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June 29, 2022

Debra Shore

Regional Administrator

Region 5, U.S. Environmental Protection Agency

77 West Jackson Blvd

Chicago, IL 60604

Submitted via electronic mail to: Opie.Jodie@epa.gov

Re: Euclid NPDES Permit (OH0031062) Public Hearing Comments

Dear Regional Administrator Shore:

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to provide written comments on the U.S. Environmental Protection Agency (EPA) Region 5's objection to the Ohio Environmental Protection Agency's (Ohio EPA) reissuance of the City of Euclid's National Pollutant Discharge Elimination System (NPDES) permit (OH0031062).

NACWA represents 350 public clean water utilities throughout the country that every day provide the essential public health and environmental service of treating billions of gallons of our nation's wastewater and stormwater. The City of Euclid and fifteen additional public clean water utilities in Ohio are members of NACWA and exemplify environmental stewardship, including through their work to address nutrient pollution. This work includes investing in advanced treatment technologies to improve surface water quality.

On behalf of the City of Euclid and our member agencies in Ohio, NACWA urges EPA Region 5 to withdraw its objection to Ohio EPA's draft NPDES permit (No. OH0031062). The proposed objection is unlawful, devoid of scientific rigor and due process considerations, and, perhaps most importantly, wholly divorced from any meaningful water quality protection measures for Lake Erie. The City of Euclid has demonstrated its commitment to making needed water quality investments and EPA Region 5's actions completely upend the meaningful progress and investment prioritization the City has made, including through its Integrated Planning efforts.

EPA Region 5 relies on its inappropriate application of EPA's August 2021 *Ambient Water Quality Criteria to Address Nutrient Pollution in*

Lakes and Reservoirs – a document that has met with significant criticism and that state regulatory agencies have barely had time to review much less consider for possible adoption – as the foundation for its objection. Not only does such an application ignore the Agency’s own caution that the models in that criteria document may not be applicable to the Great Lakes,¹ it also violates the text of the Clean Water Act (CWA) and EPA’s own regulations, which provide for state primacy with respect to water quality standards and permitting decisions and relegate EPA’s own role to one of limited oversight. Worse still, EPA’s objection is simply bad policy. It will place additional, unjustifiable technical and financial burdens on a public clean water utility – that is currently investing hundreds of millions of dollars in upgrades to reduce wet weather flows and improve water quality – for, *at best*, no tangible environmental benefit for the Lake.

Nutrients behave nothing like toxic pollutants and the inappropriate application of regulatory provisions and permitting practices intended for toxics to address nutrients leads to the perverse results we see in the Euclid permit. In fact, were the City of Euclid to attempt to meet the facially absurd limit Region 5 seeks to impose with currently available technology, the electrical, chemical, greenhouse gas and other impacts may actually result in more environmental harm than good. Such an outcome can hardly be seen as consistent with EPA Headquarters’ recent commitment to “deepen partnership with states” through “collaborative approaches” to nutrient reduction.² Region 5 should withdraw its objection and allow Ohio EPA to issue Euclid’s permit as proposed.

Region Five’s Objection Violates the Text of the CWA and EPA’s Own Regulations

States and authorized tribes develop, adopt, review and revise water quality standards. While EPA reviews these standards – which include designated uses and the criteria necessary to protect those uses – to ensure consistency with the CWA, Congress has cabined EPA’s role to determining whether a state’s standards are protective of designated uses based on sound scientific rationale.³

While U.S. EPA occasionally makes *recommendations* to states to consider adoption and incorporation of updated criteria into their own water quality standards, states can choose not to

¹ U.S. ENVIRONMENTAL PROTECTION AGENCY, EPA 822-R-20-004, RESPONSE TO PUBLIC COMMENTS ON US EPA’S DRAFT AMBIENT WATER QUALITY CRITERIA RECOMMENDATIONS FOR LAKES AND RESERVOIRS OF THE CONTERMINOUS UNITED STATES: INFORMATION SUPPORT THE DEVELOPMENT OF NUMERIC NUTRIENT CRITERIA (2021), *available at* <https://www.epa.gov/system/files/documents/2021-08/nutrient-lakes-reservoirs-epa-response-comments.pdf>.

² Memorandum from U.S. Environmental Protection Agency’s Assistant Administrator Radhika Fox to State Environmental Secretaries, Commissioners, and Directors et al. *Accelerating Nutrient Pollution Reductions in the Nation’s Waters* (April 5, 2022), *available at* <https://www.epa.gov/system/files/documents/2022-04/accelerating-nutrient-reductions-4-2022.pdf>

³ See 33 U.S.C. §§ 1313(a)(3)(C), (c)(2); 40 C.F.R. §§ 131.15(a), et seq. (noting EPA’s review in this regard is “very limited.” *City of Albuquerque v. Browner*, 97 F.3d 415, 425 (10th Cir. 1996); see also *Barnum Timber Co. v. EPA*, 835 F. Supp. 2d 773, 780 (N.D. Cal. 2011) (citing EPA’s “role is one of mere oversight.”).

adopt them if they have a scientific justification for doing so. And any *recommended* standards must be adopted by a state or, where required by the CWA, duly promulgated by EPA into a state's standards before they can be translated into enforceable permit limits.

This is the careful federal-state balance that is at the heart of the CWA, which is carried into the NPDES permitting process for states with primacy. Specifically, EPA's regulations at 40 CFR 122.44(d)(1) require that NPDES permits contain all limits necessary to "achieve [applicable] water quality standards...including State narrative criteria for water quality." Pursuant to 40 CFR 122.44(d)(1)(vi), where a discharge "has the reasonable potential to cause, or contributes to an excursion above a narrative criterion," *permit writers* – which, in the present case, is Ohio EPA – must establish permit limits "using a calculated numeric water quality criterion which the permitting authority demonstrates will attain and maintain applicable criteria...[which] may be derived *using an explicit State policy interpreting its narrative water quality criterion*" (emphasis added).

Ohio EPA's actions in this instance are entirely consistent with this process. Through its various integrated water quality monitoring reports, Ohio EPA has long taken the position that, under its narrative nutrient criterion, the occurrence of more than two exceedances of 1.0 mg/L microcystin every 5 years amounts to an excursion above the narrative criterion. Because Euclid's discharge, which is currently subject to a permit limit of 1.0 mg/L total phosphorous, has never caused an exceedance of that microcystin threshold, Ohio EPA reasonably and in accordance with 40 CFR 122.44 concluded that the same permit limit would be sufficient to meet the applicable standard.

What EPA Region 5 seeks to do, however, is to use its authority to review NPDES permits for CWA compliance to effectively impose an unadopted narrative standard translation method *it prefers* (and thereby impose an unadopted numeric phosphorous criterion) onto a state *in substitution* for a reasonable determination by that state based on its own policies and expert judgements. Such an action violates the limited oversight role Congress granted to EPA with respect to the establishment of water quality standards, ignores the due process provided during notice and comment standards setting rulemakings, runs afoul of EPA's own NPDES regulations, and will force an individual permittee into unattainable pollution discharge limits without scientific evidence or justification simply because the state's approach does not align with the Region's policy preferences.

EPA Region 5 is bypassing Ohio's current nutrient pollution approach in Lake Erie by leveraging 40 CFR 122.44(d)(1)(vi) as a means to inappropriately translate or rather simply 'interpret' the state's narrative water quality criteria consistent with Region 5's policy preferences to seek an even further reduced numeric effluent limit for the City of Euclid. While Euclid is the first community to face this issue, NACWA fears that Region 5 intends to follow this same inappropriate approach for all clean water utilities discharging to Lake Erie.

NACWA has seen this leveraging of 40 CFR 122.44(d)(1)(vi) – a provision that was meant as a stopgap measure to address toxic pollutants in the 1980s before criteria could be developed –

before, but EPA Region 5's current actions are particularly egregious. EPA Region 5's attempt to force a translation of Ohio's narrative water quality criteria into an unreasonably low numeric phosphorus value of 0.007 mg/L – a concentration that is neither scientifically justifiable nor technologically attainable – would establish a nonsensical precedent that will unnecessarily drive utilities to extreme technical and financial limits. Even if it were technically achievable, this nutrient reduction would have no meaningful impact on addressing the nutrient-related impacts in the Lake.

In the case of Euclid, EPA Region 5's actions would essentially require the City to try to comply with a 99% reduction in phosphorus for a utility that contributes less than 0.1% of the overall loading to Lake Erie, setting the City up for continual and ongoing nutrient compliance issues for the foreseeable future. An EPA Region should not single out a draft NPDES permittee merely because its permit is up for renewal and use it as an opportunity to pursue the Region's nutrient policy preferences that are inconsistent with an authorized state's existing nutrient water quality standards.

Ohio EPA and the City of Euclid are making progress to identify the best approach to address nutrient reductions. Ohio has nutrient reduction loading targets in place, a plan to evaluate discharges, the data to show standards are working, and funding for implementing further nutrient reductions. Ohio EPA is also working on a total maximum daily load (TMDL) for the Western Lake Erie Basin (WLEB). Scientific studies have indicated that if the reductions are achieved in the WLEB, the impairments in the Central Basin will be addressed. Importantly here, the City of Euclid continues to meet state-established regulations for phosphorus and is currently investing hundreds of millions of dollars in upgrades to its wastewater treatment facility to further reduce wet weather overflows which will improve the overall water quality of a limnologically complex ecosystem. Further nutrient reductions will be realized through these significant investments in plant upgrades.

This is a prime example of how NACWA's members are committed to doing their fair share to address nutrient pollution and work closely with state regulatory partners to ensure effective controls that adhere to evidence-based science are put in place. The process to reduce nutrients in surface waters is complex, especially in those watersheds where there are numerous and varied sources, and it takes thoughtful deliberation to ensure the appropriate level of protection is in place for designated uses. With meaningful progress toward common water quality goals being made, careful consideration is needed before any more stringent (or in this instance draconian) permit limits on point sources are imposed. Region 5 is ignoring the progress that is being made and the science-based approach to nutrient control that is already in place based simply on a policy preference, not actual data or evidence that the current approach is not working.

EPA Region 5's Objection Implicates Due Process Concerns

Over time, as EPA became frustrated with the progress being made on the development of numeric nutrient criteria, Headquarters and the EPA regions began to pressure state permit writers to use §122.44 in the nutrient context. NACWA's concerns over the use of this narrative interpretation or translation have been consistent – while effectively resulting in binding water quality standards, this extra-regulatory approach does not provide adequate opportunity for public participation and precludes the important stakeholder engagement opportunities that Ohio EPA's statewide nutrient control program development affords.

These state level efforts allow for open dialogue throughout the process and individual permittees and other stakeholders are given the opportunity to review and comment on any approaches or methodologies before they are used to establish limits or other conditions in their permits. Importantly, too, stakeholders can challenge an unlawfully promulgated or unjustified standard in court pursuant to a developed administrative record and scientific input. EPA Region 5's objection and recommendations do not afford the same due process considerations for stakeholders nor the same meaningful dialogue that drives true progress on water quality improvement.

U.S. EPA's Nutrient Lake and Reservoir Criteria Have Been Roundly Criticized and Have Not Been Adopted by States

The relationship between nutrients, bloom formation, and cyanotoxin production are extremely complex and site specific. Lake Erie, including the Central Basin at issue here, has variable biotic and abiotic factors that influence cyanobacterial community formation and for these reasons make it considerably difficult to predict exactly how an individual permitted discharge of phosphorous will affect an outcome (e.g., a cyanobacterial bloom). Clean water utilities do not discharge cyanotoxins and imposing overly stringent phosphorous limits on a single discharger is not a reliable or effective manner to meet Lake Erie's water quality goals or objectives.

U.S. EPA rescinded its ecoregional criteria approach to nutrient criteria development for lakes and reservoirs when it finalized its Ambient Water Quality Criteria (AWQC) Recommendations for Lakes and Reservoirs in 2021.⁴ While this effort was widely viewed as a useful improvement in how EPA could better identify nutrient endpoints by tying multiple complex water quality variables to specific surface water uses, there were serious concerns voiced by NACWA and others on how a national model built on limited limnological data could be used to derive specific nutrient criteria under CWA Section 304(a).

⁴ U.S. Env'tl. Protection Agency, Ambient Water Quality Criteria to Address Pollution in Lakes and Reservoirs (2021), available at <https://www.epa.gov/system/files/documents/2021-08/nutrient-lakes-reservoirs-report-final.pdf>.

This is particularly true and playing out in real time since the underlying limnological data used to develop the national model did not include any sampling data from the Great Lakes. The Great Lakes are complex ecosystems with each lake not only demonstrating unique ecological value holistically, but also each lake showcasing variable physical, chemical, and biological value within itself spatially and temporally. To have a national model based on zero Great Lakes or Lake Erie specific quantitative or qualitative limnological data raises serious concerns on the representativeness of such a model – particularly if it may ultimately dictate permit limits for a specific discharger to the Lake.

NACWA, in comments to U.S. EPA on the AWQC recommendations, stated, “nutrient criteria derivations should be developed from state or stakeholder led efforts that use local lake data, actual lake management goals, and water-body specific relationships” and that 304(a) criteria should be used for pollutants that can be reasonably be expected to exhibit the same empirical relationships – which is not the case for nutrient criteria.⁵

NACWA advocated that EPA finalize its AWQC as technical guidance and not as CWA 304(a) criteria because of the pressure it would put on state regulatory agencies that could deter progress made at the state level.

EPA Region 5 is effectively attempting to force Ohio EPA, which already has a phosphorus numeric limit of 1.0 mg/L for discharges to Lake Erie, into adopting whole cloth the recommended nutrient approach outlined in the 2021 AWQC guidance. EPA Region 5 clearly prefers the new AWQC, and it appears unwilling to wait for the CWA triennial review process to run its course, so it has decided to unlawfully object to state-issued permits to impose its will. Even though Ohio EPA’s draft NPDES permit for the City of Euclid requires the utility to meet Ohio’s phosphorus limit and includes a nutrient reduction optimization plan, EPA Region 5 seeks an effluent limit three orders of magnitude lower than what the state has appropriately required.

As significant as these legal concerns are, they are unfortunately overshadowed in this case by even more substantial scientific and public interest concerns. EPA Region 5’s recommended effluent limit (equivalent to 0.007 mg/L phosphorus) is not only difficult to accurately and consistently measure analytically, but it is also impossible for a clean water utility to effectively meet with any existing technology. A limit this low will undoubtedly require clean water utilities to use already scarce community resources to seek unnecessary water quality variances each time a permit is up for renewal. And worst of all, this limit is unlikely to have any positive environmental benefits in terms of mitigating nutrient-related impacts or result in any meaningful improvement in water quality in Lake Erie.

⁵ NACWA Comment Letter to U.S. Env’tl Protection Agency, 2–3 (August 20, 2020), *available at* https://www.nacwa.org/docs/default-source/resources---public/epa-hq-ow-2019-0675-0062_attachment_1.pdf?sfvrsn=c267fe61_2.

EPA Region 5's Actions are Inconsistent with Recent U.S. EPA Nutrient Memo

U.S. EPA's Assistant Administrator for the Office of Water, Radhika Fox, recently issued a new policy memorandum, *Accelerating Nutrient Pollution Reductions in the Nations Waters*.⁶ The memo directly confirms EPA's commitment to working with federal agencies and state co-regulators as well as other stakeholders to advance progress on nutrient mitigation in surface waters. Importantly, the memo directly states, "State co-regulators, territories, and tribes play a primary role in managing nutrients...[the] Office of Water is committed to reenergizing our partnerships with all levels of government, tribes, agriculture, community organizations, including research institutions, and the public to make sustained progress."

The memo also seeks to "deepen and expand [Office of Water] partnerships with the U.S. Department of Agriculture (USDA), states, tribes, territories, agriculture, industry, and the broader water sector to identify, highlight, and scale effective nutrient reduction approaches." That through "collaborative approaches," EPA "will invest, and pursue, science-based and data driven strategies to reduce flows of excess nutrients into our nation's waters."

EPA Region 5's objection to Ohio EPA's draft NPDES permit for Euclid turns the Headquarters memo on its head, substituting the state's "primary role in managing nutrients" with the Region's policy preference and replacing collaboration with a top-down command and control mandate.

Conclusion

Nutrients behave nothing like toxics and the inappropriate application of a regulatory provision (§122.44) and permitting practices intended for toxics to address nutrients leads to the perverse results we see in the Euclid permit. Furthermore, NACWA is troubled by how EPA Region 5 has singled-out a point source, in this case, a clean water utility committed to making real progress on the nutrient front, to project its policy preferences on a state which is authorized to implement the NPDES program. EPA Region 5 has usurped Ohio EPA's authority and is disrupting momentum gained on a collaborative effort to address nutrients in Lake Erie. NACWA urges EPA Region 5 to withdraw its objection to the Ohio EPA draft permit issued for the City of Euclid and allow the state to move forward with the progress made to date with permittees on crafting meaningful regulatory policies on the nutrient front.

If EPA has questions or concerns about the above comments, please contact NACWA's Deputy Chief Executive Officer, Chris Hornback at chornback@nacwa.org or 202/833-9106.

⁶ Supra note 2.

NACWA Comments on Euclid NPDES Permit (OH0031062)

June 29, 2022

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Sincerely,

A handwritten signature in black ink that reads "Adam Krantz". The signature is written in a cursive style with a prominent, sweeping flourish at the end of the name.

Adam Krantz
Chief Executive Officer

cc: Radhika Fox, Office of Water, US EPA Headquarters
Bruno Pigott, Office of Water, US EPA Headquarters
Andrew Sawyers, Office of Water, US EPA Headquarters
Chris Kloss, Office of Water, US EPA Headquarters