

ORIGINAL

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
v.	:	of Appeals, Tenth Appellate District
	:	
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.	:	

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MERIT BRIEF OF *AMICUS CURIAE* OHIO MUNICIPAL LEAGUE (OML) AND  
COUNTY SANITARY ENGINEERS ASSOCIATION OF OHIO (CSEAO) IN  
SUPPORT OF FAIRFIELD COUNTY BOARD OF COMMISSIONERS

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### **III. STATEMENT OF THE ISSUE FOR REVIEW.**

The issue presented for review in the case *sub judice* is narrowly confined to whether the Big Walnut Creek watershed TMDL must be promulgated as a rule under Ohio law before Fairfield County and the other affected stakeholders in the watershed can be subjected to new, binding, and potentially very expensive, pollutant limits.

However, in a broader sense, the question is whether Ohio EPA can use its TMDL authority to establish binding watershed-based, or even waterbody-specific, standards of water quality across the State of Ohio without first affording the protections associated with rulemaking, when the same Agency is obligated by statute to afford those protections when it establishes standards of water quality for the State as a whole. Because there is no meaningful difference between standards of water quality imposed in this or any other TMDL developed by Ohio EPA and statewide standards of water quality developed by the same Agency, the answer is that Ohio EPA must follow Ohio's requirements for rulemaking when developing the Big Walnut Creek watershed TMDL and all other TMDLs.

### **IV. STATEMENT OF INTEREST OF THE OML AND CSEAO.**

The Ohio Municipal League (OML) is a non-profit Ohio corporation composed of a membership of more than 700 Ohio cities and villages. Its webpage is <http://www.omlohio.org/>. As stated in its by-laws, the purpose of the OML is the improvement of municipal government and administration, and the promotion of the general welfare of the cities and villages of this State, by appropriate means, including, but not limited to, maintaining a central bureau of information and research for cities and villages; promoting conferences of municipal officials and short courses for the discussion and study of municipal problems and techniques involved in their solution; publishing and circulating an official

magazine and periodic bulletins and reports on issues affecting municipal governments; and formulating and supporting sound municipal policies. Consistent with these principles, the OML engages from time to time in the filing of briefs and other legal memoranda in Ohio's courts to support important issues affecting Ohio's cities and villages.

The County Sanitary Engineers Association of Ohio (CSEAO) is an affiliate association of the County Commissioners' Association of Ohio, a non-profit corporation. The CSEAO's webpage is <http://www.cseao.org/>. The CSEAO's membership consists of sanitary engineers, utilities directors, superintendents, and other management staff responsible for the delivery of wastewater, stormwater, and drinking water services to all of Ohio's 88 counties. CSEAO's primary goal is to raise the technical and non-technical standards of these services rendered to the general public by establishing a central point for reference and group discussion of mutual problems affecting all of Ohio's counties. Consistent with these principles, the CSEAO engages from time to time in the filing of briefs and other legal memoranda in Ohio's courts to support important issues affecting the delivery of these services in Ohio's 88 counties.

The members of the OML and CSEAO provide valuable public services that protect public health and the environment, and do so ever more often on budgets that are funded almost exclusively by the citizens and businesses in their respective communities. As such, their operating/improvement budgets are constrained by the number of citizens and businesses that utilize these services, what rates those citizens and businesses can afford, and what rate increases elected public officials are able to approve. Rulings that potentially impact the already-strained financial resources of owners of POTWs across Ohio are vitally important to the members of these organizations.

The members of these two organizations operate hundreds of small, medium and large POTWs in Ohio, spending millions of dollars annually to produce a high quality effluent that has enabled dramatic improvements to occur in both chemical and biological water quality in rivers and streams across the State of Ohio. Two factors drive the interests of amicus curiae in the outcome of this appeal. First, both U.S. EPA and Ohio EPA agree that non-point sources, such as agricultural and stormwater runoff, and urbanization of watersheds, not point sources such as POTWs, are by far the most significant remaining sources of pollutants entering rivers and streams.<sup>1</sup> Second, requiring Ohio's POTWs to further reduce pollutant loadings is rapidly reaching, if not already crossing, the point of diminishing returns, requiring exponentially increasing investments of capital and annual O&M to remove ever smaller quantities of pollutant loadings, stretching the limits of affordability for minimal improvements in water quality. Because Ohio EPA has indicated that it has developed so far, and intends to develop in the future, TMDLs in number that will virtually blanket the State of Ohio,<sup>2</sup> the outcome of this case will determine what protections OML and CSEAO's members will be provided as Ohio EPA stretches their shrinking revenues even further as the TMDL program moves forward.

## V. STATUTORY/REGULATORY FRAMEWORK.

OML and CSEAO agree with the statutory and regulatory framework set forth in the Merit Brief filed by Fairfield County, and therefore incorporate it herein by reference. By way of supplementation thereof with relevant statutory authority, R.C. 6111.041 provides in pertinent

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<sup>1</sup> See e.g. "What is Non-Point Source Pollution," available at <http://water.epa.gov/polwaste/nps/whatis.cfm>, and "Ohio's Nonpoint Source Program," available at <http://epa.ohio.gov/dsw/nps/index.aspx> (each last accessed on December 30, 2013).

<sup>2</sup> See "Ohio Total Maximum Daily Load Program Progress," available at [http://www.epa.ohio.gov/Portals/35/tmdl/TMDL\\_status\\_May2013.pdf](http://www.epa.ohio.gov/Portals/35/tmdl/TMDL_status_May2013.pdf) (last accessed on December 30, 2013).

part as follows:

**6111.041 Standards Of Water Quality**

*In furtherance of sections 6111.01 to 6111.08 of the Revised Code, the director of environmental protection shall adopt standards of water quality to be applicable to the waters of the state. Such standards shall be adopted pursuant to a schedule established, and from time to time amended, by the director, to apply to the various waters of the state, in accordance with Chapter 119 of the Revised Code. Such standards shall be adopted in accordance with section 303 of the "Federal Water Pollution Control Act" and shall be designed to improve and maintain the quality of such waters for the purpose of protecting the public health and welfare, and to enable the present and planned use of such waters for public water supplies, industrial and agricultural needs, propagation of fish, aquatic life, and wildlife, and recreational purposes.*

R.C. 6111.041 (emphasis added). For the reasons set forth below, OML and CSEAO believe that this statute is an additional authority that controls the outcome of this appeal.

**VI. STATEMENT OF FACTS.**

OML and CSEAO agree with the statement of facts set forth in the Merit Brief filed by Fairfield County, and therefore incorporate it herein by reference.

**VII. ARGUMENT.**

OML and CSEAO agree with the arguments set forth in the Merit Brief filed by Fairfield County, and therefore incorporate them herein by reference. They provide the Court with the following additional arguments to support the position of Fairfield County.

**A. The Big Walnut Creek Watershed TMDL Establishes A New Standard for Water Quality for Phosphorus and Therefore Must Undergo Rulemaking Pursuant to the Requirements of R.C. 6111.041.**

The following facts are undisputed:

1. The TMDL at issue in this case imposes numeric standards of water quality for phosphorus on Blacklick Creek and other waterbodies in the Big Walnut Creek watershed. *See*

Joint Exhibit (“J.E.”) 13 (TMDL) at pp. 24, 52-53 (establishing as a “target value” a maximum phosphorus concentration of 0.11 mg/l for all waterbodies in the watershed).

2. The numeric “target values” for phosphorus established in the TMDL came from an Ohio EPA technical guidance document that was not promulgated as a rule under Ohio law. *Id.* at p. 23-24 (showing source of the values as the Ohio EPA technical report “*Association Between Nutrients, Habitat, and the Aquatic Biota in Ohio Rivers and Streams*” (Ohio EPA, 1999)); *Board of Commissioners of Fairfield County, Ohio v. Director of Environmental Protection*, 2013-Ohio-2106 ¶¶ 1, ¶¶ 57, 76 (10<sup>th</sup> App. Dist. 2013) (uncontested statement that the technical report was never promulgated as a rule).

3. Ohio EPA has not yet promulgated a numeric standard of water quality for phosphorus for any waters of the State of Ohio. *See* Ohio Adm. Code Chapter 3745-1.<sup>3</sup> *See also* J.E. 13 (TMDL) at p. 23 (“...Ohio EPA does not currently have statewide numeric criteria for phosphorus...”).

4. The waterbodies in the Big Walnut Creek watershed constitutes “waters of the State of Ohio.” *See* R.C. 6111.01(H).

5. The numeric phosphorus “target values” established in the TMDL are standards of water quality for the waterbodies in the Big Walnut Creek watershed TMDL.

R.C. 6111.041 provides in pertinent part as follows:

In furtherance of sections 6111.01 to 6111.08 of the Revised Code, *the director of environmental protection shall adopt standards of water quality to be applicable to the waters of the state. Such standards shall be adopted* pursuant to a schedule established, and from time to time amended, by the director, *to apply to the*

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<sup>3</sup> Under Ohio Admin. Code 3745-1-07, Table 7-11, Ohio EPA has promulgated a narrative standard for phosphorus, stating that it shall be limited to the extent necessary to prevent nuisance growths of algae, weeds, and slimes that result in a violation of narrative water quality criteria set forth in Section 3745-1-04(E), or cause taste or odor problems for public water supplies.

*various waters of the state, in accordance with Chapter 119 of the Revised Code. Such standards shall be adopted in accordance with section 303 of the "Federal Water Pollution Control Act" and shall be designed to improve and maintain the quality of such waters for the purpose of protecting the public health and welfare, and to enable the present and planned use of such waters for public water supplies, industrial and agricultural needs, propagation of fish, aquatic life, and wildlife, and recreational purposes.*

R.C. 6111.041 (emphasis added). This statute states in clear and unequivocal terms that Ohio EPA must follow the rulemaking requirements under R.C. Chapter 119 when adopting standards of water quality for any waters of the State of Ohio. Even if the Court were to hold that the phosphorus loading allocations, *i.e.*, the “pollution diet,” set forth in the Big Walnut Creek watershed TMDL does not constitute “standards of water quality,” the maximum allowable phosphorus concentration (0.11 mg/l) established in the TMDL for all waterbodies in the Big Walnut Creek watershed clearly constitutes a “standard of water quality” for “waters of the State of Ohio.” Therefore, at a minimum, Ohio EPA could not lawfully impose a phosphorus pollution diet for Fairfield County and other phosphorus sources in the watershed derived from the 0.11 mg/l standard until that standard was first promulgated as a rule under R.C. Chapter 119.

Requiring that Ohio EPA follow the requirements for rulemaking under R.C. Chapter 119 would be consistent with previous holdings of ERAC that have not permitted the Agency to apply in permits standards of water quality from reports or guidance that had not undergone the procedures for rulemaking. *See e.g. Citizens Committee to Preserve Lake Logan v. Williams*, EBR No. 75-40, 1977 WL 10269 \*18 (May 27, 1977) *overruled on other grounds*, *Citizens Committee to Preserve Lake Logan v. Williams*, 10 App. No. 77AP-755, 1978 WL 216923 (June 22, 1978) (striking ammonia discharge limits from a permit because they were derived from guidelines that were not adopted as rules in accordance with R. C. Chapter 119); *Oxford Mining Company, LLC v. Director of Environmental Protection*, ERAC No. 12-256581, 2013 WL

5314482 \*\*36-\*\*37 (September 18, 2013) (striking down water quality certification limits derived from a “Primary Headwater Habitat” field manual that had not been promulgated under R.C. Chapter 119).

**B. Requiring Ohio EPA to Comply with Ohio’s Statutory Rulemaking Procedures Provides Special Protections for Ohio’s Counties and Municipalities.**

Formal rulemaking in the context of environmental regulation affords a number of important safeguards for local governments, the purpose of which are to ensure that Ohio EPA and the General Assembly are fully aware of the fiscal and technical consequences of proposed rulemaking on Ohio’s financially-strapped communities.

For example, as part of the rulemaking process, Ohio EPA must develop a Rule Summary and Fiscal Analysis (“RSFA”). R.C. 127.18. An RSFA requires Ohio EPA to summarize the costs and benefits of all proposed rules. The General Assembly added the RSFA requirement with a particular concern for the effect of rules on local governments, requiring in the RSFA that Ohio EPA determine “[i]f the rule has a fiscal effect on school districts, counties, townships, or municipal corporations....” R.C. 127.18(B)(8)-(10). And if a proposed rule is determined to fiscally effect school districts or local governments, Ohio EPA is subject to three specific additional requirements:

1. The Agency must determine “an estimate in dollars of the cost of compliance with the rule.” R.C. 127.18(B)(8).

2. If the rule derives from a federal requirement (as a TMDL clearly does), the Agency must provide a “clear explanation that the proposed state rule does not exceed the scope and intent of the [federal] requirement.” R.C. 127.18(B)(9). And if the rule exceeds the minimum necessary federal requirement(s), the Agency must provide a “a justification of the

excess cost, and an estimate of the costs, including those costs for local governments, exceeding the federal requirement.” *Id.*

3. The Agency must develop a “comprehensive cost estimate” for the new rule that includes “the procedure and method of calculating the costs of compliance and identifies major cost categories including personnel costs, new equipment or other capital costs, operating costs, and indirect central service costs related to the rule.” R.C. 127.18(B)(10).

Importantly, the RSFA must also “include a written explanation of the agency’s and the affected local government’s ability to pay for the new requirements and a statement of any impact the rule will have on economic development.” *Id.* Ohio EPA must also submit the RSFA to JCARR, the Secretary of State, and the Legislative Service Commission for their review and consideration. R.C. 127.18(C)-(E), 119.03(B).

As part of formal rulemaking, Ohio EPA must also complete an Environmental Amendment/Adoption Form. R.C. 121.39. This requirement applies specifically to rules concerning environmental protection. R.C. 121.39(A). It requires Ohio EPA to take several steps prior to adopting a rule or an amendment proposed to a rule dealing with environmental protection or containing a component dealing with environmental protection, including consulting with organizations that represent political subdivisions affected by the proposed rule or amendment. R.C. 121.39(D)(1).

These steps may appear perfunctory but they are not. They provide an important and necessary dialogue between Ohio EPA and local governments in the rulemaking process, and they force Ohio EPA to carefully consider and document potential impacts of proposed rules on Ohio’s local governments. Specifically in the context of development of TMDLs, they would help the General Assembly and Secretary of State to understand the significant costs and

technical feasibility issues associated with publicly owned wastewater treatment plants having to compliance with stringent TMDL-based discharge standards.

**C. If TMDLs are not Required to Be Promulgated Under Ohio Law, Ohio EPA will Have Virtually Unfettered Discretion to Establish Waterbody-Specific Standards Across the State, Further Straining the Resources of Ohio's Local Governments.**

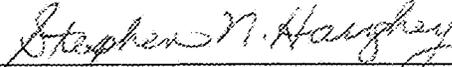
Under R.C. 6111.041, Ohio EPA must follow rulemaking procedures when adopting standards of water quality for waters of the State. If that requirement only applies to standards that are statewide in application, and the Agency is free to develop watershed-specific or waterbody-specific standards of water quality without following the rulemaking procedures, nothing would stop Ohio EPA from dissecting Ohio's rivers and streams into sets and subsets of waterbodies. It could then develop mandatory standards of water quality across the entire State of Ohio using the TMDL process with virtual impunity, thereby potentially rendering the statutory obligations of R.C. 6111.041 a nullity. Whether standards of water quality are developed on a statewide basis, a regional basis, or even on a creek-by-creek basis should not make a difference in terms of the procedure to be followed.

If this Court does not rule in favor of Fairfield County and reign in Ohio EPA now in the context of the Big Walnut Creek watershed TMDL, this risk, and the resulting additional strain on the local resources of OML and CSEAO's members, are threats that are far too real to be ignored.

**VIII. CONCLUSION.**

For all of the reasons set forth above and in the Merit Brief filed by Fairfield County, 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 such time as Ohio EPA undertakes proper rulemaking procedures.

Respectfully submitted,



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## IX. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Amicus Curiae Ohio Municipal League and County Sanitary Engineers Association of Ohio was sent via regular U.S. mail this 30<sup>th</sup> day of December, 2013, upon the following counsel of record:

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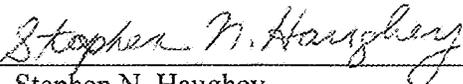
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