



**MIKE DEWINE**

★ OHIO ATTORNEY GENERAL ★

Environmental Enforcement

Office (614) 466-2766

Fax (614) 644-1926

30 E. Broad Street, 25<sup>th</sup> Floor

Columbus, OH 43215

[www.OhioAttorneyGeneral.gov](http://www.OhioAttorneyGeneral.gov)

December 18, 2015

U.S. Army Corps of Engineers - Buffalo District  
1776 Niagara Street  
Buffalo, NY 14207-3199  
ATTN: Environmental Analysis – Cuyahoga River Dredging

**RE: Request for Public Hearing pursuant to 33 U.S.C. § 1344 and 33 C.F.R. § 327  
Cleveland Harbor Dredging, 2016; Public Notice No. CLEVELAND-16**

To LTC Karl Jansen:

On behalf of the Ohio Environmental Protection Agency (“Ohio EPA”), the Ohio Department of Natural Resources (“ODNR”), and the State of Ohio, the Ohio Attorney General hereby requests a public hearing regarding Public Notice No. CLEVELAND-16. The Ohio Environmental Protection Agency, the Ohio Department of Natural Resources, and the State of Ohio have multiple interests that are adversely affected by the proposed disposal of dredged material and the disposal location selected by the United States Army Corps of Engineers (“the Corps”) in Cleveland Harbor.

Ohio EPA is committed to protecting Ohio’s environment and the health and safety of the citizens of Ohio. Ohio EPA also recognizes that there is an important need to dredge the Cleveland Harbor and the Cuyahoga River but wants that dredging to be accomplished in a way that is consistent with its mission. The disposal of contaminated sediment from the Cleveland Harbor into Lake Erie would harm Ohio’s environment, is likely to be inconsistent with or

violate Ohio's water quality standards,<sup>1</sup> and would jeopardize the health of Ohio's citizens. Likewise, a failure or refusal to dredge would harm Ohio's economy and the livelihood of many Ohio residents. Therefore, Ohio's economic and environmental interests are in ensuring that the Cleveland Harbor is dredged and that contaminated dredged material is not placed in Lake Erie.

The Corps stands alone in its position that disposing of contaminated sediment in Lake Erie is environmentally acceptable. For decades, the overwhelming national policy has been to end the practice of open-water disposal of dredged material. In amending the Clean Water Act in 1977, the Senate Committee on Environment and Public Works stated that "Congress intended that [the Clean Water Act] would in its initial implementation end the open water disposal of dredge spoil ...." Sen. Rep. No. 95-370. United States Environmental Protection Agency ("U.S. EPA") regulations state that "no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse [environmental] impact." 40 C.F.R. § 230.10. In a September 12, 2013 letter to the Corps, U.S. Fish and Wildlife Service commented that starting an open-Lake disposal regime in Cleveland would rebuff "the regulatory trend ... to try and reduce open-lake disposal." Consistent with national policy, the State of Ohio recently enacted a law to prohibit all open-Lake placement of dredged material into Lake Erie by 2020.<sup>2</sup> Ohio Rev. Code § 6111.32.

Despite strong national policy, and Federal and State environmental laws to the contrary, the Corps intends to place contaminated sediment from the Cleveland Harbor in Lake Erie. In

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<sup>1</sup> Ohio EPA is currently reviewing the Corps' application for an Ohio Water Quality Certification. In previously years, however, Ohio EPA determined that open-Lake disposal of sediments from the Cleveland Harbor would violate Ohio's water quality standards.

<sup>2</sup> This prohibition is subject to a few exceptions, such as beneficial use and habitat restoration projects for clean material.

December 2014, the Corps determined that dumping the contaminated sediment from the Cleveland Harbor into Lake Erie was its preferred disposal method (what the Corps claims to be “the Federal Standard”). The Corps believes that its December 2014 determination required it to use open-Lake disposal in 2015 and still requires it to use open-Lake disposal in 2016. However, under Federal law the Corps is prohibited from dumping dredged material into Lake Erie without approval from Ohio EPA in a State Water Quality Certification.

For the 2015 dredging, the Ohio EPA could not issue the desired Water Quality Certification because placing the dredged material from Cleveland Harbor in Lake Erie would violate Ohio water quality standards. As a result, the Corps issued Ohio an ultimatum: either Ohio or another non-Federal entity paid for the Corps’ environmental compliance or the Corps refused to dredge. However, because the Water Resources Development Act of 1986 reaffirmed that maintenance dredging of Federal channels shall be at 100% Federal expense, the State of Ohio challenged the Corps’ ultimatum in Federal Court as unlawful. 33 U.S.C. § 2211. As phrased best by the District Court in granting the State a preliminary injunction, “[t]he State cannot be blackmailed into contributing to these costs under threat of shutting down what is potentially the most commercially important section of [the harbor].” *Ohio v. U.S. Army Corps of Engineers*, No. 1:15-CV-679, 2015 WL 2341114, at \*7 (N.D. Ohio May 12, 2015). Hopefully, the Corps will not give Ohio the same ultimatum this year if Ohio EPA again determines that dumping contaminated sediment in Lake Erie would violate state water quality standards.

The Corps has acknowledged that U.S. EPA regulations require the Corps' preferred disposal method (the Federal Standard) to comply with water quality standards that Ohio sets.<sup>3</sup> Ohio's water quality standards provide that adding persistent carcinogenic toxins into Lake Erie constitutes a "significant lowering of water quality." Ohio Adm.Code 3745-1-05(F). Additionally, Ohio EPA cannot issue a water quality certification if the discharge of dredged material into Lake Erie would cause a predictable increase of persistent toxins in the aquatic food chain. Ohio Adm.Code 3745-32-05. Contrary to Federal and State law, the Corps claims that it, rather than Ohio EPA, determines whether Corps projects comply with Ohio's water quality standards as applied to U.S. EPA's prohibition under 40 C.F.R. § 230.10(b) ("No discharge of dredged...material shall be permitted if it: Causes or contributes ... to violations of applicable State water quality standards"). The Corps also claims that adding contaminated sediment—that is documented to contain persistent carcinogenic toxins—to Lake Erie would not violate Ohio's water quality standards, despite the clear prohibition cited above. Additionally, for all other Federal agency projects other than the Corps' projects, the Corps' regulations provide that State Water Quality Certifications "will be considered conclusive with respect to water quality considerations ... ." 33 C.F.R. § 320.4. Nevertheless, the Corps asserts that as it relates to its projects, Ohio is not the judge of Ohio water quality standards.

Lake Erie is Ohio's greatest natural resource and its protection has been entrusted to the State of Ohio. The Corps contradicts national policy in its attempt to usurp Ohio's authority regarding water quality standards. The Clean Water Act specifically states that "it is the policy

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<sup>3</sup> Current proposed legislation (Section 106 of House Amendment #1 to H.R. 2029), if enacted, would specifically prohibit the Corps from using Federal funds for open-Lake disposal of dredged material into Ohio's portion of Lake Erie without approval from Ohio EPA. If this legislation is enacted, the public hearing would be an opportunity for testimony regarding its impact on the Corps' proposed project.

of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.” 33 U.S.C. § 1251(b).

ODNR shares responsibility with Ohio EPA for protection of our treasured resource, Lake Erie. The Submerged Lands Act states, “ownership of the lands beneath navigable waters within the boundaries of the respective States ... and the right and power to manage ...said lands ...in accordance with applicable State Law ...[is] vested in and assigned to the respective States....” 43 U.S.C. §1311. Responsibility for the protection and management of this resource has been given to ODNR. Ohio Rev. Code §§ 1506.02(A), 1506.10. The Coastal Zone Management Act (“CZMA”) states, “[t]he Congress finds and declares that it is the national policy ... to encourage and assist states to exercise effectively their responsibilities in the coastal zone ... .” 33 U.S.C. § 1452. The CZMA requires all Federal agencies, when undertaking a project in a state’s coastal zone, to comply to the maximum extent practicable with State Coastal Management Programs. 16 U.S.C. §1456. Ohio’s Coastal Management Program states that “Polluted [dredged material] must be disposed ... in confined disposal facilities” and requires the disposal of dredged material to comply with Ohio water quality standards in accordance with Ohio Water Quality Certifications. Therefore, both the CZMA and CWA give Ohio the authority to determine what is environmentally safe to put in Ohio’s waters, yet the Corps attempts to usurp that power.

The Corps uses past pollution and flawed conclusions to support its claim that putting carcinogenic toxins in Lake Erie is environmentally safe and consistent with Ohio water quality standards. First, the Corps states that the Cleveland Harbor sediment is no more polluted than the proposed Lake Erie disposal location (labeled “CLA-1”). However, the Corps’ own test results show that CLA-1 is five times more polluted than other areas surrounding the Cleveland

Harbor.<sup>4</sup> Furthermore, the very reason CLA-1 is polluted in the first place is because the Corps dumped contaminated sediment there 40 years ago. Additionally, Ohio EPA's latest test results demonstrate that the Cleveland Harbor sediment is four to eight times more polluted than Lake Erie background conditions. Therefore, the Corps is attempting to use past pollution that it caused to justify the placement of new pollution.

Second, the Corps has maintained that Cleveland Harbor sediment once placed at CLA-1 will stay at that precise location in Lake Erie. This claim is made in an attempt to substantiate the Corps' proposal to bury its old pollution with new pollution. However, multiple scientific studies and an expert analysis provided to the Corps demonstrate that the Corps' claim that the sediment will stay in place is seriously flawed and ignores decades of research on this very topic.

Based on these concerns, Ohio EPA believes that placing contaminated sediment from Cleveland Harbor into Lake Erie is environmentally unacceptable and would likely violate Ohio's water quality standards. Furthermore, Ohio EPA believes that the Corps' own data suggests that open-Lake disposal may substantially elevate the human health risks of fish consumption in the impacted region of Lake Erie. The resulting negative impacts on Ohio's most valuable resource and the fish and wildlife indigenous to it are in derogation to the responsibility of ODNR to protect those resources for the benefit of the citizens of Ohio. As a result, the State of Ohio's interests are clearly affected by the Corps' proposed action.

Therefore, on behalf of Ohio EPA, ODNR, and the people of the State of Ohio, the Ohio Attorney General requests a public hearing so that it and all interested parties are able to present additional evidence for the Corps' consideration with regard to the dredging of the Cleveland

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<sup>4</sup> "Polluted," as used here, refers to a relative contribution of persistent carcinogenic toxins to the aquatic food chain.

Harbor and the disposition of the dredged material in 2016. The State of Ohio thanks the Corps for the opportunity to request this hearing and will continue to work together with the Corps to protect Lake Erie.

Respectfully submitted,

MICHAEL DEWINE  
OHIO ATTORNEY GENERAL

*David Emerman*  
DAVID E. EMERMAN (0089348)  
Assistant Attorney General

DALE T. VITALE (0021754)  
Section Chief,  
Environmental Enforcement Section

cc: Craig Butler, Director, Ohio Environmental Protection Agency  
James Zehringer, Director, Ohio Department of Natural Resources  
Karl Gebhardt, Deputy Director, Water Programs, Ohio EPA  
Scudder Mackey, Ph.D., Chief, Office of Coastal Management, ODNR