

ORIGINAL

IN THE SUPREME COURT OF OHIO

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 Case No. 235929
	:	
Defendant-Appellant.	:	

MEMORANDUM OF AMICUS CURIAE THE OHIO CHAMBER OF COMMERCE IN SUPPORT OF APPELLANT’S MOTION FOR RECONSIDERATION OF DECISION NOT TO ACCEPT DISCRETIONARY APPEAL ON PROPOSITIONS OF LAW II AND III

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I. INTRODUCTION.

Pursuant to S.Ct.Prac.R. 18.02(C), Amicus Curiae the Ohio Chamber of Commerce (“Chamber”) respectfully requests that the Ohio Supreme Court grant Appellant Fairfield County Board of Commissioners’ (“Fairfield County”) November 18, 2013 Motion for Reconsideration and accept Proposition of Law Nos. II and III for review together with Proposition of Law No. I.

II. SUMMARY OF BASIS FOR CHAMBER’S INTEREST AND SUPPORT OF FAIRFIELD COUNTY’S MOTION FOR RECONSIDERATION.

The Chamber hereby incorporates by reference its Statement of Interest set forth in its Memorandum in Support of Jurisdiction filed with this Court on July 8, 2013.

The Chamber appreciates this Court’s decision to accept jurisdiction over Appellant’s Proposition of Law No. I. However, Proposition of Law Nos. II and III are so integral to the analysis and disposition of Proposition of Law No. I that they should be considered and decided together. Proposition of Law No. I concerns the need to promulgate TMDLs pursuant to R.C. Chapter 119 before the TMDL may serve as a basis for permit limitations. Proposition of Law Nos. II and III address the proper standard of review for the resulting TMDL-based rules and corresponding NPDES permits. Since 1893, the Chamber’s mission has remained unchanged: to champion economic growth for the benefit of all Ohioans. Part of the way it does so is by remaining vigilant about unnecessary costs associated with misdirected governmental action. Because the decision of the Court of Appeals below allows Ohio EPA virtual carte blanche in imposing new and expensive obligations on the Chamber’s members and thereby jeopardizes the Chamber’s mission, it respectfully requests that the Court undertake a plenary review of the TMDL/rulemaking/permitting process.

III. ARGUMENT IN SUPPORT OF RECONSIDERATION.

This Court has accepted jurisdiction over Proposition of Law No. I: whether a TMDL must be promulgated under Ohio law before it may be used as the basis for permit limits. A favorable decision for Appellant Fairfield County on this Proposition will no doubt create important regulatory protections for all permittees throughout Ohio. However, Proposition of Law Nos. II and III present no less important issues that merit the Court's consideration. If the lower court's decision is allowed to stand on these issues, it will eradicate Ohio's permittees' statutory and due process rights by shielding Ohio EPA's TMDL-based rules and TMDL-driven NPDES permits from any meaningful review.

Proposition of Law Nos. II and III address two issues that would remedy the statutory and due process violations that the lower court has sanctioned. Together, they provide that the tribunals that review Ohio EPA actions—ERAC and the Court of Appeals—must *actually and meaningfully* hear and evaluate all relevant evidence relating to challenges to TMDL-based rules or TMDL-driven permits. These Propositions address the proper standard of review that will govern Ohio EPA's development of a TMDL-based rule as well as that rule's implementation, interpretation, and enforcement.

The lower court's decision effectively held that US EPA's approval of a TMDL satisfies R.C. 3745.04 and due process requirements. This is error. If this Court does not accept Proposition of Law Nos. II and III for review, permittees will be subject to functionally unreviewable and unreasonably expensive discharge limits, costing Ohio's businesses, many of whom are Chamber members, millions, if not billions, of dollars.

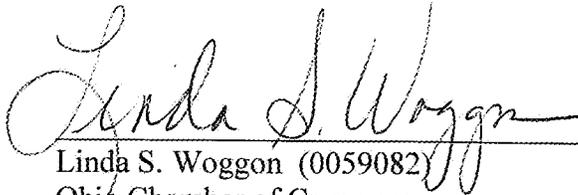
If this Court finds in favor of Fairfield County on Proposition of Law No. I, Ohio EPA will be required to promulgate TMDLs through the rulemaking procedures of R.C. Chapter 119

before they may serve as a basis for permit limits. This *procedural* protection will undoubtedly benefit Ohio's permittees. However, only adding this safeguard may not provide the scope of protection this Court intended. Additional due process safeguards are necessary. The appellate court's decision functionally precludes permittees' from challenging the *substantive* underpinnings of the TMDL, such as the data, logic, assumptions, and conclusions. This ruling violates R.C. 3745.05(A), which requires ERAC to conduct a *de novo* hearing. Such a hearing, however, is a sham if, as the lower court, held one bit of evidence—USEPA approval of a TMDL—trumps all.

V. CONCLUSION

Proposition of Law Nos. II and III are not fact-specific arguments affecting only Appellant Fairfield County. In actuality, the lower court's decision resonates state-wide by impacting every Ohio business that holds an NPDES permit to discharge into a watershed subject to a TMDL. The Chamber respectfully requests that the Court grant Appellant Fairfield County's Motion for Reconsideration, and accept jurisdiction of the two additional related propositions of law.

Respectfully submitted,



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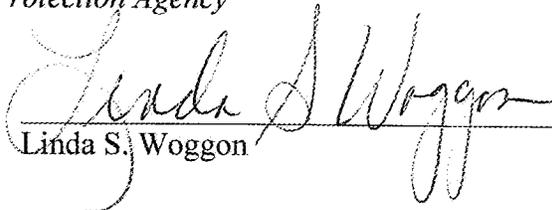
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CERTIFICATE OF SERVICE

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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