

In the
Supreme Court of Ohio

BOARD OF COMMISSIONERS OF FAIRFIELD COUNTY,	:	Case No. 2013-1085
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
	:	
SCOTT NALLY, DIRECTOR OF ENVIRONMENTAL PROTECTION,	:	Court of Appeals
	:	Case No. 11AP-508
	:	
Defendant-Appellee.	:	
	:	

**APPELLEE OHIO DIRECTOR OF ENVIRONMENTAL PROTECTION'S
MEMORANDUM IN OPPOSITION TO RECONSIDERATION**

STEPHEN P. SAMUELS* (0007979)

**Counsel of Record*

JOSEPH REIDY (0030346)

NICOLE WOODS (0084865)

Ice Miller, LLP

250 West Street

Columbus, Ohio 43215

614-462-5021

614-222-3489 fax

stephen.samuels@icemiller.com

Counsel for Appellant

Board of Commissioners of Fairfield County

MICHAEL DeWINE (0009181)

Attorney General of Ohio

ERIC E. MURPHY* (0083284)

State Solicitor

**Counsel of Record*

SAMUEL C. PETERSON (0081432)

Deputy Solicitor

L. SCOTT HELKOWSKI (0068622)

ALANA R. SHOCKEY (0085234)

Assistant Attorneys General

30 East Broad Street, 17th Floor

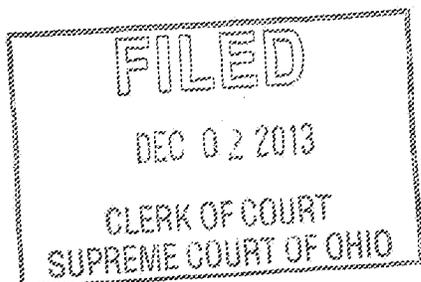
Columbus, Ohio 43215

614-466-8980

eric.murphy@ohioattorneygeneral.gov

Counsel for Appellee

Scott Nally, Director of Environmental
Protection



INTRODUCTION

Fairfield County's Motion for Reconsideration is extraordinary, even among reconsideration motions. The Motion does not simply seek a second bite at the Court's review; it actually changes what it asks the Court to review. In its Memorandum in Support of Jurisdiction, the County suggested that its Propositions of Law II and III sought review of case-specific factual and evidentiary issues that were already made in the permit process. Now the County advances a new argument in support of those propositions, one that does more than just ask the Court to review a lower tribunal's case-specific weighing of evidence. Instead, it asks the Court to speculate about how a *future* tribunal might weigh evidence in challenges to a hypothetical rulemaking as a basis to accept those propositions of law. Such speculation shows that the County's claims are unripe. Reviewing those claims is also unnecessary both because the Court has already addressed the evidentiary and procedural requirements applicable to rulemaking challenges and because accepting the County's second and third propositions of law would not aid the Court in resolving the question of law that it has already accepted.

ARGUMENT

The novelty of the arguments advanced in the County's Motion for Reconsideration is highlighted by the fact that it does not bother to restate the second and third propositions of law. Those propositions focus on weighing evidence in the *permit* proceedings below, while the arguments in the County's Motion speculate about what might happen in future *rulemaking* proceedings. The County's Motion for Reconsideration thus provides the Court with no basis to reconsider its earlier decision. The Court should deny the Motion for at least four reasons.

First, even under the theory originally presented in the County's Memorandum in Support of Jurisdiction (and now apparently abandoned), Propositions of Law II and III did not warrant review. Parties like the County already have ample opportunity to challenge stream-

wide Total Maximum Daily Load determinations (“TMDLs”) and their supporting evidence. Among other things, the approval of a TMDL by the United States Environmental Protection Agency (“U.S. EPA”) is a final agency action that an affected entity can challenge in federal court under the Administrative Procedures Act (“APA”). *See* 5 U.S.C. 701-706 (2000); *see also Longview Fibre Co, v. Rasmussen*, 980 F.2d 1307, 1309 (9th Cir. 1992). Thus, as discussed in greater detail in the State’s Memorandum in Opposition to Jurisdiction, the County had adequate opportunities to challenge the TMDL at issue in this case. It simply chose not to do so. The County failed to bring a challenge during the allowable period and instead resorted to an impermissible collateral attack well after the time for review of the final TMDL had run.

The County also had an adequate opportunity to challenge the source-specific limits imposed in its specific permit. It appealed its permit to the Environmental Review Appeals Commission and again to the Tenth District. That the County failed to prevail in each instance is not an indication that it was denied meaningful review. Instead, it simply means that the County failed to present sufficient evidence to justify its position. Such a case-specific evidentiary failure does not present a question of great general or public interest and does not warrant this Court’s review or reconsideration.

Second, as is obvious from the face of the Motion, the arguments the County would now like to make, and the challenges it would now like to bring, are manifestly unripe. The County’s Motion is based on speculation about what might occur should the Court rule in its favor and find that the Ohio Environmental Protection Agency (“Ohio EPA”) must develop TMDL proposals through formal Revised Code Chapter 119 rulemaking. The Motion “imagine[s]” what Ohio EPA might do in those proceedings, *Mtn. for Recon.* at 3, and speculates about issues that it believes are “likely” to arise, *id.* at 4, or what it believes Ohio EPA “will almost certainly

argue” when defending a future rule, *id.* at 5. Grounded as it is—not in the facts of this case—but in conjecture about what might happen in future unrelated cases, the County’s Motion raises unripe, irrelevant arguments that should be rejected. *See White Consol. Indus. v. Nichols*, 15 Ohio St. 3d 7, 9 (1984) (dismissing challenge to Ohio EPA rulemaking and stating that “[u]ntil the parties can come forward with a specific factual setting, without strictly resorting to hypotheticals and speculation, this cause does not present a justiciable controversy”).

Third, because there is no dispute about the laws and standards governing admissibility of evidence and challenges to agency rulemaking, the County’s new arguments in its Motion are not themselves worthy of review. It is well settled that “[d]ecisions involving the admissibility of evidence are reviewed under an abuse-of-discretion standard of review.” *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St. 3d 440, 2013-Ohio-1507 ¶ 22. And there is no dispute about the standard of review applicable to challenges to a rule promulgated by Ohio EPA. This Court has already addressed that issue in *Northeast Ohio Regional Sewer Dist. v. Shank*, 58 Ohio St. 3d 16 (1991). The Court held that, when reviewing an agency rulemaking, the Environmental Review Appeals Commission “may not substitute its judgment for that of the Director.” *Ne. Ohio Reg’l Sewer Dist.*, 58 Ohio St. 3d at 25. Instead, rules adopted by Ohio EPA may be overturned only if they are unreasonable or unlawful. *Id.*; *see also* R.C. 3745.05(F) (Environmental Review Appeals Commission may vacate an Ohio EPA rule if it finds that the rule was “unreasonable or unlawful”). If in the future a court departs from any of these well-settled rules, perhaps this Court’s review may be warranted. But, despite the County’s speculation about what *might* happen, nothing of the sort *has* happened here. This Court’s review is not warranted unless and until it does.

Fourth, and finally, the County's second and third propositions of law are unrelated to its first, and accepting those additional propositions of law will not aid the Court in its resolution of the first legal issue. By accepting the County's first proposition of law, the Court has accepted a clear-cut legal question that is amenable to a straightforward and bright-line resolution. If the Court does determine that the development of a TMDL proposal is a state rulemaking, the fact that it has accepted only a single proposition of law will in no way prevent the Court from resolving that issue in favor of Fairfield County. Should the Court determine that a TMDL proposal is a state rulemaking (which it is not), it can order Ohio EPA to follow the requirements of Revised Code Chapter 119. Thus, affirming the denial of the County's second and third propositions of law—and denying the Motion for Reconsideration—will have no bearing on this Court's ability to determine whether the State's development of a TMDL proposal must go through state rulemaking procedures before it is submitted to U.S. EPA for what would be a *second* round of formal rulemaking at the federal level.

Indeed, the County's arguments in favor of the second and third propositions of law are not only unrelated to the accepted proposition (Proposition of Law I), they also would affirmatively hinder the Court's ability to resolve that proposition. As is apparent from its own filings, the County is not sure what its second and third propositions of law are. It is unclear whether the County is bringing challenges to the lower tribunals' weighing of evidence in the permit challenge below (as the County's Memorandum in Support of Jurisdiction argues), or is instead raising speculative challenges to how a future tribunal might weigh evidence in a theoretical attack on a possible agency rulemaking (as the County's Motion for Reconsideration argues). If the Court were to vote to grant the County's Motion for Reconsideration, there is no way to tell what legal arguments it would be voting to accept. It might be the arguments

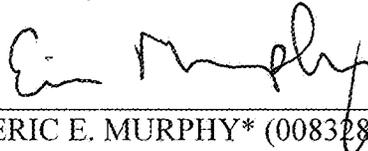
advanced in the Memorandum in Support of Jurisdiction. It might be the separate arguments advanced in its Motion for Reconsideration. Or, it might be a third, as of yet unarticulated, combination. That uncertainty alone provides a compelling reason to deny the County's Motion.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the State's Memorandum in Opposition to Jurisdiction, the County's Motion for Reconsideration should be denied.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio



ERIC E. MURPHY* (0083284)
State Solicitor

**Counsel of Record*

SAMUEL C. PETERSON (0081432)
Deputy Solicitor

L. SCOTT HELKOWSKI (0068622)

ALANA R. SHOCKEY (0085234)

Assistant Attorneys General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

eric.murphy@ohioattorneygeneral.gov

Counsel for Appellee

Ohio Director of Environmental Protection

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Opposition to Reconsideration was served via ordinary mail this 2nd day of December 2013, upon the following counsel:

Stephen P. Samuels
Joseph Reidy
Nicole Woods
Ice Miller, LLP
250 West Street
Columbus, Ohio 43215

Counsel for Appellant
Board of Commissioners of Fairfield County

Stephen N. Haughey
Frost Brown Todd LLC
301 E. Fourth Street
Cincinnati, Ohio 45202

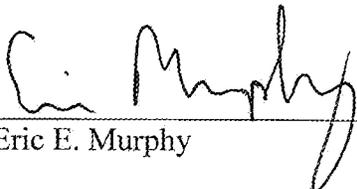
Counsel for Amici Curiae
Ohio Municipal League and County
Sanitary Engineers Association of Ohio

Linda S. Woggon
Ohio Chamber of Commerce
230 East Town Street
Columbus, Ohio 43215

Counsel for Amicus Curiae
Ohio Chamber of Commerce

Jessica E. DeMonte
Andrew Etter
Squire Sanders (US) LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215

Counsel for Amicus Curiae
Association of Ohio Metropolitan
Wastewater Agencies


Eric E. Murphy