

ORIGINAL

IN THE SUPREME COURT OF OHIO

BOARD OF COMMISSIONERS OF
FAIRFIELD COUNTY,

Appellant,

v.

SCOTT NALLY, DIRECTOR OF
OHIO ENVIRONMENTAL PROTECTION,

Appellee.

:
: CASE NO. 2013-1085
:
: 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* ASSOCIATION OF OHIO
METROPOLITAN WASTEWATER AGENCIES IN SUPPORT OF APPELLANT'S
MOTION FOR RECONSIDERATION OF DECISION NOT TO ACCEPT
PROPOSITIONS OF LAW II AND III FOR REVIEW

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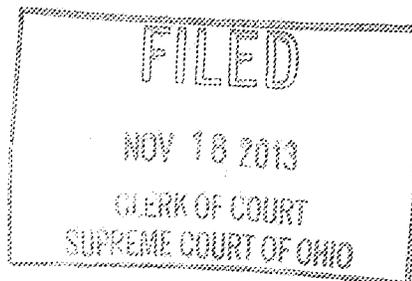
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I. INTRODUCTION

On November 18, 2013, Appellant Fairfield County Board of Commissioners (“Fairfield County”) filed a Motion for Reconsideration requesting that the Court accept jurisdiction over Propositions of Law Nos. II and III in addition to Proposition of Law No. I. These three Propositions of Law are interrelated and collectively present issues of substantial constitutional and great general interest, which should be addressed together to prevent depriving Ohio public wastewater agencies, like our members, of *actual* and *meaningful* review of TMDL-based rules and permit limits. Accordingly, pursuant to S.Ct.Prac.R. 18.02(C), the Association of Ohio Metropolitan Wastewater Agencies (“AOMWA”) respectfully submits this memorandum in support of Fairfield County’s Motion for Reconsideration.

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

AOMWA incorporates herein by reference its Statement of Interest as set forth in its Memorandum in Support of Jurisdiction filed with this Court on July 8, 2013. Further, AOMWA members will be directly impacted by the Court’s decision on jurisdiction in this matter. They are permittees under National Pollution Discharge Elimination System (“NPDES”) permits issued by Ohio EPA. These permits contain discharge or effluent limits that are in some instances derived from allocations adopted in total maximum daily pollutant loadings (“TMDLs”). If meaningful review is not afforded, our members, like Fairfield County in this instance, will be unable to challenge the scientific validity of such limits as incorporated into their permits. However, expensive expenditures may be required to achieve compliance with such limits even if they are not scientifically valid—expenses which are ultimately borne by the citizens and businesses of Ohio. Therefore, to protect the limited resources of our communities, AOMWA respectfully requests that the Court grant Fairfield County’s Motion for

Reconsideration and accept Propositions of Law Nos. II and III in addition to Proposition of Law No. I to ensure that Ohio's public wastewater agencies have *actual* and *meaningful* review, not merely just procedural review.

III. ARGUMENT

AOMWA supports and incorporates by reference the arguments raised in Fairfield County's Motion for Reconsideration and in the related memorandums in support filed by *amici curiae* the Ohio Municipal League ("OML"), the County Sanitary Engineers Association of Ohio ("CSEAO") and the Ohio Chamber of Commerce ("Chamber").

Like Fairfield County and the other amici, AOMWA also appreciates the Court's decision to accept jurisdiction over Fairfield County's Proposition of Law No. I, which posits that Ohio EPA must subject TMDLs to R.C. Chapter 119 rulemaking requirements before treating them as binding on NPDES permittees, such as our members. Indeed, a favorable decision on this Proposition will create important regulatory protections for all permittees throughout Ohio.

However, Propositions of Law Nos. II and III present no less important issues that merit the Court's consideration. Collectively, they address the proper standard of review for the TMDL-based rules and NPDES permit limits which are so integral to the analysis and disposition of Proposition of Law No. I that they should be considered and decided together. Fairfield County's Proposition of Law No. II seeks this Court's input on whether Ohio EPA may adopt a TMDL-based discharge limit without *really* evaluating whether there is a causal connection between the discharge from a permit holder and a putative water quality impairment. Memorandum in Support of Jurisdiction, pp. 9-10. Relatedly, Proposition of Law No. III asks this Court to affirm that permitted entities subjected to limits derived from TMDLs must be

afforded an opportunity to be heard “at a meaningful place and in a meaningful manner” in accordance with due process. *Id.* at p. 10-12 (citations omitted). 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.

If Propositions of Law Nos. II and III are not also addressed, the upfront procedural protections of Chapter 119, which would be afforded by a favorable ruling on Proposition of Law No. 1, would not in and of themselves ensure *actual* or *meaningful* review of TMDL-based rules or permit limits once they are included in an NPDES permit. A rulemaking requirement alone will not vitiate the very real and very serious problem that the lower court’s decision has sanctioned: that US EPA’s mere approval of a TMDL *ipso facto* satisfies R.C. 3745.04 and due process requirements, irrespective of the volume and credibility of the evidence that the TMDL is scientifically bankrupt.¹

Because a favorable ruling on Proposition of Law No. I in Fairfield County’s appeal does not by itself ensure that affected permittees like public wastewater agencies will have an actual or meaningful opportunity to be heard, AOMWA believes that Fairfield County’s related Propositions of Law Nos. II and III present issues of constitutional importance and great general interest over which this Court should accept jurisdiction.

¹ Instead of meaningful review, Ohio EPA would simply have affected permittees avail themselves of “informal negotiations with the Director” as a mechanism for challenging the assumptions, data (or lack thereof), policy choices, and conclusions underlying a TMDL-based rule or permit limit. Memorandum in Opposition to Jurisdiction, p. 1. This case is a poster child for why this process is insufficient to protect permittees’ statutory and due process rights and, ultimately, the resources of our communities.

IV. CONCLUSION

For the foregoing reasons as well as those articulated by Fairfield County and *amici curiae* OML, CSEAO and the Chamber in their respective filings referenced above, AOMWA urges this Court to grant Fairfield County's Motion for Reconsideration and also accept jurisdiction in this matter over Propositions of Law Nos. II and III.

Respectfully submitted,



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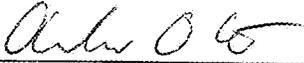
*Counsel for Amicus Association of Ohio
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum of Amicus Curiae Association of Ohio Metropolitan Wastewater Agencies in Support of Appellant's Motion for Reconsideration of Decision Not to Accept Propositions of Law II and III for Review* 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 November 18, 2013:

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