

ORIGINAL

In the
Supreme Court of Ohio

BOARD OF COMMISSIONERS OF
FAIRFIELD COUNTY,

Plaintiff-Appellant,

v.

SCOTT NALLY, DIRECTOR OF
ENVIRONMENTAL PROTECTION,

Defendant-Appellee.

: Case No. 13-1085
:
:
: On Appeal from the
: Franklin County
: Court of Appeals,
: Tenth Appellate District
:
: Court of Appeals
: Case No. 11AP-508
:
:

DEFENDANT-APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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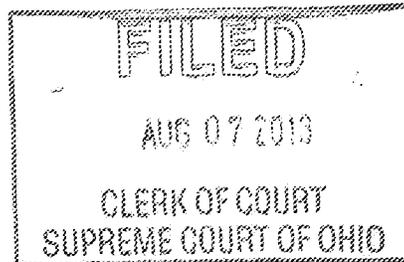


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INTRODUCTION

This case involves nothing more than a permittee wanting to discharge more pollution than its source-specific permit authorizes. The Board of Commissioners of Fairfield County (“the County”) operates a wastewater treatment plant that discharges pollution into Blacklick Creek, part of the Big Walnut Creek watershed. As required by the Clean Water Act, the County applied for and received a permit authorizing those discharges. The Director of Ohio EPA (“the Director”), on the basis of the County’s application and applicable law, rules and guidance, issued a lawful and reasonable permit, but the County thought that the limits were too strict. Despite opportunities to do so, the County did not avail itself of existing legal mechanisms to seek a variance for the limits that it contended were too stringent or avail itself of informal negotiations with the Director. Instead, the County appealed its permit, challenging the source-specific permit limits first at the Environmental Review Appeals Commission (“the Commission”), and, when that was unsuccessful, challenging the source-specific limits again at the Tenth District Court of Appeals. This appeal is simply a continuation of those earlier challenges. Having lost twice below, the County now asks *this* Court to substitute its judgment and challenge the Director’s valid factual foundation for the County’s wastewater treatment plant discharge limits.

The County’s attempts to broaden this case—to make it about more than just its source-specific permit limits—are meritless and must fail. The County had ample opportunity to participate in the joint state/federal process that set the maximum background pollution level for the Big Walnut Creek watershed as a whole—but did not take it. And it had ample opportunity to challenge U.S. EPA’s final approval and adoption of that limit—but did not take it. Thus this is not a case where the County was denied the opportunity to participate in the process; it is a

case where the County *declined* to participate in the process. It is not a failure of due process when a party fails to take advantage of the process that it is due.

At the end of the day, the County primarily asks this Court for two things, neither of which warrants review or relief. The County asks the Court to make a factual determination regarding source-specific permit limits. And the County asks the Court to excuse its earlier failures and allow it now to collaterally attack in state court U.S. EPA's approval and adoption of the maximum background pollution level for the Big Walnut Creek watershed. The Court's review of these requests is unwarranted and it should deny jurisdiction.

STATEMENT OF CASE AND FACTS

A. The maximum background level of pollution for a stream is approved and adopted by U.S. EPA as part of a joint state/federal process.

The primary goal of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. 1251(a) – (a)(1). To achieve that goal, the Clean Water Act embraces a philosophy of federal-state partnership. 33 U.S.C. 1251(b) and 1342(b). The State is primarily responsible for preventing, reducing, and eliminating pollution. 33 U.S.C. 1251(b). Along those lines, states are tasked with establishing water quality standards. 33 U.S.C. 1313(c). They are also responsible for identifying impaired waterbodies that are not meeting those standards and for determining the maximum daily amount of pollution that that should be discharged to those waterbodies. 33 U.S.C. 1313(d). The maximum amount of pollution that should be found in a waterbody as whole is known as the total maximum daily load, or "TMDL." *See id.*

A TMDL is a written, quantitative assessment of water quality problems in an entire waterbody. It specifies the amount a pollutant needs to be reduced from all potential sources to meet water quality standards. It also provides the basis for taking actions needed to restore water

quality in a waterbody. 33 U.S.C. 1313(d); Ohio Adm.Code 3745-2-02; Ohio Adm.Code 3745-2-12(B) and 3745-2-12(J).

Once the State completes a TMDL assessment, the TMDL is sent to U.S. EPA for approval. The TMDL does not become effective and enforceable until it is approved by U.S. EPA. 40 CFR 130.7(d)(2). Prior to submitting it to U.S. EPA, the State is required by federal law to submit the TMDL to the public for review as defined in the State's Continuing Planning Process. 40 CFR 130.7(c)(1)(ii). Ohio EPA's Continuing Planning Process provides for public notice and comment on all draft TMDLs. *See State Water Quality Management Plan*,¹ p. 9-10 (last visited Aug. 5, 2013).

Ohio EPA developed the TMDL for the Big Walnut Creek watershed in a manner consistent with federal law and with Ohio's Continuing Planning Process. The result was a 120-page document containing TMDLs for all bodies of water in the Big Walnut Creek watershed. Included on that list was a TMDL for the portion Blacklick Creek into which the County's Tussing Road Wastewater Treatment Plant discharges. The TMDL proposal as a whole was approved by U.S. EPA on September 26, 2005. Despite having a permit impacted by the approved TMDL, the County did not appeal the action of U.S. EPA.

B. The County received a discharge permit that limited the amount of pollution it could discharge to Blacklick Creek consistent with the TMDL. The Commission and the Tenth District determined that the pollution limits were supported by a valid factual foundation.

After U.S. EPA approved the recommended TMDL governing Blacklick Creek, Ohio EPA issued a renewal of a pollution discharge permit (better known as a National Pollutant Discharge Elimination System or "NPDES" permit) to the County. The permit renewal proposed to authorize the County's Tussing Road Wastewater Treatment Plant to discharge 3 million

¹ http://epa.ohio.gov/portals/35/mgmtplans/Final2006Plan/Final208_Aug06_A_main_text_SWQMP.pdf

gallons of water per day to Blacklick Creek, a stream in the Big Walnut Creek watershed. Joint Exhibit 4, at the February 9-13, 2009 Hearing. (“hereinafter “J.E. ___, pg. ___”). The permit also placed limits on the amount of phosphorus and total dissolved solids that the County could discharge into Blacklick Creek. The data underlying the TMDL approved by U.S. EPA was used as part of the basis for the phosphorus limit included in the final permit.

The County appealed its discharge permit to the Environmental Review Appeals Commission (“the Commission”), challenging the imposition of the discharge limits for phosphorus and total dissolved solids. The Commission held a week-long hearing, at the beginning of February 2009, where it heard testimony from 13 witnesses and received numerous exhibits. The Commission issued its decision in May 2011.

In a 46-page decision, the Commission found that the Director had a valid factual foundation for the phosphorus and total dissolved solids permit limits. The Commission nevertheless remanded the permit to the Director with instructions that he consider the technical feasibility and economic reasonableness of the pollutant limitations to the extent consistent with the Clean Water Act.

The County appealed the Commission’s finding that the Director had a valid factual foundation for the limits he placed on the amount of phosphorus and total dissolved solids that the County could discharge. Like the Commission, the Tenth District concluded that the Director had a valid factual foundation for the permit’s phosphorus and dissolved solids pollutant limits. The Tenth District also affirmed the portion of the Commission’s decision that remanded the permit to the Director of Ohio EPA so that he could, to the extent consistent with the Clean Water Act, consider the technical feasibility and economic reasonableness of the permit’s pollutant limits. This appeal followed.

**THIS CASE DOES NOT PRESENT A SIGNIFICANT CONSTITUTIONAL QUESTION
OR A QUESTION OF PUBLIC OR GREAT GENERAL INTEREST**

- A. The County had ample opportunity to participate in the development of, and challenge the determination of, both the maximum background level of pollution for Blacklick Creek and the specific pollutant limits in its permit.**

The County had ample opportunity to both participate in and challenge the development of the TMDL for the Big Walnut Creek watershed. It could have commented on and participated in the TMDL development process. It also could have challenged the final TMDL approval in federal court. The County chose not to do either. When a party fails to take advantage of the process its due, there is no denial of due process.

The approval of a TMDL by U.S. EPA is a final agency action which, under the Administrative Procedures Act (“APA”), can be appealed in federal court. *See* 5 U.S.C. 701-706 (2000); *see also Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1309 (9th Cir. 1992). Pursuant to the APA, “agency action” is defined as “the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act” 5 U.S.C. 51(13). Because U.S. EPA was the agency that actually approved the TMDL for phosphorus in Blacklick Creek, any challenge to the approval or implementation of the Big Walnut Creek TMDL could and should have been brought in federal court pursuant to the APA.

As part of the permitting process, the County also had the opportunity to participate in the allocation of the amount of pollution it could discharge under the TMDL. The County was notified of the specific limits that Ohio EPA proposed to include in its permit and had the opportunity to comment on those limits. Prior to issuing a discharge permit, the Ohio EPA issues a draft permit for review and comment. Following a minimum comment period of at least thirty days, the Ohio EPA reviews and responds to any comments received prior to issuing the permit in final form. 40 CFR 124.10 (b)(1); Ohio Adm.Code 3745-33-05. After that process, the

Director issues the discharge permit as a final action which may be appealed to the Environmental Review Appeals Commission.

In addition to these procedures, to the extent that a discharger questions its ability to meet the water quality based effluent limit, Ohio EPA's rules allow a discharger to seek a water quality variance. The County could have sought a variance in this case, but failed to do so.

B. This case involves discharger- and pollutant-specific determinations that are not of great general interest.

The County greatly overstates the potential impact of the Tenth District's decision. In its appeal, the County raises discharger-specific and site-specific concerns which may be of interest to its Tussing Road Wastewater Treatment Plant but are not of great general interest throughout the State. As explained above, Fairfield County passed up the opportunity to challenge the waterbody-wide TMDL. As a result, this case involves nothing more than a challenge to a single facility's permit limits. The Commission's and Tenth District's decisions did nothing more than hold that Ohio EPA had a valid factual foundation for two disputed pollutant limits included in discharge permit issued to the Tussing Road Waste Water Treatment Plant.

Ohio EPA evaluates each discharge permit individually based on the information collected by the Agency and the information provided by the discharger. The Tenth District's decision has not changed that fact. And should the limits of future permits be appealed, the Commission will continue to evaluate them. The Commission will also continue to evaluate the evidence underlying a pollutant limitation to determine whether the Director has a valid factual foundation for the limit. To argue that the Tenth District decision will cost Ohio dischargers millions or billions of dollars is to greatly exaggerate the potential impacts of this decision in an attempt to secure another opportunity to argue fact specific, facility specific, issues to this Court.

The County would like to discharge more pollution into Blacklick Creek – this was the

reason for their appeal to the Commission. Both the Commission and the Tenth District found that the pollutant limits contained in the County's permits were supported by sufficient evidence. Having lost twice, the County asks this Court to second-guess the facts behind its site-specific pollutant limits. These factors confirm why this Court should now deny jurisdiction.

ARGUMENT

Appellee's Proposition of Law No. 1: *The TMDL development is not a state rulemaking. Dischargers also have an ample opportunity to participate in the development of a TMDL and to obtain meaningful review of U.S. EPA's approval of a TMDL.*

Development of a TMDL is not a state rulemaking. While a state may develop *recommended* TMDLs, those TMDLs have no legal force and effect until they are approved by U.S. EPA. *See Monongahela Power Co. v. Chief, Office of Water Res., Div. of Env'tl. Prot.*, 211 W. Va. 619, 629 (W.Va. 2002) (Holding that development of a TMDL is not a state rulemaking because "a Total Maximum Daily Load becomes an order only upon approval of the [U.S.] EPA . . ."). Because TMDLs have no force of law (and do not affect the rights of private parties) until they are approved by U.S. EPA, they do not qualify as rules under R.C. 119.01(C) and are not subject to the requirements of R.C. 119.03. *See* R.C. 119.01(C). As a result, the County's claim that a TMDL is a rule that must be promulgated in accordance with Ohio law is unfounded.

The *one* state Supreme Court decision that the County cites as in support of its position reached its conclusions based on a misunderstanding of the nature of TMDL pollution load allocations. That court incorrectly found that proposed allocations of pollution contained in a more general TMDL proposal are binding requirements. *See Asarco Inc. v. State*, 138 Idaho 719, 724 (Idaho 2003) (providing "even if DEQ does not intend to enforce these limitations, and this Court is not determining whether or not it may properly do so, EPA considers these numbers binding"). But to the contrary, pollution allocations in a TMDL proposal are not binding and can be adjusted. *Fairfield Cty. Bd. of Commrs. v. Koncelik*, 2013-Ohio-2106, ¶ 141-43 (Finding that

allocations of pollution are not “set in stone” and that as part of the permitting process “individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL.” (internal citations omitted)). The *Asarco* decision from Idaho therefore stands in stark contrast to the findings of the Tenth District in this case. As the Tenth District correctly determined, allocations of pollution in a TMDL are not an absolute requirements and certain types of adjustments can be made at the permitting stage. *Id.* at ¶¶141-43, 150.

The TMDL development process also does not raise due process concerns. The County’s argument that interested members of the public do not have an opportunity to obtain a full and fair analysis of the impact and validity of the TMDL is simply incorrect. Members of the public are provided ample opportunity to participate in the development of a TMDL and are given an opportunity to challenge U.S. EPA’s approval of a TMDL in federal court.

State and federal law provide for notice and an opportunity to comment on the development of a TMDL. The federal Clean Water Act and accompanying regulations provide that a TMDL shall be subject to public review as defined in the State Continuing Planning Process. *See* 33 U.S.C. 1313(e). One requirement of a state continuing planning process is that it must to provide an opportunity for public participation. *See id.*, referencing 33 U.S.C. 1251 (stating that public participation should be provided for and encouraged). Accordingly Ohio EPA developed a TMDL planning process which includes opportunities for public notice and comment on a proposed TMDL. *See* State Water Quality Management Plan², pp. 9-10 (last visited Aug 4, 2013).

² http://epa.ohio.gov/portals/35/mgmtplans/Final2006Plan/Final208_Aug06_A_main_text_SWQMP.pdf.

U.S. EPA's approval of a state's TMDL recommendation is reviewable in federal district court pursuant to the APA. Under the APA, review of a final agency action is warranted when two conditions are satisfied. "First, the action must mark the 'consummation' of the agency's decision-making process, . . . it must not be of a merely tentative or interlocutory nature. Second, the action must be one by which 'rights or obligations have been determined,' or from which legal consequences will flow" *Barrick Goldstrike Mines, Inc., v. Browner*, 342 U.S. App. D.C. 45, 215 F.3d 45, 48 (D.C. Cir. 2000) (citations omitted). Approval of a state's TMDL satisfies those two conditions, and review is therefore available under the APA. *See Friends of the Earth v. United States EPA*, 333 F.3d 184, 193 (D.C. Cir. 2003) (holding that challenges to U.S. EPA's approval of a TMDL must be brought in federal district court, not a federal court of appeals); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1309 (9th Cir. 1992) (holding that review of U.S. EPA's approval of a TMDL belongs in federal district court, not state court or a federal court of appeals). Indeed, review in federal district court is the exclusive, yet adequate, avenue open to those wishing to challenge U.S. EPA's approval of a TMDL recommendation. *Cf. Scott v. Hammond*, 741 F.2d 992, 995 (7th Cir. 1984) (holding that "[t]he only recognized avenue for challenge to the substance of EPA's actions taken with respect to state submissions is a suit for judicial review under the Administrative Procedure Act (the 'APA').").

The County did not take advantage of any of the opportunities that it had to participate in the TMDL development process. The County could have submitted comments during State proceedings. It did not. The County also could have challenged U.S. EPA's approval of the TMDL in federal district court. Again, it did not. If the process has failed, then it was a failure on the part of the County.

Challenges to a waterbody-wide TMDL are ripe when U.S. EPA approves a state's TMDL recommendation. The County's contrary claim that review of the approval of a TMDL is unavailable prior to the permitting stage is based on a misreading of the relevant case law. The case law that the County relies on to support its claim relate to challenges to the *implementation* of a TMDL, not the adoption of the TMDL itself. *See City of Arcadia v. U.S. EPA*, 265 F.Supp. 2d 1142, 1155 (N.D. Cal. 2003) (discussing the challenge as one to "specific and expensive implementation measures" and to "possible implementation."). For purposes of judicial review, it is well-established that there is a significant difference between implementation and approval. *See Bravos v. Green*, 306 F. Supp.2d 48, 56 (D.D.C. 2004) ("The action challenged here is not the EPA's approval of the TMDL limits, but rather, the agency's alleged approval of the State's implementation plan. . ."). And all that is meant by the statement "TMDLs are not self-executing" is that, while challenges to a TMDL as a whole might be appropriate, challenges to *source-specific* limits are not ripe until the permitting process. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002) (noting that TMDL approval does not "specify the load of pollutants that may be received from particular parcels of land or describe what measures the state should take to implement the TMDL.").

In fact, the County *did* obtain judicial review of how the TMDL for Blacklick Creek was implemented in its permit. Following the submission of an application for renewal of the County's NPDES permit, Ohio EPA publicly noticed a draft NPDES Permit No. 4PU00004*HD. the County issued comments on the draft NPDES permit and a series of meetings between the parties followed. The Ohio EPA issued a written response to the County's comments. As a result of comments received from the County, certain modifications were made to the permit including a reduction of monitoring for lead, nickel and zinc, and an elimination of the

requirement to monitor for copper. J.E. 5, pp. 2-4. After the conclusion of the notice and comment period, Ohio EPA issued a final NPDES permit to the County. Rather than discuss that permit further or seek a variance, the County in turn appealed that final permit renewal to the Commission.

The County's failure to present the Commission with sufficient evidence to justify its position does not mean that it was denied meaningful review. Neither the Commission nor the Court of Appeals held that the TMDL created an un rebuttable factual foundation for the County's NPDES permit limits; they simply found that the County failed to present the evidence necessary to establish that the discharge limits that the Director imposed were unreasonable or unlawful. This Court's review of this fact-specific question is not warranted.

Appellee's Proposition of Law No. 2: *Ohio EPA may use the data collected and analysis conducted as part of a TMDL's creation in support of a pollutant limitation.*

As the Tenth District correctly concluded, data generated as part of the TMDL allocation process can later be used to support a pollutant limitation in a specific discharge permit. *Fairfield Cty. Bd. of Commrs. v. Koncelik*, 2013-Ohio-2106, ¶ 66. The Tenth District found that the data generated by the Director when he developed the overall Big Walnut Creek watershed TMDL was reliable, probative, and substantial evidence and found that it was permissible to rely on that data when determining how much phosphorus the Tussing Road Wastewater Treatment Plant should specifically be allowed to discharge. *Id.* at ¶¶ 66, 76.

The Tenth District also correctly concluded that there was a direct correlation between the data collected from the Big Walnut Creek watershed, the phosphorus limit included in the TMDL, and the phosphorus limit incorporated into the County's discharge permit. *Id.* at ¶ 65. The Tenth District *did not* find that the phosphorus limitation was automatically dictated by the TMDL approved by U.S. EPA. Memorandum in Support of Jurisdiction p. 11, (arguing that the

Tenth District held that “the TMDL automatically creates a valid factual foundation for a permit limit.”). Instead, the Tenth District held (as the Commission had held before it) that pollution allocations included in federally approved TMDLs are flexible and can be changed prior to incorporation into a discharge permit. *Id.* at ¶ 143 (“Automatic implementation of the individual TMDL allocations exactly ‘as is’ is not required in the NPDES permit.”). The Tenth District simply found that if Ohio EPA adjusts the specific pollution allocation, then it must make sure that the overall amount of pollution for the waterbody remains consistent with the waterbody-wide TMDL approved by the federal government. *Id.*

Appellee’s Proposition of Law No. 3: *The Director of Ohio EPA has the authority to require pollutant limitations that are designed to ensure compliance with State water quality standards in NPDES permits.*

Discharge permits must specify the maximum level of a pollutant that that can be discharged and still allow a receiving stream to remain in compliance with statewide water quality standards. Ohio Adm.Code 3745-33-05(A)(1)(a). The County’s discharge permit included a pollutant limitation for total dissolved solids in order to ensure compliance with the statewide water quality standard for total dissolved solids. *Fairfield Cty. Bd. of Commrs. v. Koncelik*, 2013-Ohio-2106, ¶ 97. The Tenth District correctly held that this statewide water quality standard had a valid factual foundation and the Director was not required to create a site specific water quality standard for total dissolved solids. *Id.* at ¶ 102.

Statewide water quality standards are part of the Ohio Administrative Code and are promulgated pursuant to the procedural requirements of Ohio Revised Code 6111.03 119.03.. Those requirements include public notice and an opportunity for comment. *See* Ohio Administrative Code 3745-1-07, Table 7-1. The Statewide water quality standard for total dissolved solids is 1,500 mg/l. *Id.* If there is a reasonable potential for a pollutant to cause or contribute to an excursion of an applicable water quality standard, a limitation for this pollutant

is included by the Director of Ohio EPA in a discharger's permit. 33 U.S.C. 1313(c); 40 CFR 122.44(d)(1)(i); Ohio Adm.Code 3745-33-01(HH)(5).

Ohio EPA concluded, using data submitted by the County, that the level of total dissolved solids leaving the Tussing Road Wastewater Treatment Plant had a high likelihood of causing violations of the Statewide water quality standard for total dissolved solids. 33 U.S.C. 1313(c); 40 CFR 122.44(d)(1)(i); Ohio Adm.Code 3745-33-01(HH)(5); Owens, Vol. III, pg. 133, Appendix A-3. To convert the federally-approved statewide water quality standard of 1,500 mg/l of TDS into an pollutant limit that could be integrated into an discharge permit, Ohio EPA relied on a formula set forth in Ohio Adm.Code 3745-2-06 and determined that the pollutant limit for total dissolved solids would be 1,646 mg/l for a design flow of 3 million gallons per day, and a monthly average loading limitation of 18,692 kg per day.

The Tenth District correctly held that, pursuant to Ohio Administrative Code 3745-01-07(A)(6), the Director has the authority, but is not required, to create a site-specific water quality standard for total dissolved solids. *Fairfield Cty. Bd. of Commrs. v. Koncelik*, 2013-Ohio-2106, ¶ 100. Ohio law contemplates site-specific water quality standards in limited circumstances. Where a waterbody is in demonstrated attainment of biological criteria, the Director may develop a site-specific water quality criterion. Ohio Adm.Code 3745-1-07(A)(6)(a)(i).

The County also had the option to provide a justification for a site-specific water quality standard to the Director for his approval. *Id.* But much like the failed opportunities to participate in the TMDL development process, it did not do so. The County made no effort to seek a site-specific standard, and as already discussed, the Director had no affirmative obligation to develop one on his own initiative. Accordingly, the Director possessed a valid factual foundation to establish a total dissolved solids limitation in accordance with the Statewide water

quality standard for total dissolved solids. This Court's review is not warranted simply because the County might now regret its own inaction during the permitting process.

Appellee's Proposition of Law No. 4: *The Commission properly remanded the phosphorus and total dissolved solids pollutant limitations to the Director of Ohio EPA in order to conduct a technical feasibility and economic reasonableness analysis.*

The Commission is charged with reviewing the Director's actions to determine whether they are lawful and reasonable. R.C. 3745.04(B) ("Any person who was a party to a proceeding before the director of environment protection may participate in an appeal to the environmental review appeals commission for an order vacating or modify the action of the director..."). As provided in this enabling statute, review by the Commission contemplates an action by the Director. In circumstances where a final reviewable action of the Director has not occurred, review by the Commission is not warranted. *Environmental Company v. Korleski*, 2009 Ohio ENV Lexis 3. Similarly, the Commission, in its ruling cannot substitute its judgment for that of the Director. *Citizen Committee to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 69 (10th Dist. 1977).

Where the Director has not analyzed an issue, it is entirely appropriate for the Commission to remand the issue back to the Director for further analysis. Indeed, this is exactly the holding in *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274, 2005-Ohio-4982, cited by Appellants. Memorandum in Support of Jurisdiction p. 14. In that case, the Director failed to make a finding of economic reasonableness and technical feasibility under Ohio's air pollution laws, and this Court affirmed the appellate court decision to remand the matter to the Director for such a determination – not to the Commission. *Id* at ¶ 21. The Commission is an appellate tribunal, reviewing final actions of the Director and the factual and legal bases therefor. R.C. 3745.04. The decision of the Tenth District in this case to remand to the Director was consistent with R.C. 3745.04 and this Court's precedent, and should not be the basis for further review.

CONCLUSION

For these reasons, this Court should decline jurisdiction over this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Defendant-Appellee's Memorandum in Opposition to Jurisdiction was served via ordinary mail this 7th day of August, 2013, upon the following counsel:

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