



September 25, 2017

VIA Electronic Mail (dap@lakeerie.ohio.gov)

Ohio Lake Erie Commission
P.O. Box 1049
Columbus, Ohio 43216

Re: Ohio Manufacturers Association Comments on the Ohio Lake Erie Commission's
Draft *Domestic Action Plan 2018*

Dear Commissioners,

Pursuant to the September 1, 2017, public notice published by the Ohio Lake Erie Commission (OLEC), The Ohio Manufacturers' Association (OMA) hereby submits written comments on the draft Ohio Domestic Action Plan (Action Plan).

The OMA represents over 1,400 manufacturers in every industry throughout Ohio. For more than 100 years, the OMA has supported reasonable, necessary and transparent environmental regulations that promote the health and well-being of Ohio's citizens. Many of OMA's members will be adversely impacted by the new standards and requirements set forth in the draft Action Plan. While OMA strongly supports the efforts of OLEC and its coordinating agencies, we have significant concerns regarding certain components of draft Action Plan, which concerns are outlined in these comments.

General Statement

OMA supports the hard work and study that OLEC has performed in preparation of the draft Action Plan and we expect, upon full review of the Plan, to support many of the components of the draft Action Plan. While we generally support OLEC's efforts, OMA has identified several critical concerns related to the draft Action Plan. Each of these concerns is outlined in detail in the following sections, and briefly summarized as follows:

- A. We have grave concern regarding the draft Action Plan's call for a legislative mandate of a 1.0 mg/L monthly average phosphorus limit for all treatment works in Ohio. As detailed in Section 1 below, this radical and unjustifiable shift in NPDES permitting in Ohio is completely unfounded, arbitrary, contrary to current statutory programs in Ohio, and not scientifically defensible. It would impose unnecessary and extensive costs on regulated parties without measurable decrease in Lake Erie phosphorus loads. The draft Action Plan adequately addresses point source discharges through other permitting components, such as facility-specific assessment of need, and this legislative mandate only

undermines that methodical and defensible approach to permitted dischargers. For the Action Plan to meet due process and other legal requirements and to align with the Action Plan's broader adaptive management protocols, the legislative mandate must be removed from the draft Action Plan.

- B. OMA is concerned about the very general reference in the draft Action Plan to development of a recreational use standard related to microcystin for the open water of Lake Erie (Item 9, page 16). To the extent OEPA proceeds with development of a standard or a protocol for microcystin, OEPA and OLEC should evaluate and take into consideration the many serious concerns raised by the scientific and regulated community in response to USEPA's December 2016 proposed "Draft Human Health Recreational Ambient Water Quality Criteria and/or Swimming Advisories for Microcystins and Cylindrospermopsin" (Docket ID No. EPA-HQ-OW-2016-0751, www.regulations.gov).
- C. The Action Plan comprises dozens of regulatory and other controls and standards new to the Lake Erie basin that will impact businesses, local governments, and residents in a variety of ways for decades to come. As detailed in Section 3 below, it is unreasonable, arbitrary, and contrary to both the letter and the spirit of Ohio's administrative laws to provide a mere 24-day public review period for such an important agency action. We believe that under Ohio law, OLEC is required to provide additional time for thoughtful review by the public to ensure the Action Plan is ultimately viable and defensible. We reserve the right to supplement these comments upon completion of a full review the draft Action Plan and supporting documentation.

The following sections address each of these concerns in detail.

1. **The proposed blanket phosphorus limit for NPDES dischargers is arbitrary and not scientifically principled, and, for the Action Plan to be lawful, it must rely on the facility-specific permitting provisions and not this unfounded mandate.**

While OMA understands and supports the need for action items to address phosphorus loads from both point and non-point sources to achieve the Lake Erie phosphorus reduction goals, the proposal to establish a legislative mandate for 1.0 mg/L phosphorus limits in all NPDES permits is arbitrary and unfounded. This proposal, first presented on page 16 (item 7) of the draft, contravenes the legal requirements for establishing permit limits and departs sharply from the goals of the Action Plan and the directives in the Great Lakes Water Quality Agreement and the Western Basin of Lake Erie Collaborative Framework, which focus on adaptive management protocols to achieve the most reduction in the most efficient and reasonable manner. The proposed blanket, arbitrary concentration limit would, in many cases, impose unnecessary, unreasonable and expensive controls without creating any meaningful progress towards the targets of

the Action Plan. Each of these general objections is discussed in more detail in the following subsections.

A. The 1.0 mg/L limit will in many cases be arbitrary and unnecessary, with no measurable benefit to Lake Erie but implemented at great cost to the discharger, and this mandate is not necessary or appropriate to achieve the targets of the Domestic Action Plan.

As documented in the Figure on page 5 of the draft Plan, point source dischargers, in total, comprise only 9% of the total phosphorus load in the priority Maumee Watershed and comprise a similar amount in other watersheds. Furthermore, of that already small contribution, large, heavily regulated POTWs contribute the majority of the load, leaving the load from small phosphorus sources as a generally negligible source to Lake Erie. In fact, many of the facilities that would face this new limit are far upstream and are outside of the priority basins. Imposing a 1.0 mg/L limit on these small sources will essentially have no measurable impact on the load to the Lake Erie basin, but will impose an enormous cost on these dischargers, many of whom do not have, and are not required to have, the technology in place to remove phosphorus (including most impacted industrial facilities). Additionally, a 1.0 mg/L phosphorus limit would impose far more stringent reductions on certain dischargers than the 40% load reduction set forth in the Great Lakes Agreement and thus goes well beyond the legal framework of the Action Plan. Finally, for these facilities, it is likely that mandating phosphorus limits and compelling the implementation of treatment will cause more environmental harm than is justified by the small load reductions. In sum, there is no scientific or regulatory basis for these limits, and the attempt to impose this kind of blanket limit is unreasonable and indefensible.

Additionally, to the extent OEPA needs to limit phosphorus from a point source discharger in order to reasonably and prudently achieve the Action Plan targets, other provisions of the draft Action Plan already cover this need. Phosphorus limits can (and should) be determined in accordance with Item 1 on page 15 of the Plan, whereby OEPA commits to imposing appropriate phosphorus limits as necessary on a facility-specific basis. Thus, where a 1.0 mg/L limit is necessary based on sound science and reasonable and fair planning, the Action Plan already accounts for this process. Because it is both arbitrary and unnecessary, the reference to a 1.0 mg/L mandated limit must be removed from the draft Action Plan.

B. The proposed statutory mandate would violate the due process rights of certain NPDES dischargers by establishing arbitrary and unnecessary limits without the right of appeal.

The draft Action Plan provides no scientific support for a blanket 1.0 mg/L phosphorus discharge limit. In many cases, as noted above, the blanket standard would be imposed on dischargers where achieving the 1.0 mg/L limit would not result in a measurable

reduction in phosphorus at the Lake. Additionally, the reduction to 1.0 mg/L will in some cases require as much as 80 to 90% reductions, as some dischargers have very low load but a concentration much higher than 1.0 mg/L – and all of this reduction would come at significant cost. However, while these limits would be arbitrary and unnecessary, the discharger would have limited right to appeal its permit given the statutory basis for the limit. It is arbitrary to impose a statutory mandate that creates an unnecessary and burdensome limit but implicitly strips the discharger of its due process rights to challenge such a limit.

C. The proposal to mandate a stringent phosphorus limit in all circumstances contradicts the Adaptive Management process that underlies the Western Lake Erie Basin Collaborative Implementation Framework (WEBCF) and OEPA's articulated process for addressing nutrients.

In addition to risking the imposition of arbitrary and unnecessary limits on certain facilities, the proposed mandate also contradicts the core principle of the Domestic Action Plan and the WEBCF. In its opening section, the draft Action Plan provides that “[c]entral to the implementation of the Domestic Action Plan is the adaptive management process.” (Plan at page 3) Similarly, the WEBCF contains an identical directive and supports the concept of evaluating loads and directing reductions through a methodical approach that secures the most benefit in the most efficient manner possible. (WEBCF at 3). The adaptive management approach recognizes that, in order to avoid unnecessary and often costly reductions, priority actions should be implemented and measured in steps or phases, with successive steps being informed by the success and outcomes of the previous work.

Contrary to this core principle of the Action Plan, the proposed 1.0 mg/L blanket phosphorus permit limit for “all treatment works” defies adaptive management. It would require all dischargers, irrespective of contribution, location, and cost and without any adaptive management protocols, to meet this restrictive standard in the first instance. This is particularly important where (a) some of the targeted sources are small or de minimis contributors to the phosphorus load, (b) a 1.0 mg/L constitutes far more than a 40% reduction, and (c) the costs to meet a 1.0 mg/L limit are often high, especially where phosphorus treatment is not a technically feasible option. To reiterate, some small dischargers would see load reduction requirements far in excess of 40% if subject to this unreasonable limit.

Unlike the blanket limit, Item 1 on page 15 of the draft Action Plan sets forth a reasonable and prudent adaptive management approach to phosphorus permitting, and one that fits squarely within the action plan established in the WEBCF. This provision, and not an arbitrary mandate, should control the NPDES permitting process for the Lake Erie Basin.

As an additional matter, OEPA is implementing adaptive management measures through both SB-1 and through the development of the Stream Nutrient Assessment process. Both of these important programs look to adaptive management protocols, based on sound science and technology, to evaluate the necessary controls for facilities. A blanket 1.0 mg/L mandate would fundamentally undermine and contravene these programs, notwithstanding the fact that OEPA relies on the SB-1 program as an action item in the draft Action Plan.

D. The proposed mandate fails to comply with Ohio law requiring OEPA to perform a technical feasibility and economic reasonableness analysis on any proposed permit limits.

OEPA must perform a technical feasibility and economic reasonableness analysis on any proposed permit limits. R.C. 6111.03(J)(3). If this legislative mandate proceeds, it would contravene this existing legislative requirement and strip dischargers of these important statutory protections. Even if an overall target of 1.0 mg/L from a permitted point source could be scientifically justified, the Action Plan as drafted would exclude more reasonable and economically-justifiable site-specific approaches that would allow offsets from facilities that are capable of achieving higher reductions at lower costs (or other adaptive management tools).

E. The proposed phosphorus creates secondary concerns as well.

In addition to the key legal and technical concerns outlined above, the proposal suffers additional drawbacks. First, while no blanket limit is appropriate, the reliance on a concentration limit is particularly unreasonable. The Great Lakes Agreement is premised on the phosphorus load, and a concentration limit of 1.0 mg/L bears little relationship to the load itself and is the wrong value to assess.

Second, and only as a point of clarification, the OLEC is not authorized to, and, we expect, did not intend to, impose standards or expectations outside of the Lake Erie watershed. This limitation should be clarified throughout the draft Action Plan, as certain statements appear to be applied statewide when such an action would be well outside of OLEC's statutory authorization. R.C. 1506.21.

2. OEPA should engage a stakeholder process and consider the serious concerns of the scientific and regulated community if it proceeds with development of a recreational use standard and advisory protocol for microcystin.

OMA is concerned about the very general reference in the draft Action Plan to development of a recreational use standard related to microcystin for the open water of Lake Erie (Item 9, page 16). To the extent OEPA proceeds with development of a standard or a protocol for microcystin, OEPA and OLEC should evaluate and take into

consideration the many serious concerns raised by the scientific and regulated community in response to USEPA's December 2016 proposed "Draft Human Health Recreational Ambient Water Quality Criteria and/or Swimming Advisories for Microcystins and Cylindrospermopsin"(Docket ID No. EPA-HQ-OW-2016-0751, www.regulations.gov). Additionally, given the complexity and wide-ranging implications of such a standard or protocol, OEPA should engage a technical advisory group comprised of a variety of stakeholders to support and inform the development process.

3. Because the Action Plan will impose new standards and requirements with broad impact across Ohio, more time for review of the Plan is required by interested parties.

By its own statements, the draft Action Plan establishes the standards, including key regulatory action items by a number of administrative agencies that will ultimately govern the nutrient load entering Lake Erie. The draft Action Plan includes standards established by OEPA and other agencies that would impose significant costs on a variety of stakeholders – farmers, agribusiness, municipalities, industrial facilities, and residents of and visitors to Ohio – and that will govern these stakeholders for decades into the future. Each of these groups and individuals has a strong stake in this Action Plan – both in its burdens and, more importantly, in its success.

As an initial matter, OLEC's Plan states that it was developed "with input through meetings and conversations with various stakeholder groups..." Action Plan at 2. The core stakeholder group did not include representatives of industrial dischargers (or, for that matter, any municipal wastewater groups). Critically-affected entities were not involved in the development of this important Plan.

With this background, a robust public notice and public review and comment period becomes all the more critical. It is impossible to evaluate the impacts of such an important set of standards and mandates, which will control operations in Ohio for decades to come, in the timeframe initially proposed by Ohio EPA for review and comment. While we appreciate the fact that comments after the deadline will be given thoughtful consideration, OMA remains concerned that interested manufacturing parties will not be able to provide comments in a timely fashion.

Conclusion

The OMA appreciates the opportunity to comment on the draft Action Plan. As outlined above, while OMA and its members support the hard work of OLEC and OEPA in the Lake Erie basin, we have serious concerns about certain components of the draft Action Plan. We look forward to working with OLEC and OEPA to ensure a scientifically-sound approach to phosphorus regulations for point source dischargers in the Lake Erie Basin that does not impose unreasonable, unnecessary and arbitrary controls on individual municipal and industrial dischargers.

OMA Comments
OLEC Draft Action Plan
September 25, 2017
Page 7

If OLEC has any questions regarding the foregoing, please do not hesitate to contact me or OMA's environmental counsel, Frank Merrill at Bricker & Eckler LLP (614-227-8871).

Sincerely,



Rob Brundrett
Director, Public Policy Services

cc: Mr. Karl Gebhardt, OEPA
William Fischbein, Esq., OEPA
Frank Merrill, Esq.