C. § 1365(b), on January 9, 2017, ELPC notified U.S. EPA of its intent to sue for the agency's failure to comply with its nondiscretionary duty under CWA § 303(d), 33 U.S.C. § 1313(d), to approve or disapprove Ohio EPA's 303(d) List within 30 days after Ohio EPA's submission of the list on October 20, 2016. A copy of this notice is incorporated herein by reference and attached hereto as Exhibit A. ELPC submitted its notice of intent to sue more than 60 days ago, and U.S. EPA's failure to approve or disapprove the 303(d)

List is ongoing.

11. Ohio EPA's ongoing failure to perform its mandatory duty to approve or disapprove the 303(d) List creates a continuing controversy that is actual and substantial.

12. Plaintiffs bring this action under 33 U.S.C. § 1365(a) for U.S. EPA's failure to perform a nondiscretionary duty under the CWA. 33 U.S.C. § 1365(a) provides this court with jurisdiction to hear this controversy. This court also has jurisdiction pursuant to: (1) 28 U.S.C. § 1331 because this is a civil action arising under laws of the United States; or (2) 28 U.S.C. § 1361 because this is an action compelling an officer, employee, or agency of the United States to perform a duty.

13. A substantial part of the events or omissions giving rise to the claim occurred on or near Lake Erie, which is located in this district, making venue proper under 28 U.S.C. § 1391(e). Alternatively, venue is proper in this district because Plaintiffs Michael Ferner and Susan Matz are residents of this district.

#### **PARTIES**

14. Plaintiff ELPC is a Midwest based not-for-profit corporation and legal advocacy organization concerned with improving environmental quality and protecting Midwestern natural resources. It works with concerned citizens and organizations throughout the Midwest, including Ohio, to address issues that affect water quality. ELPC members live and recreate near Lake Erie. Members depend on clean water from Lake Erie as a source of drinking water and of recreational activities including swimming, fishing, paddling, boating, nature study and aesthetic enjoyment.

15. Plaintiff Michael Ferner is a member of ELPC and a resident of Toledo, Ohio.

Mr. Ferner serves as a coordinator for Advocates for a Clean Lake Erie (“ACLE”), a grassroots environmental organization founded after a toxic algae bloom poisoned the drinking water for Toledo’s more than 400,000 residents in August 2014. ACLE’s mission includes working to get an impaired watershed designation for the Western Lake Erie basin, followed by a thorough cleanup, with a goal of keeping Lake Erie drinkable, fishable and swimmable.

16. Plaintiff Susan Matz is a member of ELPC and a resident of Toledo, Ohio. She serves as a coordinator for ACLE.

17. Defendant U.S. EPA is an agency within the United States government that is responsible for implementing the CWA and approving or disapproving each state’s 303(d) List.

18. Defendant Scott Pruitt is the Administrator of U.S. EPA and is being sued in his official capacity. The U.S. EPA Administrator is responsible for overseeing the agency, which in part includes overseeing its implementation of the CWA. This level of oversight extends to U.S. EPA’s decisions about whether to approve or disapprove states’ 303(d) Lists, which includes the October 20, 2016 list submitted by Ohio EPA.

19. Defendant Robert Kaplan is the Acting Regional Administrator of U.S. EPA Region 5 and is being sued in his official capacity. He is responsible for overseeing Region 5 of the agency, which in part includes overseeing the region’s implementation of the CWA. The State of Ohio falls within the jurisdiction of Region 5. Mr. Kaplan’s level of oversight extends to decisions about whether to approve or disapprove states’ 303(d) Lists within the jurisdiction of Region 5, which includes the October 20, 2016 303(d) List submitted by Ohio EPA.

#### **STANDING**

20. ELPC files this action on behalf of itself and its members, including Plaintiffs

Michael Ferner and Susan Matz.

21. One or more of ELPC's members have standing in this action because they reside or have a residence in Ohio near land or waters adversely affected by pollution in Lake Erie.

22. One or more of ELPC's members have standing in this action because they use or enjoy land or waters in and around Lake Erie as a source of drinking water and of recreational activities. On a regular, ongoing basis now and in the future, including this year, one or more of ELPC's members intends to continue to use or enjoy land or waters in and around Lake Erie as a source of drinking water and of recreational activities to the extent that the lake's conditions allow for them to do so. These members' use and enjoyment of the land and waters in and around Lake Erie is adversely affected by phosphorus pollution that leads to algae blooms, including toxic algae blooms, in the western Lake Erie basin.

23. One or more of ELPC's members also have standing because they pay, and will continue to pay, costs for ongoing monitoring and testing of the waters of the western Lake Erie basin for algae blooms and toxins produced by such algae blooms, as well as for treatment of such toxins in drinking water.

24. Michael Ferner and Susan Matz are residents of Toledo who rely on Lake Erie for drinking water and who use and enjoy the waters and land in and around Lake Erie, and who will continue to do so in the future.

25. These interests in the use or enjoyment of land or waters adversely affected by pollution in Lake Erie as a source of drinking water and of recreational activities fall within the zone of interests protected under the CWA. These interests are also germane to ELPC's purpose as an organization concerned with improving environmental quality and protecting Midwestern

natural resources.

26. U.S. EPA's failure to comply with the CWA requirement that it approve or disapprove the 303(d) List within 30 days after the date of Ohio EPA's submission of the list has, is, or will aggrieve or adversely affect one or more of ELPC's members because this inaction prolongs the amount of time before a decision that may trigger the development of a TMDL, which could lead to the restoration of water quality in Lake Erie.

27. The declaratory judgment and injunction sought by Plaintiffs will redress the injuries incurred by ELPC and its members, including Michael Ferner and Susan Matz. A decision on the 303(d) List could trigger the restoration of Lake Erie's water quality through the establishment of a TMDL that would cap the amount of phosphorus pollution into Lake Erie and as a result decrease the threat of adverse conditions that have injured, are injuring, or may injure ELPC and one or more of its members.

## **STATEMENT OF THE CASE**

### **Statutory and Regulatory Background**

28. The Clean Water Act serves "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a).

29. Under CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A), states must identify the waters "within [their] boundaries for which the effluent limitations... are not stringent enough to implement any water quality standard applicable to such waters."

30. Regulations promulgated under the CWA require States to submit a comprehensive 303(d) List to U.S. EPA for its approval every two years. 40 C.F.R. § 130.7(d)(1).

31. USEPA is required to approve or disapprove states' proposed 303(d) Lists before they may go into effect. 33 U.S.C.S. § 1313(d)(2).

32. The CWA places a nondiscretionary duty on U.S. EPA to make this determination within 30 days after the submission of this list. 33 U.S.C. § 1313(d)(2); 40 C.F.R § 130.7(d)(2).

33. After a 303(d) List has been approved, states must establish TMDLs for waters included on the list. 33 U.S.C § 1313(d)(1)(c). As a part of the TMDL process, states must establish pollutant limits to ensure that waters on a 303(d) List can meet all applicable water quality standards. 33 U.S.C § 1313(d)(1)(c).

#### **Factual Background**

34. Pollutants, including nitrogen and phosphorus, are regularly added to the western basin of Lake Erie via the Maumee River and other channels. Nitrogen and phosphorus, otherwise known as "nutrient pollutants," create adverse conditions, in part by promoting the growth of algae in the form of algal blooms, which often produce toxins and endanger human health and aquatic life. These adverse conditions can make the water of Lake Erie an unsafe and unattractive source for drinking water and for recreational activities.

35. On October 20, 2016, Ohio EPA submitted the State of Ohio's 2016 Integrated Water Quality Monitoring and Assessment Report ("Report") to U.S. EPA. The Report purports to satisfy the listing requirements of CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A).

36. The Report includes a 303(d) List that identifies portions of Lake Erie from which Toledo draws its drinking water, as well as areas around islands in the lake and miles of the lake's shoreline, as impaired by phosphorus pollution. The open waters of the western basin of Lake Erie are not identified as impaired on the 303(d) List.

37. U.S. EPA has neither approved nor disapproved Ohio EPA's 303(d) List.

**GROUND FOR RELIEF SOUGHT**

38. Plaintiffs re-allege and incorporate by reference all the allegations set forth above.

39. U.S. EPA is in violation of the CWA because it failed to perform its nondiscretionary duty to approve or disapprove Ohio EPA's 303(d) List within 30 days after the date of submission, contrary to CWA § 302(d)(2), 33 U.S.C § 1313(d)(2), and 40 C.F.R. § 130.7(d)(2).

**RELIEF REQUESTED**

WHEREFORE, Plaintiffs respectfully request that the Court grant the following relief:

- A. A declaratory judgment stating that U.S. EPA violated its nondiscretionary duty under the Clean Water Act, CWA § 303(d)(2), 33 U.S.C § 1313(d)(2), and 40 C.F.R. § 130.7(d)(2) by failing to approve or disapprove Ohio EPA's 303(d) List within 30 days after its submission;
- B. An injunction compelling U.S. EPA to promptly approve or disapprove Ohio EPA's 303(d) List;
- C. An order retaining jurisdiction until U.S. EPA complies with the injunction entered by this court;
- D. An award totaling the amount expended by ELPC in costs and attorney fees for bringing this action pursuant to the Clean Water Act, CWA § 505(d), 33 U.S.C. § 1365(d); and
- E. Such other relief as this Court deems just and proper.

Respectfully submitted,



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3:17 CV 1032

JS 44 (Rev. 08/16)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**  
 Environmental Law & Policy Center; Ferner, Michael S.; Matz, Susan M.

**(b)** County of Residence of First Listed Plaintiff Cook County, IL  
 (EXCEPT IN U.S. PLAINTIFF CASES)

**(c)** Attorneys (Firm Name, Address, and Telephone Number)  
 Firm: Environmental Law & Policy Center  
 Address: 21 W. Broad St., 8th Floor, Columbus, OH, 43215  
 Telephone Number: (857) 636-0371

**DEFENDANTS**  
 U.S. Environmental Protection Agency; U.S. Environmental Protection Agency Administrator Scott Pruitt; U.S. Environmental Protection Agency Acting Regional Administrator Robert Kaplan

County of Residence of First Listed Defendant \_\_\_\_\_  
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known) **JUDGE JAMES G. CARR**  
**MAG. JUDGE JAMES R. KNEPP II**

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

2 U.S. Government Defendant

3 Federal Question (U.S. Government Not a Party)

4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only) [Click here for: Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	FEDERAL TAX SUITS
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609

**V. ORIGIN** (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from Another District (specify)

6 Multidistrict Litigation - Transfer

8 Multidistrict Litigation - Direct File

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
Clean Water Act, 33 U.S.C. § 1251 et seq; 33 U.S.C § 1313(d)(2); 33 U.S.C. § 1365(b)

Brief description of cause:  
Citizen suit regarding U.S. EPA's failure to timely act on Ohio's impaired waters list as required by statute

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$ See attachment

CHECK YES only if demanded in complaint:  
 JURY DEMAND:  Yes  No

**VIII. RELATED CASE(S) IF ANY** (See instructions):

JUDGE \_\_\_\_\_ DOCKET NUMBER \_\_\_\_\_

DATE 05/16/2017

SIGNATURE OF ATTORNEY OF RECORD [Signature]

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

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

I. Civil Categories: (Please check one category only).

- 1.  General Civil
- 2.  Administrative Review/Social Security
- 3.  Habeas Corpus Death Penalty

\*If under Title 28, §2255, name the SENTENCING JUDGE: \_\_\_\_\_

CASE NUMBER: \_\_\_\_\_

II. **RELATED OR REFILED CASES.** See LR 3.1 which provides in pertinent part: "If an action is filed or removed to this Court and assigned to a District Judge after which it is discontinued, dismissed or remanded to a State court, and subsequently refiled, it shall be assigned to the same Judge who received the initial case assignment without regard for the place of holding court in which the case was refiled. Counsel or a party without counsel shall be responsible for bringing such cases to the attention of the Court by responding to the questions included on the Civil Cover Sheet."

This action is  RELATED to another PENDING civil case. This action is  REFILED pursuant to LR 3.1.

If applicable, please indicate on page 1 in section VIII, the name of the Judge and case number.

III. In accordance with Local Civil Rule 3.8, actions involving counties in the Eastern Division shall be filed at any of the divisional offices therein. Actions involving counties in the Western Division shall be filed at the Toledo office. For the purpose of determining the proper division, and for statistical reasons, the following information is requested.

ANSWER ONE PARAGRAPH ONLY. ANSWER PARAGRAPHS 1 THRU 3 IN ORDER. UPON FINDING WHICH PARAGRAPH APPLIES TO YOUR CASE, ANSWER IT AND STOP.

(1) **Resident defendant.** If the defendant resides in a county within this district, please set forth the name of such county

**COUNTY:**

**Corporation** For the purpose of answering the above, a corporation is deemed to be a resident of that county in which it has its principal place of business in that district.

(2) **Non-Resident defendant.** If no defendant is a resident of a county in this district, please set forth the county wherein the cause of action arose or the event complained of occurred.

**COUNTY:** Lucas County, OH

(3) **Other Cases.** If no defendant is a resident of this district, or if the defendant is a corporation not having a principle place of business within the district, and the cause of action arose or the event complained of occurred outside this district, please set forth the county of the plaintiff's residence.

**COUNTY:**

IV. The Counties in the Northern District of Ohio are divided into divisions as shown below. After the county is determined in Section III, please check the appropriate division.

**EASTERN DIVISION**

AKRON

(Counties: Carroll, Holmes, Portage, Stark, Summit, Tuscarawas and Wayne)

CLEVELAND

(Counties: Ashland, Ashtabula, Crawford, Cuyahoga, Geauga, Lake,

YOUNGSTOWN

Lorain, Medina and Richland)

(Counties: Columbiana, Mahoning and Trumbull)

**WESTERN DIVISION**

TOLEDO

(Counties: Allen, Auglaize, Defiance, Erie, Fulton, Hancock, Hardin, Henry, Huron, Lucas, Marion, Mercer, Ottawa, Paulding, Putnam, Sandusky, Seneca VanWert, Williams, Wood and Wyandot)

Attachment to JS 44 Civil Cover Sheet

**VII. Requested in Complaint**

Demand:

1. Declaratory judgment;
2. Injunction;
3. Order retaining jurisdiction; and
4. An award of litigation costs and attorney fees.

3:17 CV 1032

**EXHIBIT A**



**ENVIRONMENTAL LAW & POLICY CENTER**  
Protecting the Midwest's Environment and Natural Heritage

January 9, 2017

*Via Certified Mail*

Gina McCarthy, Administrator  
United States Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

**Re: Notice of Intent to Sue Administrator of the Environmental Protection Agency for Failure to Perform Its Nondiscretionary Duty Under the Clean Water Act**

Dear Administrator McCarthy:

The Environmental Law & Policy Center (“ELPC”) is writing to notify you of our intent to file suit against the Administrator of the U.S. Environmental Protection Agency (“U.S. EPA” or “Agency”) in U.S. District Court pursuant to section 505(a)(2) of the Clean Water Act (“CWA”), 33 U.S.C. § 1365(a)(2). The basis for this intent to sue is U.S. EPA’s failure to perform its nondiscretionary duty to act on the State of Ohio’s October 20, 2016, submission of a CWA impaired waters list under 33 U.S.C. § 1313(d) within thirty days.

**I. Background**

**A. State Impaired Waters Lists**

Under the Clean Water Act, each state must adopt water quality standards that “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses,” in order “to protect the public health or welfare, enhance the quality of water and serve the purposes of” the Act. 33 U.S.C. § 1313(c)(2)(B). CWA section 303(d) mandates that the state must then “identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters.” 33 U.S.C. § 1313(d)(1)(A). The state must also “establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.” *Id.* The determination that a particular water is not meeting an applicable water quality standard is commonly referred to as an “impairment” finding, and the full ranking as an “impaired waters” list.

Each state must submit this list of impaired waters to U.S. EPA for approval, and the agency must “approve or disapprove” the list “not later than thirty days after the date of submission.” *Id.*

§ 1313(d)(2). U.S. EPA regulations require each state to prepare and submit its impaired waters list every two years. 40 C.F.R. § 130.7(d)(1).

## **B. CWA Citizen Suit Provision**

CWA section 505(a) states that “any citizen may commence a civil action . . . (2) against the Administrator [of U.S. EPA] where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 33 U.S.C. § 1365(a). A plaintiff may not bring a non-discretionary duty suit under CWA section 505(a)(2) unless, at least 60 days prior, the plaintiff has given notice of the action to the Administrator of U.S. EPA. 33 U.S.C. § 1365(b)(2). The notice “shall identify the provision of the Act which requires such act or creates such duty, shall describe with reasonable specificity the action taken or not taken by the Administrator which is alleged to constitute a failure to perform such act or duty, and shall state the full name, address and telephone number of the person giving the notice.” 40 C.F.R. 135.3(b). The notice must also “state the name, address, and telephone number of the legal counsel, if any, representing the person giving the notice.” *Id.* § 135.3(c).

## **II. Legal Claim**

The Ohio Environmental Protection Agency (“Ohio EPA”) submitted its list of impaired waters to U.S. EPA on behalf of the State of Ohio on October 20, 2016, as part of an Integrated Water Quality Monitoring and Assessment Report (“Integrated Report”).<sup>1</sup> The Integrated Report designated the Lake Erie Western Basin shoreline, Lake Erie Central Basin shoreline, and Lake Erie Island shoreline as impaired due to the impacts of blooms of toxic algae on several uses, including aquatic life and public drinking water supply use. Integrated Report at D-6.

Under 33 U.S.C. § 1313(d)(2), U.S. EPA had a duty to act on that submission by November 19, 2016, or (since that was a Saturday) at least by the next business day, November 21, 2016. The Agency did not do so, and has not yet taken any action to approve or disapprove Ohio’s impaired waters list as of the writing of this letter. CWA section 505(a)(2) authorizes a suit against U.S. EPA where the agency has thus failed to carry out its mandatory duty to approve or disapprove an impaired waters list within thirty days of submission. *Hayes v. Whitman*, 264 F.3d 1017, 1023 (10th Cir. 2001). Accordingly, ELPC is providing this letter as notice of its intent to bring suit against U.S. EPA for that failure under CWA section 505(a)(2).

## **III. Party Giving Notice**

The party giving notice of this claim is:

Environmental Law & Policy Center  
21 W. Broad St., Ste. 500  
Columbus, OH 43215  
(614) 670-5586

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<sup>1</sup> See <http://www.epa.ohio.gov/dsw/tmdl/OhioIntegratedReport.aspx>.

We encourage you to contact us as soon as possible should you desire to discuss the allegations set forth in this letter. If this matter is not resolved to our satisfaction, we will file suit on or after the sixtieth day following the date of this letter.

Sincerely,



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Madeline Fleisher  
Staff Attorney  
Environmental Law & Policy Center  
21 W. Broad St., Ste. 500  
Columbus, OH 43215  
(614) 670-5586

**Copies by certified mail to:**

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