

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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Read - Ohio

TMDL  
CASE

NATIONAL WILDLIFE FEDERATION  
Great Lakes Natural Resource Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104,

LEAGUE OF OHIO SPORTSMEN  
3953 Indianola Avenue  
Columbus, Ohio 43214,

and

OHIO ENVIRONMENTAL COUNCIL  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43212-3449

Plaintiffs,

vs.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY,  
CHRISTINE TODD WHITMAN,  
ADMINISTRATOR  
Ariel Rics Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460,

and

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY REGION V,  
THOMAS SKINNER, REGIONAL  
ADMINISTRATOR  
77 W. Jackson Boulevard  
Chicago, Illinois 60604-3507,

Defendants.

C2-01-1052  
CIVIL ACTION NO.

JUDGE

JUDGE SMITH

MAGISTRATE JUDGE MAGISTRATE JUDGE KEMP

COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

**COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs National Wildlife Federation, League of Ohio Sportsmen, and Ohio Environmental Council, on behalf of their respective members, allege as follows:

**Introduction**

1. This action arises under and alleges violations of the Federal Water Pollution Control Act, as amended (the "Clean Water Act," the "CWA," or the "Act"), 33 U.S.C. § 1251 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* In particular, this action concerns the failure of defendants United States Environmental Protection Agency, Administrator Christine Todd Whitman, United States Environmental Protection Agency Region V, and Regional Administrator Thomas Skinner (collectively, "Defendants" or "EPA") to comply with § 303(d) of the Clean Water Act.

2. EPA failed to comply with CWA § 303(d) in the following three ways: (a) EPA approved the State of Ohio's 1998 list of 881 waters that do not meet water quality standards, even though Ohio did not establish the priority of restoring three of the impaired waters—Lake Erie, the Ohio River, and Maumee Bay; (b) EPA approved Ohio's decision not to determine the total aggregate amounts of the pollutants that can be discharged ("TMDLs") into Lake Erie through both point and nonpoint sources without violating water quality standards, even though Ohio included Lake Erie in its 1998 list of impaired waters that need TMDLs; and (c) EPA approved the single TMDL submitted by Ohio, implicitly approving Ohio's submission of a single TMDL, even though Ohio identified a need to submit 2,282 TMDLs for the 881 impaired waters included in its 1998 list.

3. Plaintiffs seek a declaration that EPA failed to comply with CWA § 303(d) as outlined above, and that EPA's failure to comply was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Plaintiffs also seek an order setting aside EPA's approval of Ohio's 1998 list of impaired waters, as well as its approval of Ohio's submission of a single TMDL. Plaintiffs also seek an injunction directing EPA (a) to establish the priority of restoring the impaired waters of Lake Erie, the Ohio River, and Maumee Bay; and (b) to complete all the TMDLs for each of the 881 waters included in Ohio's 1998 list of impaired waters, including Lake Erie, within an appropriate time frame. Plaintiffs further seek an order suspending the issuance of permits allowing new or expanded point source discharges that will cause or contribute to the violation of water quality standards in Ohio's impaired waters until EPA develops TMDLs for those waters. Plaintiffs finally seek reasonable attorney and expert witness fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

#### Jurisdiction and Venue

4. The court has subject matter jurisdiction to review the claims set forth in this complaint pursuant to 28 U.S.C. § 1331 (federal question) and 5 U.S.C. § 702 (judicial review of administrative action).

5. The court is authorized to grant the relief requested by 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 (declaratory relief); 28 U.S.C. § 2202 and Fed. R. Civ. P. 65 (injunctive relief); 5 U.S.C. § 706 (declaratory and injunctive relief); and 28 U.S.C. § 2412 *et. seq.* (attorney fees and litigation costs).

6. Venue is appropriate in this judicial district and court because: (a) the Defendants are a federal agency and its employees with the responsibility for implementing federal water pollution control programs in the Southern District of Ohio; (b) the events giving rise to the

claims set forth in the complaint occurred throughout Ohio, including in the counties served by the Eastern Division of the United States District Court for the Southern District of Ohio; (c) Plaintiff National Wildlife Federation has one or more members residing in this judicial district; and (d) the Plaintiffs Ohio Environmental Council and League of Ohio Sportsmen have their principal places of business in this judicial district and have one or more members residing in this judicial district. 28 U.S.C. §§ 1391 and 1402(a)(1), and S.D. Ohio Civ. R. 82.1.

7. Plaintiff National Wildlife Federation ("NWF") is a nonprofit corporation organized and existing under the laws of the District of Columbia. NWF is the largest citizen-supported conservation advocacy and education organization in the United States, with affiliate organizations and members across the nation. NWF has actively worked on behalf of its members to maintain and enhance the quality of the nation's waters, including waters under Ohio's jurisdiction.

8. Plaintiff League of Ohio Sportsmen ("LOOS") is an Ohio nonprofit corporation, and a conservation and education affiliate of NWF. LOOS is the oldest statewide conservation organization in Ohio, first organized in 1902, and became the state affiliate of NWF in 1976. LOOS is a statewide organization with individual, corporate, and conservation club members, and represents over 22,000 Ohio residents. LOOS advocates on behalf of its members for the conservation of fish and wildlife and their habitat. LOOS has, over the years, passed several resolutions calling for clean air and water across the State of Ohio.

9. Plaintiff Ohio Environmental Council ("OEC") is an Ohio nonprofit corporation. OEC is a statewide organization with more than 1,200 individual members and over 100 group members that represent thousands of citizens throughout Ohio. OEC's purpose is to preserve and protect the environment of the State of Ohio, and to represent the interests of its thousands of

members across the state regarding environmental and conservation issues of significance, including the quality of waters under Ohio's jurisdiction.

10. EPA's administration of the TMDL program in Ohio has, is, or will adversely affect the use and enjoyment of Ohio's impaired rivers, lakes, and other waters for recreational, aesthetic, or drinking purposes by plaintiffs' members because EPA has approved action or inaction by Ohio that will delay the restoration of those waters to water quality standards. Plaintiffs bring this action on behalf of their members. The interests of plaintiffs' members fall within the zone of interests protected under the Clean Water Act.

11. Defendant Christine Todd Whitman is sued here in her official capacity as the Administrator of the United States Environmental Protection Agency. Pursuant to the Clean Water Act and its implementing regulations, she is charged with the supervision and management of all EPA decisions and actions, and with the administration of the Clean Water Act.

12. Defendant United States Environmental Protection Agency is the agency of the government of the United States responsible for the implementation of the Clean Water Act, including the mandates under § 303(d) of the Act that are the subject of this lawsuit.

13. Defendant Thomas Skinner is sued here in his official capacity as the Regional Administrator of the United States Environmental Protection Agency Region V. Pursuant to the Clean Water Act and its implementing regulations, he is charged with the supervision and management of all EPA Region V decisions and actions, and with the administration of the Clean Water Act in Region V.

14. Defendant United States Environmental Protection Agency Region V is the division of the EPA that is responsible for the implementation of the Clean Water Act in Region V,

including the mandates under § 303(d) of the Act that are the subject of this lawsuit. Region V includes the State of Ohio, among other states.

Legal Framework and Factual Background

15. Congress passed the Clean Water Act in 1972 to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a).

16. To achieve the objective set out in CWA § 101(a), Congress declared "as a national goal" that "the discharge of pollutants into navigable waters be eliminated by 1985." CWA § 101(a)(1), 33 U.S.C. § 1251(a)(1).

17. To achieve the goal of eliminating the discharge of pollutants into navigable waters, each state must establish "ambient water quality standards" at levels necessary to protect the "public health or welfare, enhance the quality of water and serve the purposes of the Clean Water Act." CWA § 303 (a)-(c), 33 U.S.C. § 1313(a)-(c).

18. One of the tools provided by the Clean Water Act to ensure that water quality standards are attained is the National Pollution Discharge Elimination System ("NPDES"). Under the NPDES, EPA issues permits for point sources of pollution. These NPDES permits must contain technology-based limits established by the EPA and "any more stringent" limits that are necessary to ensure that dischargers do not cause the quality of receiving waters to violate state water quality standards. CWA §§ 301(b) and 402(a), 33 U.S.C. §§ 1311(b) and 1342(a).

19. Recognizing that NPDES permits would not necessarily be a sufficient mechanism for ensuring the attainment of water quality standards, § 303(d) of the Clean Water Act imposes a series of requirements designed first to identify waters that do not attain water quality standards

despite point source controls, and then to establish specific limitations for those impaired waters so that they do attain water quality standards.

20. Each state must identify all of the waters within the state for which technology-based NPDES permit limits alone are insufficient to attain any water quality standard applicable to such waters. CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A). These waters are referred to as Water Quality Limited Segments ("WQLSs").

21. Each state must identify all of those waters for which controls on "thermal discharges" are "not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife." CWA § 303(d)(1)(B), 33 U.S.C. § 1313(d)(1)(B). These waters are included in the term "WQLSs."

22. To ensure that the WQLSs attain water quality standards, each state must establish a total maximum daily load ("TMDL") for each pollutant that impairs each water segment on the WQLS list. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C). TMDLs must be established at "a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitation and water quality." *Id.*; see also 40 C.F.R. § 130.7(c)(1) (TMDLs "shall be established at levels necessary to attain and maintain the applicable narrative and numeric water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.").

23. The WQLS list must include a "priority ranking" for all the WQLSs that still require TMDLs; the ranking accounts for the severity of the pollution and the uses to be made of the

waters and shall identify the pollutants causing or expecting to cause violations of the applicable water quality standards. 40 C.F.R. § 130.7(b)(4).

24. Each state must submit to EPA for its review and approval or disapproval the list of WQLSs and TMDLs "from time to time, with the first submission not later than one hundred and eighty days after the date of publication" of the EPA's list of pollutants suitable for TMDL calculation. CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2).

25. On December 28, 1978, EPA published a list identifying all pollutants suitable for TMDL calculation.

26. The states' first submissions of WQLSs and TMDLs were due no later than June 26, 1979.

27. Ohio did not submit a WQLS list to EPA until April 1, 1998, although it submitted a TMDL Priority List to EPA as part of its 1993 Surface Water Quality Management Plan.

28. The 1998 WQLS list submitted by Ohio to EPA identified 881 impaired waters requiring 2,282 TMDLs.

29. The 1998 WQLS list submitted by Ohio to EPA identified Lake Erie, the Ohio River, and Maumee Bay as impaired waters, noting that fish consumption advisories have been placed on each of these waters.

30. The 1998 WQLS list does not apply the priority ranking process to Lake Erie, the Ohio River, or Maumee Bay.

31. On December 21, 1998, EPA approved Ohio's § 303(d) list.

32. EPA's approval of Ohio's 1998 WQLS list submission constituted final agency action.



33. In a 1998 TMDL report supplement, Ohio informed EPA of its decision not to schedule Lake Erie or the Ohio River for TMDL development, in spite of the fish consumption advisories imposed on those waters, because of the "complexities in TMDL development."

34. In or after March 2000, Ohio submitted its first TMDL to EPA. The TMDL was for the Middle Cuyahoga River.

35. On October 11, 2000, EPA approved the TMDL for the Middle Cuyahoga River submitted by Ohio.

36. EPA's approval of Ohio's submission of a single TMDL, for the Middle Cuyahoga River, constituted final agency action.

37. On February 16, 1999, Ohio submitted a tentative schedule to EPA to complete TMDLs for all impaired waters in fifteen years, by 2013.

38. On August 1, 2001, Ohio notified EPA that it could not maintain its tentative TMDL schedule because of budget constraints. Instead, Ohio noted that "only three new projects will be scheduled to begin each year (down from the current list's six to eight projects), lengthening the schedule from 15 to about 25 years," or until about 2023.

39. Plaintiffs have no adequate remedy at law.

#### First Claim for Relief

(Approval of the WQLS list violated the Clean Water Act and §706(2)(A) of the APA)

40. Plaintiffs re-allege each and every allegation contained in paragraphs 1-39, above.

41. EPA violated the Clean Water Act and its implementing regulations in approving Ohio's 1998 list of WQLSs because EPA failed to require Ohio's compliance with its mandatory obligation to apply a priority ranking to Lake Erie, the Ohio River, or Maumee Bay.

42. EPA's failure to require Ohio's compliance with the Clean Water Act and its implementing regulations was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Second Claim for Relief

(Approval of Ohio's decision not to schedule development of TMDLs for Lake Erie or the Ohio River violated the Clean Water Act and §706(2)(A) of the APA)

43. Plaintiffs re-allege each and every allegation contained in paragraphs 1-42, above.

44. EPA violated the Clean Water Act and its implementing regulations in approving Ohio's 1998 list of WQLSs because EPA failed to require Ohio's compliance with its mandatory obligation to schedule the development of TMDLs for all WQLSs, including Lake Erie and the Ohio River.

45. EPA's failure to require Ohio's compliance with the Clean Water Act and its implementing regulations was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

Third Claim for Relief

(Approval of Ohio's single TMDL violated the Clean Water Act and §706(2)(A) of the APA)

46. Plaintiffs re-allege each and every allegation contained in paragraphs 1-45, above.

47. EPA violated the Clean Water Act and its implementing regulations in approving Ohio's submission of a single TMDL for the Middle Cuyahoga River because EPA failed to require Ohio's compliance with its mandatory obligation to submit all 2,282 TMDLs for all 881 WQLSs on Ohio's 1998 list of impaired waters.

48. EPA's failure to require Ohio's compliance with the Clean Water Act and its implementing regulations was arbitrary, capricious, an abuse of its discretion, or otherwise not in accordance with law.

Prayer for Relief

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

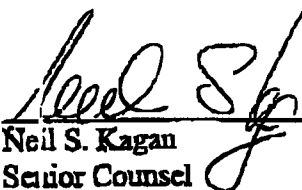
- a) Adjudge and declare that EPA violated the Clean Water Act, its implementing regulations, and the APA:
  - a. in approving Ohio's 1998 list of WQLSs despite Ohio's failure to apply a priority ranking to Lake Erie, the Ohio River, or Maumee Bay;
  - b. in approving Ohio's 1998 list of WQLSs despite Ohio's failure to schedule the development of TMDLs for Lake Erie and the Ohio River;
  - c. in approving Ohio's submission of a single TMDL for the Middle Cuyahoga River despite Ohio's failure to submit all 2,282 TMDLs for all 881 WQLSs on its 1998 list of impaired waters.
- b) Order EPA to disapprove Ohio's 1998 list of WQLSs and, not later than thirty days after the entry of the order, to apply a priority ranking to Lake Erie, the Ohio River, and Maumee Bay, and to schedule the development of TMDLs for Lake Erie and the Ohio River.
- c) Order EPA to disapprove Ohio's submission of a single TMDL for the Middle Cuyahoga River and to establish TMDLs for all WQLSs identified in Ohio's existing and future lists submitted under CWA § 303(d) for all pollutants of concern on each WQLS on the schedule to be developed as described in paragraph d below.
- d) Order EPA to submit for the Court's approval not later than thirty days after the entry of the order a schedule for EPA's establishment of the TMDLs which shall provide for the establishment of no less than twelve and a half percent (12.5%) of the total number of TMDLs per year for eight years, and which shall include an opportunity

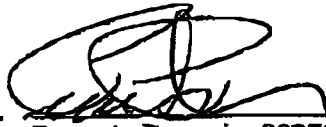
for public comment on each proposed TMDL, so that all TMDLs are established within eight years of the date of the order.

- e) Order EPA to implement (or ensure that Ohio implements) TMDLs through the NPDES permitting program as follows:
- a. Once the TMDL is established, EPA shall (or ensure that Ohio shall) cause the modification, revocation, and reissuance, or termination of permits where appropriate as necessary to implement the TMDLs, within one year of the TMDL establishment, pursuant to 40 CFR §§ 124.5 and 122.62, and likewise modify general permits as necessary to implement the TMDLs pursuant to 40 CFR § 122.28;
  - b. EPA shall (or ensure that Ohio shall) comply with 40 CFR § 122.4(i) regarding the prohibition on new sources or new or additional dischargers that will cause or contribute to a violation of water quality standards, by requiring all of the following before the new source or new or additional discharge is authorized by an NPDES permit: a TMDL with an allocation for future growth for each WQLS; a demonstration by new permittees or new dischargers that there are sufficient load allocations to allow for the discharge; and existing dischargers into a WQLS be subject to compliance schedules designed to bring the WQLS into compliance with applicable water quality standards;
  - c. All permits on basins will be subject to modification, revocation, reissuance or termination simultaneously, as necessary to implement the TMDLs;

- d. EPA shall take TMDLs into account in its review of Ohio's NPDES program and, to implement TMDLs, EPA shall review and require revision, modification, revocation, or reissuance as necessary of Ohio's Water Quality Management Plans (40 CFR §§ 130.6, 130.7 and 130.10); Ohio's Continuing Planning Process (CWA § 303(e); 40 CFR §§ 130.10 and 130.7); and any Memoranda of Agreement between EPA and the State of Ohio on water quality issues;
- e. If Ohio fails to implement TMDLs through the NPDES process, or EPA is otherwise unable to implement the TMDLs through the permit program described above due to State actions or inactions, EPA shall initiate procedures to revise the State NPDES program to incorporate the TMDL process pursuant to 40 CFR § 123.62. If the State refuses to implement TMDLs through the NPDES process, EPA shall withdraw certification of the State NPDES program, pursuant to CWA § 402(c)(3), 33 U.S.C. § 1342(c)(3) and 40 CFR § 123.63(a)(5) (withdrawal permitted where the State has not "developed an adequate regulatory program for developing water-quality based effluent limits in NPDES permits").
- f) Order EPA on December 31st of each year to submit to plaintiffs and the Court a report detailing its progress in developing and implementing TMDLs for Ohio's WQLSs. The report shall include at a minimum:
  - a. Identification of TMDLs developed during the reporting period;
  - b. Review of steps taken during the reporting period to implement the TMDLs;

- c. Review of public participation opportunities offered in the TMDL implementation process;
  - d. Review of the effectiveness of the TMDLs and implementation strategies in achieving water quality standards, which shall include a description of the water quality in each WQLS;
  - e. Review of Ohio's involvement and cooperation in the TMDL development and implementation process.
  - g) Order that the Court shall retain jurisdiction over this case generally and as specifically identified in the order plaintiffs request, above.
  - h) Award plaintiffs their reasonable fees, costs, expenses, and disbursements associated with this litigation, including attorney fees and expert witness fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.
  - i) Grant plaintiffs such additional and further relief as the court deems just and proper.
- Respectfully submitted,

  
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*Motion for Permission to Appear  
Pro Hac Vice Pending*

  
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