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U.S. Army Corps of Engineers - Buffalo District
1776 Niagara Street
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ATTN: Mr. Eric Hannes

RE: Written comments of the Ohio Attorney General Mike DeWine
Cleveland Harbor Dredge 2015, Public Notice No. CLEVELAND-15

Mr. Eric Hannes:

On February 17, 2015, at the Corps' public hearing regarding Public Notice No. CLEVELAND-15, Ohio Attorney General Mike DeWine submitted an oral statement. That statement stressed the importance of preserving and improving Lake Erie's water quality and economic viability. In addition, many concerned citizens testified that merely maintaining Lake Erie's water quality is not enough; water quality must be improved. Consistent with the views of these citizens, the Attorney General highlighted the billions of dollars spent improving Lake Erie's water quality through the efforts of the Great Lakes Restoration Initiative and other federal, state, and local entities. Furthermore, the Attorney General brought to the Corps' attention national and international standards that call for the virtual elimination of releases of toxins into Lake Erie.

The Corps stated that notwithstanding the fact that it believes that the Federal Standard allows open lake disposal, it will place all dredged material in one of the available confined disposal facilities ("CDF") this year, with the qualification that a non-Federal sponsor must pay for any additional cost of disposal in a CDF.

The Ohio Attorney General believes that CDF disposal is required under both State and Federal law, and therefore, disposal within a CDF (1) should be the disposal method utilized here and (2) should be performed at Federal expense. The following written comments further express the position of the Ohio Attorney General and supplement his February 17th oral statement.

I. To the extent that the “Federal Standard” is legally valid, it must comply with Ohio environmental requirements and the Corps has no basis for requiring Ohio to pay for that compliance.

The Corps defines the “Federal Standard” as “the alternative that meets required environmental laws and regulations in the least costly manner consistent with sound engineering practices.” 53 FR 14902. The Corps’ regulations define the Federal Standard as “... the dredged material disposal alternative or alternatives identified by the Corps which represent the least costly alternatives consistent with sound engineering practices and meeting the environmental standards established by the 404(b)(1) evaluation process or ocean dumping criteria.” 33 CFR § 335.7. From this regulation that the Corps apparently only considers three factors when determining the Federal Standard: 1) engineering concerns, 2) cost, and 3) Federal environmental compliance. The Corps believes that after it has determined the Federal Standard alternative, for the Corps to perform any other alternative requires a non-Federal entity to pay for the difference in cost. However, other considerations must apply. Specifically, in addition to Federal environmental compliance, the Corps must also comply with Ohio’s federally approved water quality standards.

In 1977, Congress amended the Clean Water Act to require federal agencies to comply with state water quality standards. *Natl. Wildlife Fedn. v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1167 (9th Cir.2004), citing 33 U.S.C. § 1323. Open lake disposal does not properly

address the Corps' obligations to comply with state water quality standards. Specifically, any increase in PCB bioaccumulation would be a significant degradation in water quality, in violation of Ohio Adm.Code 3745-01-05, and consequently the Clean Water Act.

The Corps' position is that it will comply with those State rules, but only by either deferring dredging or requiring a non-Federal entity to pay for consistency with State law. However, the Corps has no statutory basis for requiring Ohio to pay for the Corps to comply with its water quality standards.

Congress, when it amended section 404 of the Clean Water Act in 1977, intended for the Corps to pay to comply with State pollution abatement laws. Specifically, in 1977 the Senate Committee on Environment and Public Works reported the following:

Section 404 [of the Clean Water Act]-- mandates that all dredging activities of the U.S. Army Corps of Engineers be conducted in compliance with applicable state water quality standards, and all other State substantive and procedural requirements.

...

By this amendment [to section 404 of the Clean Water Act], the committee clarifies that corps dredging activities are not exempt from State pollution abatement requirements. ... Several corps district offices to date have requested and received funds to provide on land or confined disposal of dredge spoil. Pursuant to this amendment, **the corps may be required by the States in some instances to expend additional funds to protect water quality.**

S.Rep. 95-370.

This Senate report indicates that when Congress amended section 404 of the Clean Water Act in 1977, Congress contemplated situations where states may require the Corps to spend additional money to comply with State environmental laws. Therefore, the Corps' hard line insistence that it cannot use Federal funds to accommodate state water quality requirements is not only contrary to the Federal Standard, it is contrary to the expressed purpose of the 1977 amendment to the Clean Water Act, which is still applicable today.

II. The alternative the Corps chooses to be the “Federal Standard” must be consistent with Ohio’s Coastal Management Program because compliance with state Coastal Management Programs is required under the federal Coastal Zone Management Act.

The Corps acknowledges that the alternative that it determines to be the Federal Standard must be consistent with Federal environmental laws. 53 FR 14902; 33 CFR § 335.4. Therefore, the Federal Standard must be an alternative that is also consistent with the Coastal Zone Management Act (“CZMA”). The Corps, however, has declared that open lake disposal of the dredged material from the Cleveland Harbor is the Federal Standard in 2015 despite the fact that open lake disposal will violate the Federal consistency requirements of the CZMA. In doing so, the Corps is attempting to force Ohio to pay for the Corps’ compliance with the CZMA, which it cannot require.

Under the CZMA, states may develop Coastal Management Programs (“CMPs”) which after approval from the National Oceanic and Atmospheric Administration (“NOAA”) become requirements that Federal agencies must comply with to the maximum extent practicable. 16 U.S.C. § 1456(c)(1)(“Each Federal agency activity within ... the coastal zone ... shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.”). The CZMA’s legislative history stresses the importance of Federal agency compliance with state CMPs approved under the CZMA. Specifically, the Senate Commerce Committee reported that “the intent of this legislation is to enhance state authority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones.” *See, California Coastal Com'n v. Granite Rock Co.*, 480 U.S. 572, 1987, citing S.Rep. No. 92–753. The report further stated that “it is essential that Federal agencies administer their programs, including development projects, consistent with the states’ coastal zone management program.” S.Rep. 92-753.

The legislative history of the 1990 amendments to the CZMA clearly indicates that it was Congress' intent to subject Federal dredging activities to the CZMA. Specifically, the Congressional Conference Committee reported that Federal dredging activities under the Ocean Dumping Act must comply with the requirements of the CZMA.

[It is unnecessary to include a] specific clarification that Federal agency activities and Federal permits under the Ocean Dumping Act, including ocean dumping site designations, and operation and maintenance dredging, are subject to the requirements of section 307... because the amendments to section 307(c)(1) leave no doubt that **all Federal agency activities and all Federal permits are subject to the CZMA's consistency requirements....** a statutory "listing" of activities should be avoided to prevent any implication that unlisted activities are not covered.

Finally, the conferees are aware of the argument that the application of Federal consistency to activities under the Ocean Dumping Act amounts to state regulations of ocean dumping for purposes of section 106(d) of that Act. The conferees reject this argument.

H.Rep. 101-964(emphasis added). This report demonstrates that Congress intended for the Corps' dredging projects to be consistent with state CMPs. This report also demonstrates the requirement to comply with State CMPs is a Federal requirement rather than a state regulation. Therefore, since the Federal Standard must be an alternative that complies with Federal environmental laws (here, the CZMA), that alternative can only be one that is consistent with Ohio's CMP to the maximum extent practicable.

NOAA's regulations define "maximum extent practicable" as fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency. 15 CFR § 930.32. NOAA's regulations also prohibit a Federal agency from using funding restraints to demonstrate compliance to the maximum extent practicable. "Federal agencies should include the cost of being fully consistent with [state

CMPs] ... in their budget ..., **to the same extent** that a Federal agency would plan for the cost of **complying with other Federal requirements.**” 15 CFR § 930.32 (emphasis added).

Therefore, the Corps is required to budget compliance with state CMPs into its dredging projects unless appropriation “laws contain *specific* legal prohibitions ... Absent such specific prohibitions, the Presidential exemption is the only provision which may be used by a Federal agency to make a finding that a lack of funds prohibits full consistency.” 65 FR 77134 (emphasis added).

For this project, the Corps has glossed over this requirement and simply concluded that their determination of the Federal Standard is automatically consistent with state CMPs to the maximum extent practicable. 53 FR 14906. The Corps bases its opinion on a 1986 letter from Douglas A. Riggs, General Counsel, Department of Commerce, to the Corps. See 53 FR 14906. However, NOAA has a different interpretation of that letter. When NOAA promulgated its 2000 regulations, NOAA’s position was that “[t]he reference to “appropriations” in the Riggs letter is ambiguous at best, but, if interpreted with the statute and NOAA’s regulations at the time, merely mean that if something in appropriations law prohibits full consistency, then the Corps is consistent to the maximum extent practicable. Any ambiguities in the Riggs letter were replaced by the clear language of the CZMA as amended in 1990.” 65 FR 77134.

In the Corps’ Environmental Assessment for the 2015 Cleveland Harbor Dredging, on page 2, the Corps cites to Section 148 of Public Law 94-587 to justify its refusal to evaluate CDF disposal as an alternative for the dredged material from the Cleveland Harbor and Cuyahoga River. Public Law 94-587, however, contains no such *specific prohibition* on the use of CDFs. Instead, the law identifies management practices that the Corps should adopt to improve efficient *use* of CDFs.

SEC. 148. The Secretary of the Army, acting through the Chief of Engineers, shall utilize and encourage the utilization of such management practices as he determines appropriate to extend the capacity and useful life of dredged material disposal areas such that the need for new dredged material disposal areas is kept to a minimum. Management practices authorized by this section shall include, but not be limited to, the construction of dikes, consolidation and dewatering of dredged material, and construction of drainage and outflow facilities.

Nothing in this law specifically requires the Corps to use open lake disposal or specifically prohibits the use of a CDF. Certainly, nothing in this law *specifically* prohibits the Corps from fully complying with Ohio's CMP. In fact, this law supports Ohio EPA's and the Cleveland Port Authority's suggestions that, in using a CDF, the Corps should implement mechanical unloading practices that would increase CDF capacity.

NOAA's policy documents define "practicable" as "capable of being done." The Corps cannot argue that CDF disposal is incapable of being done because CDFs are available, there is capacity within them, and they were used for disposal in 2014. Furthermore, the Corps' operation and maintenance budget for the Cleveland Harbor is larger in 2015 than it was in 2014.

The Corps' implementation of its regulations seeks to limit a State's authority under the CZMA by holding dredging projects ransom. The Corps does not have the statutory authority to promulgate regulations that allow it to violate the requirements of the CZMA. By taking the approach that it will defer dredging unless a state's CMP is lenient enough, the Corps subverts Congressional intent, which seeks to give the States greater control over their coastal zones and that those protections should be binding upon the Corps whenever practicable. Furthermore, the Corps is usurping states' federally granted authority to protect their own coastal zones by exerting economic pressure on States to conform their CMPs to the Corps' desires.

Under the Corps' approach, if Ohio insists on compliance with its CMP, Ohio or another non-Federal sponsor must pay for the extra cost of complying with the CMP compliant

alternative. However, because compliance with Ohio's CMP is mandated under Federal law, compliance with Ohio's CMP is a Federal – not state – requirement. Therefore, the Federal Standard must be an alternative that complies with the CZMA and consequently, complies with Ohio's CMP.

The question may then arise who determines whether an alternative is consistent with Ohio's CMP. Ohio, not the Corps, has the authority to determine whether an alternative complies with Ohio's CMP. 16 U.S.C. § 1456(c)(1)(C). More specifically, as designated by the State of Ohio, the Ohio Department of Natural Resources ("ODNR") may concur, conditionally concur or object to the Corps' determination of whether its Federal project is consistent with Ohio's CMP. 15 CFR § 930.4; 15 CFR §§ 930.41-46. The Corps lacks authority to overrule ODNR's decision. If the Corps disagrees with ODNR's decision, either party may request that the Secretary of Commerce mediate that "serious disagreement." 15 CFR § 930.44; 15 CFR § 930.112. Therefore, the Corps cannot unilaterally decide that open lake disposal is the Federal Standard if Ohio has determined that open lake disposal is not consistent with its CMP.

ODNR has determined that it can only concur with the Corps' consistency determination if certain conditions are met. Two of the conditions in ODNR's conditional concurrence are that "[a] Section 401 Water Quality Certification, or waiver thereof, must be received from the Ohio EPA pursuant to Ohio Revised Code § 6111.03" and "[t]he project must be carried out in a manner consistent with all conditions contained in the Certification." LETTER FROM SCUDDER MACKEY, CHIEF OF THE OFFICE OF COASTAL MANAGEMENT, OHIO DEPARTMENT OF NATURAL RESOURCES TO MARTIN WARGO, ARMY CORPS OF ENGINEERS, BUFFALO DISTRICT, FEBRUARY 20, 2015. Under Ohio Adm.Code 3745-32-05(B)(1), the Director of the Ohio EPA can only issue a section 401 water quality certification if "the dredged material will not result in a modeled

increase in bioaccumulation of a ‘bioaccumulative chemical of concern’” The Corps has failed to demonstrate that the dredged material from the Cleveland Harbor and Cuyahoga River will not result in the modeled increase in bioaccumulation of PCBs. Therefore, the Director of the Ohio EPA cannot issue a section 401 certification for the disposal of that material in Lake Erie. Because the Corps cannot obtain a section 401 certification from the Ohio EPA for open lake disposal of dredged material from the Cleveland Harbor and Cuyahoga River, open lake disposal of that material would not be consistent with Ohio’s CMP, and ODNR’s conditional concurrence would become an objection to the Corps’ consistency determination. 15 CFR § 930.4(b). Unless and until mediation with the Secretary of Commerce could bring resolution of this “serious disagreement,” or it is otherwise resolved by judicial review, open lake disposal would not be consistent with Federal law—the CZMA. Therefore, open lake disposal cannot be the Federal Standard alternative. As a result, the Corps is required to use CDF disposal at its own expense.

III. Conclusion

The Corps is attempting to strong arm Ohio into paying for the Corps’ compliance with Ohio’s federally approved water quality standards and Ohio’s federally approved Coastal Management Program. The Corps, however, has no statutory authority that allows it to require non-Federal sponsors to support its dredging program. Instead, the Corps has created a scheme that punishes states for exercising their federally delegated authorities by deferring dredging—and thereby failing to fulfill their mandate to maintain navigation—if the State cannot or will not cover any additional costs of compliance. The legislative history of both the Clean Water Act and Coastal Zone Management Act demonstrate Congressional intent for the Corps to comply with state environmental requirements at the Corps’ expense in these very circumstances. As

Ohio Attorney General, I demand that the Corps dredge the Cleveland Harbor federal channel at Federal expense in compliance with Ohio's water quality standards, Ohio's Coastal Management Program, and the Federal Standard.

Respectfully Submitted,
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OHIO ATTORNEY GENERAL



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