

March 23, 2017

The Honorable Morris J. Murray
Defiance County Prosecuting Attorney
500 Court Street, Suite C
Defiance, Ohio 43512

SYLLABUS:

2017-009

1. Pursuant to R.C. 3709.11, the health commissioner of a general health district shall inform the public of the presence of a harmful algal bloom in a river when the harmful algal bloom constitutes a matter affecting the health of the district.
2. The health commissioner of a general health district has implied authority to test, or obtain testing, for harmful algal blooms in a river within or abutting the boundaries of the general health district that is accessible by the public when the testing is necessary in order for the health commissioner to inform the public of a matter affecting the health of the district pursuant to R.C. 3709.11.
3. A board of health of a general health district may test for harmful algal blooms in a river within or abutting the boundaries of the general health district that is accessible by the public and may inform the public of the results of that testing when it is necessary to protect the public health from a public nuisance.
4. A public water supply system that uses a river as a source of its water shall perform testing for harmful algal blooms in the river and inform the public of the results of that testing in accordance with 7D Ohio Admin. Code Chapter 3745-90 (2016-2017 Supplement).



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OPINION NO. 2017-009

The Honorable Morris J. Murray
Defiance County Prosecuting Attorney
500 Court Street, Suite C
Defiance, Ohio 43512

Dear Prosecutor Murray:

You have requested an opinion about the duties and responsibilities of a board of health of a general health district¹ to test for harmful algal blooms² in a river and inform the public about the results of that testing. Your request for an opinion relates to two incidents that occurred during the summer of 2016. In June 2016, the Defiance County General Health District was notified by the Ohio Department of Health that testing of the Maumee River by the Ohio Environmental Protection Agency (Ohio EPA) detected toxins from a harmful algal bloom. The general health district was asked to post signs notifying the public of the presence of the toxins in the river and to continue to post those signs until additional testing showed that the presence of the toxins was below a safe level. The City of Defiance Water Treatment Plant conducted that additional testing. The Defiance County General Health District was notified in July 2016 that

¹ Your letter also asks about the duties and responsibilities of state agencies. It is inappropriate in an opinion of the Attorney General to advise a county prosecuting attorney concerning duties of state agencies when those state agencies have not requested such an opinion. See 2004 Op. Att’y Gen. No. 2004-017, at 2-143; 2001 Op. Att’y Gen. No. 2001-032, at 2-193.

² “Harmful Algal Blooms (HABs) are large growths of cyanobacteria (also referred to as blue-green algae) that can produce a variety of harmful chemicals known as cyanotoxins which can cause illness and death in humans and animals.” Ohio Environmental Protection Agency Division of Drinking and Ground Waters, *Public Water System Harmful Algal Blooms – Overview of Upcoming Rules* (March 2016), <http://epa.ohio.gov/Portals/28/documents/habs/HAB%20rules%20factsheet%20March%202016.pdf>. Contact with water contaminated with cyanotoxins from a harmful algal bloom affects the function of a person’s liver and brain and may cause “nausea, skin rashes, gastrointestinal distress, disorientation, numbness and fatigue.” State of Ohio, *Harmful Algal Bloom Response Strategy for Recreational Waters*, 9 (2016), <http://epa.ohio.gov/portals/35/hab/HABResponseStrategy.pdf>.

an algal bloom was visually detected on the Maumee River. Testing completed by the City of Defiance Water Treatment Plant indicated that the algal bloom was not harmful.

The entire portion of the Maumee River located in Defiance County has been designated as either a scenic river or a recreational river. Accordingly, you contend that the responsibility to conduct testing of the river rests with an agency of the state, rather than the general health district. You have explained that the general health district “lacks the time, resources, funding, expertise, or manpower to take on additional duties and responsibilities pertaining to algal blooms in the navigable and recreational waterways belonging to the State of Ohio.”

A General Health District Board of Health’s Duty to Test for and Provide Notice of Harmful Algal Blooms in a River

The state is divided into city health districts and general health districts. R.C. 3709.01. The territory of cities make up city health districts and the territory of villages and townships comprise general health districts. *Id.* A combined general health district may result when one or more city health districts join with a general health district or two or more general health districts combine. R.C. 3709.07; R.C. 3709.10. Each general health district has a board of health, R.C. 3709.02(A), and a district advisory council, R.C. 3709.03(A).³

Broadly, “[a] board of health of a general health district is responsible for preserving the health and safety of persons in the district.” 2011 Op. Att’y Gen. No. 2011-032, at 2-256. As a creature of statute, a board of health has only those powers expressly provided by statute or those powers that are implied as necessary to carry out an express power. 2011 Op. Att’y Gen. No. 2011-032, at 2-255. R.C. 3709.11 requires a board of health to appoint a health commissioner who “shall be the executive officer of the board and shall carry out all orders of the board and of the department of health.” The health commissioner “shall be charged with the enforcement of all sanitary laws and regulations in the district.” *Id.* The health commissioner is also required to “keep the public informed in regard to all matters affecting the health of the district.” *Id.*

The presence of a harmful algal bloom in water that a person consumes, or is otherwise exposed to, affects the physical health of the person. Accordingly, a health commissioner of a board of health may reasonably conclude that the presence of a harmful algal bloom in the waters of a river within or abutting the boundaries of the general health district affects the health of the district. Therefore, pursuant to R.C. 3709.11, the health commissioner of a general health district shall inform the public of the presence of a harmful algal bloom in a river when the harmful algal bloom constitutes a matter affecting the health of the district.

³ For ease of discussion in this opinion, we use “board of health” to refer to a board of health of a general health district.

Although R.C. 3709.11 imposes a duty upon the health commissioner to inform the public about matters affecting the health of the district, the statute does not specify the manner in which the health commissioner shall carry out that duty. It is well established that “[w]here an officer is directed by the Constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed.” *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph 4). Stated another way, “the limitation put upon the implied power is that it is only such as may be reasonably necessary to make the express power effective.” *State ex rel. A. Bentley & Sons v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917).

Implicit in the duty to inform the public about a matter affecting the health of the district is the authority to detect the presence or existence of such a matter. It is essential that a health commissioner is able to timely detect the occurrence of a condition that affects the health of the district in order to inform the public in a useful way. Likewise, a health commissioner’s ability to fully inform the public of a matter affecting the health of the district necessarily requires the authority to determine when that condition no longer poses a threat to the health of the district. A health commissioner may become aware of the existence of a harmful algal bloom through testing conducted by or at the request of the board of health or from another source that detects the harmful algal bloom. Unless a health commissioner is made aware of the presence of a harmful algal bloom from another source, conducting testing to detect a harmful algal bloom is necessary to fulfill the health commissioner’s duty to inform of the public of a matter affecting the health of the district. R.C. 3709.23 authorizes a board of health to “provide for the carrying on of such laboratory work as is necessary for the proper conduct of its work.” Therefore, the health commissioner of a general health district has implied authority to test, or obtain testing, for harmful algal blooms in a river that is within or abutting the boundaries of the general health district and that is accessible by the public when the testing is necessary in order for the health commissioner to inform the public of a matter affecting the health of the district.

In addition to the authority provided by R.C. 3709.11, a board of health may also test for harmful algal blooms in a river pursuant to the board’s authority to abate nuisances. R.C. 3707.01 provides “[t]he board of health of a ... general health district shall abate and remove all nuisances within its jurisdiction.” R.C. 3709.21 states “[t]he board of health of a general health district may make such orders and regulations as are necessary ... for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances.”⁴ In addition, a board of health “may ... provide for the inspection and abatement of nuisances

⁴ Although R.C. 3709.21 confers broad rule-making authority upon a board of health, it does not “vest local boards of health with unlimited authority to adopt regulations addressing all public-health concerns.” *D.A.B.E., Inc. v. Toledo-Lucas Cnty. Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536 (syllabus, paragraph 1).

dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease.” R.C. 3709.22.

R.C. 3707.01 explains that “[w]hen a building, erection, excavation, premises, business, pursuit, matter, or thing ... is, in the opinion of the board [of health], in a condition dangerous to life or health ..., the board may declare it a public nuisance and order it to be removed, abated, suspended, altered, or otherwise improved or purified[.]” *See generally* R.C. 3767.01(C)(1) (“[a]s used in all sections of the Revised Code relating to nuisances ... ‘[n]uisance’ means ... [t]hat which is defined and declared by statutes to be a nuisance”); *Coy v. Montgomery Cnty. Bd. of Health*, 2d Dist. No. 18083, 2000 WL 353139 (April 7, 2000), at * 4 (“as long as there is evidence ... that would justify a judgment by the board of health that conditions upon a premises ‘are likely to be injurious to the health of [the] inhabitants [of the county],’ the county board of health may declare the conditions of the premises to constitute a public nuisance”). Accordingly, if a board of health of a general health district believes that the presence of harmful algal blooms in a river creates a condition that is dangerous to life or health, a board of health of a general health district may declare the presence of harmful algal blooms a public nuisance. Testing the river and informing the public of the results of that testing is part of abating and inspecting the nuisance. *See generally* R.C. 3709.23 (the board of health “may provide for the carrying on of such laboratory work as is necessary for the proper conduct of its work”). Therefore, a board of health of a general health district may test for harmful algal blooms in a river that is within or abutting the boundaries of the general health district and that is accessible by the public, and may inform the public of the results of that testing, when it is necessary to protect the public health from a public nuisance.

Testing for Harmful Algal Blooms in a Public Water System

The powers and duties of a board of health with respect to testing and informing the public of a harmful algal bloom in a river may overlap with the powers and duties of other public bodies. *See, e.g.*, R.C. 1546.08(B) (testing and sampling of waters of the state adjacent to public swimming beaches); R.C. 1547.81 (protection and maintenance of wild, scenic, and recreational rivers); R.C. 3701.14(A) (“[w]hen called upon by the state or local governments, or the board of health of a general or city health district, the director [of health] shall promptly investigate and report upon the water supply, sewerage, disposal of excreta of any locality”); R.C. 6109.06 (issuance of a “water use advisory” by the Director of Environmental Protection); 7D Ohio Admin. Code 3745-90-03(A) (2016-2017 Supplement) (monitoring and screening of surface water systems for harmful algal blooms).

The Maumee River is a source of water for the City of Defiance Water Treatment Plant, which is located in Defiance County. City of Defiance, *Water Treatment Plant*, <http://www.cityofdefiance.com/main/index.php/water-division> (last visited March 14, 2017) (“[t]he City of Defiance Water Treatment Plant draws water from the Maumee River to replenish its 74 acre upground reservoir. Water is then pulled from the reservoir to provide a constant, reliable raw water supply”). Accordingly, water from the Maumee River is a source of water for a public water system in Defiance County. *See generally* R.C. 6109.01(A) (a “public water

system” is “a system for the provision to the public of water for human consumption through pipes or other constructed conveyances if the system has at least fifteen service connections or regularly serves at least twenty-five individuals”); 7C Ohio Admin. Code 3745-81-01(P)(11) (2016-2017 Supplement). As a public water system that uses surface water as a source of its water, the City of Defiance Water Treatment Plant is a surface water system. *See* rule 3745-81-01(S)(17) (defining “surface water system”).

The Director of Environmental Protection may “[p]rovide a program for the general supervision of operation and maintenance of public water systems[.]” R.C. 6109.04(C)(2). In addition, the Director of Environmental Protection, or his designee, shall serve as the coordinator of harmful algae management and response. R.C. 3745.50(A). The Director of Environmental Protection, or his designee, shall also develop and implement “[a]nalytical protocols for monitoring of cyanobacteria at water intake structures of public water systems,” R.C. 3745.50(C)(1), and provisions for testing and treating excess levels of cyanobacteria, R.C. 3745.50(C)(2). Those protocols are found in 7D Ohio Admin. Code Chapter 3745-90 (2016-2017 Supplement). More specifically, the monitoring protocol for surface water systems is set forth in rule 3745-90-03(A), which requires a surface water system to conduct routine testing for cyanobacteria⁵ and microcystins.⁶ Rule 3745-90-03(A)(4) sets forth the procedures that a surface water system shall follow if the level of microcystins detected from the routine testing exceeds the action level set forth in 7D Ohio Admin. Code 3745-90-02 (2016-2017 Supplement). 7D Ohio Admin. Code 3745-90-06 (2016-2017 Supplement) establishes a protocol for notifying the public when the detected levels of microcystins pose a danger to the public. Rule 3745-90-06(A)(2) specifies the content of the notification. Rule 3745-90-06(A)(4) describes the circumstances in which the public water system shall continue to provide the notice to the public. Therefore, a public water supply system that uses surface water from a river as a source of its water shall perform testing for harmful algal blooms and inform the public of the results of that testing in accordance with 7D Ohio Admin. Code Chapter 3745-90 (2016-2017 Supplement).

Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised that:

⁵ “Cyanobacteria” are “photosynthesizing bacteria, also called blue-green algae, which naturally occur in marine and fresh water ecosystems, and may produce cyanotoxins which at sufficiently high concentrations can pose a risk to public health.” 7D Ohio Admin. Code 3745-90-01(C)(1) (2016-2017 Supplement). A “cyanotoxin” is “a toxin (such as microcystins) produced by cyanobacteria, which include liver toxins, nerve toxins and skin toxins.” Rule 3745-90-01(C)(3).

⁶ As used in Chapter 3745-90 of the Ohio Administrative Code, “[m]icrocystins’ means total microcystins: the combination of all the variants of the cyanotoxin microcystin, which is produced by a number of cyanobacteria.” Rule 3745-90-01(M).

1. Pursuant to R.C. 3709.11, the health commissioner of a general health district shall inform the public of the presence of a harmful algal bloom in a river when the harmful algal bloom constitutes a matter affecting the health of the district.
2. The health commissioner of a general health district has implied authority to test, or obtain testing, for harmful algal blooms in a river within or abutting the boundaries of the general health district that is accessible by the public when the testing is necessary in order for the health commissioner to inform the public of a matter affecting the health of the district pursuant to R.C. 3709.11.
3. A board of health of a general health district may test for harmful algal blooms in a river within or abutting the boundaries of the general health district that is accessible by the public and may inform the public of the results of that testing when it is necessary to protect the public health from a public nuisance.
4. A public water supply system that uses a river as a source of its water shall perform testing for harmful algal blooms in the river and inform the public of the results of that testing in accordance with 7D Ohio Admin. Code Chapter 3745-90 (2016-2017 Supplement).

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General