

ORIGINAL

IN THE SUPREME COURT OF OHIO

Board of Commissioners of Fairfield County,

Plaintiff-Appellant,

v.

[Scott J. Nally], Director of Environmental Protection,

Defendant-Appellant.

CASE NO. 13-1085

On Appeal from the Franklin County Court of Appeals Tenth Appellate District

Court of Appeals Case No. 11AP-508 ERAC No. 235929

MEMORANDUM OF AMICUS CURIAE THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF THE JURISDICTIONAL MEMORANDUM OF APPELLANT BOARD OF COMMISSIONERS OF FAIRFIELD COUNTY

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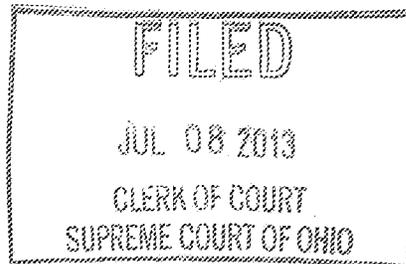


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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The decision of the Tenth District establishes erroneous precedent on a number of important environmental and due process issues that will adversely impact a vast number of Ohio businesses.

First, the court of appeals erroneously held that the imposition of a discharge limit that was lifted directly from a Total Maximum Daily Load (“TMDL”) into a National Pollutant Discharge Elimination System (“NPDES”) permit does not equate to regulation based on unpromulgated standards. Those portions of a TMDL that are functionally used as rules must be promulgated as rules under Ohio law before they can be enforced through permit limitations.

The holding of the appellate court unlawfully insulates the rulemaking process from the public and affected parties. The rule promulgation procedures in Ohio are supposed to allow for public comment and review to allow for full and fair analysis of the rule. However, the appeals court has allowed Ohio EPA to end-run this process. Countless businesses and members of the Ohio Chamber of Commerce (“Chamber”) throughout Ohio will be affected by the agency’s ability to impose limits based on unpromulgated TMDLs.

Second, the appellate court has effectively declared that the mere presence of a recommended discharge limit in a TMDL *ipso facto* means that the limit is reasonable. This erroneous holding will rob NPDES-permitted businesses from their day in court because it prevents any challenge to the assumptions, policy, and data underlying a permit limit if that permit is based on a TMDL. A great number of the Chamber’s members are subject to NPDES

permits. Each one of them will be subject to functionally unreviewable and unreasonably expensive discharge limits.

Third, because the Tenth District upheld a permit limit on the sole basis that it was derived from the TMDL without consideration of any evidence presented by the permit holder, this case raises a substantial constitutional question. ERAC denied Appellant Fairfield County its due process rights, and the appeals court held that the U.S. EPA's approval of the TMDL was due process enough. If allowed to stand, the decision will operate to prevent Ohio businesses—and Chamber members—from having their “day in court.”

Fourth, the appellate court held that Ohio EPA may impose extraordinarily expensive discharge limits even where conclusive evidence demonstrates that such limits are totally unnecessary. The court arrived at this conclusion despite unrebutted evidence that the receiving stream at issue was not and would not be adversely affected by Appellant Fairfield County's wastewater discharge. Not only is this holding inconsistent with Ohio law, it will cost Ohio businesses millions of dollars in unnecessary improvements. These needless and excessive costs will be passed on to the purchasers of their products, resulting in a corresponding economic impact that could result in lost jobs and productivity in Ohio.

Finally, the appeals court erroneously affirmed ERAC's failure to make factual findings based on the evidence presented to it, despite its legal obligation to do so. Appellant offered uncontested evidence that the permit limits were neither technically feasible nor economically reasonable. ERAC disregarded its statutory duty to so find, and simply remanded the case back to Ohio EPA. This holding will affect Ohio businesses and Chamber members subject to environmental permits in that uncontroverted evidence presented to ERAC by a permit holder is

utterly disregarded. Instead, the appellate court favors remanding the case to Ohio EPA, even in the face of the permit holder's evidence proving that a remand is futile. This is an egregious waste of resources of Chamber members, and ultimately, of the public. For all of these reasons, this case will have a major impact on the Chamber's members. This Court should grant jurisdiction to hear this case and review the erroneous decision of the court of appeals.

II. STATEMENT OF THE INTEREST OF AMICUS CURIAE

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its more than 5,000 business members and the thousands of Ohioans they employ while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena. Through its member-driven standing committees and the Ohio Small Business Council, the Chamber formulates policy positions on issues as diverse as education funding, taxation, public finance, health care, environmental regulation, workers' compensation and campaign finance. The advocacy efforts of the Ohio Chamber of Commerce are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

Because of the important interests raised in this case, the Ohio Chamber of Commerce offers this amicus memorandum in support of jurisdiction. The Chamber has an interest in protecting its members from unnecessary costs and overreaching regulations.

III. STATEMENT OF THE CASE AND FACTS

Amicus, the Ohio Chamber of Commerce, agrees with the statement of the case and facts as set forth in the memorandum in support of jurisdiction submitted by Appellant Fairfield County Board of Commissioners (“Fairfield County”) and incorporates it herein by reference.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Appellant’s Proposition of Law No. 1: A TMDL is a rule that must be promulgated in accordance with Ohio law before it can be used as the basis for a NPDES permit limit.

The Ohio Revised Code defines a rule as any standard having general and uniform operation. R.C. 119.01(C). Therefore, if a standard has general and uniform operation, it must first be formally promulgated as a rule before an agency can enforce it. *See, Ohio Nurses Ass’n, Inc. v. State Bd. of Nursing Educ. & Nurse Registration* (1989), 44 Ohio St.3d 73, 540 N.E.2d 1354 (holding that an agency’s issuance of a “position paper” that had the effect of establishing a new standard constituted a “rule” that should have been adopted in accordance with Chapter 119); *Jackson Cnty. Env’tl. Comm. v. Schregardus* (1994), 95 Ohio App.3d 527, 642 N.E.2d 1142 (holding that Ohio EPA cannot regulate through unpromulgated “guidelines”).

This Court has previously explained that the rule promulgation process is necessary because it is “designed to permit a full and fair analysis of the impact and validity of a proposed rule.” *Condee v. Lindley*, 12 Ohio St.3d 90, 93, 465 N.E.2d 450 (1984). If an agency fails to follow the procedure, then the adopted rule is invalid. *Id.*, quoting R.C. 119.02.

Once a TMDL is written for a watershed, it impacts every single city, county, and business that discharges into that watershed. It will also affect every city, county and business that will discharge into that watershed in the future. TMDLs are generally and uniformly

applicable. Therefore, permit limits derived from a TMDL are invalid unless and until the TMDL is promulgated through proper rulemaking procedures.

The Tenth District has erred. Other state supreme courts that have addressed this issue have ruled that TMDLs must be promulgated as rules before they are used as bases for permit limits. *See, 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).

The Blacklick Creek TMDL was not promulgated as a rule. Yet, Ohio EPA is treating it as a rule of general applicability for all present and future dischargers.

The appellate court erroneously upheld Ohio EPA's decision, finding that federal approval of the TMDL satisfies the state's promulgation procedures. However, U.S. EPA's approval of the TMDL is not an acceptable substitute. That holding removes the "full and fair analysis" supported by this Court. *Condee*, 12 Ohio St.3d at 93. The public is denied their ability to have an adjudication hearing on the rule, if necessary. Moreover, the State's Common Sense Initiative¹ is stripped from the procedure. Any Chamber member with an NPDES permit will be affected by this holding. Ohio EPA has eviscerated the rule promulgation process as it relates to TMDLs, and silenced the voices of impacted Ohio businesses.

¹ See, Exec. Order 2011-01K.

Appellant's Proposition of Law No. 2: The mere presence of a recommended discharge limit in a TMDL does not *ipso facto* create a valid, much less an un rebuttable, factual foundation for a NPDES permit limit, and it should not be afforded more weight than other evidence.

If a permit limit is challenged, Ohio EPA must demonstrate that there is a direct correlation between pollution control requirements and regulatory standards in order to establish there is a valid factual foundation for the imposition of the limit. *Gen. Elec. Lighting v. Koncelik*, 10th Dist. No. 05AP-310, *et seq.*, 2006-Ohio-1655 at ¶ 37. In regards to Appellant Fairfield County's challenge to the permit limits, Ohio EPA was required to prove that there was a direct correlation between the proposed limits and the protection of aquatic life in Blacklick Creek. Instead, however, Ohio EPA relied solely on the TMDL. ERAC and the appellate court erroneously upheld this decision.

Even in the face of uncontested expert testimony that the assumptions, data, and logic supporting the TMDL limit were invalid, the appellate court has declared that the mere presence of a recommended discharge limit in a TMDL *ipso facto* means that it is reasonable. The court placed great weight on the fact that the TMDL was approved by the U.S. EPA—which is irrelevant in any event—despite the fact that U.S. EPA does not require the State to submit the data that supposedly supports the TMDL.

The appellate court's erroneous decision will affect all of the Chamber's members that are required to have NPDES permits by subjecting them to essentially unreviewable discharge limits that will require the expenditure of millions of dollars, merely because the permit limits were plucked from a TMDL. Amicus curiae respectfully requests that this Court accept jurisdiction to correct this erroneous decision.

Appellant's Proposition of Law No. 3: ERAC's failure to consider evidence in opposition to a NPDES limit derived from a TMDL unconstitutionally insulates Ohio EPA's actions from meaningful review and denies the challenging party its right to due process.

Both the Ohio Constitution and the United States Constitution require administrative proceedings to comport with due process. *Village of Harbor View v. Jones*, 10th Dist. 10AP-356, *et seq.*, 2010-Ohio-6533, ¶ 36. 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 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also State ex rel. Plain Dealer Publishing Co. v. Floyd*, 111 Ohio St.3d 56, 2006-Ohio-4437, ¶ 45.

TMDLs are simply planning documents and are not self-executing. *See, e.g., Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). Therefore, any attempt to challenge a TMDL at the time it is issued would be dismissed on the basis of ripeness. *City of Arcadia v. EPA*, 265 F. Supp.2d 1142, 1155 (N.D. Cal. 2003)(holding claim challenging TMDL was unripe because the TMDLs imposed no present duties nor required immediate changes.)

Therefore, if a NPDES permit limit is based on a TMDL, a party must have the right to a meaningful review when the permit is issued. *Dayton Power & Light Co., v. Schregardus*, 123 Ohio App. 3d 476, 480, 704 N.E.2d 589 (10th Dist. 1997)(holding that ERAC must accept a party's appeal of the Director's decision because the party was no prior opportunity to comment on or challenge the decision). Because the appellate court held that the mere presence of a draft allocation in a TMDL constitutes a sufficient factual foundation for a NPDES permit limit, such permit limits are essentially unreviewable. This constitutes a clear denial of due process.

In support of its holding, the appellate court explained that Appellant Fairfield County was afforded the opportunity to challenge the permit limits during the permitting process and therefore its due process was not violated. The court, however, ignored the fact that due process requires a *meaningful* review, something that Fairfield County was denied. *Mathews*, 424 U.S. at 333. If the TMDL automatically creates a valid factual foundation for a permit limit despite overwhelming and uncontested evidence to the contrary, then no meaningful review has been afforded the permittee.

Under the Court's logic, Appellant Fairfield County's permit and all permits based on TMDLs are insulated from meaningful review. If this decision stands, a great number of the Chamber's members would also be unconstitutionally denied their due process if they wished to challenge their NPDES permits based on TMDLs. This court should accept jurisdiction to reverse the Tenth District's decision.

Appellant's Proposition of Law No. 4: Where a discharger is not harming aquatic life, Ohio EPA may not impose unnecessarily stringent water quality standards.

Ohio Adm. Code 3745-1-07(A)(6)(a) explicitly states that if a watershed is in attainment of biological criteria, then Ohio EPA may not require the discharger to meet more stringent chemical criteria. The logic behind the rule is simple: if aquatic life is not being harmed, there is no justification for a discharger to undertake unnecessary costly "improvements" to its wastewater discharge.

In this case, Ohio EPA issued a NPDES permit to Appellant Fairfield County with a chemical-specific limit for Total Dissolved Solids ("TDS"). However, Ohio EPA did not determine whether the TDS currently being discharged by Fairfield County was having an

adverse effect on the biology of Blacklick Creek. Instead, it jumped straight to the chemical specific criteria, despite the rule requiring otherwise.

In fact, Appellant Fairfield County presented un rebutted evidence to ERAC conclusively proving that Appellant's plant has been discharging TDS into Blacklick Creek for years at a level substantially higher than the proposed permit limit, and Blacklick Creek has continued to meet or exceed the applicable biological criteria. Therefore, Ohio EPA was not authorized to impose the chemical specific limit for TDS.

The court of appeals, however, upheld Ohio EPA's permit limit, despite the un rebutted fact that they are demonstrably unnecessary. This decision ignores the law of Ohio. Moreover, all Ohio businesses subject to these types of permits, either now or in the future, will be forced to make unnecessary and costly improvements to their facilities. Amicus Curiae Chamber respectfully requests this Court accept jurisdiction to prevent this type of outcome for Ohio's industries.

Appellant's Proposition of Law No. 5: ERAC is required to make findings based on the evidence presented to it, and, where a party presents probative and uncontested factual evidence in support of its challenge, ERAC may not remand the issue back to Ohio EPA.

ERAC is required to make findings based on the evidence presented to it. R.C. 3745.05(G); Ohio Adm. Code 3746-11-03; *Salem v. Koncelik*, 164 Ohio App.3d 597, 2005-Ohio-5537, 853 N.E.2d 799, ¶ 20 (10th Dist.)(remanding the case back to ERAC because it failed to make required findings, and it is ERAC's duty to make its determinations given the evidence presented at the de novo hearing). It failed to do so in this case, and the appellate court upheld the erroneous decision.

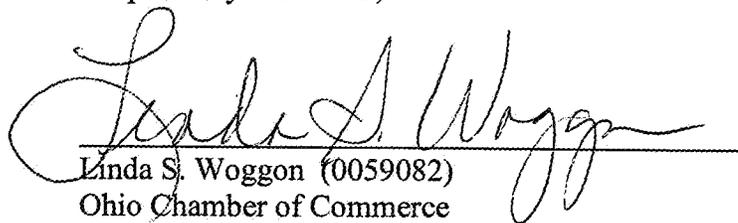
Appellant Fairfield County challenged Ohio EPA's failure to consider the technical feasibility and economic reasonableness of the NPDES permit limitations, as Ohio EPA is statutorily required to do. R.C. 6111.03(J)(3) requires such a determination in order "to ensure that the balance between regulation and encouragement of business is properly struck." *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274, 2005-Ohio-4982, 834 N.E.2d 786, ¶ 20. Not only did Appellant show that Ohio EPA did not conduct such an analysis, it also presented unrebutted and overwhelming evidence that the TDS limit is not technically feasible, the cost to reduce the phosphorus to the proposed level is not economically reasonable, and a reduction of either TDS or phosphorus will provide no benefit to Blacklick Creek.

Despite the evidence presented by Appellant, ERAC failed to make the required factual findings, and simply remanded the case back to Ohio EPA. This is error. Ohio EPA should be treated like any other litigant. If it fails to originally make the determination required by statute, and then fails to rebut the evidence presented by an Appellant, Ohio EPA should not be given another chance. If an Appellant failed to meet its burden of proof before ERAC, it would not have a second chance. Almost all of Ohio's businesses are involved in some facet of environmental law or regulation. Any number of those matters can, and often do, end up in front of ERAC. Those businesses should not be forced to shoulder the significant costs of challenging a decision of Ohio EPA only for their evidence to be dismissed as effectively irrelevant by ERAC.

V. CONCLUSION

This case involves a substantial constitutional question and presents a matter of public and great general interest. The exercise of jurisdiction is warranted and respectfully requested.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following persons this 8th day of July, 2013 via regular U.S. Mail, postage prepaid:

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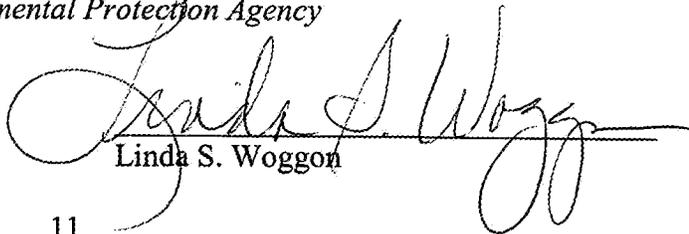
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