

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**AMENDED MERIT BRIEF OF AMICUS CURIAE THE OHIO CHAMBER OF
COMMERCE IN SUPPORT OF APPELLANT BOARD OF COMMISSIONERS OF
FAIRFIELD COUNTY**

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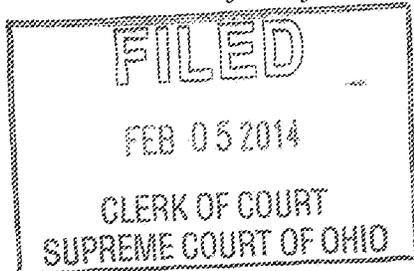


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INTRODUCTION

The decision of the Court of Appeals establishes erroneous precedent on important environmental and due process issues that will adversely impact a vast number of Ohio businesses and, more broadly, the economy of the State of Ohio, 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. Moreover, the conclusion of the Court of Appeals that the procedural approval of a TMDL by U.S. EPA can take the place of a challenge to the validity of a TMDL under Ohio law deprives Ohioans of their right to a *de novo* hearing and their constitutionally protected right to procedural due process.

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. So too is the right to a

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

meaningful hearing, when Ohio EPA seeks to impose new regulatory burdens on Ohio businesses. However, the Court of Appeals has allowed Ohio EPA and the Environmental Review Appeals Commission (“ERAC”) to end-run these important safeguards.

Countless businesses and members of the Ohio Chamber of Commerce (“Chamber”) throughout Ohio are subject to NPDES permits, either directly, or indirectly as paying customers of city and county wastewater and stormwater systems. Each of them will be affected by the Ohio EPA’s ability to impose NPDES permit limits based on unpromulgated and unchallengeable TMDLs, if the court of appeals erroneous decision is allowed to stand. Additionally, going forward, where and how Ohio EPA is allowed to regulate businesses will have a direct bearing on decisions to locate or stay in Ohio.

The instant case deals with a TMDL that seeks to regulate the discharge of phosphorous (among other pollutants) in more than 40 water bodies. However, there will eventually be 86 TMDLs, regulating thousands of water bodies. While, as in this case, the regulation of phosphorous can result in the need for new controls at a cost of millions of dollars, this is the tip of the iceberg when one considers the scores of pollutants for which water quality standards can be imposed through a TMDL at a cost of billions of dollars.

Where there is a demonstrated need for additional control of water pollutants in order to protect public health, safety and the environment, the Chamber will support it, but safeguards must be maintained to ensure that any new requirements are both necessary and appropriate.

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 Amended Merit Brief of Appellant Fairfield County Board of Commissioners (“Fairfield County”) and incorporates them herein by reference.

ARGUMENT

Appellant's Proposition of Law No. 1: *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.*

Appellant's Proposition of Law No. 2: *The Right To A De Novo Challenge To A TMDL Developed By Ohio EPA Is Guaranteed By Ohio Law, And U.S. EPA's Approval Of The TMDL Under Federal Law Does Not Limit That Right Or Provide A Valid Basis To Uphold The TMDL.*

Appellant's Proposition of Law No. 3: *A Ruling That U.S. EPA's Approval Of An Ohio EPA-Developed TMDL Limits The Scope Of Review Provided Under Ohio Law Insulates The TMDL From A Meaningful Challenge, And Denies Procedural Due Process Of Law.*

Amicus, the Ohio Chamber of Commerce, agrees with the arguments as set forth in the Amended Merit Brief of Appellant Fairfield County Board of Commissioners ("Fairfield County") and incorporates them herein by reference.

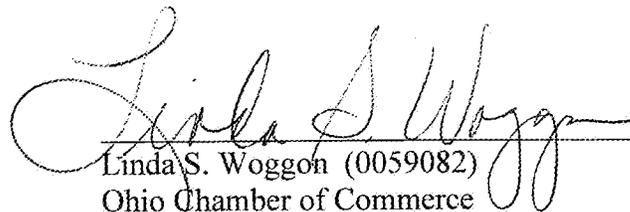
CONCLUSION

All Chamber members who discharge directly into any Ohio water, or whose facilities are connected to a governmental wastewater treatment plant will be affected by the issues in this case. Ohio EPA has eviscerated the rule promulgation process as it relates to TMDLs, and silenced the voices of impacted Ohio businesses. 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.

Moreover, the Court should also reverse the rulings below that improperly limited the scope of Fairfield County's right to a legitimate *de novo* challenge to the final TMDL under R.C. 3745.04 and 3745.05, and its due process right to a meaningful review. As part of this reversal, the Court should make clear that U.S. EPA's limited procedural approval of a TMDL under the federal CWA does not provide a valid substantive basis to uphold a TMDL on its merits under Ohio law.

In the alternative, if the Court finds that U.S. EPA's rule - stating that permitting actions taken after federal approval of a state TMDL be "consistent" with the approved loadings - limits the scope of review in a subsequent state law challenge to the TMDL, the Court should order Ohio EPA to ensure the right to a *de novo*, meaningful review by completing rulemaking procedures for each TMDL before submitting it to U.S. EPA for approval.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following persons this 5th day of February, 2014 via regular U.S. Mail, postage prepaid:

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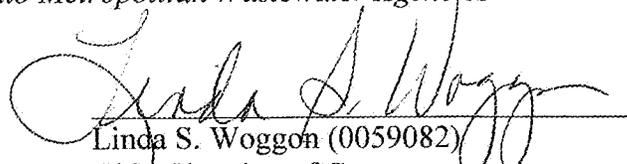
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