

ORIGINAL

IN THE SUPREME COURT OF OHIO

BOARD OF COMMISSIONERS OF
FAIRFIELD COUNTY, OHIO,

Appellant,

v.

SCOTT J. NALLY, DIRECTOR OF
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
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**BRIEF OF AMICUS CURIAE ASSOCIATION OF OHIO METROPOLITAN
WASTEWATER AGENCIES IN SUPPORT OF APPELLANT'S MERIT BRIEF**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Association of Ohio Metropolitan Wastewater Agencies (“AOMWA”) is a state-wide organization that represents the interests of Ohio’s public wastewater collection and treatment agencies. Our members include large and small municipal utilities that construct, operate, maintain and manage public sewer collection and treatment systems throughout Ohio, including the City of Columbus, the Metropolitan Sewer District of Greater Cincinnati, and the Northeast Ohio Regional Sewer District. Collectively, AOMWA’s members successfully collect and treat more than 300 billion gallons of wastewater each year for more than 4 million Ohioans. Like Fairfield County, the appellant in this case, AOMWA’s members rely on National Pollutant Discharge Elimination System (“NPDES”) permits issued by Ohio EPA for authorization to discharge treated effluent to waters of the State. These NPDES permits are essential to the continued operation of AOMWA’s members and impose, among other things, limits on the maximum levels of pollutants that may be discharged in each member’s effluent. These permits include, or have the potential to include, effluent limitations derived from total maximum daily load (“TMDL”) allocations.

Incorporation of these TMDLs into an NPDES permit has a direct and immediate impact on AOMWA’s members. In many cases, a permit holder will be required to install and operate costly pollution control equipment to meet a TMDL-prescribed limit (sometimes in excess of tens of millions of dollars) and, in the case of AOMWA’s members, these costs must ultimately be borne by our ratepayers—the residents and businesses of the State of Ohio. For this reason, it is appropriate for the public to be given the opportunity for meaningful input, as well as to challenge the substance of any TMDL prepared by Ohio EPA, before its requirements become an enforceable part of a public wastewater agency’s NPDES permit.

Consistent with this fact, the Ohio General Assembly has imposed broad procedural

requirements for rulemakings by administrative bodies, which include notice and opportunity for comment as well as the opportunity to challenge agency action, and has offered no exception or safe harbor for TMDLs. Ohio EPA was, therefore, required to afford the public both notice and the opportunity to comment on, as well as the opportunity to challenge the TMDL for Blacklick Creek, and any other TMDLs developed by Ohio EPA for that matter, before they are incorporated into NPDES permits.

The Clean Water Act does not provide differently. It relies on states to take the primary role in developing TMDLs and provides for only limited oversight by U.S. EPA through approval or disapproval of state plans within a narrow 30-day window, and independent federal TMDLs only when the authorized regulatory agency fails to develop one. The Clean Water Act further leaves to the states how they will develop and promulgate effluent standards based on an approved TMDL.

The Tenth District's decision turns the intended state-first TMDL process on its head. As found by the appellate court, Ohio EPA may incorporate TMDL-based effluent limits for Blacklick Creek into a discharger's NPDES permit without first complying with the requirements of R.C. Chapter 119 simply by relying on U.S. EPA's limited approval of the Big Walnut Creek Watershed TMDL. This holding, if allowed to stand, would allow Ohio EPA to include permit limits derived by Ohio EPA without affording the regulated community or the general public the ability to challenge these limits or the opportunity for input and review required by R.C. Chapter 119, Ohio's Administrative Procedure Act.

TMDLs receive only cursory oversight from U.S. EPA, and as a result, they are often developed with overly conservative assumptions. Allowing their perfunctory incorporation into Ohio NPDES permits without first following the rulemaking requirements set forth in Ohio's

Revised Code as well as providing an opportunity to challenge the requirements of the TMDL threatens to significantly increase the operating and construction costs for public wastewater agencies throughout Ohio and, therefore, the burden on Ohio's businesses and individual ratepayers without demonstration of the countervailing benefit to the environment the rulemaking process provides. For this reason, the Tenth District's ruling with respect to Fairfield County's NPDES permit should be reversed and the law made clear that TMDLs must be subject to the same requirements that Ohio's Administrative Procedures Act imposes on any other agency rulemaking before they may be used as the basis for an effluent limit imposed on permit holders in the State of Ohio.

REGULATORY FRAMEWORK

A. The Clean Water Act

The stated purpose of the Clean Water Act (the "Act") is a "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). At the same time, the Act makes clear that these protections should be developed by the states, not the federal government. *Id.* at 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter."). The Act leaves to the states, therefore, the obligation to develop appropriate environmental protections and promulgate them under state law, consistent with each state's own procedural protections.

To support this process, the Act identifies two categories of regulations: (1) technology-based effluent limitations, which limit the discharge of pollutants from "point sources" into navigable waters, *see* 33 U.S.C. 1311, and use-based water quality standards, which limit the

volume of pollutants that can be accepted into a particular receiving water to protect the waterway's designated uses. *See* 33 U.S.C. 1313. Technology-based effluent limits are the primary method of pollution control under the Act, but where these technology-based standards are insufficient to meet a duly-adopted water quality standard, more stringent effluent limitations may be imposed on dischargers. *Id.* Water quality standards can, therefore, impose a significant burden on permitted sources, requiring them to install controls beyond those deemed technologically appropriate in the first instance.

B. Total Maximum Daily Loads

Once water quality standards have been promulgated, the states are required to determine whether the existing effluent limits will be sufficient to achieve those standards. If not, the state must create a priority ranking of impaired waters (the so-called "impaired waters list" or "303(d) list") and promulgate TMDL standards for those listed waters. 33 U.S.C. 303(d). The TMDLs, in turn, impose both a maximum pollutant loading for the listed waterbody and limits on the state's ability to alter those standards in the future. *See id.* at 303(d)(4). Again, however, the state is responsible for both determining the TMDL and deciding how the TMDL is to be allocated among the numerous point sources, non-point sources, and natural contributors to pollutant levels.

Establishing a TMDL in Ohio involves consideration of numerous factors regarding the location under review, the type of waterbody at issue, the pollutant sources contributing to water quality, and the types of pollutants involved. *See* Ohio Adm.Code 3745-2-12. Once developed, a TMDL is submitted to U.S. EPA, which must either approve or reject it in 30 days. 33 U.S.C. 1313(d)(2). The Act does not identify any specific review requirements for U.S. EPA—it requires only approval or disapproval. *Id.* As a result, this review focuses on whether the state TMDL is consistent with the broad requirements of the Clean Water Act. Importantly, while

U.S. EPA reviews the overall TMDL and checks whether the state's allocation is consistent with the TMDL, U.S. EPA does not review the data underlying the TMDL or evaluate the propriety of the state's allocation.

Disapproval of a state-drafted TMDL imposes a duty upon U.S. EPA to develop a substitute TMDL for that water body. *Id.* Once a TMDL is approved (or prepared and issued by U.S. EPA), the state becomes responsible for implementing the TMDL through NPDES permit limits. *Id.* At no point, however, does the Clean Water Act authorize states to incorporate TMDLs directly into an NPDES permit, or to circumvent state rulemaking protections to do so.

STATEMENT OF FACTS AND PROCEDURE OF THE CASE

AOMWA hereby adopts in its entirety, and incorporates herein by reference, the Statement of the Facts and Procedure of the Case contained in the Merit Brief filed by the Appellant Fairfield County.

ARGUMENT

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

- A. Ohio Law Requires that a TMDL go through Rulemaking in Accordance with Ohio's Administrative Procedures Act to Ensure Meaningful Protection of the Environment without the Imposition of Undue Burdens on the Public**

The effect of the Tenth District's ruling is to sanction incorporation of a TMDL-derived effluent limit into an NPDES permit without the opportunity for challenge to the substance of that effluent limit at either the time it is promulgated or at the time it is implemented. Despite Ohio EPA's treatment of its TMDL as a standard of uniform applicability to all relevant dischargers to Blacklick Creek, Ohio EPA did not proceed in accordance with the requirements of R.C. Chapter 119 in connection with its finalization of the TMDL. The TMDL had not been

promulgated as a rule in accordance with R.C. Chapter 119's notice and comment procedures, and there had not been an opportunity for challenge of its substance. There was no procedural check on the accuracy of Ohio EPA's analysis, and no opportunity to challenge the data underlying Ohio EPA's TMDL before it was incorporated into Fairfield County's NPDES permit. The Court of Appeal's decision further exacerbates this by eliminating the ability of permit holders to challenge a TMDL-based limit at the permitting stage, finding that the limit was already developed in the TMDL process. Accordingly, if the Tenth District's opinion is allowed to stand, AOMWA's members, and the numerous other NPDES permit holders throughout the State subject to or potentially subject to a TMDL-based limit, will have no meaningful opportunity to comment on or contradict the complex TMDL analysis done by Ohio EPA to support more stringent effluent limits beyond those required by Ohio's technology-based effluent standards.

It is well-established that the rulemaking requirements of R.C. Chapter 119 are mandatory protections against just such an arbitrary imposition of regulatory requirements. As the Court has previously stated, "[t]he 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, 465 N.E.2d 450 (1984). To ensure adequate public participation, R.C. Chapter 119 requires public notice, the opportunity for public comment, and a public hearing before almost any agency rule 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.") (citation omitted). 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. 119.02.¹

These procedures are fundamental to the administrative process and apply broadly to any agency “rule”.² The Court has further emphasized that “[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, ¶ 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) (alterations in original)). The only exception to this general rule is guidance that interprets prior rules but does not substantively alter them. As the Court has stated, 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, 540 N.E.2d 1354 (1989). *Accord Jackson Cnty. Env’tl. Comm. v. Schregardus*, 95 Ohio App.3d

¹ *See also*, “Ohio EPA Guide to Rule-Making,” Fact Sheet, Updated March 2013 (outlining Ohio’s rulemaking requirements, including, *inter alia*, the completion of early stakeholder outreach in accordance with Executive Order 2011-01K, conducting a Business Impact Analysis, subjecting draft rules to interested party review, submitting draft rules to the Common Sense Initiative Office, completing a Rule Summary and Fiscal Analysis of the draft rules for the General Assembly’s Joint Committee for Agency Rule Review, publication of proposed rules for written comment, and holding a hearing to give the public an opportunity to provide oral testimony on the proposed rules) (available at <http://www.epa.ohio.gov/portals/33/rules/guide.pdf>) (last accessed December 30, 2013).

² Defined by R.C. 119.01(C) as any “...standard, having a **general and uniform operation...**” (Emphasis added).

527 (10th Dist. 1994) (holding that Ohio EPA cannot regulate through unpromulgated “guidelines”).

There is no question that TMDL-based effluent limits like the phosphorous limit added to Fairfield County’s NPDES permit go beyond the interpretation of existing statutes and rules. The TMDL itself is a massive undertaking involving years of research and analysis. As other courts have noted, “TMDLs take time and resources to develop and have proven to be difficult to get just right.” *Upper Blackstone Water Pollution Abatement Dist. v. United States EPA*, 690 F.3d 9, 14 (1st Cir.2012), fn. 8. The data derived in a TMDL review must also be reduced to effluent limits applicable to individual sources based on pollutant loading levels, local sensitivity of flora and fauna, and the natural hydrology and climatology of the area. These decisions are not contained anywhere within the Clean Water Act or Ohio’s environmental statutes. Nor is there any existing regulation that assigns TMDL-based effluent limits. Rather, these limits are derived entirely from the TMDL process and constitute new and distinct regulatory burdens on the permittee. If these allocations were simply guidance, there would be no need for notice and comment rulemaking. Ohio EPA, however, is attempting to treat TMDLs in this case as binding on the permittee. To do so the TMDL must be promulgated as a regulation.

The rule-like nature of TMDLs is further reflected in the fact that U.S. EPA must proceed through rulemaking when it establishes its own TMDLs. 33 U.S.C. 1313(d)(2); *see Telford Borough Auth. v. United States EPA*, E.D.Pa No. 2:12-CV-6548, 2013 WL 6047569, *2 (Nov. 15, 2013) (“If the EPA administrator disapproves of the state TMDL, the EPA may establish its own TMDL or revise the state TMDL *but must follow notice-and-comment rulemaking provisions of the Administrative Procedure Act (“APA”) in doing so.*”) (emphasis added); *see also Am. Farm Bureau Fed’n v. U.S. E.P.A.*, M.D. Pa. No. 1:11-CV-0067, 2013 WL 5177530,

**38-44 (Sept. 13, 2013) (explaining U.S. EPA's rulemaking obligations when promulgating TMDLs).³ It is illogical to allow less procedural protection under Ohio's Administrative Procedure Act than U.S. EPA itself has found is required under its federal counterpart without identifying any meaningful distinction between the scope of either statute.

The protections sought by Fairfield County are the same protections afforded the public in administrative rulemaking generally. At its core, therefore, this appeal seeks to ensure that Ohio EPA provides the same administrative protections provided for by the federal government and other states. Indeed, other State Supreme Courts considering the same issue have reached the similar conclusions. *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 addition, several other state tribunals have indicated in dicta that TMDLs are subject to rulemaking according to their respective state APAs: Delaware, *City of Rehoboth v. McKenzie*, Del.Super.Ct. No. CIV.A. 98C-12-023, 2000 WL 303634, *1 (Feb. 29, 2000) (“... the Secretary issued order No. 98-W-0044 ... establishing a Total Maximum Daily Load (“TMDL”) for pollutants of concern, nitrogen and phosphorous, for the Indian River, Indian River Bay, and Rehoboth Bay. This order, which all agree is a regulation, requires that all point source discharges into Rehoboth Bay be eliminated systematically.”); Missouri, *Mo. Soybean Ass'n v. Mo. Clean Water Comm'n*, 102 S.W.3d 10, 24

³ U.S. EPA has also itself stated that, for states developing TMDLs, the state must ensure that a TMDL exhibits “consistency with [a] State Administrative Procedures Act.” Guidance for Developing TMDLs in California, at 15 U.S. EPA (Jan. 7, 2000) (available at <http://www.epa.gov/region09/water/tmdl/303d-pdf/caguidefinal.pdf>) (last accessed December 30, 2013).

(Mo.2003) (“TMDLs are developed and implemented through future regulations”); New Jersey, *In re Adoption of Amendments to Ne., Upper Raritan, Sussex Cnty. & Upper Delaware Water Quality Mgmt. Plans*, N.J.Super.Ct. No. A-5266-07T3, 2009 WL 2148169, *5 (July 21, 2009), fn. 3 (“The DEP asserts in a footnote, without any supporting explanation, that “a TMDL is not a rule under the strict requirements of the APA.” We question the correctness of this assertion.”); and South Carolina, *Comm’rs of Pub. Works v. S.C. Dep’t of Health & Env’tl. Control*, S.C. ALC No. 03-ALJ-07-0126-CC, 2003 SC ENV LEXIS 92 (Sept. 22, 2003) (aff’d in part on other grounds, *Comm’rs of Pub. Works v. S. Carolina Dep’t of Health & Env’tl. Control*, 372 S.C. 351, 363-364 641 S.E.2d 763 (2007)) (“Because the TMDL was not promulgated as a regulation under the South Carolina Code, it does not have the force or effect of law. . . . Consequently, DHEC is not authorized to rely on the TMDL to establish permit limits.”).

Finally, there are several states that treat their TMDLs as rules *in the absence* of a court mandate. *See* California (*see, e.g.,* 23 C.C.R. 3904, TMDL for the Garcia River); Colorado (*see, e.g.,* 5 CCR 1002-35 TMDL for the Gunnison and Lower Dolores River Basin); Florida (*see, e.g.,* Fla. Admin. Code r. 62-304.315, TMDL for the Chipola River Basin); Oregon (*see, e.g.,* Or. Admin. R. 340-041-0154, TMDL for the Upper Grande Ronde Basin); and Virginia (*see, e.g.,* 9 VAC 25-720-90, TMDL for the Tennessee-Big Sandy River Basin). In other words, these states have assumed that TMDLs must be promulgated as rules and have proceeded accordingly.

Since the TMDLs in this matter were never promulgated pursuant to the requirements of R.C. Chapter 119, the Court of Appeal’s decision was erroneous in finding that the TMDL was a valid basis for NPDES permit limits. Further, if left to stand, the Court of Appeal’s decision would allow Ohio EPA to conduct an end run around one of the most fundamental protections in place for meaningful review of agency action: the process of notice and comment rulemaking

outlined in R.C. Chapter 119. This would impact not just the rights of Fairfield County, but numerous other public wastewater treatment agencies that have, or will in the future have, TMDL derived limits in their NPDES permits.

B. Allowing Ohio EPA to incorporate TMDLs into a NPDES Permit without following Ohio's Rulemaking Procedures would pose a Substantial Hardship to AOMWA's Members

The "basic goals and policies that underlie the Clean Water Act [are] that states remain at the front line in combating pollution." *City of Arcadia v. U.S. EPA*, 411 F.3d 1103, 1106 (9th Cir.2005). The Clean Water Act places with each state the "primary responsibility and authority for the creation of TMDLs" for the waters within its boundaries. *American Canoe Association, Inc., et al. v. U.S. EPA*, 54 F. Supp.2d 621, 629 (E.D.Va.1999). The time for full public participation in TMDL development, therefore, rests at the state level, not the federal level: the "approval or disapproval of state submissions under the Clean Water Act [by U.S. EPA] is not rule making; *it is only the actual development of the list or load [by the state] that is rule making.*" *Sierra Club v. U.S. EPA*, 162 F.Supp.2d 406, 419-20 (D.Md.2001) (emphasis added).

Following the establishment of TMDLs by a state, U.S. EPA has only a very narrow 30-day period to approve or disapprove the TMDL, and this review does not include public participation. *Id.* at 420 ("In the case of *the state as rule maker*, all comments are forwarded to the EPA as part of the administrative record. This affords the EPA the opportunity to review all comments and request additional information or clarification from the state prior to making a decision to approve or disapprove.") (emphasis added); *see* 33 U.S.C. 1313(d)(2). It is simply unworkable and illogical, therefore, for permittees to raise technical concerns with a state TMDL allocation during federal review. There is insufficient time and the scope of review is too general to address concerns with the underlying data or to raise contradictory factual evidence like that developed by Fairfield County in this case.

The Court of Appeals' decision was based on the erroneous assumption that U.S. EPA can provide an alternative to the rulemaking requirements of Ohio's Administrative Procedure Act through the limited review it provides state developed TMDLs. There is nothing in either the Clean Water Act or R.C Chapter 119 that would provide support for such a position. Moreover, the inability to challenge a TMDL at either the promulgation or implementation stage will work a substantial hardship on AOMWA's members.

First, the lack of any meaningful opportunity to be heard is violative of due process. "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 the Fourteenth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 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 at the time the Director submits the TMDL to U.S. EPA and before the TMDL-derived limits are imposed in a permit. Indeed, permittees' attempts to challenge TMDLs before limits have been incorporated into individual permits have routinely been dismissed because such challenges are not ripe. *City of Arcadia v. U.S. EPA*, 265 F. Supp.2d 1142, 1155 (N.D. Cal. 2003); *Bravos v. Green*, 306 F. Supp. 2d 48, 56-58 (D.D.C. 2004). At its essence, therefore, the Court of Appeal's decision has resulted in such permit limits being effectively unreviewable. This complete 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 *Armstrong 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.'").

Second, denying effective review may result in significant overregulation of NPDES permit holders. Ohio EPA is not authorized to impose water quality-based discharge limits derived from a TMDL unless the affected permit holder is a significant source of the impairment, and only if the Agency finds sufficient causation. In other words, Ohio EPA may validly impose TMDL-based limits on a public wastewater treatment agency only if it has determined there is a reasonable potential that the agency is causing or contributing to a violation of the applicable water quality standard. *See* Ohio Adm. Code 3745-2-12(B); Ohio Adm. Code 3745-2-12(G)(4) & Ohio Adm. Code 3745-2-06(A)(2). These requirements protect public wastewater agencies from being saddled with costly discharge limits that, even if achieved, will not lead to a measurable improvement of water quality. Since the Court of Appeal's decision will prevent public wastewater agencies from disputing whether Ohio EPA has met its regulatory burden of demonstrating that the utility is a significant contributing cause to a water quality exceedance, the lower court's decision will allow Ohio EPA to impose TMDL-based limits in the absence of any credible evidence of causation or worse (as in the case of Fairfield County) when there is directly contradictory evidence provided by the permittee. In other words, if permitted to stand, the lower court's decision may force dischargers to implement improvements to their facilities even if a water body is in attainment or the utility is not a significant contributing source to nonattainment. Such a holding will cost public and industrial dischargers millions of dollars in unnecessary improvements and take money away from other areas where actual environmental progress can be made. Moreover, since the costs of unnecessary projects must be borne by the ratepayers of the State of Ohio, these unnecessary expenditures by public wastewater agencies may pose a significant and undue burden not only on AOMWA's members but also on the communities and businesses that they serve.

Given that Ohio EPA has primary responsibility for TMDL development and that U.S. EPA retains a limited up-or-down review that does not include the opportunity to be heard on technical issues or challenges to the state TMDL allocation, the Tenth District's decision to allow U.S. EPA review to stand in lieu of following Ohio's rulemaking procedures shielded the Blacklick Creek TMDL from any meaningful review during its development and implementation. This sets a dangerous precedent for future overregulation using U.S. EPA's approved TMDL allocations in lieu of the rulemaking process required by Ohio's Administrative Procedure Act.

CONCLUSION

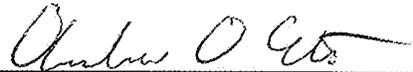
At its core, the lower court's ruling allows TMDLs to be incorporated directly into NPDES permits without any meaningful review or comment or the opportunity for substantive challenge. If allowed to stand, this would prevent AOMWA's members and the general public from raising reasonable challenges to the limits themselves or the data used to develop them. Both the Clean Water Act and Ohio law require balancing of interests when imposing regulations on public utilities, weighing the environmental benefit from increasingly stringent regulations against the economic burdens of those regulations. Limits that are not necessary to protect water quality should not be imposed, and public wastewater treatment agencies and Ohio's citizenry should not be required to incur needless costs or take resources away from projects that will provide actual environmental benefits merely for the sake of a TMDL that was developed without public notice and comment.

If not overturned, the Tenth District's decision allowing TMDLs to be incorporated directly into Fairfield County's NPDES permit without following Ohio's rulemaking procedures may lead to a significant overregulation of dischargers within the State of Ohio, to the detriment of both AOMWA's members and the general public, who must pay to meet new limits that could

be imposed without the proper balancing of costs and environmental benefits intended by the Legislature and at the cost of the public utilities' ability to protect the resources that they hold in trust for their constituents.

For the reasons discussed above as well as those articulated by Fairfield County in its Merit Brief, AOMWA respectfully requests that the Court reverse the Tenth District's ruling and mandate that only TMDLs promulgated pursuant to the requirements of R.C. 119 notice and comment rulemaking can be incorporated into a discharger's NPDES permit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Brief of Amicus Curiae Association of Ohio Metropolitan Wastewater Agencies in Support of Appellant's Merit Brief* was sent by ordinary U.S. Mail, postage pre-paid, and electronic mail to Counsel of Record for Appellant and Appellee and Counsel of Record for *Amici Curiae* at the addresses below on December 30, 2013:

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