

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

STATE OF OHIO, ex rel.
MICHAEL DeWINE,
OHIO ATTORNEY GENERAL,
30 East Broad St., 25th Floor
Columbus, Ohio 43215,

Plaintiff,

v.

UNITED STATES ARMY CORPS
OF ENGINEERS; THE HONORABLE
JOHN M. McHUGH, SECRETARY
OF THE UNITED STATES ARMY;
THE HONORABLE JO-ELLEN DARCY,
ASSISTANT SECRETARY OF THE ARMY
FOR CIVIL WORKS; LIEUTENANT
GENERAL THOMAS P. BOSTICK, CHIEF
OF ENGINEERS AND COMMANDING
GENERAL, UNITED STATES ARMY
CORPS OF ENGINEERS; BRIGADIER
GENERAL RICHARD G. KAISER,
UNITED STATES ARMY CORPS OF
ENGINEERS, GREAT LAKES AND
OHIO RIVER DIVISION; AND
LIEUTENANT COLONEL KARL D.
JANSEN, DISTRICT COMMANDER,
UNITED STATES ARMY CORPS OF
ENGINEERS, BUFFALO DISTRICT,

Defendants.

JUDGE:

CASE NO.: 1:15-cv-679

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, State of Ohio, (“State”) by and through its counsel, Attorney General Michael DeWine, at the request of the Director of the Ohio Environmental Protection Agency (“Director of Ohio EPA”) and the Director of the Ohio Department of Natural Resources (“Director of ODNR”), files this Complaint for Declaratory and Injunctive Relief and complains against Defendants United States Army Corps of Engineers; The Honorable John M. McHugh, Secretary of the United States Army; the Honorable Jo-Ellen Darcy, Assistant Secretary of the Army for Civil Works; Lieutenant General Thomas P. Bostick, Chief of Engineers and Commanding General of the United States Army Corps of Engineers; Brigadier General Richard G. Kaiser, Great Lakes and Ohio River Division Commander for the United States Army Corps of Engineers; and Lieutenant Colonel Karl Jansen, Buffalo District Commander for the United States Army Corps of Engineers (collectively “Defendants” or the “Corps”), as follows:

NATURE OF THE CASE

1. The Corps has unilaterally and in a manner contrary to compelling evidence determined that disposing of carcinogenic toxins in Lake Erie is environmentally acceptable. Because the State of Ohio refuses to permit the Corps to harm Lake Erie in this manner, which would violate both State and Federal law, the Corps is threatening to sacrifice the navigability of the Federal Navigation Channel that includes over five miles of the Cuyahoga River and Cleveland Harbor—unless Ohio is willing to pay the difference in cost between the Corps’ unlawful decision and the environmentally acceptable and lawful alternative.

2. In accordance with the Corps’ duty to maintain the navigability of Great Lakes harbors, almost every year for the past 80 years, the Corps has deepened the Cleveland Harbor and Cuyahoga River by removing sediment that has accumulated on the bottom of the channel. This process, called dredging, is necessary for deep draft cargo ships to reach the numerous

industrial facilities along the Cuyahoga River because each year, sediment accumulates and makes the River and Harbor too shallow for lakers and ocean-going cargo ships to safely navigate.

3. The sediment that has accumulated on the bottom of the Cleveland Harbor and Cuyahoga River contains toxic contaminants. These harmful contaminants make the dredged material environmentally unsuitable for disposal in Lake Erie. Therefore, for the past 40 years since the passage of the Clean Water Act, the Corps has disposed of substantially all this dredged material in confined disposal facilities (also referred to as CDFs), which are large enclosed embankments that restrict the toxic sediment from entering the Lake.

4. For the Corps' 2015 Annual Cleveland Dredging Project ("the 2015 Project"), however, the Corps unilaterally determined that it would be environmentally acceptable to dispose of this dredged material in Lake Erie. The Corps made this determination by finding a disposal site within Lake Erie, which the Corps had previously contaminated, and asserting that adding even more contaminated sediment to this disposal site is environmentally acceptable. Ohio disagrees.

5. Congress, through various Federal laws, has given Ohio authority to protect Ohio's portion of Lake Erie. The Corps is obligated to comply with all Federal laws, including those that give Ohio authority to protect the water quality of Lake Erie and Ohio's coastal zone. These Federal laws include: (1) the Submerged Lands Act (which confirms the State of Ohio's title to the submerged land under its portion of Lake Erie, on top of which the Corps wants to deposit the dredged material); (2) the Clean Water Act (which in part requires the Corps to obtain a state water quality certification for dredge and fill activities); and (3) the Coastal Zone Management Act (which requires all Federal activities to be consistent with Federally-approved

state coastal management programs). Additionally, the Corps is restricted by: (1) the National Environmental Policy Act (which requires the Corps to take a hard look at the environmental harm its projects could cause); (2) the Administrative Procedure Act (which prohibits the Corps from making arbitrary and capricious decisions and prohibits the Corps from taking actions that are inconsistent with other Federal laws); and (3) its own regulations (which only permit open lake disposal if it is environmentally acceptable).

6. Under its Federally granted authority, Ohio has determined that toxic contaminants make the dredged material from the Cleveland Harbor unsuitable for disposal in Lake Erie because open Lake placement would increase the amount of carcinogenic toxins in organisms (such as fish) that live in Lake Erie. In violation of Federal law, Ohio law, and the Corps' own regulations, the Corps has unilaterally determined that placement of the majority of the dredged material from the Cleveland Harbor into Lake Erie is the only alternative that the Corps will perform at its own expense. In making this unprecedented and unilateral decision, the Corps purports to rely on its own regulations, asserting that open Lake disposal constitutes what the Corps calls "the Federal Standard." In addition, despite having more than enough funds allocated to the 2015 Project to safely dispose of the dredged sediment, the Corps is refusing to pay for any disposal alternative more expensive than what it has self-servingly determined to be this claimed Federal Standard. Instead, the Corps demands that Ohio (or someone else) pay for the Corps' Federal environmental compliance by committing to pay the cost differential for disposal in confined disposal facilities versus in Lake Erie. And if Ohio refuses to pay, the Corps threatens not to dredge the complete Federal channel, thereby causing catastrophic economic harm to local industry, the City of Cleveland, and the State of Ohio. Despite the Corps' exclusive duty to maintain the navigability of the Cleveland Harbor, and the Corps'

obligation to comply with all Federal laws, the Corps instead chooses to unlawfully threaten economic distress as a way to force Ohio to pay for the Corps' statutory responsibilities. The Corps' position forces Ohio into a Catch-22 where it must choose between two unjust options: either 1) submitting to the Corps' unlawful demand for money and in doing so forgoing the right to challenge the Corps' unlawful determination of the "Federal Standard" or 2) passively accepting the severe economic distress that will befall local industry, the City of Cleveland, and the State of Ohio when the Corps unlawfully defers dredging a portion of the Federal channel.

7. The State of Ohio and its citizens have been aggrieved by the Corps' unlawful acts and improperly conducted decision-making, and therefore are entitled to declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

PARTIES

8. The Ohio Environmental Protection Agency ("Ohio EPA") is an agency of the State of Ohio and is responsible for environmental protection of the waters, lands, and environment of and in the State of Ohio, including lands, air, waters, wildlife, and plant life that will be adversely impacted by the 2015 Project. The Ohio Department of Natural Resources ("ODNR") is an agency of the State of Ohio that administers Ohio's Federally-approved Coastal Management Program ("CMP") and is responsible for monitoring activities that affect coastal resources and ensuring protection of Ohio's coastal resources. The State is acting upon the request of the Directors of these two Agencies. Pursuant to the public trust doctrine and implementing Federal law, the State of Ohio has a sovereign interest in the submerged lands, waters, fish, wildlife, and other natural resources that will be affected by Defendants' proposal.

9. The United States Army Corps of Engineers ("the Corps") is an agency of the Federal government and is charged with, among other things, protecting and serving the nation's

rivers and harbors in a manner that meets all environmental standards and requirements. Specifically, the Corps is responsible for the operation and maintenance of dredging activity for the Cleveland Harbor Federal Navigation Channels.

10. Defendant the Honorable John McHugh is named in his official capacity as the Secretary of the Army. Secretary McHugh is responsible for implementing the policies, procedures and requirements of the United States Army, including the Corps and applicable statutes and regulations relative to all water resources and Corps-owned or operated properties within the United States of America.

11. Defendant Lieutenant General Thomas P. Bostick is named in his official capacity as the Chief of Engineers and Commanding General of the United States Army Corps of Engineers and oversees and directs the activities of the Corps, including the management of dredging operations at the Cleveland Harbor and Cuyahoga River Federal Navigation Channel.

12. Defendant the Honorable Jo-Ellen Darcy is named in her official capacity as the Assistant Secretary of the Army for Civil Works. Defendant Darcy establishes policy direction and provides supervision of the Department of the Army functions relating to all aspects of the U.S Army Corps of Engineers' Civil Works program, including all reimbursable work performed on behalf of Federal and non-Federal entities. These responsibilities include programs for conservation and development of the nation's water and wetland resources, flood control, navigation, and shore protection.

13. Defendant Brigadier General Richard G. Kaiser is named in his official capacity as the Great Lakes and Ohio River Division Commander for the United States Army Corps of Engineers. Defendant Kaiser oversees and directs the activities of the Corps in the Division,

including the management of dredging operations at the Cleveland Harbor and Cuyahoga River Federal Navigation Channel.

14. Defendant Lieutenant Colonel Karl Jansen is named in his official capacity as the Buffalo District Commander for the United States Army Corps of Engineers. His responsibilities include dredging waterways for navigation, protecting communities from flooding and coastal storms, responding to natural and declared disasters, regulating construction in the nation's waters and wetlands, remediating environmental hazards, restoring ecosystems, building facilities for the Army and Air Force, and providing engineering, contracting and project management services for other government agencies upon request. He directly oversees and controls the activities of the Corps in the Buffalo District, including the management of dredging operations at the Cleveland Harbor and Cuyahoga River Federal Navigation Channel.

JURISDICTION AND VENUE

15. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 (Federal question) and 28 U.S.C. § 1346 (Federal defendant) because this action arises under the laws of the United States, including: the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq.*; the Coastal Zone Management Act ("CZMA"), 16 U.S.C. §§ 1451, *et seq.*; the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251 *et seq.*; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.*; and the Corps' regulations, 33 C.F.R. §§ 335-338. Additionally, this matter involves a Federal agency of the United States as a Defendant.

16. There is a present, actual, and justiciable controversy between the parties, and the requested relief is proper under 28 U.S.C. § 2201 (declaratory relief); 28 U.S.C. § 2202 (injunctive relief); and the APA, 5 U.S.C. §§ 701 *et seq.* Plaintiff is also entitled to an award of costs and attorney fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

17. Venue over this action is proper in this District pursuant to 28 U.S.C. § 1391(e)(3), which establishes venue in an action against an officer or agency of the United States in any judicial district in which one of the Plaintiffs resides, if no real property is involved in the action. Venue is additionally appropriate in this District because the action sought to be reviewed takes place in this District and affects residents, natural resources, waters of the State of Ohio, and lands within the State of Ohio where dredging will occur and dredged material is proposed to be deposited.

STATUTORY BACKGROUND

WATER RESOURCES DEVELOPMENT ACT

18. The Water Resources Development Act, 33 U.S.C. §§ 2311 *et seq.*, authorizes the Corps to conduct navigation projects. The 2015 Cleveland Harbor Project is subject to Public Law 102-580, Section 101(6) of the Water Resources Development Act, as modified by Public Law 106-53, Section 308 of the Water Resources Development Act of 1999, and as further modified by Public Law 106-541, Section 306 of the Water Resources Development Act of 2000.

19. Congress enacted the Water Resources Development Act of 2007, Public Law 110-114, in part to address navigability problems at Great Lakes harbors. Specifically, that Act was enacted to rectify situations where the Corps' dredging appropriations have delayed dredging at Great Lakes ports.

20. The Water Resources Development Act of 2007 requires the Corps to use available funds to “expedite the operation and maintenance, including dredging, of the navigation features of the Great Lakes and Connecting Channels for the purpose of supporting commercial navigation to authorized project depths.” 33 U.S.C. § 426o-2.

21. The legislative history of the Water Resources Development Act of 2007 indicates that Congress intended for that Act to direct the Corps to use available funds to dredge Great Lakes harbors because of the substantial problems the Corps' delayed dredging had imposed on commerce. The Congressional Conference Committee reported the following:

The Great Lakes contain 134 deep-draft harbors and six connecting channels **within the Corps of Engineers' dredging responsibility**, including 25 of the nation's largest ports. The total waterborne commerce on the Great Lakes equals nearly 7 percent of the nation's maritime commerce. **Recent shortfalls in the Corps' dredging appropriation have delayed dredging at many Great Lakes ports and waterways.** The low water levels that have plagued the Lakes since the late 1990s have only exacerbated the problem. As a result, the largest vessels in the Great Lakes fleet must forfeit nearly 270 tons of cargo for each 1-inch reduction in loaded draft. Ocean-going vessels in the international trade lose roughly 100 tons of cargo for each 1-inch loss of draft. Section 5014(a) directs the [Corps], using available appropriated funds, to expedite the operation and maintenance, including dredging, of the navigation features of the Great Lakes and Connecting Channels for the purpose of supporting commercial navigation to authorized project depths. H.R. Conf. Rep. 110-280 (emphasis added).

22. Based on these public laws, the Corps is required to maintain the navigability of Great Lakes harbors by dredging the Cleveland Harbor and Cuyahoga River Federal Navigation Channel to the appropriate depths.

NATIONAL ENVIRONMENTAL POLICY ACT

23. Congress enacted the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, to promote harmony between humans and their environment and to prevent or eliminate damage to the environment. NEPA requires all Federal agencies, in every proposal for major Federal action that has a significant impact on the environment, to prepare and consider a detailed environmental impact statement (“EIS”) that includes the action’s adverse effects, alternatives to the action, and the action’s long term effects.

24. Pursuant to 40 C.F.R. § 1506.2, Federal agencies must cooperate with states to the fullest extent on environmental studies, and address inconsistencies between the proposed major Federal action and state or local plans.

CLEAN WATER ACT

25. The Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* (“CWA”), was enacted to protect and improve the quality of the nation’s waters. The CWA recognizes that water quality is a primary state function, and requires any person seeking to conduct a project subject that involves the placement of dredged material into navigable waters to obtain a state water quality certification through which a state certifies that the person will comply with the state’s water quality standards and may impose any conditions required for compliance with state standards. 33 U.S.C. § 1341.

26. The CWA requires any person conducting a regulated project, including the Federal government, to comply with state water quality standards. 33 U.S.C. § 1323; 33 U.S.C. § 1341; 33 C.F.R. § 336.1.

27. When the Clean Water Act was amended in 1977, the Senate Committee on Environment and Public Works specifically addressed the Corps' obligation to comply with state water quality standards when performing dredging activities by reporting 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 (emphasis added).

COASTAL ZONE MANAGEMENT ACT

28. The Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.* ("CZMA"), was enacted to ensure coordination and consistency between Federal, state, and local actions in coastal zones. The CZMA authorizes and encourages states to develop coastal management programs, which allow states to protect their coastal zones by providing a Federally-authorized vehicle for the states to regulate the activities that occur within their coastal zones. The CZMA requires Federal activities within or that affect a state's coastal zone to be consistent to the maximum extent practicable with that state's coastal management program.

29. The legislative history of the CZMA indicates that Congress intended for the CZMA to give states Federally-authorized control over their coastal zones. 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.... [I]t is essential that Federal agencies administer their programs, including development projects, consistent with the states’ coastal zone management program.” S.Rep. 92-753.

30. Furthermore, when Congress amended the CZMA in 1990, the Congressional Conference Committee specifically addressed the necessity for Federal agencies’ dredging projects to comply with state coastal management programs by reporting the following:

[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).

31. Pursuant to the CZMA, before undertaking a project in a state's coastal zone, Federal agencies must ensure that the project is consistent with that state's coastal management program to the maximum extent practicable and must provide that state with a consistency determination. 16 U.S.C. § 1456. The state may then issue the Federal agency a concurrence, a conditional concurrence, or an objection to the Federal agency's consistency determination. 15 C.F.R. §§ 930.41, 930.41.43.

32. The CZMA is implemented by the Department of Commerce through the National Oceanic and Atmospheric Administration ("NOAA"). 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).

ADMINISTRATIVE PROCEDURE ACT

33. The Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* ("APA"), provides that judicial review is appropriate if a person/entity has suffered a legal wrong because of agency action, or has been adversely affected or aggrieved by agency action. 5 U.S.C. § 702. Section 551 of the APA defines agency action to include "the whole or part of an agency rule, order, license, sanction, relief or the equivalent denial thereof, or failure to act." 5 U.S.C. § 551(13).

34. Agency actions are subject to judicial review under the APA if they are "final agency actions." 5 U.S.C. § 704.

35. A reviewing court, pursuant to the APA, can compel agency action unlawfully withheld or unreasonably delayed, or set aside agency action, findings, or conclusions if they are found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law or without observance of procedure required by law among other things. 5 U.S.C. § 706.

CORPS' REGULATIONS

36. One of the Corps' own regulations, commonly referred to as "the Federal Standard," sets forth the policies and procedures required to "ensure prudent operation and maintenance activities." 33 C.F.R. § 335.1. Once the relative priority of a maintenance project is determined and Congress allocates funds, it is the responsibility of the Corps to carry out the work by selecting the dredged material disposal alternative(s) which is the least costly and consistent with sound engineering practices and meets the environmental standards established by the 404(b)(1) evaluation process. 33 C.F.R. § 335.7. The Corps is required to fully consider all practicable and reasonable alternatives on an equal basis. 33 C.F.R. § 335.4.

FACTUAL ALLEGATIONS

Dredging of the Cleveland Harbor Federal Navigation Channels

37. The Corps is responsible for implementing Federal navigation projects around the country. In performing these projects, the Corps is required to comply with various Federal and state environmental laws and regulations.

38. Specifically with regard to the Great Lakes, the Corps must use available funds to "expedite the operation and maintenance, including dredging, of the navigation features of the Great Lakes and Connecting Channels for the purpose of supporting commercial navigation to authorized project depths." 33 U.S.C. § 426o-2. "In operating and maintaining Federal channels and harbors of ... the Great Lakes, the [Corps] shall conduct such dredging as is necessary to

ensure minimal operation depths consistent with the original authorized depths of the channels and harbors when water levels in the Great Lakes are, or are forecast to be, below the International Great Lakes Datum of 1985.” 33 U.S.C. § 426o-1.

39. The Cuyahoga River is a river that exists wholly within the State of Ohio. It originates in Geauga County, Ohio, flows south to Akron, Ohio, then flows back north, and ultimately enters Lake Erie through the Cleveland Harbor. The Cuyahoga River is a “water of the State” under OHIO REV. CODE § 6111.01(H).

40. The Cleveland Harbor Federal Navigation Channels (“the Cleveland Harbor”) consist of 5.5 miles along the Cleveland shoreline that is enclosed by breakwater structures, 5.8 miles of the lower Cuyahoga River, and 1 mile of the Old River.

41. The southernmost mile of the Cuyahoga River that is within the Cleveland Harbor is referred to herein as the “Upper Cuyahoga Navigation Channel” or “DMMU.”

42. The Cleveland Harbor is a deep-draft commercial harbor located on Lake Erie in Cuyahoga County, Ohio. The Cleveland Harbor is the 48th-largest United States port by weight of cargo.

43. For commercial cargo ships to safely navigate the Cleveland Harbor, it must be dredged to depths ranging from 25 to 29 feet below low water datum (“LWD”) in the Outer Harbor Channels and 18 to 27 feet below LWD in the Cuyahoga River and Old River Channels. The Corps has regularly dredged the Cleveland Harbor in this manner nearly every year for the past 40 years.

44. These depths are required for cargo ships to safely navigate the Cleveland Harbor. If portions of the Cleveland Harbor become too shallow, then cargo ships will be prohibited from entering those portions, thereby cutting off access to commercial and industrial facilities located

within the Cleveland Harbor. A number of industrial facilities rely on the Cleveland Harbor to both receive raw materials and ship finished products.

45. Dredging is required annually because sediment accumulates at the bottom of the Cleveland Harbor throughout the year due to the natural flow of the River. The sediment that is removed consists of both the sediment that has accumulated since the previous dredging event and historic sediment that becomes interspersed with the accumulated sediment. This interspersed sediment occurs because the sediment that is removed creates a void. That void is filled in part by the historic sediments that fall from the sides of the channel into the void in the center.

46. As of March 30, 2015, ships servicing facilities on the Upper Cuyahoga Navigation Channel have been required to reduce their cargo loads in order to traverse the Cleveland Harbor. In addition, some of the docks in the Upper Cuyahoga Navigation Channel are not usable due to sediment accumulation over the winter and spring thaw. It is not uncommon for cargo ships to have light loads at the beginning of the shipping year, which starts shortly after the ice thaws each year. However, it is essential for facilities along the Upper Cuyahoga Navigation Channel to have access to the full channel early into the shipping season in order to receive enough raw materials to create a sufficient inventory of material to continue production throughout the winter. Cargo ships are completely prohibited from accessing the full length of the Upper Cuyahoga Navigation Channel when depths fall below 12 feet, which could occur this year unless dredging is performed within the Upper Cuyahoga Navigation Channel.

47. Typically, the Corps' annual Cleveland dredging projects involve removing approximately 225,000 cubic yards or more of sediment from the Cleveland Harbor. About 80% of this sediment is in the Upper Cuyahoga Navigation Channel. The Corps breaks the Upper Cuyahoga Navigation Channel up into three segments and refers to them as the following:

DMMU-1; DMMU-2a; and DMMU2b. The sediment within the Upper Cuyahoga Navigation Channel is referred to herein as “the DMMU sediment.”

48. Nearly every year for the past 40 years, the Corps has annually placed all of the dredged material in confined disposal facilities (“CDFs”), which are large embankments that restrict the sediment from entering Lake Erie.

49. Several CDFs are currently in operation and have sufficient space for both the dredged material from the 2015 Project and future annual dredging projects. These confined disposal facilities are identified numerically by the Corps as follows: 10B, 13, 9, and 12. Each one of these CDFs is located on the northern edge of Burke Lakefront Airport near the Lake Erie Shoreline.

50. Because the dredged sediment has been too contaminated to be suitably disposed of in Lake Erie, the CDFs have been used as a means for disposing of dredged material from the Cleveland Harbor nearly every year for the past 40 years.

51. The two contaminants of greatest concern are (and have been) polychlorinated biphenyl (“PCBs”) and polycyclic aromatic hydrocarbon (“PAHs”). Both contaminants are persistent carcinogenic toxins. The exact source of contamination is unknown; however, these contaminants likely originated from industrial activities that occurred before the 1970s, and since then these legacy contaminants have been leaching into the sediment during storm events from combined sewer overflow discharges, contaminated stormwater runoff, and runoff from historic landfills and historic industrial sites.

52. PCBs are a contaminant of concern because they are a toxic substance which is subject to bioaccumulation. This means that once PCBs enter the food chain, they remain substantially intact and concentrate in greater amounts as they move through the food chain.

Consequently, small organisms absorb the PCBs by living in contact with and consuming the contaminated sediment. Each predator then consumes and retains PCBs that are in its prey. This process results in the increased total amount of the PCBs in organisms that are higher up in the food chain. Humans absorb PCBs by consuming fish or other wildlife that has absorbed PCBs from their prey. In humans, PCBs are carcinogenic.

53. PCBs are strongly resistant to biodegradation, and take centuries to degrade. This means that once PCBs are placed in Lake Erie, those PCBs remain in the Lake for decades or longer, unless they are absorbed into the food chain.

54. PAHs are a concern because they are both acutely and chronically toxic to organisms which live in the lake sediments and high enough concentrations of PAHs are lethal to these organisms. Because this organisms serve as an important link in the aquatic food chain, the addition of high enough concentrations of PAHs has a detrimental effect on the Lake ecosystem. PAH contamination in the Cleveland Harbor is likely from both historic and current activities. Sources of PAH contamination in the Cleveland Harbor include the release of petroleum products and the incomplete combustion of coal, oil, and gas.

55. In 2012, the Corps tested the sediment in the Upper Cuyahoga Navigation Channel (“the DMMU sediment”) and unilaterally and without sufficient justification determined that the sediment was suitable for disposal into Lake Erie.

Regulation of Disposal of Dredged Material

56. Disposal of the dredged material from the Cleveland Harbor is regulated by the State of Ohio—under its Federally granted authority to protect its water quality, coastal zone, and submerged lands—and by the Corps.

57. The Ohio Environmental Protection Agency regulates the disposal of dredged material under its Federally-derived authority from the Clean Water Act, and the Ohio Department of Natural Resources regulates the disposal of dredged material in Ohio's coastal zone under Federally-derived authority from the Coast Zone Management Act.

58. The Clean Water Act gives Ohio authority to require a State water quality certification or permit before entities are allowed to place any pollutant, including dredged material, into waters of the State. Additionally, OHIO REV. CODE § 6111.04 prohibits the placement of pollutants into waters of the state without a permit from the Ohio EPA. Dredged material is a pollutant pursuant to OHIO REV. CODE §§ 6111.01(A), (D)

59. The Coastal Zone Management Act requires Federal agency activities to be undertaken in a manner consistent to the maximum extent practicable with Ohio's Coastal Management Program ("CMP").

The Federal Standard Alternative for the Disposal of Dredged Material

60. The Corps calls its determination of where and how to dispose of dredged material "the Federal Standard."

61. The Corps describes "the Federal Standard" as the alternative "that meets required environmental laws and regulations in the least costly manner consistent with sound engineering practices." 53 Fed. Reg. 14,902 (April 26, 1988).

62. 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 C.F.R. § 335.7.

63. The Corps asserts that after it has determined which dredged material disposal alternative constitutes the Federal Standard, it will not perform any other more costly alternative unless a non-Federal sponsor agrees to pay for the difference in cost.

64. The U.S. EPA and the Corps developed the Great Lakes Dredged Material Testing and Evaluation Manual (“Great Lakes Testing Manual”) in order to determine when it is environmentally acceptable to place dredged material in the Great Lakes. *The Great Lakes Testing Manual is attached hereto (without appendices) and incorporated herein as Exhibit 1.*¹ Specifically, the Great Lakes Testing Manual addresses the sampling, testing, analysis, and evaluation necessary for the Corps to determine whether it believes open lake disposal of sediment is environmentally acceptable. The Corps has historically always followed the Great Lakes Testing Manual when making determinations that involve the evaluation and disposal of dredged material into the Great Lakes.

65. The Great Lakes Testing Manual sets forth a four-tiered evaluation process, which allows the Corps to make a determination after any Tier that produces conclusive results, but which requires the Corps to proceed to the next Tier when results are inconclusive.

66. Tier 1 involves the evaluation of sediment using historic data. Tier 2 includes an evaluation of sediment using chemical analysis. Tier 3 includes an evaluation of sediment using biological testing. Tier 4 involves case-specific testing and evaluation to resolve conflicting or inconclusive results generated by Tiers 1-3.

67. Tier 4 is used only when “the information provided by Tiers 1-3 is not sufficient to make a contaminant determination.” See Exhibit 1, page 10. The Great Lakes Testing

¹ The full manual is available at: UNITED STATE ENVIRONMENTAL PROTECTION AGENCY, *Contaminated Sediment Program*, <http://www.epa.gov/greatlakes/sediment/gltem/manual.htm>.

Manual directs the Corps, when performing a Tier 4 analysis, to use “bioaccumulation tests which differ from Tier 3 in both level of intensity and cost.” See Exhibit 1, page 47. As an essential part of Tier 4, the Corps must “coordinat[e] with other agencies up front” regarding that testing and evaluation. See Exhibit 1, page 47. Furthermore, Tier 4 testing “should be focused on contaminant issues not resolved in earlier tiers,” and bioaccumulation results which failed at Tier 3 should not be reevaluated at Tier 4 in an attempt to change the contaminant determination. See Exhibit 1, page 46.

Corps’ Sampling

68. In 2012, the Corps sampled the sediment from the Upper Cuyahoga Navigation Channel (the “DMMU sediment”) and assessed it for contaminant risks by analyzing concentration of contaminants in the sediments and by applying a range of biological and information analysis techniques, including bioaccumulation bioassays, acute toxicity bioassays, food web bioaccumulation modeling, and public water supply impact modeling.

69. The Great Lakes Testing Manual states that a “sediment sampling program ... should collect samples that are representative of the materials to be dredged, and the sediments at the disposal site.” See Exhibit 1, page 24. The Great Lakes Testing Manual describes that surficial samples may be appropriate when sampling the disposal site because “it is a 2-dimensional area.” See Exhibit 1, page 25. The dredged material, however, “is a 3-dimensional mass of sediment,” which indicates that surficial sampling would not be appropriate for sampling the dredged material. See Exhibit 1, page 25.

70. When sampling the DMMU sediment the Corps only collected surficial sediment samples (only to a depth of a few inches) and only from the center of the River. Additionally when sampling the DMMU sediment, the Corps only collected and analyzed one composite

sediment sample from each of the three DMMU segments (purportedly representing a total of 180,000 cubic yards of dredged material).

71. In April and May 2014, Ohio EPA performed sediment sampling in the Upper Cuyahoga Navigation Channel (the DMMU area). Ohio EPA's data indicate that the sediment sampled at greater depths is almost three times as contaminated with PAHs as the sediment sampled at the surface depth in the same area. These data indicate that the material is not homogenous and that the deeper sediment is more contaminated. Therefore, the Corps' surficial sediment samples are not representative of the dredged material and the Corps' evaluation underestimated the acute toxicity and contamination of the sediment. Ohio EPA shared these data with the Corps in a letter dated February 20, 2015. In that letter Ohio EPA requested that the Corps further evaluate the toxicity of the sediments using dredge material obtained from core samples at depth.

72. The Corps confirmed on March 18, 2015, that it would perform core sampling that extends the full depth of the Upper Cuyahoga Navigation Channel that will be dredged and that it will perform a toxicity evaluation using those samples. However, the Corps will not perform this analysis to evaluate disposal alternatives for the 2015 Project.

73. When sampling the sediment at the Corps' proposed open Lake disposal site, labeled CLA-1, the Corps only collected and analyzed one composite sediment sample (which the Corps purports as representative of two square miles of the Lake bed).

74. As part of the 2012 sampling and testing, the Corps performed Tier 2 chemical analysis and Tier 3 biological testing, as outlined by the Great Lakes Testing Manual, on the DMMU sediment.

75. In 2013, the Corps assessed its 2012 data according to the Great Lakes Testing Manual.

76. As part of this evaluation, the Corps documented the presence of contaminants of concern, including PCBs, in the DMMU sediments.

77. Under Tier 3 biological testing, “[d]redged Material is considered **not** to [be suitable for open Lake disposal] when the mean concentration of bioaccumulative contaminant(s) in test organisms exposed to the dredged material is statistically greater than the concentration of these contaminant(s) in test organisms exposed to the disposal site sediment.” See Exhibit 1, page 43 (emphasis in original).

78. In 2013, for the first time since the development of the Great Lakes Testing Manual, when evaluating sediment from any Ohio harbor for the placement in Lake Erie, the Corps determined that the Tier 3 biological testing was inconclusive. The Corps’ analyses of all previous sample sets from the Cleveland Harbor has excluded open Lake disposal of dredged material before the Corps reached Tier 4.

79. However, for the first time in 2013, the Corps claims to have applied a Tier 4 evaluation to the sediment in the Upper Cuyahoga Navigation Channel (the “DMMU sediment”) under the Great Lakes Testing Manual.

80. The Corps’ Tier 4 evaluation involved no additional sampling or testing beyond the Tier 3 analysis, and resulted in the Corps, without factual justification or explanation, superseding the established evaluation criteria for the Great Lakes and instead making a contrary determination based solely on what appears to be nothing more than the Corps’ claimed best professional judgment.

81. In establishing its “best professional judgment,” the Corps used a mathematical model which it calls the spatially explicit screening level exposure comparison (“SESLEC”) model, which is set forth only in a draft guidance document and which, upon information and belief, has neither been peer reviewed nor approved by U.S. EPA or other regulatory agencies for use in making contaminant determinations for sediment disposal.

82. Additionally, the Corps did not consult with or otherwise involve the U.S. EPA, Ohio EPA, or any other Federal or State agency before developing its Tier 4 evaluation plan or before performing its Tier 4 evaluation of the DMMU sediment, as required by the Great Lakes Testing Manual.

The 2015 Project

83. Based on its new Tier 4 evaluation of the 2012 data, the Corps has determined that the Federal Standard for the 2015 Project is to dispose of 180,000 cubic yards of the dredged material into Lake Erie, rather than into a CDF.

84. The 180,000 cubic yards of dredged material that the Corps proposed to place in Lake Erie would be the sediment dredged from the Upper Cuyahoga Navigation Channel (the “DMMU sediment”).

85. The Corps has proposed two Lake Erie disposal locations for this dredged material, which it has labeled CLA-1 and CLA-4. Each disposal location is about one mile long by two miles wide. Both are located in Lake Erie’s central basin near the City of Cleveland. CLA-1 is nine miles north of Cleveland (GPS coordinates: 41.645504988N, 81.726066535W). The water at CLA-1 is about 62 feet deep. CLA-4 is 6.4 miles northwest of Cleveland (GPS coordinates: 41.553171131N, 81.822554593W). The water at CLA-4 is about 55 feet deep. On February 17, 2015, the Corps stated that it would no longer consider CLA-4 as a potential

disposal site for the 2015 Project. However, the Corps' Environmental Assessment and Finding of No Significant Impact provide that using CA-4 is an option for future years.

86. CLA-1 is a site that the Corps used for the disposal of dredged material from the Cleveland Harbor over 45 years ago, which was prior to the enactment of the Clean Water Act.

87. CLA-1 has higher levels of PCB contamination and projected bioaccumulation than any other area in Lake Erie that the Corps has ever tested for disposal of dredged material from the Cleveland Harbor.

88. Upon information and belief, the Corps' previous use CLA-1 as a disposal location for dredged material gave the sediment already at CLA-1 higher than average PCB contamination and projected bioaccumulation.

89. Upon information and belief, the Corps' decision to propose CLA-1 as a disposal location is based on the Corps' currently unsubstantiated claim that no significant amount of the dredged material deposited at CLA-1 will migrate out of the boundaries of CLA-1.

90. The Corps' 2012 sampling, 2013 analysis, and 2014 sampling indicate that the DMMU sediment contains PCBs and that the PCB contaminants would be biologically available to living organisms in Lake Erie during and after the proposed open Lake disposal.

91. The Corps' 2012 sampling and 2013 analysis of the sediment at the potential Lake Erie disposal sites indicates that the sediment at CLA-1, after having been compromised by the previous dumping by the Corps, is not representative of existing background conditions of PCB contamination or potential bioaccumulation in the Central Basin of Lake Erie.

92. Upon information and belief, if the Corps places the DMMU sediment at CLA-1 or CLA-4, significant amounts of the DMMU sediment would migrate from the boundaries of CLA-1 and CLA-4.

93. Upon information and belief, the DMMU sediments, if placed at CLA-1 or CLA-4, would cause an increase in PCB bioaccumulation and/or an increase in PCB contamination.

State Water Quality Certification and Coastal Zone Management Act Consistency Determination

94. Under the Clean Water Act, before a permit can be issued to dispose of dredged material into waters of a particular state, that state must grant the applicant a certification stating that the disposal of dredged material will not harm that state's water quality. This certification is called a state water quality certification (or sometimes a 401 certification).

95. The Director of the Ohio Environmental Protection Agency has the authority to issue state water quality certifications. OHIO REV. CODE § 6111.03(P); OHIO ADM. CODE § 3745-32.

96. On November 17, 2014, the Corps applied to the Director of Ohio EPA for an Ohio water quality certification for discharges of dredged material associated with the scheduled 2015 Project. The Corps sought a certification from the Ohio EPA that the discharges of dredged material associated with the scheduled 2015 Project would comply with applicable state water quality standards pursuant to Section 401 of the Clean Water Act.

97. More specifically, in its Ohio water quality certification application, the Corps included three alternatives for the 2015 Project, in accordance with Ohio's Antidegradation Rule, OHIO ADMINISTRATIVE CODE § 3745-1-05. The Corps dismissed two alternatives on its own, such as dredging over 400,000 cubic yards of sediment or dredging no sediment at all. In its application, the Corps identified what it determined to be "the minimum degradation alternative" as the dredging of a total of 225,000 cubic yards of dredged material from the Cleveland Harbor,

with 45,000 cubic yards placed into an existing CDF and 180,000 cubic yards to go to an open-Lake disposal area that the Corps has labeled CLA-1.

98. Pursuant to OHIO ADM. CODE § 3745-32-05, the Director of the Ohio Environmental Protection Agency cannot grant a water quality certification unless the Director determines that the applicant has demonstrated that the discharge of dredged material to waters of the state will not do the following:

(1) Prevent or interfere with the attainment or maintenance of applicable water quality standards.

(2) Result in a violation of any applicable provision of the following sections of the Clean Water Act:

(a) Effluent limitations as described in section 301.

(b) Water quality related effluent limitations as described in section 302.

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

(d) National standards of performance as described in section 306.

(e) Toxic and pretreatment effluent standards as described in section 307.

99. Additionally, the Director of the Ohio EPA may not issue a water quality certification for any harbor or navigation maintenance activities proposing to deposit dredged material in any part of Lake Erie unless the Director has determined that “the dredged material will not result in a modeled increase in ‘bioaccumulation’ of a ‘bioaccumulative chemical of concern’ as those terms are defined in 3745-1-02 of the Administrative Code.” OHIO ADM. CODE § 3745-32-05.

100. PCBs are defined as a bioaccumulative chemical of concern under OHIO ADM. CODE § 3745-1-02(B)(13).

101. Bioaccumulation is defined as “the net accumulation of a substance by an organism as a result of uptake from all environmental sources” under OHIO ADM. CODE § 3745-1-02(B)(11).

102. As part of Ohio’s water quality standards and as required by the Clean Water Act and U.S. EPA’s regulations, Ohio has established an antidegradation policy and review process. OHIO REV. CODE § 6111.12; OHIO ADM. CODE § 3745-1-05; 33 U.S.C. § 1313(d)(4); 40 C.F.R. § 131.12 (“The State shall develop and adopt a statewide antidegradation policy [which] shall, at a minimum be consistent with the following ... [water] quality shall be maintained and protected unless the State finds ... that allowing lower water quality in necessary to accommodate important economic or social development.”)

103. Ohio’s antidegradation rules prohibit the lowering of existing water quality of any water of the state unless the Director of Ohio EPA determines that lowering water quality is necessary to accommodate important social or economic development when considering the technical and economic feasibility of non-degradation and minimal degradation alternatives. OHIO ADM. CODE § 3745-1-05(C). Pursuant to OHIO ADM. CODE § 3745-1-05(B)(1)(c), before the Director of Ohio EPA can issue a water quality certification, an applicant must satisfy Ohio EPA’s antidegradation requirements.

104. Ohio’s antidegradation rules specifically address the disposal of bioaccumulative chemicals into Lake Erie. OHIO ADM. CODE § 3745-1-05(F). Any increased loading of bioaccumulative chemicals into Lake Erie is by rule a significant lowering of water quality. OHIO ADM. CODE § 3745-1-05(F). Any entity seeking to significantly lower water quality in this manner must submit to the Ohio EPA an antidegradation demonstration that identifies

alternatives that could eliminate the need to increase loading of bioaccumulative chemicals into Lake Erie.

105. On January 6, 2015, Ohio EPA issued a public notice of its receipt of the Corps' application for a State water quality certification. Ohio EPA held a public information session and public hearing on the Corps' 401 certification application on February 24, 2015. Ohio EPA also accepted comments and questions during the comment period, which expired on March 3, 2015.

106. On March 31, 2015, the Director of Ohio EPA granted a water quality certification that permits the Corps to dredge the Cleveland Harbor and dispose of the dredged material in CDFs 9, 10B, or 12, but expressly prohibits open Lake placement of any dredged material from the Cleveland Harbor.

107. Pursuant to the CZMA, all Federal activities that have reasonably foreseeable effects on the coastal zone must be conducted in a manner that is "consistent to the maximum extent practicable" with the enforceable policies of the State's Federally-approved Coastal Management Program ("CMP"). 16 U.S.C. § 1456(c)(1)(A).

108. Pursuant to 16 U.S.C. § 1453(1), "the [coastal] zone extends, in Great Lakes waters, to the international boundary between the United States and Canada" Therefore, Ohio's Coastal Zone extends north within Lake Erie's Central Basin to the international boundary between the United States and Canada and includes CLA-1 and CLA-4.

109. Pursuant to OHIO REV. CODE § 1506.02(A), the Ohio Department of Natural Resources has been designated by the Ohio General Assembly to develop and implement Ohio's CMP.

110. The National Oceanic and Atmospheric Administration (“NOAA”) approved the most recent version of Ohio’s Coast Management Program in April of 2007.

111. On February 11, 2015, Ohio established new rules related to Ohio’s water pollution control program under OHIO ADM. CODE § 3745-32-05, adopted in accordance with the Ohio Governor’s Executive Order 2015-02K.

112. On February 11, 2015, pursuant to 16 U.S.C. §1456(f), the Program Change Guidance issued by NOAA in July 1996, and the November 2013 Addendum to that 1996 Program Change Guidance, ODNR gave notice of incorporation of the new requirements of Ohio’s water pollution control program found in OHIO ADM. CODE § 3745-32-05 into the Ohio CMP.

113. On February 13, 2015, NOAA acknowledged the incorporation of Ohio’s changes to OHIO ADM. CODE § 3745-32-05 into Ohio’s CMP.

114. The Corps’ 2015 Project must comply with Ohio’s Federally-approved CMP to the maximum extent practicable because the Corps’ designated open Lake disposal locations are within Ohio’s coastal zone.

115. On November 20, 2014, the Corps submitted a consistency determination to the Ohio Department of Natural Resources for its 2015 Project.

116. ODNR had the option of concurring with, conditionally concurring with, or objecting to the Corps’ determination that the 2015 Project would be consistent with Ohio’s CMP. 15 C.F.R. § 930.4; 15 C.F.R. §§ 930.41-46.

117. Pursuant to Enforceable Policy 6 of Ohio’s Federally-approved CMP, Part II 5-24, “it is the policy of the State of Ohio to maintain and improve the quality of the state's coastal waters for the purpose of protecting the public health and welfare and to enable the use of such

waters for public water supply, industrial and agricultural needs, and propagation of fish, aquatic life and wildlife by ... regulating discharge of dredge or fill material into surface waters ... in accordance with section 401 of the Clean Water Act (O.R.C. 6111.03).” Enforceable Policy 6 further provides at OCMF Part II 5-29 that “rules that, in part, set forth criteria for Section 401 Water Quality Certification are contained in O.A.C. Chapter 3745-32.”

118. Pursuant to Ohio’s Federally-approved CMP, Part II 5-68, “Dredging involves large quantities of material that are very costly to remove and may pose environmental problems. Polluted materials must be disposed at approved upland sites or in confined disposal facilities.”

119. Pursuant to Enforceable Policy 17 of Ohio’s Federally-approved CMP, Part II 5-73, it is the policy of the State of Ohio to provide for the dredging of harbors, river channels and other waterways and to protect the water quality, public right to navigation, recreation and natural resources associated with these waters in the disposal of the dredged material by ... regulating, through the Ohio Environmental Protection Agency Water Quality Certification, the discharge or disposal of dredged material. (O.R.C. 6111.03(P) and O.A.C. 3745-1). Enforceable Policy 17 further provides: “Before any agency or individual disposes of dredged material into Ohio waters, a state water quality certification must be obtained.”

120. Pursuant to Enforceable Policy 27 of Ohio’s Federally-approved CMP, Part II 5-101, “it is the policy of the State of Ohio to assure the continual enjoyment of the benefits received from the fisheries of Lake Erie and to maintain and improve these fisheries by ... protecting fish habitat through Ohio EPA’s Section 401 Water Quality Certification authority (O.R.C. 6111.03(O) and 6111.03(P) and O.A.C. 3745-1 and 3745-32).” Enforceable Policy 27 further provides: “Biological criteria are considered in water quality standards, and the antidegradation policy is used to protect state resource waters from degradation. Therefore, a

Section 401 certification may be denied for sufficient grounds to protect important aquatic life uses of Lake Erie and coastal area waters. Special conditions of Section 401 certifications may be imposed on activities.”

121. Pursuant to Enforceable Policy 33 of Ohio’s Federally-approved CMP, Part II 5-119, “it is the policy of the State of Ohio to protect the visual and aesthetic amenities of Lake Erie and its shoreline to enhance the recreational, economic, cultural and environmental values inherently associated with the coastal area by ... enforcing State Water Quality Standards. (O.R.C. Chapter 6111, O.A.C. 3745-1-04).”

122. On February 20, 2015, ODNR issued a conditional concurrence with the Corps’ consistency determination including conditions that “A section 401 Water Quality Certification, or waiver thereof, must be received from the Ohio EPA pursuant to Ohio Revised Code § 6111.03. The project must be carried out in a manner consistent with all conditions contained in the Certification.” The conditional concurrence explained that the conditions within it were necessary to allow its concurrence by insuring consistency with Ohio CMP Enforceable Policies “#6 (Water Quality), #17 (Dredging and Dredged Material Disposal), #27 (Fisheries Management), and #33 (Visual and Aesthetic Quality) as applicable in 2015.”

123. The Corps has sufficient funds budgeted and allocated to the 2015 Project to place all of the dredged material from the 2015 project into CDFs. Additionally, there is sufficient space in the CDFs to place all of the dredged material from the 2015 project into the CDFs.

124. The State water quality certification from the Director of the Ohio EPA does not allow the Corps to place the dredged material from the 2015 Project in the open waters of Lake Erie. Therefore, to be consistent with Ohio’s Coastal Management Program to the maximum extent practicable, the Corps must dispose of the dredged material in a location other than Lake

Erie. As a result, if the Corps were to place the dredged material in Lake Erie, the Corps would be in violation of the CZMA. To be consistent with Federal law, i.e. the CZMA, as well as with State law and rules, the Corps must choose a disposal location other than Lake Erie. The only other disposal locations identified as available are CDFs 9, 10B and 12.

125. The Corps announced its intention to dispose of the DMMU sediment in Lake Erie at CLA-1 in the Corps' December 2014 Environmental Assessment and Finding of No Significant Impact, in its Ohio water quality certification application, and in its November 17, 2014 Public Notice of Operation and Maintenance Dredging and Dredged Material Placement for the Cleveland Harbor, Cuyahoga County, Ohio.

126. On March 25, 2015, the Corps declared that disposal of the DMMU sediment in Lake Erie at CLA-1 is the Federal Standard for the 2015 Project.

127. The Corps' March 25 declaration that the Federal Standard includes the disposal of the DMMU sediment in Lake Erie is unlawful because that alternative violates the CZMA.

The Corps' Request for Bids

128. On March 6, 2015, the Corps informed Ohio that the Corps will not dispose of the DMMU sediment at CLA-1 without a state water quality certification from the Director of the Ohio EPA.

129. The Corps also told Ohio that if Ohio does not grant the Corps a water quality certification that allows for the disposal of the DMMU sediment in CLA-1, then the Corps will not dredge Upper Cuyahoga Navigation Channel, unless a non-Federal sponsor pays for the disposal of the DMMU sediment in a CDF.

130. On or about February 23, 2015, the Corps requested bids for the 2015 Project. The Corps requested a bid that would involve placing the DMMU sediment in the open Lake at

CLA-1. This work plan was labeled Schedule A by the Corps. The Corps also requested a second bid that would involve placing the DMMU sediment at the Corps' CDF which it calls 10B. This work plan was called Schedule B by the Corps.

131. The lowest responsive responsible bid for Schedule A (open Lake disposal) was \$1,356,000.

132. The lowest responsive responsible bid for Schedule B (CDF disposal) was \$1,779,050.

133. Despite the fact that Schedule A involves disposing of PCB-contaminated sediment (the DMMU sediment) in Lake Erie at CLA-1 in violation of Federal law, the Corps as declared Schedule A as the Federal Standard.

134. The difference between the contract bids for Schedule A and B is \$423,050. The Corps will not agree to dredge the Upper Cuyahoga Navigation Channel and dispose of all the contaminated sediment in a CDF unless a non-Federal sponsor pays \$423,050 plus the value of the space lost in the Corps' CDF, which the Corps valued at \$1,032,300.

135. Therefore the Corps is demanding either \$1,455,350 from a non-Federal sponsor to place the DMMU sediment in one of the Corps' CDFs, or \$423,050 and the ability to place the DMMU sediment, free of charge, in a CDF belonging to a non-Federal sponsor.

136. The Corps has further demanded that by April 7, 2015, a non-Federal sponsor must agree to either pay \$1,455,350 or pay \$423,050 plus the free use of a CDF. If this demand is not met the Corps will refuse to dredge the Upper Cuyahoga Navigation Channel.

137. The Corps has set a deadline of May 25, 2015, to have a contract with a non-Federal sponsor for the payment of \$1,455,350, or \$423,050 plus the free use of a CDF or the Corps will refuse to dredge the Upper Cuyahoga Navigation Channel.

138. Despite its demands for subsidization by a non-Federal sponsor, the Corps has sufficient funds allocated to the 2015 Project to dispose of all dredged material in its available CDF for the 2015 Project without deferring any dredging.

139. On March 27, 2015, the Director of Ohio EPA asked the Assistant Secretary of the Army (Civil Works) to dredge the entire Cleveland Harbor and place all of the dredged material in a CDF at the Corps' expense as it has nearly every year for the past 40 years.

CLAIMS FOR RELIEF

COUNT I

Declaratory and Injunctive Relief Pursuant to 5 U.S.C. §§ 701-706 (Violation of the Clean Water Act)

140. Plaintiff hereby incorporates and reasserts the foregoing paragraphs of the Complaint.

141. The Clean Water Act requires Federal agencies to comply with all state laws “respecting the control and abatement of water pollution.” 33 U.S.C. § 1323(a).

142. The Clean Water Act further requires Federal agencies to comply with state environmental laws when they engage in activities that discharge pollutants into navigable waters. 33 U.S.C § 1344(t); 33 U.S.C. § 1323(a).

143. Federal agencies are required to obtain certifications from the states in which the agencies discharge pollutants into navigable waters. 33. U.S.C. § 1341(a)(1).

144. Ohio's water pollution control laws require that dischargers obtain a permit before placing pollutants into waters of the state. OHIO REV. CODE § 6111.04. Dredged material is a pollutant under OHIO REV. CODE §§ 6111.01(A) and (D).

145. The Corps, as a Federal agency, has an obligation to obtain a State water quality certification from Ohio EPA for the 2015 Project, to comply with the water quality standards of

Ohio, and to comply with any conditions Ohio lawfully imposes for compliance with State standards when conducting and maintaining the 2015 Project.

146. Despite this clear statement of the law, the Corps has declared that Ohio lacks authority under the Clean Water Act to authorize or prohibit the discharge of dredged material into Lake Erie related to the 2015 Project.

147. The Corps' incorrect determination that Ohio is without authority to deny authorization for the discharge of dredged material for the 2015 project is further evidenced by the Corps' declaration that open Lake disposal is the Federal Standard.

148. The Corps' determination that the Federal Standard is open Lake disposal of the DMMU sediment in the absence of a Ohio water quality certification authorizing disposal in Lake Erie is arbitrary and capricious, an abuse of discretion, and not in accordance with law.

149. Based on the Corps' determination that Ohio lacks authority under the Clean Water Act to prohibit the Corps' discharge of dredged material into Lake Erie, the Corps is demanding that Ohio or another non-Federal sponsor pay to place the DMMU sediment in a CDF.

150. The Corps' determinations and actions in accordance with those determinations constitute a final agency action reviewable by this Court pursuant to the APA, 5 U.S.C. § 704.

151. The State of Ohio has suffered a legal wrong or has been adversely affected or aggrieved by the Corps' action. 5 U.S.C. §702.

COUNT II

Declaratory and Injunctive Relief Pursuant to 5 U.S.C. §§ 701-706 (Failure to Prepare an Environmental Impact Statement pursuant to NEPA)

152. Plaintiff hereby incorporates and reasserts the foregoing paragraphs of the Complaint.

153. The National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4332(2)(C), requires all agencies of the Federal government to prepare an environmental impact statement (“EIS”) on all major Federal actions significantly affecting the quality of the human environment.

154. The Council on Environmental Quality (“CEQ”) has promulgated regulations to guide Federal agencies in determining what actions are subject this statutory requirement at 40 C.F.R. § 1500.3. Furthermore, the Corps has adopted regulations, codified at 22 C.F.R. §§ 230.1 *et seq.*, to guide its implementation of NEPA. The Corps’ regulation, at 33 C.F.R. § 230.6, indicates that proposed major changes to projects, increasing size or adding additional purposes, ordinarily call for the preparation of an EIS.

155. CEQ regulations allow an agency to prepare a more limited Environmental Assessment (“EA”) only if the agency correctly determines that the proposed action will not significantly affect the quality of the human environment. 42 U.S.C. § 4332(C).

156. If an agency, when performing an EA, determines that agency actions will not have a significant effect on the human environment, the agency must issue a Finding of No Significant Impact (“FONSI”). 40 C.F.R. §§ 1501.4(e), 1508.13.

157. Where the effects on the human environment are “highly uncertain or involve unique or unknown risks,” however, an agency must prepare an EIS. 40 C.F.R. § 1508.27(b)(5).

158. The dredging of the Upper Cuyahoga Navigation Channel and the deposit of the DMMU sediment into Lake Erie is a major Federal action within the meaning of NEPA.

159. Due to the toxic contamination in the dredged material, nearly every year for the past 40 years the Corps has disposed of dredged material from the Upper Cuyahoga Navigation Channel in nearby CDFs.

160. On December 18, 2014 the Corps issued an EA and a FONSI in which it indicated that it would begin the open-Lake disposal of the DMMU sediment in the 2015 work season. The Corps claimed that the proposed maintenance activity was limited in scope and “not a major federal action,” thus finding that no further analysis of the environmental impact of the 2015 Project via an EIS was necessary. Since then, the Corps has taken additional steps to proceed with the 2015 Project, including a bid solicitation process and an announcement that the 2015 Project will commence in May 2015.

161. In preparing its December 18, 2014 EA and FONSI, the Corps failed to adequately consider the cumulative impacts of disposing of contaminated dredged material in Lake Erie. Specifically, the Corps admits that there will be an increase in PCB contamination and bioaccumulation from the physical process of dumping the dredged material into the Lake. This is caused by some plumes of sediment remaining suspended after the dredged material is released from the barge into the open Lake. However, the Corps failed to consider the effect that dumping multiple loads of sediment multiple times during the 2015 Project will have on the environment. The Corps must evaluate this impact because dredging operations take multiple months to complete and occur two times per year. Because these projects occur annually, the suspended plumes of sediment will remain in the Lake for multiple weeks throughout every year. The Corps failed to evaluate the cumulative impacts of these PCB-contaminated plumes. Therefore, the Corps admits that the 2015 Project will increase available PCB contamination, and thereby increased bioaccumulation of PCBs in the environment, but failed to consider those facts when it determined that there would be no significant impact.

162. Additionally, the Corps failed to adequately consider the impact that placing PCB-contaminated sediment in the Lake every year would have on the environment. If the

Corps places the dredged material in the Lake every year, as it has not declared the Federal Standard to be, there is a cumulative increase in the total amount of PCBs in the Lake. Additionally, the mound created by placing the PCB-contaminated sediment in the same disposal location will become larger every year. The Corps' only explanation of this impact is an inexplicable and unsubstantiated summary prediction that "it is expected that all the sediment from the Federal navigation channels will likely become suitable for open-lake placement in the future." The Corps has ignored the scientific evidence of the cumulative impacts caused by placing dredged material, known to contain PCBs, into the Lake on an annual basis.

163. The DMMU sediment does not meet Federal "contaminant determination" guidelines for open-lake placement pursuant to 40 C.F.R. § 210.11[d]. The material further does not meet Ohio's water quality standards pursuant to OHIO ADM.CODE § 3745-1-05, and it does not meet the requirements of OHIO ADM.CODE § 3745-32-05. Ohio EPA therefore could not and did not certify that disposal of the DMMU sediment in Lake Erie complied with State water quality standards and would not allow it to be placed at an open Lake area.

164. The Corps' determination that disposing of the PCB-contaminated sediment into Lake Erie would be permissible without preparing an EIS, without further analysis of the suitability of this material for open-Lake placement, without sufficient analysis of the impacts of bioaccumulation on the already impacted Lake, and without adequate information regarding the migration of the deposited sediment to other regions of the Lake violates NEPA, and is arbitrary, capricious, and not in accordance with the law.

165. The Corps' determination that disposing of PCB-contaminated sediment into Lake Erie would cause no significant impact violates NEPA and is arbitrary, capricious, and not in accordance with the law.

166. The Corps has solicited bids and awarded a contract for Federal action despite not having complied with its responsibilities under NEPA.

167. The Corps' failure to prepare an EIS is subject to review by this Court under the APA. 5 U.S.C. §§ 551(13), 701 and 704.

168. When performing its EA for the 2015 Project, the Corps incorrectly concluded that a FONSI was acceptable in lieu of an EIS. This decision is subject to review by this Court under the APA. 5 U.S.C. §§ 551(13), 701 and 704.

169. The State of Ohio, its citizens, and the environment within it have suffered a legal wrong or have been adversely affected or aggrieved by the Corps' failure to prepare an environmental impact statement for a Federal action. 5 U.S.C. § 702.

COUNT III
Declaratory and Injunctive Relief Pursuant to 5 U.S.C. §§ 701-706
(Violation of the Coastal Zone Management Act)

170. Plaintiff hereby incorporates and reasserts the foregoing paragraphs of the Complaint.

171. The Corps' 2015 Project is required to be consistent to the maximum extent practicable with Ohio's Federally-approved Coastal Management Program ("CMP").

172. The Ohio Department of Natural Resources determined that the disposal of PCB-contaminated sediment in the open waters of Lake Erie would be consistent with Ohio's Federally-approved CMP only if the Corps obtained and complied with a State water quality certification from the Ohio EPA.

173. The Ohio EPA granted the Corps an Ohio water quality certification with conditions including the following: 1) "All dredged material shall be disposed of in CDF 9, 10B

or 12;” and 2) “No open lake placement of dredged material is authorized with this Certification.”

174. Therefore, disposal of sediment from the DMMU sediment into Lake Erie would violate the CZMA.

175. The Corps’ determination that the Federal Standard for the 2015 Project includes open-Lake disposal of the DMMU sediment is arbitrary and capricious, an abuse of discretion, and not in accordance with the CZMA.

176. The State of Ohio, its citizens, and the environment have suffered a legal wrong or have been adversely affected or aggrieved by the Corps’ decision that the Corps can dispose the DMMU sediment, which is contaminated with PCBs, in the open waters of Lake Erie in violation of the CZMA. 5 U.S.C. § 702.

COUNT IV
Declaratory and Injunctive Relief Pursuant to 5 U.S.C. §§ 701-706
(Violation of the Federal Standard)

177. Plaintiff hereby incorporates and reasserts the foregoing paragraphs of the Complaint.

178. Pursuant to its regulations, the Corps is required to manage dredged material “in the least costly manner, at the least costly and most practicable location, and consistent with engineering and environmental compliance.” 33 C.F.R. § 335.4. The Corps refers to the disposal alternative that satisfies this regulation as “the Federal Standard.”

179. The Corps’ regulations more specifically 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 C.F.R. § 335.7.

180. The Corps has determined that the Federal Standard must be the lowest cost alternative that satisfies the following two criteria: 1) environmentally acceptable and 2) in accord with sound engineering. However, a prerequisite of determining and implementing the Federal Standard is that the chosen alternative must also be an alternative that the Corps is legally permitted to undertake. The Corps cannot undertake an activity in violation of Federal or applicable state law.

181. Therefore, the Federal Standard alternative must be an alternative that is: 1) environmentally acceptable; 2) in accord with sound engineering; and 3) permitted under Federal law. The Corps can then choose the least costly alternative that satisfies these criteria.

182. The Corps’ dredged materials management decisions and practices are subject to review by this Court under the APA. 5 U.S.C. §§ 531(13), 701 and 704.

183. Without a sufficient factual or legal basis, the Corps has unilaterally decided that disposal of the DMMU sediment, which is contaminated with PCBS, in into Lake Erie is environmentally acceptable.

184. Open Lake disposal of PCB-contaminated sediment cannot lawfully be the Federal Standard because the Corps has failed to demonstrate that disposing of the DMMU sediment in the open Lake would not cause an increase in PCB contamination and bioaccumulation and has failed to justify the discharge in accordance with Ohio’s antidegradation rules found in OHIO ADM. CODE § 3745-1-05.

185. Open Lake disposal of the DMMU sediment cannot lawfully be the Federal Standard because the Corps violated its own regulations in concluding that the open Lake disposal was the Federal Standard for reasons including, but not limited to, the following:

- a. The Corps' sampling within the DMMU segments of the Cleveland Harbor Navigation Channel was not representative of the DMMU sediment.
- b. The Corps' sampling at CLA-1 and the analysis of the CLA-1 data was not representative of background Lake conditions.
- c. The Corps' sampling at disposal area CLA-1 was not representative of the sediment at CLA-1.
- d. The Corps used a contaminated sample site to determine background Lake conditions.
- e. The Corps performed a Tier 4 analysis without first consulting with or otherwise involving the Ohio EPA or U.S. EPA.
- f. The Corps' Tier 4 analysis was conducted in a manner contrary to the Great Lakes Testing Manual, the Corps' own Manual for making such determinations.
- g. The Corps used a draft guidance document to support its Tier 4 analysis, which is not a binding rule and had not been peer-reviewed nor approved by U.S. EPA.

186. Open Lake Disposal of the DMMU sediment at CLA-1 cannot lawfully be the Federal Standard because it is inconsistent with Federal law for reasons including the following:

- h. The Corps has not obtained an Ohio water quality certification for the disposal of dredged material from the 2015 Project into Lake Erie.
- i. The disposal of dredged material from the 2015 Project into Lake Erie would not be consistent with Ohio's CMP to the maximum extent practicable.

- j. The disposal of dredged material from the 2015 Project into Lake Erie would be prohibited under NEPA because the Corps was required to issue an EIS for that activity.

187. Disposal of the dredged material from the 2015 Project into the open waters of Lake Erie cannot be the Federal Standard because the Corps cannot choose to act in violation of the CZMA, the CWA, or NEPA.

188. The Corps acted arbitrarily, capriciously, with an abuse of discretion, not in accordance with the law, in excess of statutory authority, and without observance of procedure required by declaring that disposal of the dredged material from the 2015 Project into the open waters of Lake Erie was the Federal Standard.

189. The State of Ohio, its citizens, and the environment have suffered a legal wrong or have been adversely affected or aggrieved by the Corps' decision that the disposal of PCB-contaminated sediment, which includes all of the dredged material from the 2015 Project, into the open waters of Lake Erie is the Federal Standard. 5 U.S.C. § 702.

COUNT V

Declaratory and Injunctive Relief Pursuant to 5 U.S.C. §§ 701-706 (Violation of Statutory Requirement to Maintain Navigability of Great Lakes Harbors)

190. Plaintiff hereby incorporates and reasserts the foregoing paragraphs of the Complaint.

191. Under the Water Resources Development Acts of 2000 and 2007, the Corps is required to dredge Federal navigation channels, including the Cleveland Harbor to both maintain navigability and maintain the minimum operation depths.

192. Upon information and belief, the Corps will not dredge the full Cleveland Harbor unless a non-Federal sponsor pays the extra operational costs for disposal of the DMMU sediment in a CDF and pays a cost that the Corps has assigned for the value of the space in that CDF.

193. By failing to dredge the full Cleveland Harbor, portions of that Cleveland Harbor will become shallower than the minimum operational depths and/or will no longer be navigable.

194. Ohio has suffered a legal wrong or has been adversely affected or aggrieved by the Corps' action to defer dredging of the full Cleveland Harbor in compliance with its statutory duty. 5 U.S.C. §702.

195. The Corps' decision to defer dredging of the full Cleveland Harbor is arbitrary and capricious, an abuse of discretion and not in accordance with law in violation of the Water Resources Development Acts of 2000 and 2007 and § 706 of the APA.

COUNT VI
Declaratory and Injunctive Relief Pursuant to 5 U.S.C. §§ 701-706
(Unlawful Delegation of Authority)

196. Plaintiff hereby incorporates and reasserts the foregoing paragraphs of the Complaint.

197. The Corps' refusal to dredge the full Cleveland Harbor and put the dredged material into a confined disposal facility unless the State of Ohio or another non-Federal sponsor pays the cost difference between the CDF disposal and open Lake disposal is arbitrary, capricious, and not in accordance with law.

198. The Corps has no authority, in statute or otherwise, to require a non-Federal sponsor to pay for operation and maintenance dredging activities necessary for Federal navigation channels that are the responsibility of the Corps.

199. By requiring a non-Federal sponsor for the full dredging of the Cleveland Harbor, the Corps has unlawfully delegated its responsibilities under Water Resources Development Acts of 2000 and 2007, and other Federal law.

200. Ohio has suffered a legal wrong or has been adversely affected or aggrieved by the Corps' unlawful delegation. 5 U.S.C. §702.

201. The Corps' attempted delegation and actions in accordance therewith are arbitrary and capricious, an abuse of discretion and not in accordance with law in violation of § 706 of the APA.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays for relief as follows:

A. Order, declare, and adjudge that the Corps' decision that the Federal Standard for the 2015 Project is disposal of dredged material from the 2015 Project into the open waters of Lake Erie is arbitrary, capricious, an abuse of discretion, in violation of law and in violation of the CZMA, the CWA, NEPA, and/or the APA;

B. Order, declare, and adjudge that the Corps is in violation of NEPA and the APA by unlawfully failing to issue an Environmental Impact Statement for the 2015 Project for the new decision to dispose of the dredged material from the 2015 Project into the open waters of Lake Erie;

C. Issue an injunction requiring the Corps to develop and complete an Environmental Impact Statement regarding their decision to dispose of dredged material from the 2015 Project into the open waters of Lake Erie for the first time in over forty years;

D. Order, declare, and adjudge that the Corps' Federal Standard alternative must be an alternative that complies with the CZMA, the CWA, NEPA, and the applicable and issued State water quality certification;

E. Order, declare, and adjudge that the Corps' Federal Standard must be an alternative that complies with Ohio's Federally-approved Coastal Management Program, including Ohio's water quality standards and the State water quality certification issued consistent therewith;

F. Order, declare, and adjudge that the Corps cannot demand that non-Federal sponsors pay for any costs that are incurred in the 2015 Project that are required to comply with Ohio's Federally-approved Coastal Management Program and Ohio's water quality certification;

G. Order Defendants to dredge the full Cleveland Harbor in 2015 without disposing of any dredged material from the 2015 Project into the open waters of Lake Erie;

H. Order Defendants to place all dredged material from the 2015 Project in a confined disposal facility or other suitable upland disposal sites;

I. Enjoin Defendants from requiring that a non-Federal sponsor pay for the disposal of dredged material from the 2015 Project into a confined disposal facility;

J. Enjoin Defendants from disposing of dredged material from future Cleveland Harbor Dredging Projects into the open waters of Lake Erie until the Corps (1) issues an EIS for the disposal of dredged material from the Cleveland Harbor into Lake Erie pursuant to NEPA; (2) obtains a water quality certification from the Ohio Environmental Protection Agency for

disposal of dredged material from the Cleveland Harbor into the open waters of Lake Erie, as required by the CWA; and (3) receives a concurrence from the Ohio Department of Natural Resources that disposal of dredged material from the Cleveland Harbor into the open waters of Lake Erie is consistent with Ohio's CMP pursuant to the CZMA;

K. Retain jurisdiction to review the Corps' compliance with all judgments and orders entered into herein;

L. Award reimbursement of the State's costs of litigation and reasonable attorney fees; and

M. Order such other relief as the Court deems appropriate and just.

Respectfully submitted,

MICHAEL DEWINE
OHIO ATTORNEY GENERAL

/s/ David Emerman

DALE T. VITALE (0021754)
DAVID E. EMERMAN (0089348)
CHRISTINE RIDEOUT SCHIRRA (0088134)

Assistant Attorneys General
Environmental Enforcement Section
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3400
Telephone: (614) 466-2766
Facsimile: (614) 644-1926
Dale.Vitale@OhioAttorneyGeneral.gov
David.Emerman@OhioAttorneyGeneral.gov
Christine.Schirra@OhioAttorneyGeneral.gov
Counsel for Plaintiff, State of Ohio