

IN THE SUPREME COURT OF OHIO

13-1085

Board of Commissioners of Fairfield
County,

Plaintiff-Appellant,

v.

[Scott J. Nally], Director of
Environmental Protection,

Defendant-Appellant.

CASE NO. _____

On Appeal from the Franklin
County Court of Appeals
Tenth Appellate District

Court of Appeals
Case No. 11AP-508
ERAC No. 235929

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT
BOARD OF COMMISSIONERS OF FAIRFIELD COUNTY

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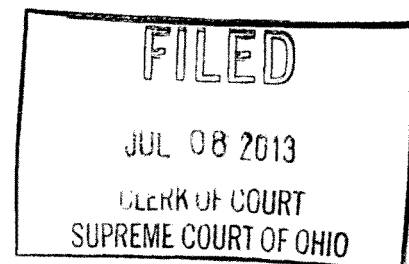


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I. STATEMENT OF THE CASE AND FACTS

This case presents three distinct albeit related issues, two of which are critical to thousands of industrial and publically owned wastewater treatment facilities in this State. The first is whether the Ohio Environmental Protection Agency (“Ohio EPA”) can require industries, cities, and counties to spend hundreds of millions, perhaps billions, of dollars to further polish the quality of their wastewater when the bodies of water into which they discharge have already achieved their regulatory-determined quality. The second is whether Ohio EPA can, through the artifice of an unreviewable preliminary step, completely prevent meaningful legal challenges by the people who are affected by this egregious overregulation. The third issue is whether and how the Environmental Review Appeals Commission (the “Commission”) should act to correct these abuses by Ohio EPA.

A. Overview of Pertinent Provisions of Federal Law

The regulation of water pollution is driven by the federal Clean Water Act (the “Act”), the objective of which was to restore and maintain the health of the nation’s waterways.¹ This goal is accomplished principally through the permit program known as National Pollutant Discharge Elimination System (“NPDES”).² NPDES permits are issued to individual dischargers, both public and industrial, and authorize the discharge of substances into state waters at levels that meet water quality standards. In Ohio, Ohio EPA has been delegated the authority from U.S. EPA to issue NPDES permits.

Section 303(d) of the Act established the Total Maximum Daily Load (“TMDL”) program, which focuses on identifying and restoring polluted streams, rivers, and other surface waters. A TMDL describes the maximum amount of a pollutant that a body of water can

¹ 33 U.S.C. §§ 1251, *et seq.*

² 33 U.S.C. § 1311.

receive from all sources—point sources (such as wastewater treatment plants and factories), non-point sources (such as golf courses and stormwater runoff) and naturally occurring background—while still meeting water quality standards.³ The process for creating a TMDL in Ohio can be summarized in four steps. First, Ohio EPA must identify, list, and prioritize the water bodies in the State that do not meet Ohio’s water quality standards. The watersheds are then targeted for TMDL development. Second, Ohio EPA then prepares the TMDL documents for the targeted watersheds. Next, U.S. EPA reviews and approves the TMDL. However, U.S. EPA guidelines do not require the submission or review of the underlying data that Ohio EPA used to prepare the TMDL. Finally, once the TMDL is approved, Ohio EPA is then responsible for implementing the TMDL.

As of May 9, 2013, there were approximately 86 TMDLs in Ohio, either in place or in the process of being prepared and submitted. Each TMDL can include recommended limits on numerous types of pollutants: chlorine, coliform bacteria, detergents, and dissolved oxygen, to name a few.

B. Facts Specific to this Appeal

Appellant Fairfield County owns and operates a wastewater treatment plant (the “Plant”) located on Blacklick Creek in Pickerington, Ohio. On June 30, 2006, the Ohio EPA issued a renewal NPDES Permit for the Plant, but for the first time included limits for the discharge of phosphorus and Total Dissolved Solids.⁴ The County timely appealed to the Environmental Appeals Review Commission (the “Commission”), setting forth multiple reasons why these discharge limitations were unlawful and unreasonable.

³ See OAC 3745-2-02(B)(67).

⁴ Total dissolved solids is a generic term for certain salts, metals, and other substances that dissolve in water.

Following a five day adjudication hearing, the Commission issued its decision, which was not only completely unsupported by the facts introduced *at the hearing*, it was completely contradicted by the unrebutted testimony from six supremely qualified experts, including Ohio EPA's testifying expert. The unequivocal evidence proved that the Plant's current discharge of phosphorus at a level in excess of 1.0 milligram per liter (mg/l) was not having an adverse impact on the biota in Blacklick Creek and that the \$5 million price tag to meet 0.5 mg/l effluent limit in the Permit was totally unnecessary.

Ohio EPA admitted that the sole reason that the phosphorus limit was included in the Permit was because it was recommended in the TMDL prepared for Big Walnut Creek.⁵ Without first promulgating the TMDL as a rule, Ohio EPA simply lifted the number from the TMDL and plugged it into the Permit. No one at Ohio EPA evaluated the biological impact—or, more accurately, the lack thereof—of current or future discharges of phosphorus from the Plant. At the hearing, Fairfield County presented overwhelming and uncontradicted evidence that the phosphorus limit was unreasonable. However, the Commission refused to consider Fairfield County's evidence, and instead treated the unpromulgated TMDL-recommended limit as *ipso facto* creating a valid, and unchallengeable, factual foundation for the permit limitation.

Following a different, but equally esoteric, line of reasoning, the Commission held that Ohio EPA had a valid factual foundation for requiring Fairfield County to reduce the amount of total dissolved solids discharged by the Plant. In direct contravention of Ohio law, the Commission upheld the imposition of a technically infeasible, fabulously expensive permit limit, despite an unrebutted and thoroughly documented demonstration that the amount of total

⁵ Blacklick Creek, and several score other streams, discharge directly or indirectly into Big Walnut Creek. Big Walnut Creek, and numerous other streams, flow into the Scioto River.

dissolved solids being discharged from the Plant has not and will not harm aquatic life in Blacklick Creek.

The Commission did sustain Fairfield County's contention that Ohio EPA violated R.C. 6111.03(J) by failing to consider the technical feasibility and economic reasonableness of imposing the total dissolved solids and phosphorus limitations. However, rather than affirmatively making the factual findings compelled by the unrebutted expert testimony, as it is required to do by law—to wit, that it is not technically feasible for the County to treat for total dissolved solids, and the \$5,400,000 cost of achieving compliance with the phosphorus limit is not justified—the Commission erroneously returned the matter to Ohio EPA.

On June 8, 2011, Fairfield County filed its appeal of the Commission's decision to the Tenth District Court of Appeals. On May 23, 2013, the court erroneously affirmed the Commission's decision, largely parroting the Commission's reasoning.

II. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The decision of the Tenth District establishes erroneous precedent on a number of novel (in Ohio) and important environmental and due process issues that will adversely impact cities and industries throughout the state and, indeed, the nation.

First, the court of appeals erroneously held that the imposition of a discharge limit that was lifted directly from a TMDL into a NPDES permit does not equate to regulation based on unpromulgated standards. The court's justification—that the permit limit came from the TMDL, which was “properly developed and federally approved”—is constitutionally insufficient. Those portions of a TMDL that are functionally used as rules must be promulgated as a rule under Ohio law before they can be enforced through permit limitations.

This holding empowers Ohio EPA to end-run Ohio law requiring administrative agencies to regulate through legally promulgated rules. Countless municipalities and businesses throughout Ohio will be affected by the agency's ability to impose limits based on unpromulgated TMDLs. Just in the Scioto River Watershed, there are currently thirteen TMDLs either already approved or in preparation, each of which affects numerous public and privately-owned wastewater dischargers. The TMDL at issue in this appeal affects twelve dischargers in addition to Appellant Fairfield County.

Second, the appellate court has effectively declared that the mere presence of a recommended discharge limit in a TMDL *ipso facto* means that the limit is reasonable, even where unrebutted expert testimony demonstrates that Ohio EPA's assumptions putatively supporting the limit are invalid. This faulty conclusion robs a permittee of its day in court, as it prevents any *real* challenge to the assumptions, data, and logic underlying permit limits when they are based on a TMDL. As the TMDL and NPDES programs are national, and intertwined, the lower court's holding and analysis will affect vast numbers of dischargers, in Ohio and nationwide. Wastewater dischargers will be subject to functionally unreviewable, and frequently vastly expensive, TMDL-recommended discharge allocations even when they are based upon inadequate or faulty data and questionable science.

Third, because the Commission, and now the appellate court, upheld a permit limit on the sole basis that it was derived from the TMDL and without consideration of any evidence presented by Fairfield County, this case raises a substantial constitutional question. The Commission denied Appellant Fairfield County its due process rights, and the appeals court held that the U.S. EPA's approval of the TMDL was due process enough. If allowed to stand, the

decision will operate to prevent thousands of Ohio businesses, cities, and counties from having their “day in court.”

Fourth, the Tenth District held that Ohio EPA may impose extraordinarily expensive discharge limits even where conclusive evidence demonstrates that such limits are totally unnecessary to protect the receiving stream’s designated use (*i.e.*, that aquatic life is not being harmed). The court arrived at this conclusion despite un rebutted evidence that the receiving stream was and would remain in full attainment of its designated use. This decision is flatly inconsistent with Ohio law, which states that if aquatic life is not being harmed by a particular pollutant, Ohio EPA may not require the discharger to pay for further unnecessary pollutant reductions.

This decision will cost Ohio dischargers millions or possibly billions of dollars in unnecessary improvements. In the case of municipal dischargers, these needless costs will be borne by the public, in the form of increased user fees. For industrial dischargers, these costs will be passed on to the purchasers of their products, with a corresponding economic impact that can result in lost jobs and productivity in Ohio and around the country.

Finally, the appeals court erroneously affirmed the Commission’s failure to make the factual finding that the permit limits were neither technically feasible nor economically reasonable despite a thorough and uncontested factual record so demonstrating. Although Ohio law requires the Commission to make factual findings based on the evidence before it, the Commission disregarded its statutory duty and simply remanded the case back to Ohio EPA. This holding also has wide-reaching implications. Under the appellate court’s strained reasoning, uncontroverted evidence presented to the Commission by a permit holder is utterly disregarded. Instead, the appellate court allows remanding the case to Ohio EPA, even in the

face of the permit holder's evidence proving that a remand is futile. This is an egregious waste of resources of the Ohio EPA, of the Commission, of the permit holder, and ultimately, of the public.

In sum, this case will have a major impact on many thousands of cities, counties, and industries throughout Ohio and, undoubtedly, across all fifty states. The significant and far-reaching environmental and due process issues presented by the decision of the Court of Appeals have already found resonance among the national environmental bar and the regulated community. This Court should grant jurisdiction to hear this case and review the erroneous decision of the court of appeals.

In support of its position on this issue, the Board presents the following arguments:

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

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.

Under Ohio law, if a standard has general and uniform operation, it must first be formally promulgated as a rule before an agency can enforce it. *See, Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. & Nurse Registration* (1989), 44 Ohio St.3d 73, 540 N.E.2d 1354 (holding that an agency's issuance of a "position paper" that had the effect of establishing a new standard constituted a "rule" that should have been adopted in accordance with Chapter 119); *Jackson Cnty. Envtl. Comm. v. Schregardus* (1994), 95 Ohio App.3d 527, 642 N.E.2d 1142 (holding that Ohio EPA cannot regulate through unpromulgated "guidelines").

R.C. 119.01(C) defines a rule as "any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule." This Court has previously explained why the rule promulgation process is necessary. "The rulemaking requirements set

forth in R.C. Chapter 119 are designed to permit a full and fair analysis of the impact and validity of a proposed rule.” *Condee v. Lindley*, 12 Ohio St.3d 90, 93, 465 N.E.2d 450 (1984). The failure of any agency to comply with the rule promulgation procedure shall invalidate any rule adopted. *Id.*, quoting R.C. 119.02.

Every single TMDL impacts *all* current and future cities and industries that discharge into a watershed, not just one entity. Collectively, TMDLs impact virtually all dischargers. They are generally and uniformly applicable. Therefore, permit limits derived from a TMDL are invalid unless and until the TMDL is promulgated through proper rulemaking procedures.

The Tenth District decision below is an anomaly. Other state supreme Courts that have addressed this issue have held that TMDLs may not be implemented through NPDES permit limits until promulgated. *Arasco, Inc. v. Idaho*, 138 Idaho 719, 69 P.3d 139 (2003)(holding that permit limits were invalid because the TMDL was not promulgated as a rule); *Comm’rs of Pub. Works v. S.C. Dep’t of Health and Env’tl. Control*, 372 S.C. 351, 641 S.E.2d 763 (2007)(holding that the state was not authorized to rely on the TMDL to set permit limits because the TMDL had not been promulgated as a regulation).

By plucking a recommended permit limit from the TMDL and inserting it into the NPDES permit, Ohio EPA is acting as if the TMDL is a rule of general applicability for all present and future dischargers to the Blacklick Creek watershed. However, the TMDL at issue was never promulgated pursuant to and as required by R.C. Chapter 119.

The appellate court erroneously held that the mere fact that the TMDL was federally approved satisfies Ohio’s rulemaking procedures. However, U.S. EPA’s approval of a document, the TMDL, cannot supplant the rule promulgation process. That outcome completely ignores the rulemaking procedure’s “full and fair analysis” supported by this Court. *Condee*, 12

Ohio St.3d at 93. Ohio EPA's rule promulgation procedure requires, *inter alia*, JCARR approval, Common Sense Initiative review, and the ability to challenge the rule in an adjudication hearing. The TMDL process that has been approved by the Commission and the court of appeals strips the public, and the regulated community, of these rights. If this decision is allowed to stand, state agencies can sidestep Ohio rule promulgation requirements as long as the policies they wish to enforce have a federal stamp of approval. Such an expansion of agency regulation violates Ohio law and should be prevented.

Proposition of Law No. 2: 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.

At a hearing challenging an action of Ohio EPA, the Commission must consider the evidence presented in order to determine whether a valid factual foundation exists for the challenged action. *Citizens Comm. To Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70, 381 N.E.2d 661 (10th Dist. 1977). In order to establish a valid factual foundation for the imposition of permit limitations, the Director must demonstrate that there is a direct correlation between pollution control requirements and regulatory standards. *Gen. Elec. Lighting v. Koncelik*, 10th Dist. No. 05AP-310, *et seq.*, 2006-Ohio-1655 at ¶ 37.

In this case, Ohio EPA was required to prove that there was a direct correlation between the proposed permit limits and the attainment of the water quality standards applicable to Blacklick Creek. It utterly failed to do so. Instead, Ohio EPA, the Commission, and now the appellate court relied solely on the TMDL, which is a wholly insufficient substitute.

The appellate court has effectively declared that the mere presence of a recommended discharge limit in a TMDL *ipso facto* means that the limit is reasonable, even where un rebutted expert testimony conclusively demonstrates that Ohio EPA's assumptions putatively supporting

the limit are invalid. The court relied heavily on the fact that the TMDL was approved by the U.S. EPA, as if the mere fact that an agency of the federal government has approved a document makes it automatically reliable. However, the appellate court's conclusion is bereft of *any* legal authority and is further undercut by the fact that U.S. EPA guidelines do not require the submission, let alone review, of the underlying data that purportedly support the permit limits recommended in a TMDL.⁶

This faulty conclusion of the appellate court will subject wastewater dischargers to functionally unreviewable—and extremely expensive—discharge limits merely because they were based on a TMDL. The court's decision must be reversed.

Proposition of Law No. 3: 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.

The Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution require that administrative proceedings comport with due process. *Village of Harbor View v. Jones*, 10th Dist. 10AP-356, *et seq.*, 2010-Ohio-6533, ¶ 36. 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 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also State ex rel. Plain Dealer Publishing Co. v. Floyd*, 111 Ohio St.3d 56, 2006-Ohio-4437, ¶ 45.

⁶ By way of example, Matt Fancher, the author of the portion of the TMDL pertaining to Blacklick Creek, was not qualified as an expert at the hearing before the Commission, and acknowledged that due to his inexperience at the time he performed his work on the TMDL he was forced to use a less accurate water quality model to produce the recommended allocations. Mr. Fancher's work on the allocations in the TMDL that formed the basis for the recommended phosphorous limit in the permit was rife with speculation, including changing an allocation from 80% to 90% simply because he believed the numbers “just didn't add up.”

Appellant Fairfield County has been denied the right to be heard in a meaningful manner. The extant case law indicates that a party does not have the right to obtain meaningful review of a TMDL's policy choices, data, or logic at the time it is issued or approved. TMDLs are not self-executing; they are merely planning documents. *See, e.g., Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). Because of that, permittees' attempts to challenge TMDLs have routinely been dismissed because such challenges are not ripe. *City of Arcadia v. EPA*, 265 F. Supp.2d 1142, 1155 (N.D. Cal. 2003)(holding claim challenging TMDL was unripe because the "TMDLs impose[d] no present, affirmative duties on [the cities] and require[d] no immediate changes in [the cities'] conduct.")

Therefore, parties must have the right to a meaningful review when a NPDES permit is issued. *Dayton Power & Light Co., v. Schregardus*, 123 Ohio App. 3d 476, 480, 704 N.E.2d 589 (10th Dist. 1997)(holding that the Commission must accept a party's appeal of the Director's decision to place a property on the Master Sites List, which identifies property that is contaminated or is suspected of being contaminated, because the party was not afforded any other opportunity to comment on or challenge the decision). The appellate court decision, finding that the mere presence of a draft allocation in a TMDL constitutes a sufficient factual foundation for a NPDES permit limit, despite the presence of overwhelming evidence to the contrary, makes such permit limits functionally unreviewable. This constitutes a clear denial of due process.

The appellate court held that Fairfield County was not denied due process because it was afforded the opportunity to challenge the permit limits during the permitting process. However, due process requires not just the ability to obtain review of an agency's decision, but to obtain a *meaningful* review. *Mathews*, 424 U.S. at 333. The review of a permit limit by the Commission

is entirely illusory if, as the appellate court held here, the TMDL automatically creates a valid factual foundation for a permit limit, despite mountains of un rebutted evidence to the contrary.

Under this tortured reading of the law, permit limits based on a TMDL are functionally insulated from meaningful review. If allowed to stand, this decision will unconstitutionally prevent thousands of public and industrial dischargers from having their day in court.

Proposition of Law No. 4: Where a discharger is not harming aquatic life, Ohio EPA may not impose unnecessarily stringent water quality standards.

Water quality standards in Ohio have two distinct elements: (1) designated uses, and (2) numerical criteria that are used to measure attainment of the designated uses. Ohio Adm. Code 3745-1-07(A). Designated uses are identified by taking into consideration the use and value of the water body for public water supply, for protection of fish, shellfish, and wildlife, and for recreational, agricultural, industrial, and navigational purposes. The numerical criteria include both biological and chemical criteria.

The chemical standards establish numeric goals for specific parameters (*e.g.*, a stream shall have a minimum dissolved oxygen concentration of 5.0 mg/l, a chlorine concentration less than 19 µg/l, etc.) that usually are an approximate measurement of the capability of a stream to support a specific aquatic ecosystem. However, per Ohio Adm. Code 3745-1-07(A)(6), the biological criteria “provide a direct measure of attainment of the” designated use. If a watershed is meeting or exceeding the biological criteria established for that watershed’s particular designated use, then it is considered to be in attainment. *See*, Ohio Adm. Code 3745-1-07(A)(6) and Table 7-15.

Ohio Adm. Code 3745-1-07(A)(6)(a) explicitly states that if a watershed is in attainment of biological criteria, that takes precedence over the application of chemical criteria. In lay terms,

if aquatic life is not being materially harmed by a particular pollutant, Ohio EPA may not require a discharger to pay for further, unnecessary, reductions in the discharge of that pollutant.

Ohio EPA has, by regulation, adopted a chemical-specific water quality standard for total dissolved solids of 1500 mg/l. It then used that standard to calculate the 1,646 mg/l total dissolved solids limit in Appellant's permit. However, Ohio EPA did not determine whether that limit, or any limit on total dissolved solids, was having or would have an adverse impact on aquatic life, or whether the total dissolved solids being discharged by Appellant was having an adverse effect on the biology of Blacklick Creek. Ohio EPA based the limit on a rote arithmetic calculation.

Unrebutted evidence presented at the hearing conclusively proved that Appellant's plant has discharged total dissolved solids into Blacklick Creek for years in amounts substantially higher than the newly added permit limit, and that the Creek has nevertheless continued to meet, and will continue to meet, the applicable biological criteria. Under these circumstances, Ohio EPA is not required—indeed, it is not legally authorized—to impose a chemical specific water quality standard, and the Commission and the Court of Appeals should have so held.

Instead, the appeals court disregarded Ohio EPA's own rule and held that Ohio EPA may impose unlawful and unnecessarily stringent permit limits, even where they are demonstrably unnecessary. If allowed to stand, cities, counties, and businesses will be forced to implement improvements to their facilities, even if demonstrably unnecessary for the protection of the aquatic ecosystem, something the Ohio Administrative Code never contemplated or intended. Such a holding will cost public and industrial dischargers millions or possibly billions of dollars in superfluous improvements.

Proposition of Law No. 5: The Commission is required to make findings based on the evidence presented to it and, where a party presents probative and uncontested factual evidence in support of its challenge, the Commission may not remand the issue back to Ohio EPA.

The Commission is required to make findings based on the evidence presented to it. R.C. 3745.05(G); Ohio Adm. Code 3746-11-03. However, it failed to do so in this case, and the appellate court upheld the Commission's erroneous decision.

Appellant challenged Ohio EPA's failure to properly consider the technical feasibility and economic reasonableness prior to its issuance of the permit limitations. R.C. 6111.03(J)(3) requires such a determination "to ensure that the balance between regulation and encouragement of business is properly struck." *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274, 2005-Ohio-4982, 834 N.E.2d 786, ¶ 20. However, the evidence Appellant submitted to the Commission went much farther than merely demonstrating Ohio EPA's failure to properly evaluate the technical and economic information presented to it by the Appellant during the pre-permit issuance (comment) stage of the proceedings. Appellant presented un rebutted evidence at the hearing that the total dissolved solids limit is not technically feasible, the cost to reduce the phosphorus to the permitted level is not economically reasonable, and there is no benefit to Blacklick Creek that would result from reduction of either total dissolved solids or phosphorus.

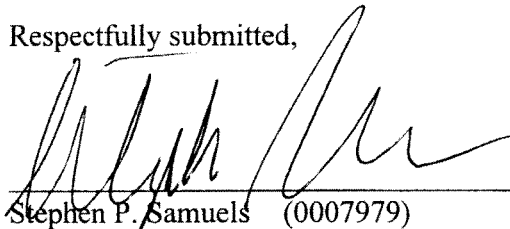
The evidence relevant to the determination was presented to the Commission, and it is the Commission that is required to make the factual findings consistent with the facts presented to it at the hearing. *Salem v. Koncelik*, 164 Ohio App.3d 597, 2005-Ohio-5537, 853 N.E.2d 799, ¶ 20 (10th Dist.)(remanding the case back to the Commission because it failed to make required findings, and it is the Commission's duty to make its determinations given the evidence presented at the *de novo* hearing). Instead, the appellate court completely ignored the evidence and remanded the case back to the Ohio EPA. This is clear error. Ohio EPA should be treated

the same as any other litigant: if it fails to prove its case, or rebut the evidence presented by an adverse party, the Commission should rule against it.

IV. CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. Therefore, Appellant Fairfield County requests that this Court accept jurisdiction in this case so the vital issues presented will be reviewed on the merits.

Respectfully submitted,



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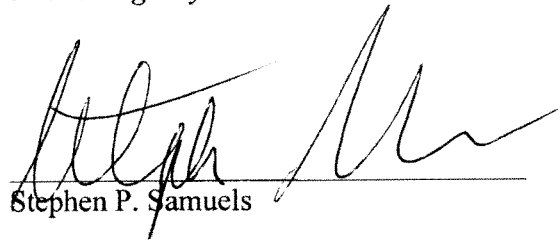
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following persons this 8th day of July, 2013 via regular U.S. Mail, postage prepaid:

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