THE LAKEFRONT CITY
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June 28, 2022

**SUBMITTED VIA EMAIL TO:**
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**Re: City of Euclid's written comments concerning U.S. EPA Region 5's Specific Objection to Ohio EPA's Proposed NPDES permit for the City of Euclid (OH0031062)**

To Whom It May Concern:

The City of Euclid appreciates the opportunity to submit written comments in response to the Specific Objection to the Proposed NPDES Permit for the City of Euclid (OH0031062) ("Objection Letter") sent to Ohio EPA on November 2, 2021, by the Water Division of U.S. EPA Region 5. These written comments complement the verbal comments and PowerPoint presentation made by Euclid during the June 8, 2022, virtual hearing. A copy of that PowerPoint presentation is attached.

As discussed in greater detail below, Euclid is an economically disadvantaged, environmental justice community that is engaged in ambitious Consent Decree projects to improve the City's wastewater infrastructure and the health of the Lake Erie Central Basin. State- and federally-approved facility, equipment, and layout changes at Euclid, combined with plant optimization, are already yielding cleaner effluent and nutrient reductions. Euclid is consistently meeting Ohio's 1.0 mg/L effluent limit for phosphorous discharges to Lake Erie.

The water quality and public health concerns are with elevated levels of microcystin in Lake Erie. These toxin levels are the result of nutrient loading that is overwhelmingly from non-point sources—such as runoff from agriculture within the Lake Erie watersheds. Additionally, microcystin in the Central Basin generally originates in and flows from the Western Basin. Ohio EPA's strategy to address the issue, developed in coordination with other Lake Erie border states to address these sources and reduce total nutrient loading to the lake, prioritizes the most beneficial and useful nutrient reductions. It is unreasonable for Region 5 to leap-frog Ohio's strategy and expect an imposed, near-zero phosphorus effluent limit from municipal wastewater sources such as Euclid's to make a measurable difference in water quality when the latest science shows that those sources are collectively only a tiny fraction of the total nutrient loading to the lake. We

certainly appreciate U.S. EPA's desire to address nutrient reductions for the health of Lake Erie, but the focus on point-sources like Euclid is misplaced, the cost of compliance is too high, and the means cannot possibly achieve the desired result.

*City of Euclid – Social and Economic Perspective*

Understanding the City's background is essential to a full understanding of implications arising from EPA's revolutionary approach in its Specific Objection letter. The City of Euclid is an inner-ring suburb immediately east of the City of Cleveland. Euclid has had a thriving industrial heritage, and we are proud of that strong tradition. Manufacturing remains vital to the city. That industrial engine provided incredible opportunities for many people, including large communities of immigrants for whom English was a second language, to come here and realize the American Dream of good jobs, good schools, good services, and homeownership. Those communities make up an important part of our civic fabric.

But a national economy that has been moving away from the industrial prowess of the mid-twentieth century has presented Euclid with very serious challenges, as it has for much of Northeast Ohio. In the last few decades, Euclid has moved from majority owner-occupied residential to majority renter. We have increasing levels of significant poverty in our community. Our Median Household Income has barely increased from the same level it was in 1990—and that is unadjusted for inflation—while MHI for the country has nearly doubled in that time. We are today a minority-majority community, with multiple vulnerable populations. Euclid-specific Census data from 1990 compared to present is available from the Census Bureau or upon request to Euclid.

**These critical facts put Euclid in the category of an economically disadvantaged environmental justice community.**

Despite the challenges, we have been building Euclid to thrive in the 21st century. That is manifest most clearly in our commitment to improving and maximizing our water resources. Again, Euclid is known as "The Lakefront City." Even with economic challenges, Euclid spent almost a decade and a half creating a model lakefront park. This linear park provides public access to the beautiful Lake Erie lakefront where there was none, but also provides sustainable protection from erosion attacking the lakefront properties. See more at: https://www.cityofeuclid.com/euclid-waterfront-improvements-plan. We have a new fishing pier. We are connecting these improvements to our existing lakefront park—Sims Park—and the public transit nodes in our highly walkable downtown. Euclid is making every effort to be a resilient, vibrant community to thrive in the 21st century, and our commitment to the Lake and its water quality is paramount to that vision.

*City of Euclid - Consent Decree Progress*

Our commitment to public health and water quality improvement is also represented in our progress under a very burdensome Clean Water Act federal consent decree, entered in *U.S. and*

*State of Ohio v. City of Euclid*, Case No. 1:11-cv-01783 (N.D. Ohio). The scope of the consent decree program represents the largest single infrastructure effort in the city's history. Euclid's commitment to improvement of its water resources, despite this heavy burden, is shown in timely completion of all Consent Decree-required SSO projects and continued efforts to install the largest Membrane Bioreactor (MBR) treatment of its kind in North America. The plant will provide excellent quality water treatment. Taking one year as an example, if the current MBR plant had been in place in the year 2014, an additional 1,122 kilograms of phosphorous would have been removed compared to the old plant. Our significant investments are making real improvements.

The Consent Decree Program is an extremely burdensome undertaking for the city at a time of great efforts to stabilize challenging demographic and financial trends. The Consent Decree program was originally estimated to cost approximately $136 million. However, some cost overruns, supply chain issues, and unforeseen complexities and setbacks mean **Euclid is facing total Consent Decree costs that are almost exactly double what the Parties originally estimated.** These ballooning expenditures have accumulated during decades where the City's median household income has been almost completely flat in *nominal* dollars, and falling behind in real, inflation-adjusted dollars. The costs already are straining Euclid's financial capability and further work remains.

Nevertheless, the city maintains fiscal responsibility amid severe local and regional economic challenges. To that end, we are actively taking an Integrated Planning approach to our compliance with our Consent Decree. Euclid will be implementing our CSO control improvements, which will get measurable environmental bang for the buck, including more phosphorous reduction. We are grateful to have had excellent, detailed engagement with EPA Region 5 water division and lawyers in your Office of Regional Counsel, as well as personnel from U.S. EPA headquarters and the Department of Justice and Ohio EPA—all of whom have gotten to know the facts of our situation in Euclid quite well.

*City of Euclid – The Reality Today*

Euclid simply does not have the capacity, financially or physically, to have U.S. EPA unilaterally prioritize even more phosphorous reduction and put the city in a perpetual state of permit non-compliance. The phosphorous effluent limit in the Specific Objection letter would require technology that does not exist in the industry today. Even if such technology existed, the realities of Euclid's wastewater treatment plant site preclude installation of additional processes—there simply is no room. There also is no community support for displacing the neighboring residents from their lakefront neighborhood, which is why the City went above and beyond the minimums to go for a more expensive, higher quality MBR technology for our plant.

We cannot explain to the people of Euclid how this Specific Objection is anything but arbitrary and capricious, and not in accordance with law. It would force on us a permit with which we can never comply.

1. **Knowable relevant facts have been ignored in the Specific Objection letter.**

The City of Euclid has seen no evidence that any of these facts specific to Euclid were considered during U.S. EPA's review of Euclid's draft NPDES permit. This is deeply troubling to Euclid, because these are the highly relevant facts Euclid has been living and must live with. Euclid feels like it is being singled out and penalized even where it is doing so many good things for water quality.

Even more difficult for Euclid to explain to its citizens and ratepayers is this simple fact: nearly EVERYTHING noted above is known by personnel in the Region 5 office. Instead of addressing the readily-available information, the Specific Objection is a result of an unrealistic myopia, where one group has fixated on a narrow bureaucratic phosphorous achievement, and not actual microcystin reduction in the Central Basin. The failure to take any effort to understand real-world environmental improvement in Euclid is the essence of arbitrary and capricious decision making.

2. **The CWA cannot be interpreted or implemented to force absurd results.**

Congress, through the Clean Water Act, did not intend ad hoc policy making for water quality improvement via real-time permit oversight. The Clean Water Act is more comprehensive. For example, Congress intended for state and federal regulators to use the tools of TMDLs. Congress intended states and local communities to have the ability to prioritize steps to compliance via Municipal Integrated Planning. Importantly, Congress intended to reserve responsibility for pollution control to the states. Congress stated that its policy is to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to provide Federal technical services and financial aid to State and interstate agencies . . . in connection with the prevention, reduction, and elimination of pollution." 33 U.S.C. §1251(b).

It is a fundamental principle that statutes cannot be interpreted to effect absurd results. *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope." (quoting *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509 (1989)). In unilaterally forcing phosphorus limits upon Euclid, U.S. EPA is sidestepping congressional intent that Ohio has primary responsibility and final say on environmental protection, including setting effluent limits for discharges to Lake Erie. *See Ohio v. United States Army Corps of Eng'rs*, 259 F. Supp. 3d 732, (N.D.Ohio 2017) (finding Congress intended states to have the primary responsibility, and the final say on issues of environmental protection). U.S. EPA's Specific Objection proposes to eviscerate that congressional intent and put Euclid in a state of perpetual non-compliance with the impossible phosphorous permit limit of 0.0086 mg\L.

3. **Region 5 may not use the Euclid permit as a bureaucratic beachhead to a massive policy change that focuses on paper accomplishments over measurable, achievable environmental outcomes.**

The problem of algal impairment in Lake Erie is a complex phenomenon more than 150 years in the making. It cannot be solved by ad hoc permit actions in 5-year NPDES permits. A defensible, science-based approach needs to respect the complexity of the problem and the complexity of Lake Erie and pursue cost-effective approaches with real environmental outcomes.

Ohio EPA's Reasonable Potential analysis demonstrates that Euclid is not the cause or the solution to this vast problem. Indeed, 40 CFR 122.44(d)(1) affords Ohio significant latitude in determining whether Euclid's phosphorus effluent limit has reasonable potential to cause or contribute to excursion from water quality criteria. Upon introduction of the "reasonable potential" language in 1989, U.S. EPA stated that "a permitting authority [such as Ohio in this case] has a significant amount of flexibility in determining whether a particular discharge has a reasonable potential to cause an excursion above a water quality criterion, taking the factors in subparagraph (ii) into account." Preamble 50 FR 23868. Those factors in subparagraph (ii) allow the permitting authority to "use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent … and where appropriate, the dilution of the effluent in the receiving water." 40 CFR 122.44(d)(1)(ii). There is no indication that U.S. EPA considered these factors or, more importantly, gave Ohio such flexibility before it issued its Specific Objection Letter.

Ohio EPA is taking a comprehensive approach. Ohio EPA knows Euclid and the other Lake Erie basin dischargers. Ohio knows the complex dynamics of Lake Erie and is pursuing the detailed cause analysis in its expedited Maumee TMDL. Ohio EPA also knows it is bound by a phosphorous water quality standard in state law. To willfully ignore the legal restrictions on Ohio EPA in an attempt to force it beyond a legally promulgated phosphorous standard is callous disrespect for law. It ignores and undermines what Congress intended under the Clean Water Act where state water quality standards themselves become federally enforceable standards—not mere suggestions to be cast aside for the preferences of federal policy makers. The Specific Objection ignores many relevant facts that Ohio has considered. And yet is so vague, without any identifiable compliance certainty for Euclid. A permit based on this Specific Objection would be arbitrary, capricious, unreasonable, and unlawful.

4. **The 2012 Great Lakes Water Quality Agreement (GLWQA) Annex 4 does not provide a basis for U.S. EPA to set effluent limits for Euclid below Ohio's established 1.0 mg/L total phosphorus limit.**

U.S. EPA's reference during the June 8, 2022, virtual hearing to Annex 4 of the GLWQA as a basis for implementing some lower phosphorus limit at Euclid is unsupported in the text of Annex 4. In cooperation and consultation with the United States, Ohio has met the letter of the Agreement and has satisfied the Annex 4 recommendations.

The GLWQA Nutrients Annex Subcommittee determined that the focus for Lake Erie's Central Basin should be to minimize the extent of hypoxic zones associated with excessive phosphorus. https://www.epa.gov/glwqa/recommended-binational-phosphorus-targets (last accessed 6-21-2022). The GLWQA Subcommittee did not focus on Central Basin microcystin levels in relation to drinking water risks, the alleged impairment to which the Specific Objection is addressed.

As part of Annex 4, the United Stated agreed to *cooperate and consult with Ohio to "assess* and, where necessary, develop and implement" programs to reduce phosphorus loading from urban sources, including "programs to ensure that construction and operation of municipal wastewater treatment facilities that discharge one million liquid gallons or more per day achieve a maximum effluent concentration of . . . 0.5 milligram per litre total phosphorus for plants in the basins of Lakes Ontario and Erie." (Emphasis added.) GLWQA at 34. The United Stated further agreed to *cooperate and consult with Ohio to "assess* and, where necessary, develop and implement regulatory and non-regulatory programs to reduce phosphorus loading from agricultural and rural non-farm point and non-point sources . . .." (Emphasis added.) GLWQA at 34. None of the agreed-upon assessment in the GLWQA was aimed at any perceived exceedance of Central Basin microcystin levels that might impair drinking water. It would be capricious for U.S. EPA to 'borrow' the GLWQA as a justification for a separate desired permit and policy goal.

Ohio indeed has assessed and developed programs to address the targets outlined in the GLWQA, and these programs continue to develop as the state of the science and conditions in the Lake Erie evolve. This is the purpose of the expedited Maumee Basin TMDL that is ongoing. Importantly, each of the action items and recommendations of the GLWQA, including Annex 4 target reductions for the Central Basin, are guided by the principles of adaptive management – "implementing a systematic process by which the Parties assess effectiveness of actions and adjust future actions to achieve the objectives of this Agreement, as outcomes and ecosystem processes become better understood." GLWQA at 6. Ohio's approach is the essence of an adaptive management strategy. Given the totality of its assessments, Ohio is requiring point-source nutrient dischargers to optimize their reduction while abiding under the state-adopted regulation of a 1.0 mg/L total phosphorus limit for municipal wastewater treatment facilities that discharge one million liquid gallons or more per day to Lake Erie. For non-point sources, Ohio has implemented the H2Ohio Program to help curb nutrients in runoff and is developing a TMDL for Lake Erie's Western Basin, which Ohio EPA analysis shows is where microcystin originates. These measures have been assessed and identified as providing the substantial and quantifiable nutrient reduction in the Western and Central Lake Erie basins.

**5. The Specific Objection lacks any reasonable grounding, and as a result, U.S. EPA's proposed limit would fail to pass state and federal permit review.**

Challenges to any final Ohio NPDES permit limits are subject to the exclusive jurisdiction of the Ohio Environmental Review Appeals Commission (ERAC) under the "lawful and reasonable standard". *See* R.C. 3745.04, 3745.05, and 3745.07. Under the standard, "unlawful" means "that which is not in accordance with law," and "unreasonable" means "that which is not in accordance with reason, or that has no factual foundation." *Citizens Committee to Preserve Lake*

*Logan v. Williams* (1977), 56 Ohio App.2d 61, 70. The U.S. EPA proposed limit for total phosphorus is both unlawful and unreasonable.

The reasoning in U.S. EPA's Specific Objection Letter omits what Ohio is required by statute to consider and makes its attempted imposition of an impossible total phosphorus effluent limit legally dubious. U.S. EPA has conditioned approval of Euclid's NPDES permit on Ohio EPA's revision of total phosphorus limits from 83 kg/day (1.0 mg/L) average monthly loading, down to 0.72 kg/day (0.0086 mg/L)—which represents more than a 100-fold decrease. *See* Ohio Adm.Code 3745-33-06(C) (setting phosphorus treatment limits of 1.0 mg/L for Lake Erie Basin POTWs with design flow of one million gallons per day or more or designated as a major discharger by the director). This new limit is technically infeasible and economically unreasonable, and, if issued by Ohio EPA, cannot pass Ohio's appellate standard of review for NPDES permitting.

Ohio Revised Code 6111.03 sets forth the powers of the Director of the Ohio EPA. Under R.C. 6111.03(J)(1), the Director may issue permits for the discharge of wastes "into the waters of the state, and for the installation or modification of disposal systems or any parts thereof in compliance with all requirements of the Federal Water Pollution Control Act and mandatory regulations." Ohio Revised Code 6111.03(J)(3) sets certain permitting requirements of the Director as follows:

> To achieve and maintain applicable standards of quality for the waters of the state adopted pursuant to section 6111.041 of the Revised Code, ***the director shall impose***, where necessary and appropriate, as conditions of each permit, ***water quality related effluent limitations*** in accordance with sections 301, 302, 306, 307, and 405 of the Federal Water Pollution Control Act ***and***, *to the extent consistent with that act*, ***shall give consideration to, <u>and base the determination on</u>, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties from those wastes*** and to evidence relating to conditions calculated to result from that action and their relation to benefits to the people of the state and to accomplishment of the purposes of this chapter.
> (Emphasis added.)

Setting water quality-based effluent limits without the requisite technical feasibility and economic reasonableness analysis is unlawful. *Bd. Of Comm'rs v. Nally*, 10th Dist. Franklin No. 11AP-508, 2013-Ohio-2106; 6111.03(J)(3). Likewise, setting limits where EPA's Specific Objection specifies would be patently unreasonable, because there is no factual foundation that can support the technical feasibility and economic reasonableness of a phosphorus average monthly loading of 0.72 kg/day at Euclid's treatment facility. Under state law, Ohio EPA could not set such an effluent limit and survive legal scrutiny.

U.S. EPA's Specific Objection also seems to ignore the comprehensive analysis of facts that shows that Euclid is neither the cause nor the solution to the listed impairments allegedly driving this Specific Objection. Euclid has already made great, extensive, and expensive strides in reducing phosphorous. Ohio EPA's most current Integrated Water Quality report makes clear that

the alleged impairment listing arises from samples taken in 2017, barely within the 5-year look-back period; the trend is toward improvement and compliance and does not call for radical and unreasonable ad hoc change.

Ohio's current Integrated Report also explicitly says in App. F. that in the central basin, "The Microcystis generally originates from the western basin." There is no demonstration that phosphorous entering the central basin is itself the source of the high 2017 microcystin levels that led to listing in the Integrated Report. U.S. EPA has jumped to assumptions instead of investigating the complexity of flows and chemistry and trends of Lake Erie flows from its Western Basin to the Central Basin.

U.S. EPA's Specific Objection instead applied a suspect new lakes and reservoirs guidance—not statute, not regulation, but new guidance—to improperly apply a mathematical model to these complexities of Lake Erie. U.S. EPA conceded that Great Lakes water quality data was not used in the development of the chlorophyll-microcystin model being applied in the Specific Objection Letter, and that further evaluation of the applicability of the model is warranted when applied to non-sampled waters. *See U.S. EPA, Response to Public Comments on U.S. EPA's Draft Ambient Water Quality Criteria Recommendations for Lakes and Reservoirs of the Conterminous United States: Information Supporting the Development of Numeric Nutrient Criteria* ("U.S. EPA Response to Comments") (Aug. 2021) at 62. The Lake Erie Central Basin is a fundamentally different system from those lakes upon which the models were derived. The differences, in fact, are so broad as to render the criterion models in the lakes and reservoirs recommendation inapplicable and its use unreasonable under the circumstances. The lakes and reservoirs guidance is scientifically unsupported and patently unreasonable under the Ohio review standards.

This permitting action would also fail federal review under the Administrative Procedure Act for these same reasons. The APA standard is whether U.S. EPA's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A reviewing court will set aside those actions where the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

**6. U.S. EPA's Specific Objection fails to address environmental justice concerns.**

Most troubling of all to the people of Euclid are the environmental justice considerations. Reviewing U.S. EPA's webpage "Learn About Environmental Justice," the city cannot fathom how Region 5 thinks that this Specific Objection comports with those policies. To attempt such a significant regulatory change without any engagement with the local government of the City of Euclid fully undermines any "whole of government approach" to environmental justice.

President Biden's January 27, 2021, Executive Order on Tackling the Climate Crisis at Home and Abroad states, at Sec. 219, "To secure an equitable economic future, the United States must ensure that environmental and economic justice are key considerations in how we govern." Impossible permit conditions do not secure an equitable economic future for our community. Euclid is already making significant water quality progress. But the city does not have the economic capacity, the physical space, real-world technology, or time in a five-year permit to deviate from our productive path in favor of impossible permit conditions that disproportionately effects an already overburdened community.

Euclid is making real environmental progress at great cost and sacrifice. U.S. EPA's failure to provide "meaningful involvement" in its permit decision-making makes the Specific Objection environmentally unreasonable, arbitrary, and unjust to the people of the City of Euclid.

For these reasons, and for the many other reasons offered by other commenters, the people and City of Euclid respectfully request that U.S. EPA withdraw this Specific Objection to the City of Euclid's draft NPDES permit. Should you have any questions, please contact me. Thank you again for your attention to and consideration of these comments.

Sincerely,

MAYOR KIRSTEN HOLZHEIMER GAIL

Cc:
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