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INTRODUCTION

The decision of the Tenth District establishes erroneous precedent on important environmental and due process issues that will adversely impact a vast number of Ohio businesses by holding that the imposition of a discharge limit that was lifted directly from a Total Maximum Daily Load (“TMDL”) into a National Pollutant Discharge Elimination System (“NPDES”) permit does not equate to regulation based on unpromulgated standards. Those portions of a TMDL that are functionally used as rules must be promulgated as rules under Ohio law before they can be enforced through permit limitations.

Contrary to the established policy of this State, the holding of the appellate court unlawfully insulates the rulemaking process from the public and affected parties.

“Ohio’s regulatory process should be built on the foundations of transparency, accountability and performance. Government must be held accountable to justify that every regulation in place serves a purpose and is implemented in the most effective manner possible. Agencies should develop regulations in the full light of public scrutiny, and the public should have the opportunity to help shape those regulations and to challenge any that are unfair, overly burdensome, or ineffective.”¹

The rule promulgation procedures in Ohio are an important part of the checks and balances on administrative agencies, and are in place to assure that the public, the regulated community, and the General Assembly has an opportunity for meaningful input, and that the rule has been subjected to a full and fair analysis before it is implemented. However, the appeals court has allowed Ohio EPA to end-run this process. Countless businesses and members of the Ohio Chamber of Commerce (“Chamber”) throughout Ohio are subject to NPDES permits. Each one of them will be affected by the agency’s ability to impose NPDES permit limits based on unpromulgated TMDLs, if the court of appeals erroneous decision is allowed to stand.

¹ Ohio Common Sense Initiative, Executive Order 2011-01K.

STATEMENT OF THE CASE AND FACTS

Amicus, the Ohio Chamber of Commerce, agrees with the statement of the case and facts as set forth in the Merit Brief of Appellant Fairfield County Board of Commissioners (“Fairfield County”) and incorporates them herein by reference.

ARGUMENT

Appellant’s Proposition of Law: A TMDL is a rule that must be promulgated in accordance with Ohio law before it can be used as the basis for a NPDES permit limit.

The Ohio Revised Code defines a rule as any standard having general and uniform operation. R.C. 119.01(C). Therefore, if a standard has general and uniform operation, it must first be formally promulgated as a rule before an agency can enforce it. *See, Ohio Nurses Ass’n, Inc. v. State Bd. of Nursing Educ. & Nurse Registration*, 44 Ohio St.3d 73, 540 N.E.2d 1354 (1989) (holding that an agency’s issuance of a “position paper” that had the effect of establishing a new standard constituted a “rule” that should have been adopted in accordance with Chapter 119); *Jackson Cnty. Env’tl. Comm. v. Schregardus*, 95 Ohio App.3d 527, 642 N.E.2d 1142 (1994) (holding that Ohio EPA cannot regulate through unpromulgated “guidelines”).

Once a TMDL is written for a watershed, it impacts every city, county, and business that discharges into that watershed. It will also impact every city, county and business that will discharge into that watershed in the future. TMDLs are generally and uniformly applicable. Therefore, permit limits derived from a TMDL are invalid unless and until the TMDL is promulgated through the rulemaking procedures prescribed by R.C. Chapter 119.

The Tenth District has erred. It is well-established that the rulemaking requirements of R.C. Chapter 119 are mandatory protections against the arbitrary imposition of regulatory requirements. “The rulemaking requirements set forth in R.C. Chapter 119 are designed to

permit a full and fair analysis of the impact and validity of a proposed rule” before it is imposed upon the regulated community. *Condee v. Lindley*, 12 Ohio St.3d 90, 93 (1984). To ensure adequate public participation, R.C. Chapter 119 requires, among other protections, public notice, the opportunity for public comment, and a public hearing before agency rules can be validly imposed. See *Northeast Ohio Regional Sewer Dist. v. Shank*, 58 Ohio St.3d 16, 24, 567 N.E.2d 993 (1991) (“provid[ing] an opportunity for opponents of a proposed regulation to express their views as to the wisdom of the proposal and to present evidence with respect to its legality.”). The Legislature has further determined that “the failure of any agency to comply with such procedure shall invalidate any rule or amendment adopted, or the rescission of any rule.” R.C. 119.02.

The protections provided by these procedures are fundamental to the administrative process and apply broadly to any action by an agency that functions as a “rule”. As this Court has emphasized “[i]t is the effect of the [document], not how the [agency] chooses to characterize it, that is important’ to determining whether the document qualifies as a ‘rule.’” *State ex rel. Saunders v. Indus. Comm’n*, 101 Ohio St.3d 125, 2004-Ohio-339, 802 N.E.2d 650 (2004), ¶ 26 (quoting *Ohio Nurses Ass’n, Inc., et al., v. State Board of Nursing Education and Nurse Registration*, 44 Ohio St.3d 73, 76, 540 N.E.2d 1354 (1989)(alternations in original).

The only exception to this mandate is guidance which serves to interpret prior rules but does not substantively alter them. The “pivotal issue in determining the effect of a document” therefore “is whether it enlarges the scope of the rule or statute from which it derives rather than simply interprets it.” *Id.* (citing *Ohio Nurses Ass’n, Inc.* at 76). Accordingly, if a standard has general and uniform operation, and does more than simply interpret existing rules or statutes, it *must* first be formally promulgated as a rule pursuant to the procedures of R.C. Chapter 119

before it can be enforced against the general public. *See, e.g., Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. & Nurse Registration*, 44 Ohio St.3d 73 (1989). *Accord Jackson Cnty. Env'tl. Comm. v. Schregardus*, 95 Ohio App.3d 527 (1994) (holding that Ohio EPA cannot regulate through unpromulgated "guidelines").

Other state supreme courts that have addressed this issue have correctly ruled that TMDLs must be promulgated as rules before they are used as the basis for discharge limitations. *See, Asarco, Inc. v. Idaho*, 138 Idaho 719, 69 P.3d 139 (2003)(holding that permit limits were invalid because the TMDL was not promulgated as a rule); *Comm'rs of Pub. Works v. S.C. Dep't of Health and Env'tl. Control*, 372 S.C. 351, 641 S.E.2d 763 (2007)(holding that the state was not authorized to rely on the TMDL to set permit limits because the TMDL had not been promulgated as a regulation).

In this case, the Ohio EPA is treating the TMDL as a rule of general applicability. It is the standard that has been and will be used to impose new limits on numerous dischargers in more than forty water bodies. Yet the Ohio EPA failed to provide these dischargers, and the public generally, with the basic due process protections provided by R.C. Chapter 119.

"Although due process is flexible and calls for such procedural protections as the particular situation demands, the basic requirements of procedural due process are notice and an opportunity to be heard." *State v. Hudson*, 2013-Ohio-647, 986 N.E.2d 1128, ¶ 48 (3rd Dist.) (citing U.S.C.A. Const. Amend. 14; Const. Art. 1, ¶ 16) (Citations omitted.). In the absence of R.C. Chapter 119 procedures, no opportunity exists for a party to obtain meaningful review of a TMDL's policy choices, data, and logic before the TMDL-derived limits are imposed in a permit. The abrogation of meaningful review of TMDL-based NPDES permit limits deprives NPDES permit holders of due process. *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976),

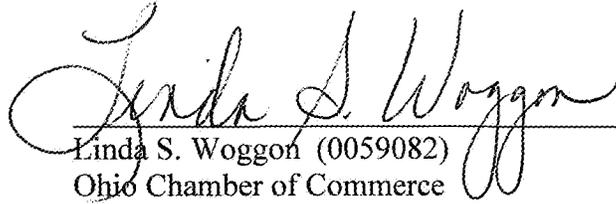
quoting *Amstrong v. Manzo*, 380 U.S. 545, 552 (1965) (A “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful place and in a meaningful manner.’”)

The appellate court erroneously upheld Ohio EPA’s application of the TMDL standards into the County’s NPDES permit concluding, without analysis, that federal approval of the TMDL satisfies the state’s prescribed administrative procedures. However, U.S. EPA’s approval of the TMDL is not an acceptable substitute, either factually or legally. The lower court’s holding removes the checks and balances on the authority of executive agencies that is provided by the “full and fair analysis” that this Court has held is mandatory. *Condee*, 12 Ohio St.3d at 93. All Chamber members who discharge directly into any Ohio water, or whose facilities are tied into a governmental wastewater treatment plant will be affected by this holding. Ohio EPA has eviscerated the rule promulgation process as it relates to TMDLs, and silenced the voices of impacted Ohio businesses.

CONCLUSION

Ohio businesses must be accorded the basic protections from unexamined regulations that are provided by Ohio law. U.S. EPA and states across the country have determined that TMDLs impose binding standards that must be promulgated as rules pursuant to their respective administrative procedures acts. Ohioans deserve no less. This Court should reverse the decision below, and declare that the Big Walnut Creek watershed TMDL is null and void and cannot be applied until Ohio EPA undertakes proper rulemaking procedures.

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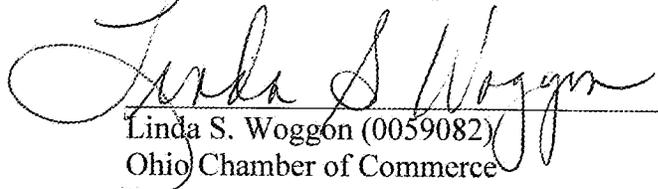
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