

**BEFORE THE
ENVIRONMENTAL REVIEW APPEALS COMMISSION
OF THE STATE OF OHIO**

NATIONAL WILDLIFE FEDERATION <i>et al.</i> ,)	
)	
Appellants,)	
)	
v.)	ERAC Case Nos.
)	996447, 486448, 626449,
CHRIS KORLESKI, DIRECTOR OF)	096450, 256451
ENVIRONMENTAL PROTECTION,)	
)	Submitted electronically on
and)	August 9, 2010
)	
U.S. ARMY CORPS OF ENGINEERS,)	
BUFFALO DISTRICT,)	
)	
Appellees.)	

**APPELLANTS' PREHEARING BRIEF IN SUPPORT OF
AN APPEAL OF THE DIRECTOR'S ACTION ISSUING
OEPA CERTIFICATION NO. 093554**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

TABLE OF EXHIBITS v

I. ASSIGNMENTS OF ERROR 1

 A. The Director’s Action Issuing The Section 401 Certification Was Unreasonable Because The Director Acted Without Knowing Whether The Water Quality Standard For Lake Erie Is Attained..... 1

 B. The Director’s Action Issuing The Section 401 Certification Was Unlawful Because The Director Failed To Determine That The Discharge Of Dredged Sediment Will Not Prevent Or Interfere With The Attainment Or Maintenance Of Applicable Water Quality Standards 1

 C. The Director’s Action Issuing The Section 401 Certification Was Unreasonable Because The Director Failed To Explain His Determinations That (1) The Discharge of Dredged Sediment Will Not Result In A Violation Of Water Quality Standards And (2) A Lowering Of Water Quality Is Necessary 1

 D. The Director’s Action Issuing The Section 401 Certification Was Unreasonable Because The Corps Failed To Prove That The Discharge Of Dredged Sediment Will Not Prevent Or Interfere With The Attainment Or Maintenance Of The Lake Erie Water Quality Standard And Will Not Result In A Violation Of The Lake Erie Water Quality Standard..... 1

II. STATEMENT OF THE CASE AND FACTS 2

 A. Statement Of The Case 2

 B. Statement Of Facts 4

 1. Lake Erie 4

 2. The water quality of the Western Basin of Lake Erie is already impaired 4

 3. The Director has determined that the project will lower the water quality of the western basin of Lake Erie 7

 4. Appellants’ members have been harmed by the Corps’ past discharges of dredged material to the western basin of Lake Erie and will be harmed by the project..... 8

III. STATUTORY AND REGULATORY BACKGROUND..... 13

 A. Water Quality Standards 13

 1. Designated uses 14

 2. Criteria..... 15

3. Antidegradation provisions	15
B. State Certification Of A Federal License Or Permit: Section 401 Of The Clean Water Act 18	
IV. THE STANDARD OF REVIEW: WHETHER THE DIRECTOR’S ACTION ISSUING THE SECTION 401 CERTIFICATION WAS UNLAWFUL OR UNREASONABLE.....	20
V. ARGUMENT	21
A. The Director’s Action Issuing the Section 401 Certification Was Unreasonable Because The Director Acted Without Knowing Whether The Water Quality Standard For Lake Erie Is Attained.....	21
B. The Director’s Action Issuing The Section 401 Certification Was Unlawful Because The Director Failed To Determine That The Discharge Of Dredged Sediment Will Not Prevent Or Interfere With The Attainment Or Maintenance Of Applicable Water Quality Standards	24
C. The Director’s Action Issuing The Section 401 Certification Was Unreasonable Because The Director Failed To Explain His Determinations That (1) The Discharge of Dredged Sediment Will Not Result In A Violation Of Water Quality Standards And (2) A Lowering Of Water Quality Is Necessary	26
D. The Director’s Action Issuing The Section 401 Certification Was Unreasonable Because The Corps Failed To Prove That The Discharge Of Dredged Sediment Will Not Prevent Or Interfere With The Attainment Or Maintenance Of The Lake Erie Water Quality Standard And Will Not Result In A Violation Of The Lake Erie Water Quality Standard.....	28
1. The Corps did not prove that the discharge of dredged sediment will not prevent or interfere with the attainment or maintenance of the Lake Erie water quality standard and will not result in a violation of the Lake Erie water quality standard.....	28
2. The Corps could not prove that the discharge of dredged sediment will not prevent or interfere with the attainment or maintenance of the Lake Erie water quality standard and will not result in a violation of the Lake Erie water quality standard.....	29
VI. CONCLUSION.....	32

TABLE OF AUTHORITIES

Cases

<i>Citizens Commt. to Preserve Lake Logan v. Williams</i> (1977), 56 Ohio App.2d 61, 10 O.O.3d 91, 381 N.E.2d 661	20, 26
<i>Cleveland Electric Illuminating Co. v. City of Cleveland</i> (1988), 37 Ohio St.3d 50, 524 N.E.2d 441	25
<i>Columbus Coated Fabrics Division v. McAvoy</i> , Case No. EBR 79-3, 1979 WL 10815 (Ohio Env.Bd.Rev. July 11, 1979).....	20, 26, 31
<i>East Ohio Gas Co. v. Public Utilities Commn. Of Ohio</i> (1988), 39 Ohio St.3d 295, 530 N.E.2d 875	25
<i>Kripke-Tuschman Industries v. Williams</i> , Case No. EBR 78-60, 1978 WL 9433 (Ohio Env.Bd.Rev. December 27, 1978)	20
<i>Lund v. Koncelik</i> , Case No. ERAC 015795, 2006 WL 573872 (Ohio Env.Rev.App.Com. February 28, 2006).....	20
<i>McFee v. Nursing Care Management of America, Inc.</i> (2010), 2010 Ohio 2744	25
<i>Ohio Fresh Eggs, LLC v. Wise</i> (2008), 10th Dist. No. 07AP-780, 2008-Ohio-2423	20, 26
<i>PUD No. 1 v. Washington Dept. of Ecology</i> (1994), 511 U.S. 700, 714, 114 S.Ct. 1900, 128 L.Ed.2d 716.....	13, 18

Statutes

Ohio Adm. Code 3745-1-02(B)	14, 15
Ohio Adm. Code 3745-1-04	15
Ohio Adm. Code 3745-1-05(A).....	14, 16
Ohio Adm. Code 3745-1-05(B)	17, 29
Ohio Adm. Code 3745-1-05(C)	16, 17, 27
Ohio Adm. Code 3745-1-05(E)	17
Ohio Adm. Code 3745-1-06(C)(5)	17
Ohio Adm. Code 3745-1-07(A).....	13
Ohio Adm. Code 3745-1-07(B)	14, 15
Ohio Adm. Code 3745-1-31(A).....	14
Ohio Adm. Code 3745-32-05(A).....	19, 22, 24
Ohio Adm. Code 3745-32-05(C)	19
R.C. 3745.01	14
R.C. 3745.05	20
R.C. 6111.03	14
R.C. 6111.038	14
Section 1251(a), Title 33, U.S. Code	13, 18
Section 131.12, Title 40, C.F.R.	15, 16

Section 131.3, Title 40, C.F.R. 13, 14, 15, 16
 Section 131.6, Title 40, C.F.R. 13
 Section 1313(c), Title 33, U.S. Code 13
 Section 1313(c), Title 33, U.S.Code 18
 Section 1313(d), Title 33, U.S. Code..... 22
 Section 1341, Title 33, U.S. Code 17, 18

Other Authorities

U.S. Environmental Protection Agency, *Water Quality Standards Handbook* (Jul. 3, 2007)13, 15,
 16

TABLE OF EXHIBITS

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2. USACE, Finding of No Significant Impact and Environmental Assessment (April 2009) (“FONSI/EA”).
3. Ohio EPA, Response to Comments, Project: Toledo Harbor Dredging, 401 Water Quality Certification Ohio EPA ID #: 093554 (March 2010) (“Response to Comments”).
4. Ohio EPA, 401 Water Quality Certification for Toledo Harbor Dredging Public Hearing (Jan. 14, 2010) [transcript] (“Public Hearing”).
5. Email from Neil Kagan to Ben Smith, *Toledo Harbor Dredging Application – Comments on Section 401 Water Quality Certification, Project No. 093554* (Feb. 22, 2010) (“NWF Comments”).
6. Email from Sandy Bihn to Ben Smith, *Toledo Harbor 401 Application* (Feb. 22, 2010).
7. Letter from Lindsay Webb to Chris Korleski (Feb. 5 2010).
8. Letter from Chris Korleski, OEPA Director, to Martin P. Wargo, Supervisory Biologist, USACE, Buffalo District, *Grant of Section 401 Certification (MODIFIED Minimum Degradation Alternative)* (Apr. 15, 2010) (“certification”).
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11. Letter from Chris Korleski, Ohio EPA, and Sean Logan, Ohio DNR, to Lt. Col. Daniel Snead, USACE, *Continuing Issues Pertaining to the Open Lake Disposal of Dredged Materials in Lake Erie’s Western Basin* (April 15, 2010) (“Joint Letter”).
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15. Letter from William D. Franz, Chief of Environmental Review Branch, Planning and Mgmt. Div., U.S. EPA, to Col. Hugh F. Boyd, U.S. Army Corps of Engineers (Apr. 12, 1990).
16. Letter from William D. Franz, Chief of Environmental Review Branch, Planning and Mgmt. Div., U.S. EPA, to Col. John W. Morris, U.S. Army Corps of Engineers (Feb. 13, 1992).
17. Affidavit of Jamie Matuszak (July 28, 2010) (“Matuszak Aff.”).
18. Affidavit of Jerald Eichbauer (Aug. 6, 2010) (“Eichbauer Aff.”).
19. Affidavit of Rick Unger (Aug. 6, 2010) (“Unger Aff.”).
20. Affidavit of Mike Murray, Ph.D. (Aug. 9. 2010) (“Murray Aff.”).
21. Affidavit of Richard Graham (Aug. 6, 2010) (“Graham Aff.”).
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I. ASSIGNMENTS OF ERROR

- A. The Director's Action Issuing The Section 401 Certification Was Unreasonable Because The Director Acted Without Knowing Whether The Water Quality Standard For Lake Erie Is Attained**
- B. The Director's Action Issuing The Section 401 Certification Was Unlawful Because The Director Failed To Determine That The Discharge Of Dredged Sediment Will Not Prevent Or Interfere With The Attainment Or Maintenance Of Applicable Water Quality Standards**
- C. The Director's Action Issuing The Section 401 Certification Was Unreasonable Because The Director Failed To Explain His Determinations That (1) The Discharge of Dredged Sediment Will Not Result In A Violation Of Water Quality Standards And (2) A Lowering Of Water Quality Is Necessary**
- D. The Director's Action Issuing The Section 401 Certification Was Unreasonable Because The Corps Failed To Prove That The Discharge Of Dredged Sediment Will Not Prevent Or Interfere With The Attainment Or Maintenance Of The Lake Erie Water Quality Standard And Will Not Result In A Violation Of The Lake Erie Water Quality Standard**

II. STATEMENT OF THE CASE AND FACTS

A. Statement Of The Case

This is an appeal of the action of the Director (“Director”) of the Ohio Environmental Protection Agency (“OEPA”) issuing a Section 401 certification to the U.S. Army Corps of Engineers, Buffalo District (“the Corps” or “USACE”), for the 2010 Toledo Harbor Dredging Project, OEPA Project Number 093554 (“the project”).

On September 8, 2009, the Corps applied to OEPA for Section 401 certification of the project. (*See* USACE, Application for Ohio EPA Section 401 Water Quality Certification (Sept. 8, 2010) (“Application”), Ex.1.) The Corps applied for certification of a proposal to dredge the Toledo Harbor federal navigational channel and discharge up to 1.25 million cubic yards of dredged material to the open waters of Lake Erie. (Application, Ex. 1, at Continuation Sheet 3.) The discharge area is located 3.5 miles from the Toledo Harbor Lighthouse and has been used several times during the last decade for the discharge of dredged material. (*See* USACE, Finding of No Significant Impact and Environmental Assessment (April 2009) (“FONSI/EA”), Ex. 2, at 4.)

On January 14, 2010, OEPA held a public hearing on the proposed project. (*See* Ohio EPA, Response to Comments, Project: Toledo Harbor Dredging, 401 Water Quality Certification Ohio EPA ID #: 093554 (March 2010) (“Response to Comments”), Ex. 3, at 1.) Appellants Lake Erie Charter Boat Association, Ohio Environmental Council, and Western Lake Erie Waterkeeper Association testified in opposition to the proposed open-lake discharge of dredged material at the public hearing. (*See* Ohio EPA, 401 Water Quality Certification for Toledo Harbor Dredging Public Hearing (Jan. 14, 2010) [transcript] (“Public Hearing”), Ex. 4, at 5-18, -23, -29.)

OEPA also provided an opportunity for written public comment. (*See* Response to Comments, Ex. 3, at 1.) Appellants National Wildlife Federation and Western Lake Erie Association separately submitted comments during the public comment period opposing the proposed open-lake discharge of dredged material. (*See* Email from Neil Kagan to Ben Smith, *Toledo Harbor Dredging Application – Comments on Section 401 Water Quality Certification, Project No. 093554* (Feb. 22, 2010) (“NWF Comments”), Ex. 5; *see also* Email from Sandy Bihn to Ben Smith, *Toledo Harbor 401 Application* (Feb. 22, 2010), Ex. 6.)

A number of other individuals and communities opposed the project because of existing impairments to Lake Erie. (*See generally* Public Hearing, Ex. 4.) The Toledo City Council, for instance, adopted a Resolution to encourage the Director to prevent open water dumping in the Western Basin of Lake Erie because of the impacts of sediment on increased turbidity and other sediment nutrients, as did the City of Oregon, Ohio. (*See, e.g.*, Letter from Lindsay Webb to Chris Korleski (Feb. 5, 2010), Ex. 7.)

On April 15, 2010, the Director authorized the project, granting Section 401 certification to the Modified Minimum Degradation Alternative. (*See* Letter from Chris Korleski, OEPA Director, to Martin P. Wargo, Supervisory Biologist, USACE, Buffalo District, *Grant of Section 401 Certification (MODIFIED Minimum Degradation Alternative)* (Apr. 15, 2010) (“certification”), Ex. 8, at 1.) The certification authorizes the Corps to discharge 800,000 cubic yards of dredged material during calendar year 2010 to the northeast half of a one square mile area in the Western Basin of Lake Erie. (Certification, Ex. 8, at 3 (Parts I.C.2 & II.D.), 4 (Part II.F.), 7 (Part III.A.).)

Because the Certification was unlawful and unreasonable, the National Wildlife Federation, Western Lake Erie Association, Lake Erie Charter Boat Association, Izaak Walton

League of America, Ohio Division, and the Ohio Environmental Council filed this appeal on May 13, 2010.

B. Statement Of Facts

1. Lake Erie

Lake Erie is divided into western central, and eastern basins. (*See* Jennifer Vincent, Environment Canada, and Julie Letterhos, OEPA, eds., Lake Erie Lakewide Management Plan 2008 Report (2008) (“LaMP”), Ex. 9, at Section 2.1., p. 1.)¹ The western basin is very shallow, with an average depth of twenty-four feet. (*Id.*) Strong southwest winds expose large areas of the lake bottom in the western basin. (*Id.*) “Most of the lake bottom is covered with fine sediment particles that are easily disturbed when the shallow lake is stirred up by winds.” (*Id.* at 2.)

Lake Erie is the warmest and most biologically productive of the Great Lakes. (LaMP, Ex. 9, at Section 2.1, p. 3.) Lake Erie has more than half the consumable fish in the Great Lakes. (Public Hearing, Ex. 4 at 5-23:14-16.) The boat chartering business on Lake Erie brings \$800 million into Ohio each year. (*Id.* at 5-18:13-14.)

2. The water quality of the Western Basin of Lake Erie is already impaired

The LaMP documents a number of impairments of the western basin of Lake Erie, including the following:

- Degradation of phytoplankton and zooplankton populations, caused by zebra and quagga mussel grazing and high planktivory;
- Degradation of fish populations, caused by habitat loss and degradation, among other things;
- Loss of fish habitat, caused by sediment and nutrient loading, among other things;

¹ The co-leads for the LaMP are Environment Canada and the U.S. Environmental Protection Agency. LaMP, Acknowledgments at i.

- Degradation of wildlife populations, caused by sediment and nutrient loading, among other things;
- Loss of wildlife habitat, caused by sediment and nutrient loading, among other things;
- Degradation of benthos, caused by loss and degradation of habitat, among other things;
- Eutrophication or undesirable algae, caused by phosphorus, among other things.

(LaMP, Ex. 9, Table 4.10 at 18-19.)

Beginning in the 1990s, loads of dissolved reactive phosphorus have been increasing in Lake Erie. (OEPA, Ohio Lake Erie Phosphorous Task Force Final Report (Apr. 2010) (“Task Force”), Ex. 10, Section 1 at 11.) Both spring and summer mean total phosphorus concentrations in the Western Basin of Lake Erie continue to exceed the water quality goal for the basin of 15 ug/l. (Affidavit of Michael Murray, Ph.D. (“Murray Aff.”), Ex. 20, at ¶23.)

In general, increasing concentrations of phosphorus are associated with increasing probability of cyanobacterial growth, and thus, the risk of HABs. (Murray Aff., Ex. 20, at ¶25.) Indeed, coincidental to the increase in phosphorus, the lake has grown increasingly degraded. (Task Force, Ex. 10, Section 1 at 11.) Blue-green algal blooms began to appear in the western basin, including a particularly massive bloom of *Microcystis aeruginosa* in 2003. (*Id.*) *Microcystis* produces toxins that can be harmful to humans, animals and aquatic life, and it has been associated with harmful algal blooms. (*Id.*) “Walleye and yellow perch populations have been showing long term declining trends since the 1990s, and there has not been a good hatch of walleye since 2003.” (*Id.*)

An additional factor that can influence growth of cyanobacteria is suspended sediment levels in the water. (Murray Aff., Ex. 20, at ¶27.) Researchers at the University of Toledo have found that certain levels of suspended sediments (mixing due to moderate winds) can be optimal

for growth of *Microcystis*, due to a protective effect - the increased turbidity shields the organisms from harmful solar radiation, but they still have enough light to grow. (*Id.*)

The Director of OEPA and the Director of the Ohio Department of Natural Resources agree that the western basin of Lake Erie suffers from excessive sediment and nutrient loads. (Letter from Chris Korleski, Ohio EPA, and Sean Logan, Ohio DNR, to Lt. Col. Daniel Snead, USACE, *Continuing Issues Pertaining to the Open Lake Disposal of Dredged Materials in Lake Erie's Western Basin* (April 15, 2010) ("Joint Letter"), Ex. 11 at 3.) They concede that such loads likely cause adverse environmental impacts (possibly including harmful algal blooms) which in turn adversely affect the use of the lake for recreation, fishing and drinking water, among other things. (*See id.* at 2-3.)

Yet, the Director does not know the full extent of the impairment of the water quality of the western basin of Lake Erie. OEPA does not assess whether the open waters of the lake meet the water quality standard. OEPA, Final Ohio 2010 Integrated Report, Framework for Reporting and Evaluation at D-24 & 48, *available at* http://www.epa.state.oh.us/portals/35/tmdl/2010IntReport/Section_D.pdf (last visited Aug. 6, 2010) ("Ohio EPA reports on the waters that are within Ohio's boundaries. For shared waters such as the open waters of Lake Erie and the Ohio River, the agency relies on U.S. EPA and ORSANCO programs that have jurisdiction over these waters."). Ohio only assesses the nearshore waters of Lake Erie, meaning areas within 100 meters of the shoreline. *See* OEPA, Final Ohio 2010 Integrated Report, Executive Summary at xi, *available at* http://www.epa.state.oh.us/portals/35/tmdl/2010IntReport/Cover_front_matter.pdf (last visited Aug. 6, 2010) ("Results are reported for 1,538 new, smaller watershed units, 38 large river units (in Ohio's 23 rivers that drain more than 500 square miles), and 3 Lake Erie nearshore units."),

& Evaluating Beneficial Use: Aquatic Life at G-5, *available at* http://www.epa.state.oh.us/portals/35/tmdl/2010IntReport/Section_G.pdf (last visited Aug. 6, 2010), & Summary Tables of Waterbody Conditions at L3-1 (Status of Lake Erie Assessment Units), *available at* http://www.epa.state.oh.us/portals/35/tmdl/2010IntReport/Section_L.pdf (last visited Aug. 6, 2010).

3. The Director has determined that the project will lower the water quality of the western basin of Lake Erie

In issuing the Section 401 certification, the Director himself determined that the project will lower the water quality of the western basin of Lake Erie, although he did not make any determination either of the degree or magnitude of the degradation or the impairments that will occur. (*See* Certification, Ex. 8, at 1.) On the very day the Director issued the certification, though, he, together with the Director of the Ohio Department of Natural Resources, wrote to the Corps that the disposal of dredged sediment raises ecological issues of concern, specifically light penetration, algal blooms, and fish spawning. (Joint Letter, Ex. 11.). Earlier, the Director wrote to U.S. EPA expressing his belief that the disposal of dredged sediment is a cause, but not the only cause, of the outbreak of harmful algal blooms in the western basin of Lake Erie, which have impacted fisherman, boaters, tourists, and residents. (Letter from Chris Korleski, Director, Ohio EPA, to Gary Gulezian & Cameron Davis, U.S. EPA (January 27, 2010), Ex. 12, at 1.)

OEPA has previously admitted that “the practice of open lake disposal of large quantities of fine grain dredged material is harmful to the Western Basin of Lake Erie ecosystem.” (Letter from R. Bournique, Manager, 401 Wetlands Section, OEPA, to Martin P. Wargo, Chief, Environmental Analysis Section, Buffalo District, USACE (May 29, 2009), Ex. 13, at 1.) “Ohio EPA considers that sediment itself is a pollutant, even if it is determined to be uncontaminated.”

(*Id.* at 2.) “The Ohio EPA maintains that the sheer volume of sediments placed into open waters impacts lake ecology by reducing water clarity for an extended time and redistributing pollutants.” (R. Bournique, Ohio EPA, Toledo Harbor Dredging Project Update (May 19, 2009), Ex. 14, at 2.)

OEPA knows that its opinion about the harm caused the western basin of Lake Erie by open-lake disposal “is shared by the U.S. EPA, the Ohio Department of Natural Resources, members of the academic community, a number of environmental organizations, and many members of the general public.” (*Id.*) For instance, the U.S. EPA wrote to the Corps that disposal of dredged sediment in the open waters of Lake Erie is “environmentally unacceptable.” (Letter from William D. Franz, Chief of Environmental Review Branch, Planning and Mgmt. Div., U.S. EPA, to Col. Hugh F. Boyd, U.S. Army Corps of Engineers (Apr. 12, 1990), Ex. 15, at 2.) Specifically, the U.S. EPA wrote as follows:

Upon disposal of Toledo Harbor sediments into the open lake, these sediments will initially settle on the lake bottom. Subsequent resuspension of these sediments will allow for the uptake of phosphorus and other nutrients by the biota, adding to the Great Lakes eutrophication problem.

(*Id.*) The U.S. EPA reiterated these concerns in 1992. (Letter from William D. Franz, Chief of Environmental Review Branch, Planning and Mgmt. Div., U.S. EPA, to Col. John W. Morris, U.S. Army Corps of Engineers (Feb. 13, 1992), Ex. 16, at 1-2.)

4. Appellants’ members have been harmed by the Corps’ past discharges of dredged material to the western basin of Lake Erie and will be harmed by the project

The Appellants are five organizations whose members live in or near Ohio, and who use and enjoy the waters of the western basin of Lake Erie for work and recreation.

Appellant National Wildlife Federation (“NWF”) submitted written comments on the draft Certification on February 22, 2010. (“NWF Comments”, Ex. 5, p. 2.) NWF is a District of Columbia not-for-profit corporation with an office in Ann Arbor, Michigan. (*Id.*) Its mission includes protecting the ecosystems that are most critical to native wildlife in order to ensure a healthy wildlife legacy for future generations. (*Id.*) Its membership includes tens of thousands of Ohio citizens, who have used or use the western basin of Lake Erie for recreation and aesthetic enjoyment. (*Id.*) Any activity that would degrade those waters would adversely affect the use and enjoyment of those waters by NWF’s members. (*Id.*)

Appellant Ohio Environmental Council (“OEC”) is a non-profit organization dedicated to protecting Ohio’s natural resources, including Lake Erie. (Affidavit of Jamie Matuszak (“Matuszak Aff.”), Ex. 17, at ¶ 3.) The OEC’s Director of Agricultural and Clean Water Programs testified at the January 14, 2010, Public Hearing on 401 Water Quality Certification for Toledo Harbor Dredging. (See Public Hearing, Ex. 4, p. 29.)

Among the members of OEC are individuals who would be personally aggrieved by the open-lake dumping operations. Jamie Matuszak is a member of the OEC and Appellant Western Lake Erie Association, as well as an avid boater in the western basin. (Matuszak Aff., Ex. 17, at ¶¶ 3, 10.) The turbidity that results from open-lake dumping already “has adversely affected, and continues to adversely affect, [her] recreational, economic, and aesthetic enjoyment of Lake Erie.” (*Id.* at ¶ 23.) She states that, near the dumpsite after the operations commence, she can only see “a couple inches deep in the water” where she normally could “see to a depth of three to four feet.” (*Id.* at ¶ 13.) To her knowledge, the turbidity spreads far beyond the dumpsite: she has “witnessed the silty, clouded water at West Sister Island, which is around 10 miles east of the open-lake dumping site.” (*Id.*) Through monitoring reports from the radio channels at work at

West Marine, Ms. Matuszak states that she has noticed “fewer people [using] the waters for recreation and it appears fewer boaters are catching fish.” (*Id.* at ¶ 19.) She believes “that further open-lake dumping will diminish water quality and further decrease the recreational, ecological, and economic value of the Western Basin.” (*Id.* at ¶ 23.)

Ms. Matuszak is further concerned that open-lake dumping is contributing to harmful algal blooms “by stirring up and re-suspending nutrients from the lake bottom.” (*Id.* at 14.) The algae and turbidity negatively impact her recreation in multiple ways. Not only has she stopped swimming and water skiing in the Western Basin after becoming ill two times, she also “had to pay to have [her sailboat] dry docked so it could be washed with clean water” because it wasn’t feasible for she and her sailing partner “to sail far enough to the east to reach water that we would be comfortable getting into to clean the boat.” (*Id.* ¶ 15.) Ms. Matuszak notices physical changes in the water when the algal blooms get particularly bad, finding that it “is so thick with algae that it splashes differently: like oil would rather than normal water.” (*Id.* at ¶ 14.)

Jerald Eichbauer, another Western Lake Erie Association member, is similarly concerned that open-lake dumping may be contributing to the worsening algal blooms since he has “noticed increasing levels of algae in the last few years.” (Affidavit of Jerald Eichbauer (“Eichbauer Aff.”), Ex. 18, at ¶ 10.) Mr. Eichbauer, from Luna Pier, Michigan, about eight miles north of Toledo, is an avid sailor who primarily sails in the western basin of Lake Erie. (*See id.* at ¶¶ 3, 6.) Part of his enjoyment of sailing on Lake Erie has been “the color and clarity of the water.” (*Id.* at ¶ 3.) Though he moved to the shore of the western basin for “the opportunity * * * that it gave [him] to enjoy the beauty of the clear, blue-green water off the beach,” that water is “never clear while sediment is being dumped into the lake.” (*Id.* at ¶ 5.) Mr. Eichbauer lives about six miles west of the dumpsite, yet finds that “the turbidity and murkiness continues for weeks

throughout the period during which sediment dumping occurs.” (*Id.*) The water is “dirty and dark” following dumping operations at one of his favorite sailing destinations, the Toledo Harbor Light, which is “very close” to the dumpsite. (*Id.* at ¶ 6.) “Because the bad water quality occurs just after dumping,” Mr. Eichbauer believes that “the dumped sediment may be ruining the water and [his family’s] sailing experience.” (*Id.*)

Rick Unger, President of Appellant Lake Erie Charter Boat Association, as well as the owner of Chase Charters, has experienced economic harm as a result of increased turbidity. (Affidavit of Rick Unger (“Unger Aff.”), Ex. 19 at ¶¶ 9, 19; see also Matuszak Aff., Ex. 17, at ¶3.) The Lake Erie Charter Boat Association seeks environmental protection for fish and wildlife in Lake Erie. (Unger Aff., Ex. 19 at ¶3.) A board member of the Lake Erie Charter Boat Association spoke at OEPA’s January 14, 2010, public hearing. (*See* Public Hearing, Ex. 4 at p. 65.)

Mr. Unger has “observed a correlation between the time of year that the U.S. Army Corps of Engineers dumps sediment in the open-lake of the Western Basin of Lake Erie and an increase in the turbidity of the water [there].” (Unger Aff., Ex. 19 at ¶ 11.) Mr. Unger is afraid the problems will only worsen if the Director’s Section 401 certification is affirmed: “I have had to spend extra money and gas to take charters further out into Lake Erie for fishing and recreational purposes, to escape the muddy water and algal blooms in the western basin. As a result, my charter boat business has suffered financially.” (*Id.* at ¶ 19.) Based on his experience, “it has been more difficult to catch fish wherever there is green water and algae. Fish tend to avoid areas of the lake where there is a surplus of algae, making it difficult to fish in western Lake Erie. Practically no fish are caught where thick algae occurs in the western basin of Lake Erie.” (*Id.* ¶¶ 16,17.) Mr. Unger is “concerned that the nearly \$900 million dollars in tourism and

recreational fishing revenue that is brought to Ohio each year will decline in part because of the Corps' disposal of the dredged sediment in the western basin of Lake Erie," and "that the Corps' disposal activities make the water quality worse." (*Id.* ¶ 21.) He states: "In particular, I am concerned that the revenues of my charter boat business will decline" because "[p]eople no longer want to fish or swim in the poor quality water of the western basin of Lake Erie." (*Id.*)

Appellant Izaak Walton League of America, Ohio Division, ("the League") is "involved with protecting and restoring Lake Erie and other waters of the Great Lakes." (Affidavit of Richard Graham ("Graham Aff."), Ex. 21, at ¶ 3.) One of the League's members agrees that fishing suffers due to the Applicant's open-lake dumping. (*See id.* at ¶ 12.) Based on Richard Graham's observations, "as the turbidity of the water increases, fish either stop feeding, die or migrate to other areas." (*Id.* at ¶ 11.) According to him, "[l]ast year was a difficult season for fishing, but it has been worse this year because the fish have either died or migrated away." (*Id.* ¶ 12.) Mr. Graham is very familiar with the dredging process and is very concerned about "the water quality in Lake Erie and the impairment of [his] use and enjoyment of its natural resources as a result of open-lake dumping." (*Id.* at ¶¶ 8, 9.) Because of his education (*see id.* at ¶ 7) and the source of the materials to be dredged, he believes "that open-lake dumping will increase the amount of nutrients in Lake Erie[,] * * * and will cause[] harmful algal blooms, which contribute to fish toxicity" (*id.* at ¶ 13). Like some of the other affiants, Mr. Graham has "personally observed terrible turbidity in Lake Erie in the Western Basin * * * in the vicinity of the area where open-lake dumping of dredged sediment [occurs]" but he also has noticed that "wind from the west brings the turbid water east toward the area where I boat, fish, and swim" and as far as "Kelleys Island." (*Id.* at ¶ 10.) Mr. Graham's concern about the Project at issue is "based on

[his] past experience of the increased turbidity associated with the dumping, both in the vicinity of the dumping and to points east; algal blooms; and harm to fish.” (*Id.* at ¶ 19.)

III. STATUTORY AND REGULATORY BACKGROUND

A. Water Quality Standards

Congress enacted the Federal Water Pollution Control Act (“Clean Water Act” or “Act”) in 1972 to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” and to achieve “water quality which provides for the protection and propagation of fish, shellfish, and wildlife, and provides for recreation in and on the water.” Section 1251(a), Title 33, U.S. Code. To achieve the Act’s goal of eliminating the discharge of pollutants into navigable waters, each state must establish ambient water quality standards for intrastate waters at levels necessary to protect the “public health or welfare, enhance the quality of water and serve the purposes of” the Act. Section 1313(c)(2)(A), Title 33, U.S. Code.

“A water quality standard defines the water quality goals for a water body . . . by designating the use or uses to be made of the water, by setting criteria necessary to protect the uses, and by protecting water quality through antidegradation provisions.” U.S. Environmental Protection Agency, *Water Quality Standards Handbook* (Jul. 3, 2007) (“*EPA WQS Handbook*”), Section 1.2, *available at* <http://www.epa.gov/waterscience/standards/handbook/chapter01.html#section2> (last visited Aug. 4, 2010); *see also* Section 1313(c)(2)(A), Title 33, U.S. Code.; *see also PUD No. 1 v. Washington Dept. of Ecology* (1994), 511 U.S. 700, 714, 114 S.Ct. 1900, 128 L.Ed.2d 716; *see also* Section 131.3(i), Title 40, C.F.R. (“Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria

for such waters based upon such uses.”); *see also* Section 131.6, Title 40, C.F.R. (identifying the elements that states must include in water quality standards, including designated uses, water quality criteria, and an antidegradation policy); Ohio Adm. Code 3745-1-07(A) (“Water quality standards contain . . . designated uses; and numerical or narrative criteria designed to protect and measure attainment of the uses.”).

Ohio established the Ohio Environmental Protection Agency (“OEPA”) to “administer the laws pertaining to . . . the prevention, control, and abatement of . . . water pollution.” R.C. 3745.01. The Director of the OEPA develops water quality standards and is charged with preventing or abating water pollution and ensuring compliance with the Federal Water Pollution Control Act. *See, e.g.*, R.C. 6111.03(A)-(P), 6111.038.

1. Designated uses

“Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained.” Section 131.3(f), Title 40, C.F.R.; *accord* Ohio Adm. Code 3745-1-02(B)(29).

OEPA has specified the following uses as designated uses for Lake Erie, among others: exceptional warmwater habitat, superior high quality water, and bathing waters. Ohio Adm. Code 3745-1-31(A).

Exceptional warmwater is a water “capable of supporting and maintaining an exceptional or unusual community of warmwater aquatic organisms having a species composition, diversity, and functional organization comparable to the seventy-fifth percentile of the identified reference sites on a statewide basis.” Ohio Adm. Code 3745-1-07(B)(1)(c).

Superior high quality water is a surface water that “possess[es] exceptional ecological values.” Ohio Adm. Code 3745-1-05(A)(10)(b).

Bathing waters are a subset of the recreation designated use, which covers boating and sport fishing, among other things. *See* Ohio Adm. Code 3745-1-07(B)(4). They “are waters that, during the recreation season, are heavily used for swimming.” *Id.* at 3745-1-07(B)(4)(a). As waters suitable for swimming, they are also suitable for uses involving less body contact, such as boating, water skiing, canoeing, and kayaking. *See id.* at 3745-1-07(B)(4)(b).

2. Criteria

“Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.” Section 131.3(b), Title 40, C.F.R.; *accord* Ohio Adm. Code 3745-1-02(B)(23).

“When criteria are met, water quality will generally protect the designated use.” Section 131.3(b), Title 40, C.F.R.

A number of narrative criteria apply to all surface waters within the state, including Lake Erie. Ohio Adm. Code 3745-1-04. Among them are criteria requiring surface waters, “to every extent practical and possible,” to be (1) “[f]ree from suspended solids or other substances that enter the waters as a result of human activity. . . that will adversely affect aquatic life,” Ohio Adm. Code 3745-1-04(A); (2) “[f]ree from substances entering the waters as a result of human activity in concentrations that are . . . harmful to human, animal or aquatic life,” *id.* at 3745-1-04(D); and (3) “[f]ree from nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae.” Ohio Adm. Code 3745-1-04(E).

3. Antidegradation provisions

The Clean Water Act requires each state to develop an antidegradation policy. Section 131.12, Title 40, C.F.R. The antidegradation policy must provide several layers of protection for

state waters. *Id.* The policy must maintain and protect existing uses and the level of water quality necessary to protect existing uses. *Id.* at Section 131.12(a). This “provides the *absolute floor* of water quality in all waters of the United States.” *EPA WQS Handbook* at Section 4.4, available at <http://www.epa.gov/waterscience/standards/handbook/chapter04.html#section4> (last visited Aug. 9, 2010) (emphasis added). “Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.” Section 131.3(e), Title 40, C.F.R.; Ohio Adm. Code 3745-1-05(A)(8).

In addition, the antidegradation policy must maintain and protect the quality of waters with quality better than necessary to support fish, wildlife, and recreation, unless the state finds that “allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located.” Section 131.12(b), Title 40, C.F.R. “This provision is intended to provide relief only in a few extraordinary circumstances where the economic and social need for the activity clearly outweighs the benefit of maintaining water quality above that required for ‘fishable/swimmable’ water, and both cannot be achieved.” *EPA WQS Handbook* at Section 4.5, available at <http://www.epa.gov/waterscience/standards/handbook/chapter04.html#section5> (last visited Aug. 9, 2010). *EPA WQS Handbook* at Section 4.5. The state may not, however, allow water quality to be lowered to a level that either violates the applicable water quality criteria for designated uses or falls below the absolute floor for protecting existing uses. Ohio Adm. Code 3745-1-05(C)(1).

OEPA concedes the accuracy of the preceding summary of the Act’s requirements with respect to antidegradation: “The antidegradation rule ensures that existing and designated uses of the water body are protected. It only allows lowering water quality *consistent with protecting existing and designated uses* of the water body when it is necessary to support important social

and economic development.” (Response to Comments, Ex. 3 at 11, Comment 19 (emphasis added).)OEPA, *Response to Comments, Toledo Harbor Dredging, 401 Water Quality Certification*, Ohio EPA ID No. 093554 (“*Response to Comments*”), at 11, Comment 19 (Mar. 2010), *available at*

http://www.epa.state.oh.us/portals/35/401/toledo_harbor_response_to_comments_mar10.pdf

(last visited July 1, 2010) (emphasis added).

Indeed, consistent with the Act’s requirements, OEPA has provided that “[e]xisting uses . . . and the level of water quality necessary to protect existing uses, shall be maintained and protected.” Ohio Adm. Code 3745-1-05(C)(1). “There may be no degradation of water quality that results in . . . the elimination or substantial impairment of existing uses.” *Id.*

In addition, to justify a lowering of water quality in waters with quality better than necessary to meet designated and existing uses, an applicant must provide documentation of a number of items, including an estimate both of (1) the important social, economic and environmental benefits to be realized through the project or activity if the water quality is lowered and (2) important social, economic and environmental benefits to be lost if water quality is lowered, such as lost or lowered recreational opportunities. Ohio Adm. Code 3745-1-05(B)(3)(a)-(h). Before approving activities that lower water quality in superior quality waters, such as Lake Erie, Ohio Adm. Code 3745-1-05(E)(1)(a), the Director of OEPA must consider thirteen separate factors. These factors range from the magnitude of the proposed lowering of water quality; to the anticipated impact on aquatic life; to the effects on the economic value of the water body for recreation, tourism and other commercial activities, and aesthetics. Ohio Adm. Code 3745-1-06(C)(5)(a)-(m).

B. State Certification Of A Federal License Or Permit: Section 401 Of The Clean Water Act

Pursuant to § 401 of the Clean Water Act, applicants for a federal license or permit for any activity which may result in a discharge into state waters must provide the federal permitting agency with a certification from the state that the discharge will comply with applicable effluent limitations, water quality standards, and standards of performance. Section 1341(a)(1), Title 33, U.S.Code; *PUD No. 1 of Jefferson Co. v. Wash. Dept. of Ecology*, 511 US at 712-13.

Section 401 also requires the certification to set forth limitations and monitoring requirements necessary to assure that dischargers will comply with water quality standards. Section 1341(d), Title 33, U.S.Code. To assure compliance with water quality standards, a certification must include conditions sufficient to assure compliance with all three components of the water quality standards: the designated uses, the criteria (numeric or narrative), and antidegradation provisions. *See PUD No. 1 of Jefferson Co. v. Wash. Dept. of Ecology*, 511 US at 715, 719.

To protect a designated use, the use must be maintained. This follows from the CWA's mandate that WQS "shall . . . serve the purposes of this Act," Section 1313(c)(2)(A), Title 33, U.S.Code, which are "to restore and *maintain* the chemical, physical, and biological integrity of the Nation's waters." Section 1251(a), Title 33, U.S.Code. An impairment of a designated use would run contrary to the mandate of maintaining the integrity of the water. Consequently, a violation of a WQS occurs where a designated use continues to a diminished extent. The purposes of the Act would not be served by deeming a designated use protected even as its usefulness degrades, by turning a blind eye to the degradation of a designated use until it is completely eliminated.

The requirement to fully maintain designated uses is paralleled for existing uses. For instance, as explained above, the antidegradation policy requires the maintenance and protection of existing uses and the water quality necessary to protect existing uses.

OEPA's rules governing Section 401 certifications are consistent with the Clean Water Act. These rules provide as follows:

The director [of OEPA] shall not issue a section 401 water quality certification unless he determines that the applicant has demonstrated that the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the state will:

- (1) Not prevent or interfere with the attainment or maintenance of applicable water quality standards;
- (2) Not result in a violation of any applicable provision of the following sections of the Federal Water Pollution Control Act including:

...

- (c) Water quality standards and implementation plans as described in section 303[.]

Ohio Adm. Code 3745-32-05(A).

Further, the rules provide that the Director of OEPA "may impose such terms and conditions as part of a section 401 water quality certification as are appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of water quality."

Ohio Adm. Code 3745-32-05(C).

In sum, the Director of the OEPA has the authority to grant or deny a Section 401 certification, but may grant certification only upon finding that the activity "will . . . [n]ot prevent or interfere with the attainment or maintenance of applicable water quality standards" and "will . . . [n]ot result in a violation of any applicable . . . [w]ater quality standards." Ohio Adm. Code 3745-32-05(A)(1) & (2)(c).

IV. THE STANDARD OF REVIEW: WHETHER THE DIRECTOR'S ACTION ISSUING THE SECTION 401 CERTIFICATION WAS UNLAWFUL OR UNREASONABLE

The Ohio Revised Code outlines the standard of review that this Commission must apply when deciding an appeal from a final action of the Director of the OEPA:

If, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.

R.C. 3745.05(F). “‘Unlawful’ means that which is not in accordance with law

Unreasonable’ means that which is not in accordance with reason, or that which has no factual foundation.” *Citizens Commt. to Preserve Lake Logan v. Williams* (1977), 56 Ohio App.2d 61, 70, 10 O.O.3d 91, 381 N.E.2d 661 (cited with approval by *Ohio Fresh Eggs, LLC v. Wise* (2008), 10th Dist. No. 07AP-780, 2008-Ohio-2423, ¶31). If the Commission finds that “the Director’s action is either unlawful or unreasonable within the meaning of those terms, then the Board has the power to vacate or modify the action taken by the Director.” *Columbus Coated Fabrics Division v. McAvoy*, Case No. EBR 79-3, 1979 WL 10815 (Ohio Env.Bd.Rev. July 11, 1979) at *2.

In applying the “unreasonable” component of the standard, the Commission must determine whether the Director had a valid factual foundation and provided reasons for his action. *Citizens Commt. To Preserve Lake Logan*, 56 Ohio App.2d at 70; *Lund v. Koncelik*, Case No. ERAC 015795, 2006 WL 573872 (Ohio Env.Rev.App.Com. February 28, 2006) at *12, ¶12; *Columbus Coated Fabrics Division*, 1979 WL 10815 at *2-3; *Kripke-Tuschman Industries v. Williams*, Case No. EBR 78-60, 1978 WL 9433 (Ohio Env.Bd.Rev. December 27, 1978) at *2.

The Director must explain how he arrived at his conclusions; simply stating them is insufficient.

Columbus Coated Fabrics Division, 1979 WL 10815 at *2-3.

V. ARGUMENT

The Director issued the Section 401 certification although he concluded that it will lower the water quality of the western basin of Lake Erie. His action was inconsistent with OEPA's longstanding opposition to the Corps' discharge of dredged material in the open waters of the lake. (Joint Letter, Ex. 11, at 3.)

Indeed, the very day that the Director certified the project, the Directors of OEPA and the Ohio Department of Natural Resources jointly sent a letter to the Corps complaining that their concerns about the dumping of dredged sediment in Lake Erie "cannot be overstated." *Id.* at 2. They specifically mentioned "ecological issues of concern like algal blooms, light penetration and the potential impact on fish spawning." *Id.* They said they "are *already* convinced that an excessive sediment/nutrient load to the Western Basin of Lake Erie is likely causing negative impacts." *Id.* at 3 (emphasis in original). They concluded, "We cannot state our belief any more clearly: Open lake disposal of these huge quantities of sediment in the Western Basin of Lake Erie is not environmentally acceptable to the State of Ohio and needs to be discontinued." *Id.* at 3-4.

The Director's certification of the project, regardless of the concerns he himself expressed, was without reason and was not supported by a valid factual foundation. For these reasons, the Director's action was unlawful and unreasonable, and the Commission should vacate the Section 401 certification to redress the harm it causes Appellants.

A. **The Director's Action Issuing the Section 401 Certification Was Unreasonable Because The Director Acted Without Knowing Whether The Water Quality Standard For Lake Erie Is Attained**

OEPA's rules prohibit the Director from issuing a Section 401 certification "unless he determines that the applicant has demonstrated that the discharge of dredged . . . material to waters of the state . . . will . . . [n]ot prevent or interfere with the attainment or maintenance of applicable water quality standards" or violate water quality standards. Ohio Adm. Code 3745-32-05(A)(1) & (2)(c). The Director cannot make these determinations in a vacuum. He can only make them if he knows whether the applicable water quality standard is being met. If he does not know this, he has no context for gauging whether a discharge will prevent or interfere with the attainment or maintenance of a water quality standard, or violate a water quality standard.

A few examples will demonstrate why knowledge of the condition of a water's quality is essential to the Director's determinations. If the water already does not meet the applicable water quality standard as a result of a pollutant in the water that is also found in the dredged material, then an applicant could not demonstrate that the addition of the same pollutant will not prevent or interfere with the *attainment* of the standard. If the water just barely meets the standard, then an applicant could not demonstrate that the addition will not prevent or interfere with the *maintenance* of the standard and will not violate the standard. If the water more than meets the standard, then the applicant could not demonstrate that the addition will not prevent or interfere with the maintenance of the standard and will not violate the standard unless it can demonstrate that the water quality is high enough to accommodate the diminution in quality that will occur.

In sum, the Director can only evaluate the impact of a discharge on a water quality standard, and can only carry out the appropriate evaluation, if he knows what the condition of the receiving water is. In this case, the Director was ignorant of the quality of the open waters of Lake Erie.

The Clean Water Act requires each state to periodically assess and report to the U.S. Environmental Protection Agency whether the waters within its boundaries meet the applicable water quality standards. Section 1313(d)(1) & (2), Title 33, U.S.Code. Ohio recently completed its final 2010 report, but openly admitted that it did not assess or report on the open waters of Lake Erie. OEPA, Final Ohio 2010 Integrated Report, Framework for Reporting and Evaluation at D-24 & 48, *available at* http://www.epa.state.oh.us/portals/35/tmdl/2010IntReport/Section_D.pdf (last visited Aug. 6, 2010) (“Ohio EPA reports on the waters that are within Ohio’s boundaries. For shared waters such as the open waters of Lake Erie and the Ohio River, the agency relies on U.S. EPA and ORSANCO programs that have jurisdiction over these waters.”). Ohio only assesses the nearshore waters of Lake Erie, meaning areas within 100 meters of the shoreline. *See* OEPA, Final Ohio 2010 Integrated Report, Executive Summary at xi, *available at* http://www.epa.state.oh.us/portals/35/tmdl/2010IntReport/Cover_front_matter.pdf (last visited Aug. 6, 2010) (“Results are reported for 1,538 new, smaller watershed units, 38 large river units (in Ohio’s 23 rivers that drain more than 500 square miles), and 3 Lake Erie nearshore units.”), & Evaluating Beneficial Use: Aquatic Life at G-5, *available at* http://www.epa.state.oh.us/portals/35/tmdl/2010IntReport/Section_G.pdf (last visited Aug. 6, 2010), & Summary Tables of Waterbody Conditions at L3-1 (Status of Lake Erie Assessment Units), *available at* http://www.epa.state.oh.us/portals/35/tmdl/2010IntReport/Section_L.pdf (last visited Aug. 6, 2010).

Indeed, OEPA admitted that for the past five years it has not assessed whether Lake Erie attains the exceptional warmwater habitat, recreation, or public water supply designated uses, or

the criteria for these designated uses. (OEPA Responses to Requests for Admissions (July 16, 2010), Ex. 22, Nos. 12, 15, 18.)

Thus, OEPA could not provide the Director with its own assessment of the condition of Lake Erie. Nor did the Corps provide data showing whether the Lake Erie water quality standard is being met. There is plenty of documentation, however, that Lake Erie is currently impaired because of degraded plankton, benthos, fish, and wildlife populations; degraded habitat; eutrophication; and harmful algal blooms. *See text, supra*, at 4-7.

For these reasons, the Director did not have a valid factual foundation for determining that the discharge of dredged material to Lake Erie will not prevent or interfere with the attainment or maintenance of applicable water quality standards or violate water quality standards. Consequently, the Director's issuance of the Section 401 certification to the Corps was unreasonable. Therefore, the Commission should vacate the Director's action.

B. The Director's Action Issuing The Section 401 Certification Was Unlawful Because The Director Failed To Determine That The Discharge Of Dredged Sediment Will Not Prevent Or Interfere With The Attainment Or Maintenance Of Applicable Water Quality Standards

The Director must make two separate determinations before he can issue a Section 401 certification. First, he must determine "that the applicant has demonstrated that the discharge of dredged . . . material to waters of the state . . . will . . . [n]ot prevent or interfere with the attainment or maintenance of applicable water quality standards." Ohio Adm. Code 3745-32-05(A)(1). Second, he must determine "that the applicant has demonstrated that the discharge of dredged . . . material to waters of the state . . . will . . . [n]ot result in a violation of any applicable provision of the following sections of the Federal Water Pollution Control Act including" Sections 301, 302, 303, 306, and 307. Ohio Adm. Code 3745-32-05(A)(2)(c).

In this case, the Director did not make the first determination. (See Certification, Ex. 8, at 1.) The Director made only the second determination, although he cast his determination in a positive formulation. Specifically, in issuing the Section 401 certification to the Corps, he “certifie[d] that the . . . project will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act.” (*Id.*)

The Director’s determination that the project will not violate Sections 301, 302, 303, 306, and 307 of the Clean Water Act does not satisfy his obligation to make a determination that the project will not prevent or interfere with the attainment or maintenance of applicable water quality standards. “[A] basic rule of statutory construction [is] that words in statutes should not be construed to be redundant, nor should any words be ignored.” *East Ohio Gas Co. v. Public Utilities Commn. Of Ohio* (1988), 39 Ohio St.3d 295, 299, 530 N.E.2d 875; accord *Cleveland Electric Illuminating Co. v. City of Cleveland* (1988), 37 Ohio St.3d 50, 53, 524 N.E.2d 441 (“A court construing a provision in a city charter, statute, contract or other writing may not ignore the existence of any word or phrase.”). The rules of statutory construction apply to administrative rules as well as to statutes. *McFee v. Nursing Care Management of America, Inc.* (2010), 2010 Ohio 2744 at ¶27.

Beyond the rule’s language specifying that the Director must make two determinations, the two determinations are not redundant. A project that will not itself result in a violation of a water quality standard established pursuant to Section 303 may nevertheless prevent or interfere with the *attainment* of the water quality standard in a water body that is already impaired. The same project may also prevent or interfere with the *maintenance* of the water quality standard if its impacts, when added to the impacts of other sources of pollution, harm designated uses, exceed criteria, or degrade existing uses.

For these reasons, the Director's failure to make the first determination required by the rule was unlawful. Therefore, the Commission should vacate the Director's action.

C. The Director's Action Issuing The Section 401 Certification Was Unreasonable Because The Director Failed To Explain His Determinations That (1) The Discharge of Dredged Sediment Will Not Result In A Violation Of Water Quality Standards And (2) A Lowering Of Water Quality Is Necessary

The Director flatly concluded that the "project will comply with the applicable provisions of Sections 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act."

(Certification, Ex. 8, at 1.) He did not cite any facts to support this conclusion or give his reasons for reaching it. (*Id.*)

An action is unreasonable either if it has no valid factual foundation or if it is not in accordance with reason. *Ohio Fresh Eggs*, at ¶7 (quoting *Citizens Comm. To Preserve Lake Logan*, 56 Ohio App.2d at 70). In *Columbus Coated Fabrics Division*, the "Director's Orders . . . contained little more than a conclusory statement that the applicant was not in compliance with applicable laws, rules and regulations." 1979 WL 10815 at *2. The Commission found this unreasonable, vacating the orders because the Director failed to identify the facts underlying his determination or to enunciate his method or reasons for reaching it. *Id.* at *2-3.

The Director's conclusion that the discharge of dredged sediment will not result in a violation of water quality standards is similarly unreasonable. Facts and reasons justifying the Director's conclusory statement were especially critical because the Director also determined that the project will lower the water quality of Lake Erie. (*See* Certification, Ex. 8, at 1 ("I have determined that a lowering of water quality in . . . Lake Erie . . . as authorized by this permit is necessary.") .) This determination made it incumbent upon the Director to address the

antidegradation provision of the water quality standard, because it prohibits “degradation of water quality that results in either a violation of the applicable water quality criteria for the designated uses . . . or the elimination or substantial impairment of existing uses.” Ohio Adm. Code 3745-1-05(C)(1). This prohibition required the Director to detail the degree and magnitude of the degradation the project admittedly will cause and explain why that degradation will not violate the criteria for designated uses or eliminate or substantially impair existing uses.

The Director also failed to cite any facts to support his determination that a lowering of water quality in Lake Erie is “necessary.” (Certification, Ex. 8, at 1.) He said he “made this determination based upon the consideration of all public comments, and including the technical, social, and economic considerations concerning this application and its impact on waters of the state.” (*Id.*) He did not, however, identify which of the thirteen factors he was required to consider he actually considered or what facts formed the basis for his considerations. *See* Ohio Adm. Code 3745-1-05(C)(5)(a)-(m).

How the Director could have carried out any reasoned consideration of the required factors is a mystery, because he had no factual foundation. OEPA did not determine the degree or magnitude of the lowering of water quality that will occur, or the impact of the lowered water quality on aquatic life and wildlife, the overall aquatic community structure or function, the overall quality and value of the western basin of Lake Erie, or the economic value of the western basin for recreation, tourism, commercial activities, aesthetics, or other use or enjoyment. (OEPA Responses to Requests for Admissions, Ex. 22, Nos. 3, 4, 5, 6, 7, and 8.) These are all factors that the Director must consider. Ohio Adm. Code 3745-1-05(C)(5)(a)-(e). Certainly, the Director did not explain how he weighed the considerations he cited or how they led him to make his determination.

For these reasons, the Director's conclusions that (1) the discharge of dredged sediment will not result in a violation of water quality standards and (2) a lowering of water quality is necessary were unreasonable. Therefore, the Commission should vacate the Director's action.

D. The Director's Action Issuing The Section 401 Certification Was Unreasonable Because The Corps Failed To Prove That The Discharge Of Dredged Sediment Will Not Prevent Or Interfere With The Attainment Or Maintenance Of The Lake Erie Water Quality Standard And Will Not Result In A Violation Of The Lake Erie Water Quality Standard

1. The Corps did not prove that the discharge of dredged sediment will not prevent or interfere with the attainment or maintenance of the Lake Erie water quality standard and will not result in a violation of the Lake Erie water quality standard

OEPA rejected the Corps' key justification for the project – an environmental assessment of the project and a finding of no significant impact – as fundamentally “inadequate to properly assess the impacts” of the discharge of dredged material. (Letter from R. Bournique, Manager, 401 Wetlands Section, OEPA, to Martin P. Wargo, Chief, Environmental Analysis Section, Buffalo District, USACE (May 29, 2009), Ex. 13, at 1.) In light of this rejection, the Corps could not possibly be considered to have proved that the discharge of dredged sediment will not prevent or interfere with the attainment or maintenance of the Lake Erie water quality standard and will not result in a violation of the Lake Erie water quality standard. The Director's issuance of the Section 401 certification, regardless, was not in accordance with reason.

OEPA claimed that the dredged materials are similar to sediments already in the lake, citing the Corps' and U.S. EPA's *Great Lakes Dredged Material Testing and Evaluation Manual*. (Response to Comments, Ex. 3, at 12 (Response 19).) But the focus of the manual is chemical contaminants. (U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, *Great Lakes Dredged Material Testing and Evaluation Manual* (1998) (“Manual”), Ex.

23, Section 1.3 at 1.) Thus, OEPA's claim is not a refutation of OEPA's prior admission that sediment itself is a pollutant, even if uncontaminated. (Letter from R. Bournique, Manager, 401 Wetlands Section, OEPA, to Martin P. Wargo, Chief, Environmental Analysis Section, Buffalo District, USACE (May 29, 2009), Ex. 13, at 2.)

Also beside the point was OEPA's claim that the western basin of Lake Erie is naturally turbid; that re-suspension occurs regularly as a result of wave action; and that, once deposited, the dredged sediment will be subject to the same forces. (Response to Comments, Ex. 3, at 4-5 (Response 5).) OEPA did not deny that suspended and re-suspended dredged sediment cause turbidity. Moreover, "The Ohio EPA maintains that the sheer volume of sediments placed into open waters impacts lake ecology by reducing water clarity for an extended time and redistributing pollutants." (R. Bournique, Ohio EPA, Toledo Harbor Dredging Project Update (May 19, 2009), Ex. 14, at 2.)

Finally, the Corps failed to provide sufficient data for OEPA to determine whether lowering the superior high quality water of Lake Erie is necessary to accommodate important social or economic development. Specifically, the Corps failed adequately to provide information that is necessary for OEPA to consider the "important social, economic and environmental benefits to be lost if water quality is lowered, such as lost or lowered recreational opportunities." Ohio Adm. Code 3745-1-05(B)(3)(g). The Corps merely provided a cursory overview of some of the benefits lost. (*See* FONSI/EA, Ex. 2, at 17-25.)

- 2. The Corps could not prove that the discharge of dredged sediment will not prevent or interfere with the attainment or maintenance of the Lake Erie water quality standard and will not result in a violation of the Lake Erie water quality standard**

The Corps not only failed to prove that the discharge of dredged sediment will not prevent or interfere with the attainment or maintenance of the Lake Erie water quality standard and will not result in a violation of the Lake Erie water quality standard. The Corps could not have proved these propositions, as it had to, for a number of reasons.

As Appellants have shown, designated uses, criteria, and existing uses in the western basin of Lake Erie are already impaired. Plankton, benthos, fish, and wildlife populations are degraded; habitat is degraded; the lake suffers from eutrophication; and the lake is plagued by harmful algal blooms. *See text, supra*, at 4-7.

OEPA itself has previously determined that the discharge of dredged sediment in the open waters of Lake Erie is “environmentally unacceptable,” as indicated by the following:

Then in 1991, the USEPA concurred with *OEPA’s determination* that the current practice of open lake disposal is environmentally unacceptable due to the following: (1) violations to applicable Water Quality Standards, (2) violations to Ohio’s Phosphorus Reduction Strategy, and (3) the shallow, erosive nature of the dredged material disposal site results in the resuspension of the dredge material.

(Toledo Harbor Planning Group, *Long-Term Dredged Material Management Plan within the context of Maumee River Watershed Sediment Management Strategy: Executive Committee Phase 3 Report with Environmental Assessment* (Nov. 1995), Ex. 24, at vi (emphasis added).)

Indeed, on the same day the Director issued the Section 401 certification, he stated, “Open lake disposal of these huge quantities of sediment in the Western Basin of Lake Erie is not environmentally acceptable to the State of Ohio and needs to be discontinued.” (Joint Letter, Ex. 11, at 3-4.) The conflict between these statements and the Director’s action issuing the Section 401 certification renders his action unreasonable.

In addition, there are many open questions about the effects of discharging dredged material on the water quality of Lake Erie. These uncertainties make it impossible for the Corps

to definitively prove that the discharge will not prevent or interfere with the attainment or maintenance of the Lake Erie water quality standard and will not result in a violation of the Lake Erie water quality standard.

A key uncertainty is the relationship between the discharge of dredged sediment, increased loads of phosphorus in the lake, and harmful algal blooms. The Corps claimed that the project will not contribute to nuisance or harmful algal blooms, but its claim was based on studies twenty-four and thirty-two years old. (*See* FONSI/EA, Ex. 2, at 18, 20.) These dated studies do not constitute a valid factual foundation for the Director's action. *See Columbus Coated Fabrics Division v. McAvoy*, Case No. EBR 79-3, 1979 WL 10815 (Ohio Env.Bd.Rev. July 11, 1979), at *5 (finding that 4-year old tests did not provide a valid factual foundation for the Director's action.).

In contrast to the Corps' old studies, the April 2010 Ohio Lake Erie Phosphorous Task Force Final Report released by OEPA states as follows:

What is not known . . . is the amount of phosphorus in this load [of discharged dredged sediment] that is bioavailable and if it is affecting the incidence of algal blooms.

(Task Force, Ex. 10, Section 4.2.2.4 at 55.) The Task Force cited a lack of data, but observed that "the constant mixing of the extremely fine clay sediment particles by wind and waves in the shallow western basin may increase the opportunity for phosphorus to dissolve in the water column." (*Id.*)

OEPA itself conceded that "[c]urrent scientific data does suggest that increased soluble reactive phosphorus and even turbidity can result in increased algal blooms in the western basin of Lake Erie." (Response to Comments, Ex. 3 at 5 (Response 6).) Even the Corps has conceded that phosphorus released from discharged sediment becomes available to algae, including

Dated August 9, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail a copy of Appellants' Prehearing Brief in Support of an Appeal of the Director's Action Issuing OEPA Certification No. 093554 upon the following: Chris Korleski, Ohio Director of Environmental Protection, to his attorneys at *david.dokko@ohioattorneygeneral.gov* and *janean.weber@ohioattorneygeneral.gov*, and the United States Army Corps of Engineers, to its attorneys at *bryan.e.miller@usace.army.mil* and *ann.d.navaro@usace.army.mil*, on August 9, 2010.

_s/ _____
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