

**NOTICE OF APPEAL  
TO THE ENVIRONMENTAL REVIEW APPEALS COMMISSION**

**NATIONAL WILDLIFE FEDERATION** )  
Great Lakes Regional Center )  
213 West Liberty Street, Suite 200 )  
Ann Arbor, Michigan 48104 )  
(734) 887-7106 )

and )

**WESTERN LAKE ERIE ASSOCIATION** )  
6565 Bayshore Road )  
Oregon, Ohio 43618 )  
(419) 691-3788 )

and )

**LAKE ERIE CHARTER BOAT ASSOCIATION** )  
In care of Kelly Collins )  
735 Timber Lane )  
Port Clinton, Ohio 43452 )  
(216) 401-6231 )

and )

**IZAAK WALTON LEAGUE OF AMERICA,** )  
**OHIO DIVISION** )  
900 Morman Road )  
Hamilton, Ohio 45013 )  
(513) 868-3179 )

and )

**OHIO ENVIRONMENTAL COUNCIL** )  
1207 Grandview Avenue, Suite 201 )  
Columbus, Ohio 43212 )  
(614) 487-7506 )

**APPELLANTS,** )

**ERAC Case No.** \_\_\_\_\_

**NOTICE OF APPEAL**

vs. )  
 )  
**CHRIS KORLESKI** )  
 Director of Environmental Protection )  
 Lazarus Government Center )  
 50 West Town Street )  
 P.O. Box 1049 )  
 Columbus, Ohio 43216-1049 )  
 )  
 and )  
 )  
**U.S. ARMY CORPS OF ENGINEERS** )  
 Buffalo District )  
 1776 Niagara Street )  
 Buffalo, New York 14207-3199 )  
 )  
**APPELLEES.** )

**NOTICE OF APPEAL**

**INTRODUCTION**

Pursuant to R.C. 3745.04 and 3745.07, notice is hereby given that the National Wildlife Federation (“NWF”), Western Lake Erie Association (“WLEA”), Lake Erie Charter Boat Association (“LECBA”), Izaak Walton League of America, Ohio Division (“IWLA”), and Ohio Environmental Council (“OEC”) hereby appeal on behalf of their members to the Environmental Review Appeals Commission from the Section 401 Water Quality Certification issued to the U.S. Army Corps of Engineers (“Corps”) to discharge sediment dredged from Toledo Harbor to the Western Basin of Lake Erie, OEPA Certification No. 093554 (“the Certification”), entered on April 15, 2010, by the Director of the Ohio Environmental Protection Agency (“OEPA”).

The Certification authorizes the Corps to discharge up to 800,000 cubic yards of sediment dredged from Toledo Harbor into the open waters in the northeast half of a one square mile area in the Western Basin of Lake Erie during the 2010 calendar year, between July 1st and December 31st. A copy of the Certification is attached to this Notice of Appeal.

The Corps failed to demonstrate that the discharge of sediment will not prevent or interfere with the attainment or maintenance of the water quality standard for the Western Basin of Lake Erie and will not violate the water quality standard for the Western Basin of Lake Erie. Data is either insufficient to establish whether the water quality standard for the Western Basin of Lake Erie is attained or, in the alternative, data establishes that the water quality standard for the Western Basin of Lake Erie is already impaired as a result of siltation, among other things.

The Director acknowledged in the Certification itself that granting it will lower the water quality of Lake Erie. In addition, the very same day that the Director granted the Certification, he separately sent a letter to the Corps stating that his concern about the discharge of dredged sediment in Lake Erie “cannot be overstated,” and that he is “already convinced that an excessive sediment/nutrient load to the Western Basin of Lake Erie is likely causing negative impacts, and possibly an exacerbation of [Harmful Algal Blooms].” Letter from Chris Korleski, Director, OEPA, and Sean D. Logan, Director, Ohio Department of Natural Resources, to Lt. Col. Daniel B. Snead, P.E., District Commander, Buffalo District, U.S. Army Corps of Engineers, at 2-3 (Apr. 15, 2010) (emphasis in original). The Director concluded by stating, “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. A copy of this letter is attached to this Notice of Appeal.

## **APPELLANTS**

Appellant National Wildlife Federation is a District of Columbia not-for-profit corporation with an office in Ann Arbor, Michigan. Its mission includes protecting the ecosystems that are most critical to native wildlife in order to ensure a healthy wildlife legacy for future generations. Its approximately one million members nationwide include approximately

40,000 Ohio citizens, which include one or more individuals who have used or use the Western Basin of Lake Erie for recreation and aesthetic enjoyment, or who would were it not for the turbidity, suspended sediment, and siltation caused or exacerbated by the discharge of dredged sediment authorized by OEPA, and who are concerned that the discharge of dredged sediment authorized by the Certification will adversely affect their recreation in the Western Basin of Lake Erie, including boating and fishing, and adversely affect fish and fish habitat and contribute to harmful algal blooms. NWF submitted written comments on the draft Certification on February 22, 2010.

Appellant Western Lake Erie Association (“WLEA”), a licensed organization of the Waterkeeper Alliance, is an Ohio not-for-profit corporation with an office in Oregon, Ohio. Its mission is to preserve, protect, and improve the watershed, waters, and fish of Western Lake Erie, the Great Lakes’ warmest, shallowest, most biologically productive area, and to increase public awareness through collaboration, education and advocacy. Its approximately 150 members include one or more Ohio citizens who have used or use the Western Basin of Lake Erie for recreation and aesthetic enjoyment, or who would were it not for the turbidity, suspended sediment, and siltation caused or exacerbated by the discharge of dredged sediment authorized by OEPA, and who are concerned that the discharge of dredged sediment authorized by the Certification will adversely affect their recreation in the Western Basin of Lake Erie, including boating and fishing, and adversely affect fish and fish habitat and contribute to harmful algal blooms. WLEA submitted written comments on February 22, 2010, and testified at the public hearing on the draft Certification.

Appellant Lake Erie Charter Boat Association (“Charter Boat Association”) is an association with an office in Port Clinton, Ohio. Its mission includes encouraging and promoting

sound fisheries management in Lake Erie. Its approximately 200 members earn all or part of their livelihood transporting anglers on fishing trips in Lake Erie, and one or more members have transported or transport anglers to the area of the Western Basin of Lake Erie where OEPA has authorized dredged sediment to be discharged, or would were it not for the turbidity, suspended sediment, and siltation caused or exacerbated by such discharges. One or more members of the Charter Boat Association is concerned that the discharge of dredged sediment authorized by the Certification will adversely affect their business in the Western Basin of Lake Erie by adversely affecting fish and fish habitat and contributing to harmful algal blooms. The Charter Boat Association submitted written comments and testified at the public hearing on the draft Certification.

Appellant Izaak Walton League of America, Ohio Division (“IWLA”), is an Ohio not-for-profit corporation with an office in Hamilton, Ohio. Its mission includes conserving, maintaining, protecting, and restoring the water of the United States, including Lake Erie. Its approximately 2,300 members include one or more Ohio citizens who have used or use the Western Basin of Lake Erie for recreation and aesthetic enjoyment, or who would were it not for the turbidity, suspended sediment, and siltation caused or exacerbated by the discharge of dredged sediment authorized by OEPA, and who are concerned that the discharge of dredged sediment authorized by the Certification will adversely affect their recreation in the Western Basin of Lake Erie, including boating and fishing, and adversely affect fish and fish habitat and contribute to harmful algal blooms. IWLA submitted written comments or testified at the public hearing on the draft Certification or both.

Appellant Ohio Environmental Council (“OEC”) is an Ohio not-for-profit corporation with an office in Columbus, Ohio. Its mission is to secure healthy air, land, and water for all

who call Ohio home. Its approximately 3,000 individual and 100 organizational members include one or more Ohio citizens who have used or use the Western Basin of Lake Erie for recreation and aesthetic enjoyment, or who would were it not for the turbidity, suspended sediment, and siltation caused or exacerbated by the discharge of dredged sediment authorized by OEPA, and who are concerned that the discharge of dredged sediment authorized by the Certification will adversely affect their recreation in the Western Basin of Lake Erie, including boating and fishing, and adversely affect fish and fish habitat and contribute to harmful algal blooms. OEC submitted written comments or testified at the public hearing on the draft Certification or both.

The appellants have members who live near, work in, or recreate in and around the Western Basin of Lake Erie who will be aggrieved and adversely affected by the discharge of sediment authorized by the Certification, because it will harm their recreational use, aesthetic enjoyment, or livelihood by causing or contributing to the turbidity, suspended sediment, and siltation in the Western Basin of Lake Erie, preventing or interfering with the attainment of the water quality standard for the Western Basin of Lake Erie, or violating the water quality standard for the Western Basin of Lake Erie. Consequently, the appellants have standing to appeal the Director's grant of the Certification.

#### **APPELLANTS' ASSIGNMENTS OF ERROR**

The Director's grant of the Certification is unlawful and unreasonable for a number of reasons, including, but not limited to, the following:

1. The application for certification fails to demonstrate that the discharge of sediment will not prevent or interfere with the attainment or maintenance of the water quality standard for the Western Basin of Lake Erie and will not violate the water quality standard for the

Western Basin of Lake Erie as required by Ohio law. Ohio Adm. Code 3745-32-05(A), 3745-32-07, 3745-47-23(A)(1). Specifically, the Corps failed to prove that the deposition, settling, and re-suspension of discharged sediment will not prevent or interfere with the attainment or maintenance of, and will not violate:

- a. the designated uses of the Western Basin of Lake Erie, including, but not limited to, its designation as exceptional warmwater aquatic life habitat, Ohio Adm. Code 3745-1-31(A). Data is either insufficient to establish whether the designated uses of the Western Basin of Lake Erie are attained or, in the alternative, data establishes that the designated uses of the Western Basin of Lake Erie are already impaired, for instance, as a result of siltation;
- b. the water quality criteria applicable to the Western Basin of Lake Erie, including, but not limited to, the criteria requiring all surface waters to be:
  - i. “Free from suspended solids or other substances that enter the waters as a result of human activity and that will settle to form . . . objectionable sludge deposits, or that will adversely affect aquatic life,” Ohio Adm. Code 3745-1-04(A); and
  - ii. “Free 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); and
- c. the prohibition against the elimination or substantial impairment of existing uses of the Western Basin of Lake Erie, including, but not limited to, its existing use as aquatic life habitat, Ohio Adm. Code 3745-1-05(C)(1). The Corps failed to

determine the existing uses, including, but not limited to, the resident aquatic life, or the level of water quality necessary to protect the existing uses; and

- d. the limitation on the lowering of water quality in high quality waters to situations where lower water quality is necessary to accommodate important social or economic development in the area where the Western Basin of Lake Erie is located. Ohio Adm. Code 3745-1-05(C)(5).

The deposition, settling, and re-suspension of dredged sediment will cause or contribute to a reduction in the penetration of sunlight through the water column, reducing phytoplankton and aquatic plant growth; harm to fish, increasing the risk of infection and disease; and harm to benthic organisms and bottom substrate. The Director's grant of the Certification, regardless, is unlawful and unreasonable.

2. The Director failed properly to apply the antidegradation review requirements by conflating the rule governing the prohibition of degradation that results in the elimination or substantial impairment of existing uses – whether or not such degradation is necessary to accommodate development – and the rule governing the lowering of water quality in high quality waters to accommodate development. As a result, the Director failed to separately determine whether the Corps demonstrated that the lowering of water quality, which the Director admits the Certification will allow, will not prevent or interfere with the attainment or maintenance of, and will not violate the prohibition against the elimination or substantial impairment of existing uses of the Western Basin of Lake Erie, including, but not limited to, its existing use as aquatic life habitat, Ohio Adm. Code 3745-1-05(C)(1).



3. The Director failed properly to apply the antidegradation review requirements by failing entirely or adequately to consider the factors he is obligated to consider when determining whether lower water quality in high quality waters is necessary to accommodate important social or economic development. Ohio Adm. Code 3745-1-05(C)(5)(a)-(m). The factors the Director failed entirely or adequately to consider include, but are not limited to, the following:
  - a. “The magnitude of the proposed lowering of water quality,” Ohio Adm. Code 3745-1-05(C)(5)(a);
  - b. “The anticipated impact of the proposed lowering of water quality on aquatic life and wildlife, including threatened and endangered species, important commercial or recreational sport fish species, other individual species and the overall aquatic community structure and function,” Ohio Adm. Code 3745-1-05(C)(5)(b); and
  - c. “The effects of lower water quality on the economic value of the water body for recreation, tourism and other commercial activities, aesthetics, or other use and enjoyment by humans,” Ohio Adm. Code 3745-1-05(C)(5)(e).
4. Appellants reserve the right to amend this Notice of Appeal upon the discovery of additional facts or issues that may be determined upon the filing of the Certified Record or as may be determined in the course of discovery during the proceedings in this appeal.

### **REQUESTED REMEDY**

Appellants respectfully request that this Commission find that the action of the Director in granting Section 401 Water Quality Certification to the Corps to discharge sediment dredged from Toledo Harbor to the Western Basin of Lake Erie, OEPA Certification No. 093554, was unlawful and unreasonable. As a result, Appellants further request that this Commission vacate

the Certification and remand the matter to the Director for further action as required by law and for such other and further relief as is appropriate.

Respectfully submitted,

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Neil S. Kagan  
National Wildlife Federation  
Great Lakes Regional Center  
213 West Liberty Street, Suite 200  
Ann Arbor, Michigan 48104  
Phone: 734-887-7106  
Fax: 734-887-7199  
Email: [kagan@nwf.org](mailto:kagan@nwf.org)

Of Attorneys for Appellants

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Peter A. Precario, 0027080  
326 South High St., Annex, Suite 100  
Columbus, Ohio 43215  
Phone: 614-224-7883  
Fax: 614-224-4510  
Email: [precariolaw@aol.com](mailto:precariolaw@aol.com)

Of Attorneys for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that I have served by Certified U.S. mail a copy of this Notice of Appeal upon the following: Ohio Director of Environmental Protection, Lazarus Government Center, P.O. Box 1049, Columbus, Ohio, 43216-1049; Martin P. Wargo, U.S. Army Corps of Engineers, Buffalo District, 1776 Niagara Street, Buffalo, New York, 14207-3199, on May \_\_\_\_\_, 2010.

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Peter A. Precario 0027080  
326 South High Street  
Annex, Suite 100  
Columbus, Ohio 43215  
Phone: 614-224-7883  
Fax: 614-224-4510  
Email: [precariolaw@aol.com](mailto:precariolaw@aol.com)