

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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**MERITS BRIEF OF AMICI CURIAE  
ASSOCIATION OF OHIO METROPOLITAN WASTEWATER AGENCIES AND  
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES  
IN SUPPORT OF APPELLANT'S MERIT BRIEF WITH RESPECT TO  
PROPOSITIONS OF LAW NOS. II AND III**

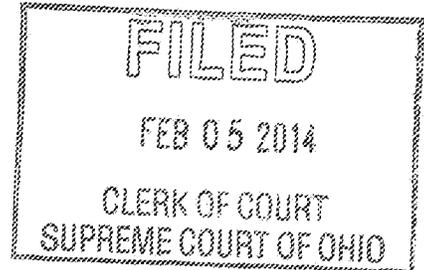
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## INTRODUCTION

The due process issues raised by Appellant Fairfield County Board of Commissioner's ("Fairfield County's") Propositions of Law Nos. II and III are not confined to the circumstances of this matter. Instead, this Court's decision will have significant implications for thousands of NPDES permittees, including many clean water utilities both in Ohio and nationwide. At their core, Propositions of Law II and III ask whether the review of Total Maximum Daily Load plan ("TMDL") derived National Pollution Discharge Elimination System ("NPDES") permit limitations comports with due process where permittees are not permitted to meaningfully challenge the scientific basis of TMDLs and where TMDL development and approval alone are a valid regulatory basis for subsequent permit limits.

The NPDES and TMDL programs are national in scope and thus, these policy questions regarding the reviewability of TMDLs and TMDL derived permit limits will impact utilities not just here in Ohio, but throughout the U.S. Indeed, because of the implications beyond Ohio's borders, the National Association of Clean Water Agencies ("NACWA") joins the Association of Ohio Metropolitan Wastewater Agencies ("AOMWA") in submitting this Merit Brief in support of Fairfield County's Proposition of Law Nos. II and III.<sup>1</sup>

It is critical to both the fairness and practicality of the NPDES program that such limits not be imposed without a valid factual basis, and that permittees be given a *meaningful* opportunity to challenge limits derived from TMDL plans either before or after their incorporation into a permit. Like Fairfield County, AOMWA members in Ohio as well as

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<sup>1</sup> AOMWA submitted an amicus brief on December 30, 2013 in support of Proposition of Law No. I, which involves the procedural state law issue of whether a TMDL must be adopted as a rule under R.C. Chapter 119 before it may be utilized as a basis for permit limits. However, due to the broader significance of the due process issues involved in Propositions of Law Nos. II and III, NACWA joins in this brief to provide the additional perspective of clean water utilities nationwide. As a result, AOMWA and NACWA are submitting this as a separate merit brief rather than a revision to AOMWA's prior brief.

NACWA members throughout the country have or are facing TMDL derived limits for phosphorus and other nutrients or pollutants, and therefore, have and will continue to face the same due process issues presented in this matter. Indeed, the absence of meaningful review in such circumstances would result in public wastewater utilities, like our members, being forced to expend significant funds—indeed, hundreds of millions of dollars—to comply with limits that may be scientifically invalid and/or insufficiently supported, and thus may fail to produce real environment improvements for the moneys spent. These squandered costs would, nevertheless, still be borne by our ratepayers—the citizens and businesses of our communities. Therefore, this Court’s decision on these issues will be crucial precedent for Ohio utilities and closely analyzed by other jurisdictions as jurisprudence in the TMDL context continues to develop.

For the reasons set forth herein, as well as those set forth in the Revised Merits Briefs of Fairfield County and other amici, AOMWA and NACWA respectfully request that the Court reverse the Court of Appeals and find that due process mandates that TMDL derived permit limitations be afforded meaningful review.

#### **STATEMENT OF INTEREST OF AMICI CURIAE**

For reasons of brevity, AOMWA incorporates herein its statement of interest from its December 30, 2013 amicus brief on Proposition of Law No. 1 and merely provides in summary that it is a state-wide organization that represents the interests of Ohio’s public wastewater collection and treatment agencies. Like Fairfield County, AOMWA’s members are subject to NPDES permits issued by Ohio EPA that authorize our members to discharge treated effluent in accordance with the permit’s terms. These permits contain limits on the maximum levels of pollutants that may be discharged in each member’s effluent and include, or have the potential to

include, effluent limitations derived from TMDL allocations.<sup>2</sup>

NACWA is a national organization that represents the interests of nearly 300 public clean water management agencies across the country.<sup>3</sup> NACWA members serve the majority of the sewered population in the United States, and collectively manage billions of gallons of wastewater each day. Similarly, NACWA's members are also subject to NPDES permits issued by regulatory agencies—U.S. EPA and authorized state counterparts—which may include or have the potential to include TMDL derived permit limits. Therefore, like AOMWA, NACWA's members have a significant interest in seeing that such limits are based on sound science and subject to *actual* and *meaningful* review before they can be incorporated into NPDES permits and made directly enforceable against a permittee.

### **STATUTORY AND REGULATORY FRAMEWORK**

To avoid unnecessary repetition, AOMWA and NACWA adopt and incorporate by reference the Statutory and Regulatory Framework contained in the amicus brief filed by AOMWA on December 30, 2013 and in Fairfield County's Revised Merits Brief filed on February 5, 2014.

### **STATEMENT OF THE CASE AND FACTS**

Similarly, AOMWA and NACWA also adopt, and incorporate by reference, the Statement of the Case and Statement of Facts contained in the Revised Merit Brief filed by

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<sup>2</sup> Indeed, AOMWA has several members that are facing similar TMDL derived permit limitations in draft NPDES permits issued by Ohio EPA. Thus, if the due process issues are not resolved in this case, these utilities, likewise, will be unable to obtain actual and meaningful review of such limits once their permits are issued final.

<sup>3</sup> NACWA's membership includes twelve public utility members in Ohio alone, including the Northeast Ohio Regional Sewer District, City of Akron, Avon Lake Regional Water, City of Canton, City of Columbus, City of Dayton, City of Lebanon, City of Lima, City of Sidney, City of Toledo, the Metropolitan Sewer District of Greater Cincinnati, and Montgomery County Water Services.

Appellant Fairfield County on February 5, 2014.

## ARGUMENT

At its essence, the Court of Appeal's decision in this matter results in the abrogation of meaningful review of NPDES permit limits derived from a TMDL thereby depriving Fairfield County, or any similarly situated public wastewater treatment agency, of due process. A "fundamental requirement of due process is the opportunity to be heard 'at a meaningful place and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), quoting *Amstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965) (emphasis added). *Accord State v. Hudson*, 3rd Dist. No. 9-12-38, 2013-Ohio-647, 2013 Ohio App. LEXIS 581, ¶ 48 (citing the Fourteenth Amendment to the U.S. Constitution and Ohio Constitution, Article I, Section 16 as the basis for finding that "the basic requirements of procedural due process are notice and an opportunity to be heard." (citations omitted and emphasis added).

The opportunity to be heard cannot be *pro forma*; it must be meaningful. *State ex rel. Ormet Corp. v. Industrial Com. of Ohio*, 54 Ohio St.3d 102, 107, 561 N.E.2d 920 (1990) ("the decision-maker must, in some meaningful manner, consider evidence obtained at hearing.") (emphasis in original); *Mathews, supra*. Thus, due process guarantees a regulated entity an *actual* and *meaningful* opportunity to be heard and to have the evidence actually evaluated—both the agency's basis for its action (Proposition II) and the regulated entity's own evidence challenging such limits (Proposition III).

AOMWA and NACWA agree with the arguments set forth in the Revised Merit Brief filed by Fairfield County, as well as, the revised amicus briefs filed by other amici in this case, and therefore incorporate them by reference herein. However, AOMWA and NACWA provide the following additional arguments to support the position of Fairfield County.

**Proposition of Law No. II:**

- A. *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 a NPDES permit limit, and should not be afforded more weight than other evidence.*

TMDLs are not adopted by Ohio EPA pursuant to the procedural protections of the Administrative Procedures Act, R.C. Chapter 119 (which is the focus of Fairfield County's Proposition of Law No. I). Accordingly, there is no opportunity 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.<sup>4</sup> Despite this lack of scrutiny, however, the Court of Appeals affirmed the Environmental Review Appeal Commission's ("ERAC's") determination that Fairfield County's NPDES permit lawfully imposed a 0.5 mg/l phosphorus limit because the limit was derived from a "properly developed and federally approved TMDL allocation." *Bd. of Comm'rs. of Fairfield Cty. v. Nally*, 10th Dist. No. 11AP-508, 2013-Ohio-2106, 2013 Ohio App. LEXIS 2008, ¶ 76 ("App. Op."). It further concluded that "the Director \* \* \* has the option to simply impose in the NPDES permit the limitation set forth in the TMDL \* \* \*." *Id.* at ¶ 71.

Such a decision renders a TMDL binding upon wastewater treatment agencies simply because it is developed by Ohio EPA and approved by U.S. EPA—even though TMDLs are merely planning documents and U.S. EPA approval is a simple administrative step not a

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<sup>4</sup> Indeed, other jurisdictions have rejected permittees' attempts to challenge TMDLs derived permit limits before such limits have actually been incorporated into a NPDES permit on ripeness grounds, which likewise leaves only the opportunity for post-incorporation review in many other jurisdictions as well. *See City of Arcadia v. 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).

scientific or substantive review.<sup>5</sup> The effect of this holding insulates a TMDL and its underlying basis from any substantive review by *presuming* that a TMDL alone presents a valid factual foundation for a permit limitation—rendering it essentially *unrebuttable*. In fact, it renders the Court of Appeal’s review post-permit incorporation not just illusory in this case, but nonexistent—a clear violation of due process.

Yet, Ohio EPA and other similar regulatory agencies have the express burden of demonstrating that their decisions to impose such limits are supported by a “valid factual foundation.” *Gen. Elec. Lighting v. Koncelik*, 10th Dist. Nos. 05AP-310 and 05AP-323, 2006-Ohio-1655, 2006 Ohio App. LEXIS 1509, ¶ 38 (quoting *Citizens Committee v. Williams*, 56 Ohio App.2d 61, 70, 381 N.E.2d 661 (10th Dist.1977)). Indeed, Ohio EPA must prove that there is a reasonable potential that the wastewater utility is causing or contributing to a violation of the applicable water quality standard before it may validly impose TMDL-based limits. *See id*; Ohio Adm.Code 3745-2-12(B), (G)(4) and 3745-2-6(A)(2).

However, in a five-day adjudicatory hearing below, all of the expert testimony presented, including that of Ohio EPA’s own witnesses, documented that Blacklick Creek is in attainment with all aquatic life-based biological water quality standards downstream of Fairfield County’s discharge. Hearing Transcript (“Tr”), v. II, pp. 31-36, 121, 170-171. Ohio EPA offered no

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<sup>5</sup> *See App. Op.* ¶ 17 (approval by U.S. EPA within one month of submittal); *U.S. EPA’s Guidance to all Regional offices for Reviewing TMDL Submittals by States*, <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/final52002.cfm> (accessed Feb. 3, 2014); *U.S. EPA, Guidance for Water Quality-Based Decisions: The TMDL Process* (April 1991), Ch.4 <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/dec4.cfm> (accessed Dec. 28, 2013) (detailing that U.S. EPA simply issues an approval or disapproval letter to the state within the 30-day window).

contrary evidence.<sup>6</sup> Instead, un rebutted testimony from Fairfield County's expert witnesses demonstrated the absence of a scientific justification for the 0.5 mg/l phosphorus limit. Tr., v. I, p 142, v. II, pp. 75-76, v. IV, p. 147. Despite its scientific inadequacy, the TMDL-derived limit proposed by Ohio EPA would result in Fairfield County spending over \$5 million to achieve a pollutant reduction with no discernable benefit to the environment. See Tr., v. III, p. 12.

ERAC concluded, notwithstanding the serious deficiencies demonstrated at the hearing, that U.S. EPA's approval of the TMDL, standing alone, created a sufficient, valid, and essentially unchallengeable, factual foundation for the phosphorus standards. Rather than evaluate the evidence, ERAC determined, and the Court of Appeals affirmed, that Ohio EPA could sidestep its evidentiary burden merely by showing that the permit limit at issue had come from an approved TMDL.

This precedent is perilous. If left to stand, Ohio EPA or regulatory agencies in other jurisdictions could avoid *ever* having to demonstrate that TMDL allocations and subsequently developed permit limitations are supported by a valid scientific basis—indeed, no opportunity for review would exist before incorporation and no meaningful review would be provided after.<sup>7</sup>

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<sup>6</sup> Indeed, John Owen of Ohio EPA was responsible for developing the permit limits imposed in Fairfield County's new permit. App. Op. ¶ 24. Mr. Owen admitted that the sole reason he included a phosphorus limit in the permit was because the limit was set forth in the Big Walnut Creek TMDL. *Id.* Owen simply plugged the number into the permit. *Id.*; see also Tr., v. III, pp. 137-41, 166. He did not conduct an independent analysis to evaluate whether a phosphorus limit was warranted, and, if so, what the limit should be. App. Op. ¶ 24; see Tr., v. III, p. 161. Instead, the only evidence of analysis offered by Ohio EPA was the testimony of Matt Fancher, who authored the portion of the TMDL pertaining to Blacklick Creek in the vicinity of Fairfield County's WWTP. App. Op. ¶ 21-22. However, Mr. Fancher was unable to remember who recommended the 0.5mg/l allocations to him, the basis for them, or why he did not run the allocation with other values—demonstrating the dubiousness of the limits in this case. *Id.*; see Tr., IV, pp. 104-105.

<sup>7</sup> Fairfield County's Motion for Reconsideration also demonstrates the importance of these due process issues even if a TMDL is adopted as a rule under APA procedures because an

Permittees would be in a virtual catch-22—forced to comply with limits based on TMDL allocations that may be scientifically flawed but for which they have no recourse to challenge. Thus, the impact of the Court’s decision in this case is crucial and has the potential to effect wastewater utilities both in Ohio and across the country that have or may have TMDL derived limits imposed in their NPDES permits.

To demonstrate the scope that this decision may have, U.S. EPA has approved over 51,000 TMDLs since 1995, over 5,700 of which address nutrients, and there are potentially thousands more that will be developed in the next few years.<sup>8</sup> Upholding the Court of Appeal’s decision, therefore, would lay the groundwork for a massive and unprecedented reshaping of the NPDES permit program without giving those with the most knowledge of local waterways a say in developing the standards that will apply to them. Given this scope, the jurisprudence of this case will be both significant as a case of first impression and highly influential as TMDL development continues to be undertaken throughout the U.S and other permittees face these same types of limits. Indeed, many of our members are watching this case very closely as they confront their own TMDL derived limits.

In reaching its decision in this matter, we also hope that the Court will give significant consideration to the potentially staggering financial implications this decision will have on public utilities. Compliance with TMDL derived phosphorous limits, like those at issue herein, may

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opportunity for a hearing before incorporation must still be a *meaningful* one to meet due process requirements. *See* Motion, p. 3. Otherwise, Ohio EPA or another regulatory agency would be able to argue in a rulemaking proceeding that the TMDL’s development and approval by U.S. EPA is a sufficient factual foundation alone for the rule. Accordingly, these due process issues remain crucial regardless of the procedural posture.

<sup>8</sup> *See National Summary of Impaired Waters and TMDL Information*, [http://iaspub.epa.gov/waters10/attains\\_nation\\_cy.control?p\\_report\\_type=T](http://iaspub.epa.gov/waters10/attains_nation_cy.control?p_report_type=T) (accessed Feb. 3, 2014).

require expensive control technologies that could impose millions, and collectively perhaps billions, of dollars in costs on the nation's water utilities—and ultimately their ratepayers. Without the ability to meaningfully challenge whether such limits are scientifically sound (or economically reasonable), public utilities are prevented from protecting the resources that they hold in trust for their constituents. Indeed, if these limits are not necessary to ensure the protection of water quality, wastewater utilities would be incurring costs needlessly and taking resources away from projects that may provide actual environmental benefits. This is precisely why Ohio EPA and other regulatory agencies should be required to adequately support their decisions before imposing costly discharge reductions on public utilities.

Therefore, we respectfully request that Court reject ERAC and the Court of Appeal's determination that TMDLs may alone serve as a sufficient factual foundation for TMDL derived permit limits.

**Proposition of Law No. III:**

- B. *The Commission's failure to consider evidence in opposition to a 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.***

As discussed above, in the NPDES permit appeal before ERAC, Ohio EPA bore the burden of establishing that its permit limits were based upon a "valid factual foundation." *See Gen. Elec. Lighting v. Koncelik*, 2006-Ohio-1655, 2006 Ohio App. LEXIS 1509, at ¶ 38 (quoting *Citizens Committee*, 56 Ohio App.2d 61, at 70, 381 N.E.2d 661). Not only was this not done, but Fairfield County introduced six *unrebutted* witnesses who undermined both the discharge limit proposed by Ohio EPA and the science on which the TMDL was developed. However, ERAC failed to consider or weigh the evidence presented by Fairfield County—thereby depriving Fairfield County of a "meaningful review" as required by due process requirements. *See*

*Mathews*, 424 U.S. at 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (quoting *Armstrong*, 380 U.S. at 552, 85 S.Ct. 1187, 14 L.Ed.2d 62); *Hudson*, 2013-Ohio-647, 2013 Ohio App. LEXIS 581, at ¶ 48.

In fact, it was clear from the record below that Ohio EPA failed to contest Fairfield County's technical testimony demonstrating that the WWTP's receiving stream was in attainment with water quality standards. Instead, Ohio EPA's singular position was that a phosphorous limit was appropriate because it was in the TMDL. As such, ERAC 1) failed to require Ohio EPA to properly support its phosphorous limit with a valid factual foundation and 2) failed to appropriately consider Fairfield's evidence—which overwhelmingly demonstrated that a phosphorous limit was not justified. This results in a direct violation of due process.

This violation was compounded by the Court of Appeal's review. Instead of affirming, the Court of Appeals should have reversed ERAC's findings because they were not supported by substantial evidence given the totality of the testimony before ERAC. If ERAC's decision is not supported by substantial evidence, the Court of Appeals must "reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law." *Citizens Against Am. Landfill Expansion v. Koncelik*, 10th Dist. Nos. 12AP-741, 12AP-742, 12AP-743, and 12AP-744, 2014-Ohio-123, 2014 Ohio App. LEXIS 101, ¶ 13. "[S]ubstantial evidence is evidence which carries weight, or evidence which has importance and value." *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St. 3d 570, 571, 589 N.E.2d 1303 (1992).

"In determining whether ERAC's decision is supported by the requisite quantum of evidence, [the Court of Appeals] must weigh and evaluate the credibility of the evidence presented to ERAC. This process involves a consideration of the evidence and, to a limited extent, would permit a substitution of judgment by the reviewing court." *Parents Protecting*

*Children v. Korleski*, 10th Dist. No. 09AP-28, 2009-Ohio-4549, 2009 Ohio App. LEXIS 3845, ¶ 10 (internal citations omitted). *Accord Gen. Elec. Lighting, supra*. Therefore, the Court of Appeals was required to evaluate all the evidence presented to ERAC, and should have reversed ERAC's decision since it was not supported by substantial evidence in this case.

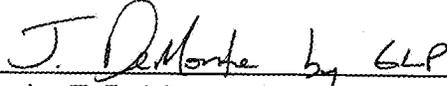
Instead, reliance on a TMDL alone to support a permit limit, as the Court of Appeals sanctioned below, robs the permittee of its day in court and prevents any real or meaningful challenge to the assumptions, data, and logic underlying the limit. Given that the TMDL and NPDES programs are national in scope, such a holding, if left to stand, would affect thousands of public and private dischargers, in Ohio and nationwide, including many of AOMWA and NACWA's members. Permittees looking to this Court for guidance in this developing area of law would be subject to functionally unreviewable, and frequently very expensive, TMDL-based discharge limitations even when they are derived from inadequate or faulty data and/or questionable science. Due process requirements prohibit such a result.

For such reasons, this Court should reverse the Court of Appeal's decision to ensure that public utilities (and their ratepayers) have the meaningful opportunity to challenge the basis for TMDL-derived limits so as to protect the limited resources they hold in trust for their constituents.

### CONCLUSION

The Court of Appeal's decision has shielded the TMDL-derived discharge limits in Fairfield's NPDES permit from any meaningful review. This not only sets a dangerous precedent but results in a clear violation of due process, which this Court should not permit to stand. To ensure that agency decisions are supported by valid factual foundations, Amici Curiae AOMWA and NACWA respectfully request that the Court of Appeal's decision be reversed.

Respectfully submitted,



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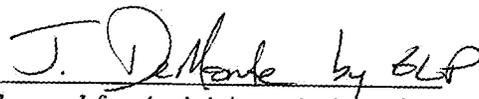
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Association of Clean Water Agencies*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the *Merits Brief of Amici Curiae Association of Ohio Metropolitan Wastewater Agencies and National Association of Clean Water Agencies in Support of Appellant's Merit Brief With Respect to Propositions of Law Nos. II and III* 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 February 5, 2014:

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