

IN THE SUPREME COURT OF OHIO

BOARD OF COMMISSIONERS OF FAIRFIELD COUNTY, OHIO,	:	CASE NO. 2013-1085
	:	
Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
	:	
SCOTT J. NALLY, DIRECTOR OF ENVIRONMENTAL PROTECTION FOR THE STATE OF OHIO,	:	Court of Appeals Case No. 11-AP-508 ERAC Case No. 235929
	:	
Appellee.	:	

**MEMORANDUM OF *AMICUS CURIAE* OHIO MUNICIPAL LEAGUE (OML) AND
COUNTY SANITARY ENGINEERS ASSOCIATION OF OHIO (CSEAO) IN SUPPORT
OF APPELLANT'S MOTION TO ALSO ACCEPT PROPOSITION OF LAW NOS. II
AND III FOR REVIEW**

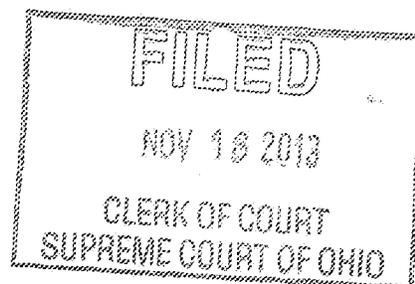
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I. INTRODUCTION.

Pursuant to S. Ct. Prac. R. 18.02(C), *Amicus Curiae* Ohio Municipal League (OML) and County Sanitary Engineers Association of Ohio (CSEAO) respectfully request that the Ohio Supreme Court grant Appellant Fairfield County Board of Commissioners' November 15, 2013, Motion for Reconsideration, and accept Fairfield County's Proposition of Law Nos. II and III for review together with the review of Proposition of Law No. I.

II. SUMMARY OF BASIS FOR OML AND CSEAO'S INTEREST AND SUPPORT OF FAIRFIELD COUNTY'S MOTION FOR RECONSIDERATION.

Amicus Curiae OML and CSEAO hereby incorporate by reference their Statement of Interest set forth in their joint "Memorandum of *Amicus Curiae* Ohio Municipal League (OML) and County Sanitary Engineers Association of Ohio (CSEAO) in Support of Jurisdiction of Appellant," filed with the Court on July 8, 2013.

The OML and CSEAO both appreciate and strongly support this Court's November 6, 2013, Entry accepting jurisdiction over Proposition of Law No. I raised in Fairfield County's appeal. Proposition of Law No. I addresses the important issue of whether Ohio EPA must promulgate under R.C. Chapter 119 total maximum daily pollutant loadings ("TMDLs") for pollutant discharges into Ohio's streams before lawfully imposing such limits in discharge permits issued to local governments and industry located along the applicable stream. A ruling by this Court in favor of Fairfield County on this issue will provide important procedural protections for all of OML and CSEAO's members.

However, Proposition of Law Nos. II and III raised in Fairfield County's appeal address the closely-related issue of the proper standard of review of TMDLs, and are so intertwined with Proposition of Law No. I that the three Propositions should logically be considered together. In addition, for the reasons elaborated upon below, accepting only

Proposition of Law No. I for review may effectively deny meaningful relief to Fairfield County and the members of OML and CSEAO who operate wastewater treatment plants across the State of Ohio.

III. ARGUMENT OF OML AND CSEAO IN SUPPORT OF FAIRFIELD COUNTY.

Fairfield County's appeal raised three Propositions of Law:

1. A TMDL is a rule that must be promulgated in accordance with Ohio law before it can be used as the basis for an NPDES permit limit.
2. The mere presence of a proposed discharge limit in a TMDL does not *ipso facto* create a valid, much less un rebuttable, factual foundation for an NPDES permit limit, and should not be afforded more weight than other evidence.
3. The Commission's failure to consider evidence in opposition to an 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.

See Memorandum in Support of Jurisdiction of Appellant Board of Commissioners of Fairfield County, p. ii.

The essence of Proposition of Law Nos. II and III is that the ERAC improperly held below (and the Court of Appeals affirmed) that U.S. EPA's approval under federal law of the disputed TMDL: (i) *ipso facto* created a valid, almost irrefutable, foundation under Ohio law to support imposing the TMDL's loading limits into the discharge renewal permit issued for the County's wastewater treatment plant, and (ii) limited the County's right under Ohio law to challenge the TMDL to nothing more than a challenge to the distribution of the approved loading limits, without any opportunity to challenge the underlying data, modeling, and conclusions that formed the basis for the loadings. *Id.* at pp. 9-12; *see also* Memorandum of

Amicus Curiae Ohio Municipal League (OML) and County Sanitary Engineers Association of Ohio (CSEAO) in Support of Jurisdiction of Appellant, pp. 9-11 (same).

Proposition of Law No. I addresses important procedural protections for OML and CSEAO's members under Ohio's rulemaking procedures codified under R.C. Chapter 119. However, Proposition of Law Nos. II and III effectively "put the meat on the bones," so to speak, for these procedural protections, by addressing the proper standard of review that will govern Ohio EPA's development of the TMDL that will be subjected to the rulemaking process, including the proper weight to be afforded to the fact that U.S. EPA may have approved the TMDL under federal law.

If this Court should find in Fairfield County's favor on Proposition of Law No. I, Ohio EPA will be required to undergo proper rulemaking procedures under R.C. Chapter 119 before imposing TMDLs upon local governments (and industry) in applicable discharge permits issued for wastewater treatment plants. However, this procedural protection is of limited value if, as was held below, the impacted parties are limited in their right to appeal the final TMDL rule to a review only of the distribution of the pollutant loadings, and not a *de novo* review of all aspects of the TMDL, including the underlying data, modeling, and conclusions, as required under R.C. 3745.05(A).¹ Such protection is also of limited value if, as was held below, the fact that U.S. EPA approved the applicable TMDL under federal law is deemed to be the controlling factor in determining whether recommended limits in the final TMDL rule are lawful and otherwise reasonable under R.C. 3745.05(F).²

Because Proposition of Law Nos. II and III are so closely related to Proposition of

¹ R.C. 3745.05(A) states that for final actions of Ohio EPA appealed to the ERAC, where no adjudication hearing was conducted below, the ERAC shall conduct a *de novo* hearing.

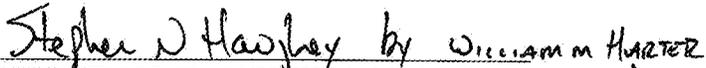
² R.C. 3745.05(F) states that upon completion of the hearing the ERAC must issue a written order (i) affirming the action under appeal if it is found to be lawful and reasonable, or (ii) vacating or modifying the action under appeal if it is found to be unlawful or unreasonable.

Law No. I, and because a resolution of Proposition No. I in favor of Fairfield County may not provide the scope of relief intended by the Court if it decides not to also take up Proposition of Law Nos. II and III for review, the three Propositions are intertwined with one another and should logically be reviewed together by this Court as part of the review of the “TMDL issues” presented in Fairfield County’s appeal.

IV. CONCLUSION.

For the foregoing reasons, the OML and CSEAO request that the Court grant Fairfield County’s Motion for Reconsideration, and take jurisdiction of the two additional TMDL-related issues that impact their members across the State of Ohio.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Memorandum Of Amicus Curiae Ohio Municipal League (OML) And County Sanitary Engineers Association Of Ohio (CSEAO) In Support Of Appellant's Motion To Also Accept Proposition Of Law Nos. II And III For Review* was sent via regular U.S. Mail on the 18th day of November 2013 to the following:

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