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I. THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND ISSUES OF BROAD PUBLIC INTEREST THAT HAVE SIGNIFICANT REPERCUSSIONS FOR OHIO'S PUBLIC WASTEWATER TREATMENT AGENCIES.

According to S.Ct.Prac.R. 5.02, a jurisdictional appeal is an appeal from a decision of a court of appeals that involves: 1) a substantial constitutional question or 2) a question of public or great general interest. This matter involves both. Therefore, pursuant to S.Ct.Prac.R. 7.06, the Association of Ohio Metropolitan Wastewater Agencies ("AOMWA") respectfully requests that the Ohio Supreme Court accept jurisdiction of Appellant Board of Commissioners of Fairfield County's ("Fairfield County's") appeal in this matter.

AOMWA is a state-wide organization that represents the interests of Ohio's public wastewater treatment agencies. Our members include large and small public utilities that construct, operate, maintain and manage public sewer collection and treatment systems throughout Ohio. Collectively, AOMWA's members successfully treat more than 300 billion gallons of wastewater each year for more than 4 million Ohioans. Consistent with its important public role, AOMWA engages, from time to time, in the filing of briefs and other legal memoranda in Ohio's courts on issues impacting the ability of its members to deliver efficient and cost-effective wastewater collection and treatment services to Ohio's residents and businesses.

Like Fairfield County, public wastewater agencies in Ohio, including AOMWA's members, are subject to National Pollutant Discharge Elimination System ("NPDES") permits issued by Ohio EPA, which authorize their discharges. These NPDES permits impose limits on the maximum levels of pollutants that may be discharged by such utilities in their effluent. Our agencies' permits include or have the potential to include effluent limitations derived from total maximum daily load ("TMDL") allocations developed by Ohio EPA and approved by U.S. EPA,

similar to the limits at issue in this proceeding for Fairfield County. Imposition of such limits in many cases requires our members to install expensive control technologies, which can cost in excess of tens of millions of dollars. These costs are ultimately borne by our rate-payers—the residents and businesses of this State. However, if these limits are not necessary to protect water quality, such limits should not be imposed so that public wastewater treatment agencies are not incurring needless costs or taking resources away from projects that will provide actual environmental benefits. At its core, this action hinders the ability of our agencies to challenge the scientific necessity of such limits. Without that ability, public wastewater utilities are prevented from protecting the resources that they hold in trust for their constituents.

While TMDLs are recognized as merely planning documents, Ohio EPA nonetheless treats TMDLs as binding upon wastewater treatment agencies once the TMDLs are approved by U.S. EPA. Yet, Ohio EPA fails to promulgate these TMDLs in accordance with R.C. Chapter 119's notice and comment procedures thereby prohibiting public wastewater agencies from challenging Ohio EPA's basis for the allocations before their incorporation into a NPDES permit. The Court of Appeal's decision further exacerbates this by eliminating the ability of our agencies to raise any meaningful challenge to the TMDL derived limits after they are incorporated into NPDES permits, thereby eliminating any opportunity for actual review.

Accordingly, the significance of Fairfield County's challenges to the Court of Appeal's decision on the grounds that the Director 1) failed to abide by the notice and comment procedures of R.C. 119; 2) violated due process; and 3) was not supported by substantial evidence have direct relevance to other utilities throughout Ohio. Indeed, if permitted to stand, the Court of Appeal's decision would place wastewater treatment agencies in a clear due process quandary—a catch-22—with no opportunity for meaningful review of TMDL derived limits (or

their scientific basis) either before or after their inclusion in an NPDES permit. Therefore, AOMWA urges this Court to accept jurisdiction of Appellant's appeal because the merits have public significance well beyond just Fairfield County's individual circumstances and further raise a substantial constitutional question.

II. STATEMENT OF CASE AND FACTS

AOMWA hereby adopts in its entirety, and incorporates herein by reference, the statement of the case and statement of facts contained in the Jurisdictional Memorandum filed by the Appellant Fairfield County.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

AOMWA further supports and hereby incorporates the jurisdictional arguments raised by Fairfield County and *amicus curiae* the Ohio Municipal League ("OML") and the County Sanitary Engineers Association of Ohio ("CSEAO") in their jurisdictional memoranda. However, AOMWA believes that three propositions of law warrant specific attention to highlight their impact on public wastewater agencies throughout Ohio.

PROPOSITION OF LAW NO. 1: Ohio EPA's treatment of TMDLs as binding on public wastewater agencies in their NPDES permits constitutes rulemaking subject to the notice and comment requirements of R.C. Chapter 119.

As this Court has previously stated, "[t]he rulemaking requirements set forth in R.C. Chapter 119 are designed to permit a full and fair analysis of the impact and validity of a proposed rule" before it is imposed upon the regulated community. *Condee v. Lindley*, 12 Ohio St.3d 90, 93, 465 N.E.2d 450 (1984). To protect this opportunity, R.C. Chapter 119 requires public notice, the opportunity for public comment, and a public hearing before an agency rule can be validly imposed. These procedures apply to agency "rules," which are defined by R.C. 119.01(C) as any "standard, having a general and uniform operation...." (Emphasis added). Accordingly, if a standard has general and uniform operation, it must first be formally

promulgated as a rule pursuant to the procedures of R.C. Chapter 119 before an agency can enforce it. *See, e.g., Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. & Nurse Registration*, 44 Ohio St.3d 73, 540 N.E.2d 1354 (1989). *Accord Jackson Cnty. Env'tl. Comm. v. Schregardus*, 95 Ohio App.3d 527, 642 N.E.2d 1142 (10th Dist. 1994) (holding that Ohio EPA cannot regulate through unpromulgated "guidelines").

Even though this is a well-established principle of law in Ohio, Ohio EPA has failed to abide by it. Ohio EPA does not promulgate its TMDLs in accordance with the notice and comment rulemaking procedures of R.C. Chapter 119, yet still treats the TMDLs as binding on all permittees, including public wastewater agencies, within a TMDL-covered watershed. This is not just the case with the TMDL at issue in this matter for Fairfield County, but is true of other Ohio EPA-prepared TMDLs as well.

However, since Ohio EPA treats the TMDLs as generally and uniformly binding, it is therefore required to comply with R.C. 119 rulemaking requirements. Having failed to do so renders its TMDL derived permit limits invalid unless and until the TMDL is promulgated through proper rulemaking procedures. Indeed, other state Supreme Courts considering the same issue have held exactly that. *Arasco, Inc. v. Idaho*, 138 Idaho 719, 69 P.3d 139 (2003) (holding that permit limits were invalid because the TMDL was not promulgated as a rule); *Comm'rs of Pub. Works v. S.C. Dep't of Health and Env'tl. Control*, 372 S.C. 351, 641 S.E.2d 763 (2007) (holding that the state was not authorized to rely on the TMDL to set permit limits because the TMDL had not been promulgated as a regulation).

Since the TMDLs in this matter were never promulgated pursuant to the requirements of R.C. Chapter 119, the Court of Appeal's decision was erroneous in finding that the TMDL was a valid basis for NPDES permit limits. Further, if left to stand, the Court of Appeal's decision

would allow Ohio EPA to conduct an end run around one of the most fundamental protections in place for meaningful review of agency action: the process of notice and comment rulemaking. This would impact not just the rights of Fairfield County but numerous other public wastewater treatment agencies that have TMDL derived limits in their NPDES permits or that will have such limits in the future as additional TMDLs are developed.

PROPOSITION OF LAW NO. 2: Failure to consider opposing evidence in a NPDES Permit appeal challenging a limit derived from an unpromulgated TMDL results in violation of due process.

The Court of Appeal's decision completely abrogates the ability of Fairfield County, or any similarly situated public wastewater treatment agency, to obtain meaningful review of NPDES permit limits derived from a TMDL thereby depriving them of due process. A "fundamental requirement of due process is the opportunity to be heard 'at a meaningful place and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), quoting *Amstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965).

In the absence of R.C. Chapter 119 procedures, no opportunity exists for a party to obtain meaningful review of a TMDL's policy choices, data, and logic at the time the Director submits the TMDL to U.S. EPA and before the TMDL derived limits are imposed in a permit. Indeed, permittees' attempts to challenge TMDLs before limits have been incorporated into individual permits have routinely been dismissed because such challenges are not ripe. *City of Arcadia v. EPA*, 265 F. Supp.2d 1142, 1155 (N.D. Cal.2003); see also *Bravos v. Green*, 306 F. Supp. 2d 48, 56-58 (D.D.C.2004). Therefore, parties must have the right to that review when a NPDES permit is issued if it contains limits based on the TMDL.

The Court of Appeals, despite agreeing that review should occur during the permitting process¹ nevertheless held that “the Director ... clearly has the option to simply impose in the NPDES permit the limitation set forth in the TMDL...” notwithstanding unrebutted evidence submitted by Fairfield County challenging the scientific basis for the TMDL limits.² The Tenth District’s holding, therefore, results in such permit limits being effectively unreviewable.

If as suggested by the Court of Appeals a TMDL automatically creates a valid factual foundation for a permit limit, despite unrebutted expert testimony to the contrary, then after-incorporation review in Ohio is not just illusory, but nonexistent. This constitutes a clear denial of due process and places Fairfield County (and similarly situated public wastewater utilities) in an untenable catch-22—with no opportunity for review before limits are imposed nor any meaningful review after.

As the Court of Appeals recognized, “[t]o comply with the requirements of procedural due process, government agencies must provide notice and an opportunity for a hearing...” 10th Dist. Opinion at ¶80 (emphasis added) (*citing Mathews*, 424 U.S. 319). However, since its opinion leaves no opportunity for a meaningful hearing, the Court of Appeals’ decision raises a substantial constitutional question. Accordingly, this Court should accept jurisdiction because leaving the decision stand will unconstitutionally prevent public wastewater agencies, like Fairfield County and AOMWA’s members, from having meaningful review of the basis for TMDL derived limits.

PROPOSITION OF LAW NO. 3: Ohio EPA must demonstrate that a public wastewater agency is a significant contributing cause of a violation of applicable water quality standards before it can impose stringent and costly new permit limits.

Ohio EPA is not authorized to impose water quality-based discharge limits derived from

¹ *Bd. of Comm’rs. of Fairfield Cty v. EPA*, 10th Dist. Franklin No. 11AP-508, 2013 Ohio 2106 (“10th District Opinion”), ¶78.

² *Id.* at ¶71.

a TMDL unless the affected permit holder is a significant source of the impairment, and only if the Agency finds sufficient causation, *i.e.*, that the discharge from the public wastewater treatment agency has the reasonable potential to cause or contribute to a violation of water quality standards leading to the impairment—may it impose such limits. *See* Ohio Admin. Code 3745-2-12(B); Ohio Admin. Code 3745-2-12(G)(4) and Ohio Admin. Code 3745-2-06(A)(2). These requirements protect public wastewater agencies from being saddled with costly discharge limits that, even if achieved, will not lead to a measurable improvement of water quality.

The Court of Appeal's decision, however, will prevent public wastewater agencies from disputing whether Ohio EPA has met its regulatory burden of demonstrating that the utility is a significant contributing cause. Instead, the decision allows this burden to be merely inferred where Ohio EPA has developed a TMDL that is approved by U.S. EPA and disregards all credible contrary evidence demonstrating otherwise (as was the case for Fairfield County). If permitted to stand, dischargers will be forced to implement improvements to their facilities even if a water body is in attainment or the utility is not a significant contributing source. Such a holding will cost public and industrial dischargers millions of dollars in unnecessary improvements.

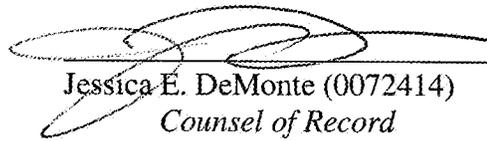
The expenditure of unnecessary costs by public wastewater agencies, which will ultimately be borne by local ratepayers, renders this a matter of significant public interest and as such, is appropriate for review before the Ohio Supreme Court.

IV. CONCLUSION

For the reasons discussed above as well as those articulated by Fairfield County and *amicus curiae* OML and CSEAO in their jurisdictional memoranda, this case involves issues of great public interest with the potential to impact wastewater treatment agencies throughout Ohio, which in turn will impose costs on the rate-paying residents and businesses of this state. It

further involves a substantial constitutional question. Accordingly, pursuant to S.Ct.Prac.R. 5.02 and 7.06, AOMWA urges this Court to accept jurisdiction of Appellant Fairfield County's appeal so that the issues presented by this case will be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Jurisdictional Memorandum of Amicus Curiae Association of Ohio Metropolitan Wastewater Agencies in Support of Appellant's Jurisdictional Appeal* was sent by ordinary U.S. Mail, postage pre-paid, and electronic mail to counsel for Appellant and Appellee and counsel for *amicus curiae* at the addresses below on July 8, 2013:

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