

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. 11-AP-508
: ERAC Case No. 235929
:

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

STEPHEN N. HAUGHEY (0010459)

Counsel of Record

THADDEUS H. DRISCOLL (0083962)

FROST BROWN TODD LLC

301 E. Fourth Street

Cincinnati, OH 45202

Telephone: (513) 651-6800

shaughey@fbtlaw.com

tdriscoll@fbtlaw.com

*Counsel for Amici Curiae Ohio Municipal League and
County Sanitary Engineers Association of Ohio*

STEPHEN J. SMITH (0001344)

FROST BROWN TODD LLC

10 W. Broad Street

Columbus, Ohio 43215

Telephone: (614) 464-1211

ssmith@fbtlaw.com

JOHN GOTHERMAN (0000504)

OHIO MUNICIPAL LEAGUE

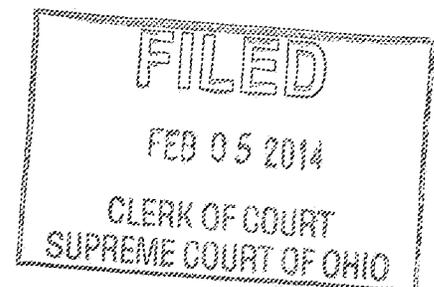
175 S. Third Street, #510

Columbus, Ohio 43215-7100

Telephone: (614) 221-4349

jgotherman@columbus.rr.com

Counsel for Amicus Curiae Ohio Municipal League



STEPHEN P. SAMUELS (0007979)
Counsel of Record
JOSEPH M. REIDY (0030346)
STEPHEN N. HAUGHEY (0010459)
THADDEUS H. DRISCOLL (0083962)
FROST BROWN TODD LLC
One Columbus, Suite 2300
10 West Broad Street
Columbus, Ohio 43215-3484
(614) 464-1211
(614) 464-1737 (facsimile)
ssamuels@fbtlaw.com
jreidy@fbtlaw.com
shaughey@fbtlaw.com
tdriscoll@fbtlaw.com
*Counsel for Appellant Board of
Commissioners of Fairfield County, Ohio*

**MICHAEL DeWINE, ATTORNEY
GENERAL OF OHIO**
ERIC E. MURPHY (0083284)
State Solicitor
Counsel of Record
SAMUEL C. PETERSON (00831432)
Deputy Solicitor
L. SCOTT HELKOWSKI (0068622)
ALANA R. SHOCKEY (0085234)
Assistant Attorneys General
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
eric.murphy@ohioattorneygeneral.gov
samuel.peterson@ohioattorneygeneral.gov
lawrence.helkowski@ohioattorneygeneral.gov
alana.shockey@ohioattorneygeneral.gov
*Counsel for Appellee Scott Nally, Director
Environmental Protection*

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III. AMENDED STATEMENT OF ISSUES FOR REVIEW AND SUMMARY OF ARGUMENT.

The first issue presented for review is whether the Total Maximum Daily Loadings (“TMDL”) developed by Ohio EPA for the Big Walnut Creek watershed must be promulgated as a rule under Ohio law before Fairfield County and the other affected stakeholders in the watershed can be forced to comply with its pollution control standards. In a broader sense, however, the issue is whether Ohio EPA can use its TMDL authority to establish binding watershed-based, or even waterbody-specific, water quality standards across the State of Ohio without first affording the protections associated with rulemaking, when the very same Agency is statutorily obligated to afford those protections when it establishes water quality standards for the State as a whole. There is no difference between watershed-based water quality standards imposed in a TMDL developed by Ohio EPA, and statewide water quality standards developed by the same Agency. Thus, Ohio EPA must follow Ohio’s requirements for rulemaking when developing the Big Walnut Creek watershed TMDL and all other TMDLs.

The second and third issues presented for review are two sides of the same coin, addressing: (1) the statutory right to a *de novo* review under Ohio law for actions taken by Ohio EPA, (2) the broader constitutional due process right under Ohio law to a meaningful review of actions that affect important property rights, and (3) the impact, if any, on these rights following a limited, procedural approval under the federal Clean Water Act (“CWA”) of an Ohio EPA-developed TMDL.

Neither the CWA nor its implementing rules evidence the intent of Congress or U.S. EPA to preempt, or in any way circumscribe, the scope of review of a state-developed TMDL under state law. The tribunals below effectively held otherwise. Their rulings violated Ohio

law and threaten to disrupt the relationship that Congress established between states and the federal government under the CWA for state water pollution control programs, a relationship that has worked well for many decades. Their rulings also disrespected the important role that state law plays in the CWA regulatory scheme, ensuring that environmental requirements developed to satisfy federally-delegated CWA-based program requirements are properly supported in fact and in law, thereby doing injustice to established principles of state and federal comity and cooperative federalism embodied in the CWA.

Finally, the truncated standard of review erroneously adopted by ERAC and affirmed by the Court of Appeals is particularly problematic when, as in the case *sub judice*, the record demonstrates that important factual foundations for Ohio EPA's development of a "pollution diet" for the Big Walnut Creek watershed were either missing or at least woefully inadequate. The record below demonstrates vividly why review of TMDLs under Ohio law must not be limited to a request that Ohio EPA exercise its discretion to adjust the final allocation of the pollution diet, and must instead be a meaningful *de novo* review of all data, modeling, policy decisions, assumptions, and other information upon which the TMDL was derived, as well as the evidence contra. The tribunals below erred when they allowed inappropriate deference toward U.S. EPA's procedural approval of the TMDL to constrict their obligation to comply with Ohio law. Their rulings must therefore be reversed.

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.omloho.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 *amici 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.¹ 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 that will virtually blanket the State of Ohio,² the outcome of this case will determine what protections OML and CSEAO's members will be provided as Ohio EPA's TMDL program stretches their shrinking revenues even further.

¹ 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).

² See "Ohio Total Maximum Daily Load Program Progress," available at http://www.epa.ohio.gov/Portals/35/tmdl/TMDL_status_May2013.pdf (last accessed on December 30, 2013).

V. STATUTORY/REGULATORY BACKGROUND.

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

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

Proposition of Law #1: Ohio EPA's Development of TMDLs Must Undergo R.C. Chapter 119 Rulemaking Because TMDLs Impose New Standards of Water Quality for Waterbodies and Expand the Agency's Regulatory Authority.

A. The Big Walnut Creek TMDL Established 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 imposed new numeric standards of water quality for phosphorus on Blacklick Creek and 40 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 value" 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 value 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 ¶¶ 57, 76 (10th App. Dist. 2013) (uncontested statement that the technical report was never promulgated as a rule).

3. Ohio EPA has not promulgated a numeric standard of water quality for phosphorus for any waters of the State of Ohio. See Ohio Adm. Code Chapter 3745-1. 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 water

quality standards for the waterbodies in the Big Walnut Creek watershed. Ohio Adm. Code 3745-1-02(B)(89) (definition of water quality standards).

R.C. 6111.041, quoted in pertinent part, *supra*, states in clear and unequivocal terms that Ohio EPA must follow the rulemaking requirements under R.C. Chapter 119 when adopting or amending water quality standards for any waters of the State of Ohio. 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 water quality 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 allowed the Agency to issue permits with water quality standards 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*, 10th App. No. 77AP-755, 1978 WL 216923 (June 22, 1978) (striking ammonia water quality-based limits from a permit because they were derived from guidelines that had not been promulgated under 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 an Ohio EPA field manual that had not been promulgated under R.C. Chapter 119).

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

Formal rulemaking in the context of environmental regulation affords a number of important statutory safeguards enacted by the General Assembly specifically for local governments, which 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 affect 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 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 require an important, critically-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 its proposed rules on Ohio’s local governments. At a minimum, in the context of the development of lengthy and complex TMDLs, they help the General Assembly and Secretary of State to understand the significant costs and technical feasibility issues associated with publicly-owned treatment plants having to comply with stringent TMDL-based discharge standards.

C. If TMDLs are not Required to Be Promulgated as Rules, Ohio EPA will Have Virtually Unlimited Power to Establish Unreviewable Water Quality Standards Across the State, Further Straining the Limited 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 applies only to standards that are statewide in application, and the Agency is free to develop watershed-specific or waterbody-specific water quality standards without following the rulemaking procedures, nothing would stop Ohio EPA from dissecting Ohio's rivers and streams into sets and subsets of waterbodies. The Agency could then use its TMDL process to develop water quality standards for waters across the State of Ohio that are virtually immune from judicial review based on the erroneous ruling below that limited state-law review of federally-approval TMDLs. The effect of such action would be to render a nullity the statutory rulemaking obligations of R.C. 6111.041 for water quality standards.

Whether water quality standards are developed on a statewide basis, a regional basis, or even on a creek-by-creek basis, and whether they are buried in a lengthy TMDL report or set apart in traditional rulemaking format, should not, and does not, make a difference in the procedure that must be followed to protect Ohio's local governments. If this Court does not rule in favor of Fairfield County and reign in Ohio EPA now in the context of the water quality standards established in the Big Walnut Creek TMDL, this risk is all too real, just as is the concurrent risk of yet additional strain on the already-stressed economic resources of OML and CSEAO's members.

Proposition of Law #2: U.S. EPA's Approval of a State-Developed TMDL before it is Subjected to an Evaluation of its Merits under State Law has no Bearing on the State's Substantive Review Process.

A. U.S. EPA's Promulgation of Language in 40 C.F.R. 122.44(d)(1)(vii)(B) that Requires "Consistency" with Approved TMDLs was Never Intended to Override State Law.

The decision of ERAC and the Court of Appeals to elevate U.S. EPA's approval of the Big Walnut Creek TMDL into a controlling mandate that limited the right to challenge the merits of the TMDL was misguided. The language cited by both tribunals requires that state water-quality based permitting decisions include pollutant loading allocations (often referred to as "wasteload allocations" or "WLAs") consistent with the assumptions and requirements of a federally-approved TMDL. *See* 40 C.F.R. 122.44(d)(1)(vii)(B) (state TMDLs are approved by U.S. EPA under 40 C.F.R. 130.7). However, U.S. EPA never intended the language in that rule to circumscribe the standard of review provided under state law to test the lawfulness and reasonableness of the approved allocations. When U.S. EPA promulgated the rule, the Agency explained its purpose as follows:

The second requirement in proposed subparagraph (v)³ for deriving water quality-based effluent limits, is that the water quality based effluent limits must be consistent with wasteload allocations (WLAs) developed and approved in accordance with 40 C.F.R. 130.7 if a WLA is available for the discharge. A wasteload allocation is defined at 40 C.F.R. 130.2, and reflects the portion of a receiving water's loading capacity that is allocated to a point source. The requirement to use approved wasteload allocations for water quality-based permit limits is implied in current § 122.44(d) because paragraph (d) requires effluent limits to meet water quality standards. Today's proposed language clarifies EPA's existing regulations by stating that when WLAs are available, they must be used to translate water quality standards into NPDES permit limits....Pursuant to section 303(c) of the CWA, the States adopt water quality standards, and then, under section 303(d), develop total maximum daily loads (TMDLs) to attain and maintain the water quality standards. The TMDLs are used to derive a wasteload

³ 40 C.F.R. 122.44(d)(1)(vii)(B) was originally promulgated and codified as 40 C.F.R. 122.44(d)(1)(v)(B), but subsequently was renumbered following several unrelated rulemakings addressing other subparagraphs of the rule.

allocation for individual pollutants discharged from a point source....Proposed subparagraph (v) does not prescribe detailed procedures for developing water quality-based effluent limits. Rather, the proposed regulations prescribe minimum requirements for developing water quality-based effluent limits, and at the same time, give the permitting authority the flexibility to determine the appropriate procedures for developing water quality-based effluent limits.

See 54 Fed. Reg. 1300, 1304, January 12, 1989. As EPA explained, the purpose of this rule was to ensure that after states developed TMDL-based, EPA-approved, wasteload allocations for their permitted point sources, designed to maintain applicable water quality standards, they subsequently issue permits “consistent” with those allocations. *Id.* On its face, there is no indication in this explanation of any purpose to curtail the rights of a permit holder to test the accuracy and lawfulness of the state’s own procedures used to develop those WLAs. In fact, U.S. EPA clarified in its explanation that the rule was not intended to limit the flexibility of a state to determine its own procedures to derive WLAs and to develop them into water quality-based effluent limits. *Id.* An intent to preempt state-law rights of review could hardly be less evident in this language.

At most, any proscribing intent to be gleaned from this rule is based upon an assumption by EPA that the state’s development of a TMDL-based, EPA-approved allocation of pollutant loadings occurred in compliance with the state’s own laws for developing such allocations and, to the extent challenged under those laws, survived that challenge before being submitted to EPA for approval. Since Fairfield County never had an opportunity to challenge the WLAs established in the Big Walnut Creek TMDL before U.S. EPA approved the WLAs, the condition upon which the logical assumption behind the language of 40 C.F.R. 122.44(d)(1)(vii)(B) never occurred.

ERAC and the Court of Appeals erred when they cavalierly accepted this limited language as circumscribing the scope of review required under Ohio law to be afforded to the

County's challenge to the TMDL.

B. A Ruling that U.S. EPA's Approval Circumscribes a Subsequent State-Law Challenge to the Merits of a State-Developed TMDL Upsets the Balance of Power in the CWA Between the States and the Federal Government.

The CWA has clear language demonstrating Congress' express intent that states are to play the primary role with respect to water pollution control within their boundaries, and, in particular, their primary role with respect to decisions about the designated uses to be made of their waters, and the water quality standards to be developed to protect those designated uses.

For example, 33 U.S.C. 1251(b) provides:

Congressional recognition, preservation, and protection of primary responsibilities and rights of States

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. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution. (emphasis added).

As another example, 33 U.S.C. 1370 provides:

State authority

Except as expressly provided in this chapter, nothing in this chapter shall...be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States. (emphasis added)

Finally, with respect to a state's authority over water quality standards, 33 U.S.C. 1313(c) provides:

Water quality standards and implementation plans

The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

* * * *

Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses....

* * * *

If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. (emphasis added)

In interpreting these expressions of Congressional intent, the federal courts have construed U.S. EPA's role as a supervisory one. *See e.g. District of Columbia v. Schramm*, 631 F. 2d 854, 860 (D.C. Cir. 1980). Furthermore, although the states and U.S. EPA share duties in achieving the CWA's goals for water quality, the primary responsibility for establishing and enforcing appropriate water quality standards is left to the states. *See e.g. Natural Resources Defense Council, Inc. v. U.S. EPA*, 16 F. 3d 1395, 1399 (4th Cir. 1993). Finally, consistent with the fact that the federal TMDL authority addresses the effectiveness of a state's water quality standards program (*see* 33 U.S.C. 1313(d)), the development and implementation of TMDLs is also intended to be the primary role of the states, with U.S. EPA once again relegated to a supervisory role. *See e.g. Sierra Club v. Meiburg*, 296 F. 3d 1021, 1026-1027 (11th Cir. 2002).

A ruling by this Court to affirm ERAC and the Court of Appeals would directly conflict with this carefully-crafted statutory scheme and division of responsibilities. It would relegate Ohio's oversight and judicial review of its own water quality-based TMDL program to a secondary role behind that of U.S. EPA, based solely on whether the Agency completed the

largely ministerial act of approving a water quality-based TMDL submittal by Ohio EPA.

If the states are intended to take the lead role in the development and implementation of water quality standards-based TMDLs, as Congress so dictated, that lead role must include the unfettered right of the states to oversee and judicially review those water quality-based TMDLs under their own laws, free of any conscription thereof arising from U.S. EPA's approval of submittals made under those programs. If U.S. EPA can control and limit the scope of a state's review of its own TMDLs, it effectively controls a major sector of the state's water quality standards program. In such circumstance, the proverbial "tail is wagging the dog," elevating what Congress intended to be a "back seat role" for U.S. EPA into the "front seat role" when Congress intended the states to be "driving the water quality standards bus." The rulings of ERAC and the Court of Appeals below did just that by aggrandizing the limited, procedural approval of a TMDL under federal law into a muzzle that prevented the County from obtaining a meaningful review of the TMDL under Ohio law. A ruling by this Court in favor of the County is required to restore the proper balance of power that Congress intended with respect to Ohio's water quality-based TMDL program.

C. Established Principles of Federal-State Comity and Cooperative Federalism Warrant a Ruling for the County.

The principle of federal-state comity is ingrained in this country's government and its jurisprudence. At heart, comity is based in notions of respect for state sovereigns and for their essential role in a national republic. Justice Brennan summarized the essence of federal-state comity in the seminal case of *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971):

*[C]omity...is a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism,'The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. **What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.** It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.*

Id. at 43-45 (internal citations omitted) (emphasis added. The State of Ohio has a legitimate interest in protecting the rule of law in its courts and administrative tribunals. The State also has a legitimate interest in guaranteeing that the regulatory actions of its agencies will not escape the light of day, and will be fully vetted on their merits in some forum before they become binding decrees that impact important personal and property rights of its citizens.

If U.S. EPA's approval of an Ohio EPA-developed TMDL under federal law negates the ability of the TMDL to be scrutinized on its merits and fully vetted in order to "test its mettle" under, *inter alia*, Ohio's TMDL statutes (R.C. 6111.52(A) and 6111.56) and TMDL rules (Ohio Adm. Code 3745-2-12), then the federal government has disrespected important functions that Ohio's adherence to the rule of law provides for its citizens, in derogation of the established principle of federal-state comity. In the words of Justice Brennan, "[Comity was] born in the early struggling days of our Union of States, [and] occupies a highly important place in our Nation's history and its future." *Id.* The lower tribunals failed to take into account whether their decision to elevate the importance of a limited federal TMDL approval to a point that it nullified an important state standard of review did violence to longstanding principles of comity between

the federal and state governments.

The action of the lower tribunals also did injustice to settled principles of cooperative federalism embodied within the statutory framework of the CWA. When states develop CWA-based programs and are delegated to operate those federal programs at the state level, the state programs are incorporated into a “unitary federal enforcement scheme,” with federal provisions remaining in effect, resulting in a “system of cooperative federalism” in which the state program operates alongside the federal one. *See In re Appalachian Fuels, LLC*, 493 B. R. 1, 27 (6th Cir. 2013) (internal citations omitted). It is also said that the CWA “anticipates a partnership between the States and the Federal Government...” (*Arkansas v. Oklahoma*, 503 U.S. 91, 101, 112 S. Ct. 1046, 117 L. Ed. 2d 239 (1992)), and this relationship has also been aptly characterized as a “distinctive variety of cooperative federalism.” *U.S. Department of Energy v. State of Ohio*, 503 U.S. 607, 633, 112 S. Ct. 1627, 118 L. Ed. 2d 255 (1992).

The rulings of the lower tribunals are inconsistent with any settled notions of cooperative federalism between Ohio and the federal government under the CWA. Their rulings basically negate important rules of law that govern Ohio’s fully-delegated CWA programs, rules that are vital to its ability to administer those programs in compliance with the procedural due process rights of the State’s residents, local governments, and businesses. Their rulings must be overturned to reestablish the cooperative federalism that Congress intended under the statutory scheme of the CWA.

Proposition of Law #3: Because the “Pollution Diet” Recommended in a State-Developed TMDL is the Culmination of a Multi-Year Process that Combines Science and Policy into a Decision with Longstanding, Widespread Economic Impacts, a Ruling that Insulates the “Base of the TMDL Pyramid” from Meaningful Review Must be Avoided.

Just as a building is only as solid as the foundation upon which it is built, a pyramid is

only as solid as the blocks of stone that form its base. The process of developing a TMDL is much like the process of building a pyramid. It is a significant, time-consuming, and scientifically-rigorous undertaking, requiring, among other things, (1) collecting and evaluating massive amounts of chemical and biological water quality data for each impaired waterbody, (2) collecting and assessing data from numerous potential sources of the impairment(s), (3) determining the maximum pollutant loadings each impaired waterbody can assimilate and still maintain applicable standards, (4) determining and ranking the causes of impairment(s), and (5) developing an allocation or distribution of pollutant reductions among the sources, designed to eliminate the impairment(s) and restore each impaired waterbody. Ohio Adm. Code 3745-2-12 (TMDL rule); *see also* U.S. EPA, *Guidance for Water Quality-Based Decisions: The TMDL Process* (April 1991), <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/dec4.cfm> (accessed February 4, 2014).

Each of these steps in the TMDL process creates stones that add layers to the pyramid. The apex of the pyramid is essentially the “pollution allocation diet,” the recommended allocation of pollutant reductions among the point and nonpoint sources of the impairment that, once implemented, is designed to, or at least hoped to, lead to a reduction of the fat and the creation of a healthy waterbody.

Just as the apex of a pyramid is only as sturdy as the stones that form its base, so to a TMDL “allocation diet” is only as sufficiently fortified and defensible as the data collection and assessment, modeling, policy choices and assumptions, and other information gathering, used to develop the allocation. A standard of review that limits judicial scrutiny of a TMDL to asking that the “aggregate” at the apex of the pyramid be “remixed” creates a considerable risk that the stones that formed the layers of the pyramid will not support it, and the entire structure will come

tumbling down. Unfortunately, if the process of developing an allocation diet in a TMDL is flawed, the “structure” may not collapse until countless millions of dollars have been spent to achieve a goal that was never supported by the process to begin with.

A. The Decisions Made by Ohio EPA that Supported the Big Walnut Creek TMDL and its “Pollution Diet” Reveal why “the Base of a TMDL Pyramid” Must be Vetted under the Bright Lights of a Meaningful De Novo Review, Despite U.S. EPA’s Approval.

A review of the transcript from the ERAC proceeding below reveals why it is so important that the entire TMDL process be vetted in a meaningful *de novo* review under Ohio law, regardless whether U.S. EPA has already placed its procedural stamp of approval on the TMDL. The following is a summary of the substantial deficiencies adduced at the hearing:

1. Neither Mr. Fancher nor Mr. Owen, two key witnesses for Ohio EPA at the hearing (nor anyone else at Ohio EPA), evaluated the impact—or, more accurately, the lack thereof—of current or future discharges of phosphorus from the County’s WWTP on attainment of applicable biological standards for aquatic life in Blacklick Creek. Tr. v. III, p. 197.

2. All of the expert testimony presented at the hearing, including that of Ohio EPA’s own witnesses, documented that Blacklick Creek was, and would remain, in attainment of all aquatic life-based biological water quality standards downstream of the WWTP discharge. Tr. v. II, pp. 31-36, 121, 170-171.

3. Unrebutted testimony from the County’s expert witnesses demonstrated the absence of a scientific justification for the 0.5 mg/l phosphorus limit, and that the WWTP was not presently having, nor would in the future have, an adverse impact on water quality in Blacklick Creek. Tr. v. I, p. 142; v. II, pp. 75-76; v. IV, p. 147.

4. Even the testimony of Ohio EPA’s own water quality expert Robert Miltner supported the testimony of Fairfield County’s experts. Tr. v. II, pp. 166-171.

5. Ohio EPA's study in which dissolved oxygen was measured in the waterbodies (relied upon by Mr. Fancher to support his conclusions) was inadequate to demonstrate nutrient enrichment downstream of the WWTP because Ohio EPA requires at least seven days of such data before it is deemed representative, yet only two days of data were collected in the study. Tr. v. I, pp. 130-134; v. II, p. 71.

6. Multiple Ohio EPA and County witnesses testified that they had never observed excessive algal growth in Blacklick Creek downstream of the County's WWTP. Tr. v. II, pp. 27-29; v. V, pp. 50-51; v. III, p. 196; v. III, p. 162; v. IV, pp. 109-110.

7. Ohio EPA's witness Mr. Fancher admitted that the standard set forth in the TMDL for the maximum phosphorus loading that Blacklick Creek could assimilate and still maintain applicable water quality standards was just a "target value" lifted from a guidance document that Ohio EPA developed. J.E. 21; Tr. v. IV, p. 99. In developing the TMDL, Mr. Fancher also testified that he assumed that the concentration of phosphorus in the Creek could not exceed the target value without impairing attainment of biological standards. *Board of Commissioners of Fairfield County v. Nally*, 2013-Ohio-2106, 2013 WL 2422905 ¶ 23 (10th App. Dist. 2013).⁴

8. Using the target value, Mr. Fancher developed a second standard in the TMDL (the pollution diet for the Creek) by allocating phosphorus loadings for point and nonpoint sources believed by Ohio EPA to be contributing to the impairment. His first allocation assumed without any explanation that point sources (like the County's WWTP) would all have to meet a 1.0 mg/l phosphorus limit in their discharge permits, which resulted in a determination that all nonpoint sources, such as farms, golf courses, and sources of urban runoff, would need to reduce

⁴ Cited hereinafter as "App. Op."

their discharge of phosphorus by 90% to avoid exceeding the 0.11 mg/l standard. App. Op. at ¶ 23. Then, without any explanation other than that these numbers “just didn’t add up,” Mr. Fancher redid the allocation using a 0.5 mg/l phosphorus limit for the point sources, which resulted in a determination that all nonpoint sources would need to reduce their discharge of phosphorus by 80% to meet the 0.11 mg/l standard. *Id.*

9. Mr. Fancher was unable to remember who recommended these two “allocation diets” to him or the basis for them, or why he did not examine other potential allocation diets. *Id.*; see also Tr. IV, pp. 104-105.

10. Fairfield County commissioned an upstream/downstream study of Blacklick Creek to replicate the study cited by Mr. Fancher, but used more conservative conditions than those relied upon by Ohio EPA, and the study concluded that biological conditions were actually *better* downstream of the WWTP than upstream. Tr. v. I, pp. 208-211.

A ruling by this Court in favor of Fairfield County ensures that unsupported legal and factual foundations, policy choices, and assumptions, such as these, that do not constitute a valid factual foundation for the TMDL-based pollution diet, will not escape proper vetting in a meaningful *de novo* review. Their careful scrutiny maximizes the probability that a final, fully-vetted, properly-supported TMDL will achieve its water quality goals.

B. A Ruling that Allows only the End Product of a State-Developed TMDL to be Subjected to Review is the Epitome of “No Due Process at All.”

ERAC and the Court of Appeals not only limited the County to the right to request that the Big Walnut Creek TMDL’s “allocation diet” be redistributed among the point sources of the alleged impairment, but both tribunals then ruled that even that right was basically illusory. Each held that it was within Ohio EPA’s discretion to grant or deny the request. See *Board of Commissioners of Fairfield County, Ohio v. Director of Environmental Protection*, 2011 WL

1841913 ¶ 84 (ERAC No. 235929, May 12, 2011) (holding that it was within the Director’s discretion to “exercise the option” to adjust the WLA); App. Op. at ¶ 71 (same). Because ERAC and the Court of Appeals allowed U.S. EPA’s limited procedural approval of the TMDL under federal law to basically control the outcome of the *de novo* hearing under Ohio law, and then reduced Fairfield County’s rights to a meaningless request for Ohio EPA to exercise a wholly-discretionary option, both tribunals effectively denied all due process to the County.

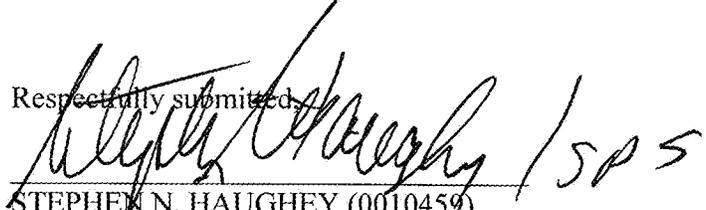
The due process right under Article I, Section 16 of the Ohio Constitution to notice and an opportunity to be heard at a meaningful time and in a meaningful manner (*see e.g. State v. Hochhausler*, 76 Ohio St. 3d 455, 459, 668 N.E. 2d 457 (1996)) is admittedly a flexible one, dependent on the importance attached to the interest to be protected and the particular circumstances under which the deprivation may occur. *Id.* But the actions of the lower tribunals in the case *sub judice* stretched that flexibility beyond its breaking point, requiring that the Court reverse their rulings in order to mend the damage.

VIII. CONCLUSION.

For all of the reasons set forth above and in the Amended Merit Brief filed by Fairfield County, this Court should reverse the decision below, and declare that the Big Walnut Creek TMDL is null and void and cannot be applied until Ohio EPA undertakes proper rulemaking procedures. For the same reasons, the Court should clarify that U.S. EPA limited procedural review and approval of Ohio’s TMDLs under the CWA does not preempt or otherwise circumscribe the right to a meaningful *de novo* review of the TMDLs on their merits under Ohio law. Finally, in the alternative, if the Court rules that U.S. EPA’s limited procedural review and approval does in fact have such preemptive effect, the Court should rule that Ohio EPA must afford the statutory and constitutional rights to a meaningful *de novo* review under Ohio law by

promulgating TMDLs in compliance with R.C. Chapter 119 before submitting the TMDLs to U.S. EPA for its review and approval.

Respectfully submitted,

 /SPS
STEPHEN N. HAUGHEY (0010459)

Counsel of Record

THADDEUS H. DRISCOLL (0083962)

FROST BROWN TODD LLC

301 E. Fourth Street

Cincinnati, OH 45202

Telephone (513) 651-6800

Facsimile: (513) 651-6981

shaughey@fbtlaw.com

tdriscoll@fbtlaw.com

STEPHEN J. SMITH (0001344)

FROST BROWN TODD LLC

10 W. Broad Street

Columbus, Ohio 43215

Telephone: (614) 464-1211

Facsimile: (614) 464-1737

ssmith@fbtlaw.com

*Counsel for Amici Curiae Ohio Municipal League
and County Sanitary Engineers Association of Ohio*

JOHN GOTHERMAN (0000504)

OHIO MUNICIPAL LEAGUE

175 S. Third Street, #510

Columbus, Ohio 43215-7100

Telephone: (614) 221-4349

Facsimile: (614) 221-4390

jgotherman@columbus.rr.com

Counsel for Amicus Curiae Ohio Municipal League

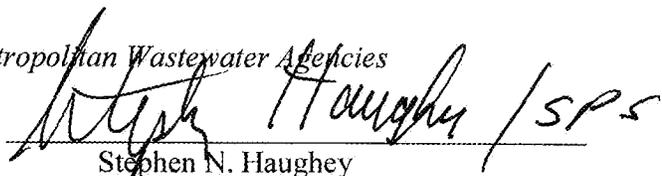
IX. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amended Merit Brief of *Amici Curiae* Ohio Municipal League and County Sanitary Engineers Association of Ohio was sent via regular U.S. mail this 5th day of February 2014 upon the following counsel of record:

MICHAEL DeWINE (0009181)
Attorney General of Ohio
ERIC E. MURPHY (0083284)
State Solicitor
Counsel of Record
SAMUEL C. PETERSON (00831432)
Deputy Solicitor
L. SCOTT HELKOWSKI (0068622)
ALANA R. SHOCKEY (0085234)
Assistant Attorneys General
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
Counsel for Appellee Scott Nally
Director of Environmental Protection

LINDA S. WOGGON (0059082)
OHIO CHAMBER OF COMMERCE
230 East Town Street
Columbus, Ohio 43215
Counsel for Amicus Ohio Chamber of Commerce

JESSICA E. DEMONTE (0072414)
ANDREW O. ETTER (0085013)
SQUIRE SANDERS LLP
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215
JOHN D. LAZZARETTI (0080780)
SQUIRE SANDERS LLP
4900 Key Tower
127 Public Square
Cleveland, Ohio 44114
Counsel for Amicus Association of Ohio Metropolitan Wastewater Agencies


Stephen N. Haughey