

IN THE SUPREME COURT OF OHIO

ORIGINAL

Board of Commissioners of Fairfield County,	:	
	:	CASE NO. 2013-1085
	:	
Plaintiff-Appellant,	:	On Appeal from the Franklin County Court of Appeals
	:	Tenth Appellate District
v.	:	
	:	
[Scott J. Nally], Director of Environmental Protection,	:	Court of Appeals
	:	Case No. 11AP-508
	:	ERAC No. 235929
Defendant-Appellant.	:	

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APPELLANT BOARD OF COMMISSIONERS OF FAIRFIELD COUNTY'S MOTION FOR RECONSIDERATION OF DECISION NOT TO ACCEPT PROPOSITIONS OF LAW II AND III FOR REVIEW

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## I. INTRODUCTION

Appellant Fairfield County Board of Commissioners (“Fairfield County”) respectfully asks this Court to reconsider its Entry dated November 6, 2013, accepting jurisdiction over only one of the five Propositions of Law advanced by the County. The Court accepted only Proposition of Law No. I. However, three justices (Pfeifer, Lanzinger, and French, J.J.) voted to also accept jurisdiction as to Proposition of Law Nos. II and III. *11/06/13 Case Announcements*, 2013-Ohio-4861. Because Proposition of Law Nos. II and III are so closely intertwined both substantively and procedurally with Proposition of Law No. I, the three Propositions should be considered together. In addition, as described below, accepting only Proposition of Law No. I for review is likely to result in Fairfield County (and hundreds, or thousands, of other local governments and companies operating wastewater treatment plants) not being able to obtain *meaningful* review of Ohio EPA TMDL-related permitting and rulemaking actions—actions that will potentially require the expenditure of many hundreds of millions of dollars.

Although a favorable decision by this Court on Proposition of Law No. I—which states that TMDLs must be promulgated as rules before they can be used as a basis for permit limits—will create important procedural protections for the regulated community, this Court’s review of Proposition of Law Nos. II and III is needed to “put

the meat on the bones” of these procedural protections, by establishing that regulated entities have meaningful statutory and due process rights. At their heart, those two propositions of law assert that the regulated community has a constitutional right, or at least a statutory right, to have the adverse evidence and their own evidence *actually and meaningfully* evaluated and judged under Ohio law.

A favorable decision by the Court on Proposition of Law No. I will introduce the not-inconsequential procedural protections afforded by rulemaking. However, leaving intact the decision of the lower court on the statutory and constitutional issues inherent in Propositions II and III is likely to allow Ohio EPA to circumvent the equally important substantive protections that judicial (and quasi-judicial) review is supposed to protect. It is no stretch to imagine Ohio EPA adopting a TMDL-based rule, and then defending a challenge to the rule by arguing that solely because the TMDL was approved by USEPA, (1) the rule has a sufficient factual foundation or, (2) the appealing party cannot challenge certain aspects of the rule, because those challenges were already resolved in the Agency’s favor in the decisions of ERAC and Court of Appeals below.

## **II. ARGUMENT**

Pursuant to Supreme Court Practice Rule 18.02, Fairfield County respectfully moves this Court for reconsideration of its Entry declining jurisdiction over Proposition of Law Nos. II and III. “This Court’s power to reconsider matters permits it to “correct

decisions which, upon reflection, are deemed to have been made in error.” *State ex rel. Shemo v. Mayfield Hts.*, 96 Ohio St.3d 379, 2002-Ohio-4905, 775 N.E.2d 493, ¶ 5 (internal quotations omitted).

Fairfield County respectfully submits that this Court’s decision not to review Proposition of Law Nos. II and III leaves open the door for Ohio EPA to adopt TMDL-based rules and interpret, implement, and enforce them through NPDES permits while shielding the process from meaningful review.

Proposition of Law Nos. II and III are two sides of the same coin: due process guarantees a regulated entity a *meaningful* opportunity to be heard and have the evidence *actually* evaluated—both the agency’s evidence (Proposition II) **and** its own evidence (Proposition III). Such meaningful review is also guaranteed by statute: R.C. 3745.04 subjects all actions on the part of Ohio EPA to a *de novo* review if no adjudicatory hearing was held before the Agency.

The problem that likely arises if Propositions II and III are not also accepted for review is that the statutory and due process violations that the lower court sanctioned in permit appeals will now also plague rulemaking appeals. For example, the appeals court held, *inter alia*, that the presence of a recommended discharge limit in a USEPA-approved TMDL was, in and of itself, an adequate and valid foundation for the ensuing permit limit, notwithstanding the volume and credibility of all other evidence to the contrary. If that ruling is not reviewed and this Court decides in Fairfield County’s

favor on Proposition I, Ohio EPA will almost certainly argue in the next case (based on the decisions below) that the fact that the promulgated TMDL was approved by USEPA is sufficient foundation to uphold the rule under Ohio law, even if all the data, assumptions, logic, and conclusions underlying the rule are faulty.

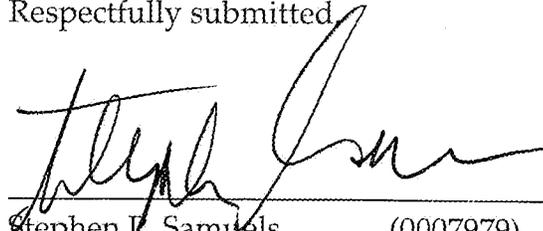
Obviously, this is not an issue confined to the facts of this particular case. The very real danger is that hundreds of counties, municipalities, and businesses throughout the State will be affected by Ohio EPA's ability to impose functionally-unreviewable limits through TMDL-driven NPDES permits or through TMDL-based rules. If Fairfield County's un rebutted evidence below is any indication, the effect of the TMDLs will be to force Ohio's cities, counties, and companies to spend millions of dollars "fixing" ephemeral problems. And the TMDL process does not sunset. The due process and statutory evisceration created by ERAC and sanctioned by the Court of Appeals will continue to plague the permitting and regulatory process for decades to come.

The Court's decision to only accept Proposition of Law I does not address, and cannot provide redress for, the substantive problem: insulating TMDL-based permits and TMDL-based rules from meaningful review by those directly impacted by them.

### III. CONCLUSION

Together with Proposition of Law No. I, Proposition of Law Nos. II and III present the guts of the inextricably intertwined TMDL/rulemaking/permitting process. Appellant Fairfield County requests that this Court reconsider its November 6, 2013 Entry and accept jurisdiction of Proposition of Law Nos. II and III.

Respectfully submitted,



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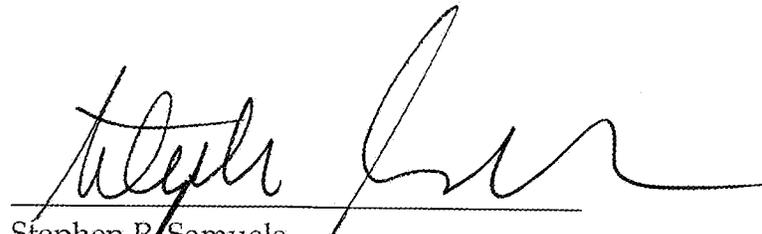
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following persons this 18th day of November, 2013 via regular U.S. Mail, postage prepaid:

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