

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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MERIT BRIEF OF APPELLANT
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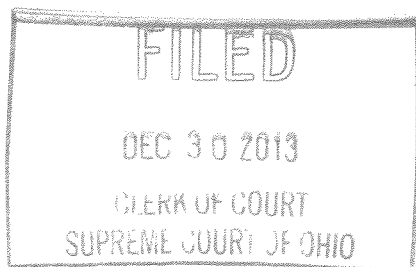


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INTRODUCTION AND STATEMENT OF THE ISSUE FOR REVIEW

Distilled to its essence, this appeal presents the fundamental question of whether and when due process will be afforded to the members of a class of affected stakeholders adjoining an Ohio river or stream before they are subjected to new, binding, and frequently very expensive, pollutant limits developed by Ohio EPA.

The process at issue is the federal Clean Water Act-driven development of a total maximum daily load ("TMDL"), which is essentially a "pollution diet" developed for a "fat" river or stream found to be impaired by excessive amounts of pollutants. The affected stakeholders include: (1) all governmental, commercial, and industrial discharge permit holders in the watershed, (2) all farmers and other non-point sources of pollution in the watershed, (3) all owners/operators of storm sewer collection systems in the watershed, and (4) all homeowners who own private sewage disposal systems in the watershed, determined to be contributing to the obesity of the waterbody, and thus obligated to meet new standards designed to "reduce their fat" and return the stream to a healthy condition. The question is when, and in what manner, those stakeholders will be afforded meaningful review of the new standards before being forced to expend substantial resources to comply with them.

In the case *sub judice*, Fairfield County is the affected stakeholder that took up the laboring oar by challenging the TMDL developed by Ohio EPA, and approved by U.S. EPA, for the Big Walnut Creek watershed, a watershed consisting of more than forty waterbodies. When Ohio EPA imposed its new TMDL-derived pollution standards for Blacklick Creek in the County's discharge permit, the County appealed the permit asserting, among other arguments, that the data, methodology, assumptions, and policy choices involved in the development of the TMDL were flawed, and that the new standards set forth in the TMDL

could not be imposed without first undergoing proper notice and comment rulemaking under Ohio law. The lower tribunals disagreed with the County's several arguments. This Court agreed to take up the issue pertaining to notice and comment rulemaking.¹

As demonstrated below, Ohio EPA's development of binding standards for the Big Walnut Creek watershed and Blacklick Creek clearly constitutes rulemaking under Ohio law, and U.S. EPA and several other states (at least ten so far) that have addressed the issue agree. Because Ohio EPA did not follow Ohio's requirements for rulemaking, the new standards are null and void and unenforceable until the Agency complies with these requirements.

STATUTORY/REGULATORY FRAMEWORK

Under the federal Clean Water Act ("CWA" or "Act"), 33 U.S.C. 1251 *et seq.*, states like Ohio that have been delegated the authority to administer the Act must: (1) identify all waterbodies that are incapable of achieving applicable water quality standards using just technology-based effluent limits, (2) create a list of the "impaired" waterbodies for U.S. EPA's approval, (3) prioritize the list for development of TMDLs designed to eliminate the causes of impairment of each waterbody, (4) develop TMDLs and implementation plans for each waterbody and submit the TMDLs to U.S. EPA for approval, (5) implement the approved TMDLs pursuant to their state CWA programs, and (6) assess the effectiveness of each implemented TMDL and adjust or modify it if needed. *See* 33 U.S.C. 1313(d)-(e); *see also* 40 C.F.R. 130.7 (same).

All TMDLs establish at least two sets of standards: (1) the maximum amount of pollutants, including a margin of safety, that an impaired waterbody can assimilate and still

¹ On November 18, 2013, Fairfield County moved the Court to reconsider its November 8 ruling and take up two additional TMDL-related issues for appeal. If the Court decides to hear the two additional issues, the County will file a supplement to this Merit Brief, or file an amended Merit Brief, that addresses the two issues.

achieve and maintain applicable water quality standards,² and (ii) the allocation of a pollution “diet” among all sources contributing to the impaired condition, designed to reduce pollutant loadings below the allowable maximum. Ohio Adm. Code 3745-2-12; *see also* 40 C.F.R. 130.7(c) (same).

The development of a TMDL is a significant and scientifically-rigorous undertaking, requiring, among other things, collecting and assessing voluminous chemical and biological water quality data for the applicable waterbody, collecting and assessing data from potential sources of the impairment(s), determining the maximum pollutant loading(s) the waterbody can assimilate and still maintain applicable standards, determining and ranking the causes of impairment(s), and developing an allocation or distribution of pollutant reductions among the sources, designed to eliminate the impairment(s) and restore the waterbody. *Id.*; *see also* U.S. EPA, *Guidance for Water Quality-Based Decisions: The TMDL Process* (April 1991), http://water.epa.gov/scitech/datait/models/upload/1999_11_05_models_SASD0109.pdf (accessed Dec. 28, 2013). Not surprisingly, the development of TMDLs is a lengthy process, typically lasting two or more years for each impaired waterbody. *See e.g.* Ohio EPA, *Overview of the TMDL Project Process* (Mar. 12, 2001), http://epa.ohio.gov/portals/35/tmdl/integrated_process.pdf (accessed Dec. 28, 2013) (Ohio EPA’s timeline for developing TMDLs, showing an average of 18 months for data collection and assessment, followed by an average of 12 months to develop the TMDL).

After a state completes a TMDL, it must be submitted to U.S. EPA for approval, which

² Water quality standards consist of designated uses assigned to each waterbody (such as, for example, recreation, drinking water, coldwater fisheries, *etc.*), numeric and/or narrative criteria developed to protect the uses assigned to each waterbody, and an antidegradation policy that ensures long term maintenance of the uses in waters performing better than applicable criteria. *See* 40 C.F.R. 130.6; Ohio Adm. Code Chapter 3745-1.

that Agency must do within 30 days of receipt. 33 U.S.C. 1313(d)(2). While the CWA does not set forth U.S. EPA's review criteria, consistent with its limited time for review, U.S. EPA's review is procedural, not substantive. See U.S. EPA, *Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992* (March 6, 2012), <http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/final52002.cfm> (setting forth the procedural checklist) (accessed Dec. 28, 2013).

If U.S. EPA disapproves a state-drafted TMDL, or a state fails to develop a TMDL for a listed impaired waterbody, U.S. EPA must develop a TMDL for the applicable waterbody. 33 U.S.C. 1313(d)(2). Once U.S. EPA approves or issues a TMDL for a waterbody, the applicable state must implement it through the state's EPA-approved water quality management plan. 40 C.F.R. 130.6(c)(1) & 130.7(d)(2); see also Ohio Adm. Code 3745-2-12(G) & 3745-33-05(A) (requiring that Ohio EPA issue permits with limits based upon approved TMDLs).

As of May 9, 2013, Ohio EPA had organized Ohio's impaired waterbodies and watersheds into approximately 86 to-be-developed TMDLs, approximately one-third of which have been completed, approved by U.S. EPA, with the applicable standards in some unspecified stage of implementation; and the remaining two-thirds still in various stages of preliminary assessment or development of applicable standards. See Ohio EPA, *Ohio Total Maximum Daily Load Program Process* (May 9, 2013), http://epa.ohio.gov/Portals/35/tmdl/TMDL_status_May2013.pdf (colored map of Ohio showing the stage of TMDL development across the State) (accessed Dec. 28, 2013).

STATEMENT OF FACTS AND PROCEDURE OF THE CASE

A. The Tussing Road Wastewater Treatment Plant.

Fairfield County owns and operates the Tussing Road wastewater treatment plant (the

“WWTP”) located along Blacklick Creek in Pickerington, Ohio. *Board of Commissioners of Fairfield County, Ohio v. Director of Environmental Protection*, 10th Dist. App. Franklin No. 11AP-508, 2013-Ohio-2106, ¶ 4 (“App. Op.”). The WWTP treats wastewater before discharging it to Blacklick Creek pursuant to a National Pollutant Discharge Elimination System (“NPDES”) permit issued by Ohio EPA. *Id.* at ¶ 23.

B. The TMDL for the Big Walnut Creek Watershed.

In 2000, Ohio EPA began studying the water quality of the Big Walnut Creek watershed, which includes Blacklick Creek. *Id.* at ¶ 14. The watershed contains more than forty waterbodies. Joint Exhibit (“J.E.”) 13 (TMDL) at pp. 16-22. After concluding that the watershed was impaired, the Agency spent the next five years developing a TMDL to identify and address the causes of impairment (the “TMDL”). *Id.* at ¶ 17. The TMDL (1) concluded that nutrient enrichment due to elevated discharges of phosphorus was a primary cause of impairment in the watershed,³ (2) set a maximum standard of 0.11 mg/l for phosphorus for the watershed and its tributaries to achieve and maintain applicable water quality standards, (3) concluded that numerous point and nonpoint sources were causing or contributing to the impairment, including the County’s WWTP,⁴ and (4) established an allocation of pollutant loadings to be distributed among all of the alleged causes of the impairment, designed to reduce phosphorus discharges to enable the 0.11 mg/l standard to be achieved. *Id.*

Based upon the 0.11 mg/l maximum standard set for phosphorus for the watershed, Ohio EPA then developed a second standard, consisting of the phosphorus loading reductions that the

³ Other identified “priority” causes of impairment in the watershed were stream habitat alterations, siltation, organic pollutant loadings, and pathogens. J.E. 13 (TMDL) at pp. 23-27.

⁴ Other sources identified in the TMDL as causing or contributing to the impairment were farmers involved in crop production or raising livestock, owners of private home sewage disposal systems, urban development, runoff from stormwater collection systems, and discharges from other wastewater treatment plants. *Id.* at pp. 16-22, 50-51, and 62-69.

sources of the impairment would have to meet to achieve the 0.11 mg/l standard. The portion of the “allocation diet” assigned to the County’s WWTP was a phosphorus discharge limit of 0.5 mg/l. App. Op. at ¶ 17. Ohio EPA submitted the TMDL to U.S. EPA in August 2005; less than a month later, U.S. EPA approved it. *Id.*

C. Application of the TMDL Standards to the County’s Treatment Plant.

On June 30, 2006, Ohio EPA issued a renewal NPDES permit for the County’s WWTP. *Id.* at ¶ 19. Included in the permit was a new 0.5 mg/l phosphorus limit taken from the final TMDL. *Id.* In order to meet the new limit, the WWTP would need to install over \$5 million of additional equipment. *Id.* at ¶ 39; *see* Hearing Transcript (“Tr.”) v. III, p. 12; J.E. 30 at p. 13.

John Owen of Ohio EPA was responsible for developing the permit limits imposed in the County’s new permit. App. Op. at ¶ 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. at ¶ 24; *see* Tr., v. III, p. 161.

Ohio EPA did not follow the requirements of Ohio’s Administrative Procedures Act, R.C. Chapter 119, and promulgate the new standards set forth in the TMDL before imposing them in the County’s NPDES permit. App. Op. at ¶ 76.

D. Appeal to the Environmental Review Appeals Commission.

Fairfield County timely appealed the issuance of the NPDES permit to the Environmental Review Appeals Commission (“ERAC” or “the Commission”), setting forth multiple reasons why the phosphorus discharge limitations were unlawful and unreasonable. *Id.* at ¶ 20. The Commission conducted an evidentiary hearing in February 2009. *Id.*

The evidence adduced at the hearing demonstrated that the only analysis of the phosphorus limit was done by Ohio EPA employee Matt Fancher, who authored the portion of the TMDL pertaining to Blacklick Creek in the vicinity of the County's WWTP. *Id.* at ¶¶ 21-22. Long after the permit was initially prepared, he was asked to prepare a memorandum to address Fairfield's County's objections to the phosphorous limits in the draft permit. *Id.*; *see also* J.E. 6; Tr., v. III, p. 177-78. However, neither he nor Mr. Owen, nor anyone else at Ohio EPA, evaluated the impact—or, more accurately, the lack thereof—of current or future discharges of phosphorus from the WWTP on attainment of applicable biological standards for aquatic life. App. Op. at ¶¶ 23-24; *see* Tr., v. III, p. 197. All of the expert testimony presented at the hearing, including that of Ohio EPA's own witnesses, documented that Blacklick Creek is in attainment of all aquatic life-based biological water quality standards downstream of the WWTP discharge.⁵ Tr., v. II, pp. 31-36, 121, 170-171; *see also* J.E. 17, p. 15.

Further, 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. Even the testimony of Robert Miltner, Ohio EPA's own expert in water quality standards and aquatic biology, supported the testimony given by Fairfield County's experts. Tr., v. II, pp. 166-171.

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 not a value developed as a promulgated water quality standard for the

⁵ Although the Big Walnut Creek TMDL found some sections of Blacklick Creek in non-attainment (*i.e.*, impaired), none of these sections was remotely close to the Tussing WWTP. The TMDL did not attribute any area of non-attainment to discharges from the WWTP. Tr., v. II, p. 24.

Creek, but was instead a “target value” of 0.11 mg/l lifted from a technical guidance document that Ohio EPA issued in 1999. App. Op. at ¶ 23; *see also* J.E. 21; Tr., v. IV, p. 99. In developing the TMDL, Mr. Fancher testified that he assumed that the concentration of phosphorus in the Creek could not exceed the 0.11 mg/l target value. App. Op. at ¶ 23.

Using the 0.11 mg/l target value as the maximum allowable concentration for phosphorus in Blacklick Creek, Mr. Fancher then developed the second standard in the TMDL (the pollution diet for the Creek) by performing alternative phosphorus loading allocations for point and nonpoint source dischargers believed by Ohio EPA to be contributing to the impairment. *Id.* His first allocation assumed that point sources like the County 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 their discharge of phosphorus by 90% to avoid exceeding the 0.11 mg/l standard. *Id.* Concluding that these numbers “just didn’t add up,” Mr. Fancher redid the allocation using a 0.5 mg/l phosphorus limit for all point sources, including the County, 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.* Mr. Fancher was unable to remember who recommended these allocations to him, the basis for them, or why he did not run the allocation with other values. *Id.*; *see* Tr., IV, pp. 104-105.

Despite the TMDL’s serious deficiencies demonstrated at the hearing, the Commission held that U.S. EPA’s approval of the TMDL, standing alone, created a sufficient, valid, and essentially unchallengeable, factual foundation for the phosphorus standards. *See Board of Commissioners of Fairfield County, Ohio v. Director of Environmental Protection*, ERAC No. 235929, 2011 WL 1841913 (May 12, 2011).

E. Appeal to the Tenth District Court of Appeals.

Fairfield County appealed ERAC's decision to the Tenth District Court of Appeals, and the Director cross-appealed. App. Op. at ¶ 41. In the portion of the decision relevant to the Assignment of Error over which this Court has accepted jurisdiction, the Court of Appeals affirmed the holding below that Fairfield County's NPDES permit lawfully imposed the 0.5 mg/l phosphorus limit because the limit was derived from a "properly developed and federally approved TMDL allocation." *Id.* at ¶ 76. Relying exclusively on *Jackson County Environmental Committee v. Schregardus*, 95 Ohio App. 3d 527 (10th App. Dist. 1994), the Court of Appeals concluded that the Director had not imposed an unpromulgated rule in the County's renewal NPDES permit. *Id.* This appeal followed.

ARGUMENT

Fairfield County, Ohio's Proposition of Law:

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.

As spiritual advice, marching to the beat of one's own drum may be sound. It is not, however, sound jurisprudence. The Court of Appeals' decision that a TMDL is not a rule that requires promulgation under R.C. Chapter 119 contradicts Ohio law, is inconsistent with the precedent established by other states in their TMDL processes, and is also inconsistent with the practice of U.S. EPA itself when it must step in to develop a TMDL.

A. The Big Walnut Creek Watershed TMDL Contains Binding Standards of Uniform Application for More than Forty Waterbodies in the Big Walnut Creek Watershed and for all Alleged Sources of the Impairment and Must Therefore be Promulgated as Rules under R.C. Chapter 119 before the Standards can be Applied.

Rule promulgation is necessary "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).

Ohio's Administrative Procedures Act (the "APA"), R.C. Chapter 119, allows this analysis by providing an opportunity for opponents of a proposed regulation to express their views as to the wisdom of the proposal and to present evidence with respect to its legality. *Northeast Ohio Regional Sewer District v. Shank*, 58 Ohio St. 3d 16, 24, 567 N.E. 2d 993 (1991) (citations omitted). The failure of any agency to comply with such procedure invalidates the rule or amendment adopted, or the rescission of the rule. R.C. 119.02.

Although R.C. 119.01(C) defines 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...", this Court has interpreted the statute broadly, holding that "[i]t is the effect of the [document], not how the [agency] chooses to characterize it, that is important" in determining whether the document qualifies as a "rule." *State ex rel. Saunders v. Industrial Commission*, 101 Ohio St. 3d 125, 2004-Ohio-339, 802 N.E. 2d 650, ¶ 26 (quoting *Ohio Nurses Association, Inc. v. State Board of Nursing Education and Nurse Registration*, 44 Ohio St. 3d 73, 76, 540 N.E. 2d 1354 (1989)). "[T]he pivotal issue in determining the effect of a document is whether it enlarges the scope of the rule or statute from which it derives rather than simply interprets it." *Id.* at ¶ 27 (citing *Ohio Nurses Association, supra*, at 76).

Perhaps the case most directly on point is *Condee v. Lindley, supra*, 12 Ohio St. 3d 90 (1984), which involved a longstanding policy by the Tax Commissioner that distinguished property of electric companies that was "situable" (having a fixed location) and non-situable. *Id.* at syllabus. The policy required the electric companies to report their situable property at seventy percent of its true taxable value, and allocate the remaining thirty percent of the value as non-situable property. *Id.* This "seventy-thirty" formula had not been adopted according to

R.C. Chapter 119. *Id.* at 91-92.

The Tax Commissioner argued that the policy was a valid administrative policy because it fulfilled a statutory apportionment directive. The Court disagreed and held that satisfying a statutory directive did not exempt the policy from the rulemaking requirements of R.C. Chapter 119. Because the policy consisted of a general apportionment that applied to individual utilities, it was a requirement of general and uniform applicability and therefore a rule under the APA. *Id.* at 92.

In *Ohio Dental Hygienists Association v. Ohio State Dental Board*, 21 Ohio St. 3d 21, 487 N.E. 2d 301 (1986), the Court likewise held that an advisory letter establishing which orthodontic procedures could be delegated by a licensed dentist qualified as a rule, because it established standards that expanded the scope of existing regulatory authority applicable to dentists. *Id.* at 25 (citing R.C. 4715.39). Similarly, the Court held in *Ohio Nurses Association, Inc., supra*, 44 Ohio St. 3d 73, that a position paper that described the authority of licensed practical nurses to administer intravenous fluids was subject to the APA. *Id.* at 74-76. The Court concluded that the paper qualified as a rule because it enlarged the scope of practice for nurses, regulated nurses by requiring a post-licensure course of study, and had uniform application to a class of people, *i.e.*, licensed practical nurses in Ohio. *Id.* at 75-76.

The most comprehensive analysis of the rule-like properties of TMDLs is found in *Asarco Incorporated v. State of Idaho*, 69 P. 3d, 139, 141 (Id. 2003), where the Supreme Court of Idaho held that a TMDL established by the Idaho Division of Environmental Quality (“DEQ”) should have been subject to formal rulemaking under that state’s administrative procedures act. The case involved a challenge by several mining companies to the DEQ’s use of an unpromulgated TMDL for the Coeur d’Alene River Basin as the basis for lead, zinc, and

cadmium limits. Although the DEQ had provided notice to interested parties and taken testimony regarding the establishment of the TMDL, the DEQ conceded that it had not followed the Idaho Administrative Procedures Act for rulemaking. The DEQ argued that a TMDL is “an unenforceable planning tool analogous to a comprehensive plan; the TMDL does not prescribe a new enforceable standard; and the TMDL does not have the force and effect of law.” *Id.* at 142-143. The Supreme Court of Idaho disagreed, and found that the TMDL constituted a rule. *Id.* at 143. It determined that a TMDL has “wide coverage” because it applies “generally and uniformly” to “all current and future dischargers in a specific water body,” and therefore applied to “a large segment of the general public rather than an individual.” *Id.* at 143-144. The Idaho Supreme Court also concluded that the TMDL process requires “focus on the waterbody as a whole, as opposed to the individual sources of pollution,” and prescribed a “legal standard” because it “in fact contains quantitative legal standards not provided by either the Clean Water Act or the Idaho Water Quality Act.” *Id.* at 144. Based on this reasoning, the Idaho Supreme Court held that the TMDL was void because the DEQ had failed to comply with formal rulemaking requirements in developing it. *Id.*

By establishing a quantitative pollution budget for bodies of water that is not found in a rule or statute, a TMDL enlarges the scope of the Ohio EPA’s regulatory authority. There is nothing interpretative about the Agency’s decision (1) to set the “maximum” amount of pollution that a water body can handle, (2) to elevate a technical guidance document into a *de facto* water quality standard, and (3) to then develop a second set of standards consisting of a loading allocation budget between nonpoint and point sources required to achieve the new standard. In addition, by applying this budget to a class of dischargers located within a specific water basin, a TMDL applies uniformly and generally to a class of entities. 40 C.F.R. 130.2(I); *see also Ohio*

Nurses Association, Inc. supra, 44 Ohio St. 3d at 74. As the Supreme Court of Idaho concluded, “even though the TMDL involves determinations of specific applicability, the over-all scheme demonstrates the TMDL is more appropriately described as generally and uniformly applicable.” *Asarco*, 69 P. 3d at 144.

In the Court of Appeals below, the Director described TMDLs as “water quality standards.” *See* Director’s Merit Brief at p. 14. In this respect, he is correct. A TMDL imposes a general and uniform requirement that enlarges the scope of existing regulatory authority, and therefore meets the definition of a rule under the APA. It is therefore subject to the meaningful review that is accorded to any other rule promulgated in the State of Ohio.

B. Ohio EPA’s Process of Developing the Big Walnut Creek Watershed TMDL Is Indistinguishable from the Process the Agency Utilizes to Develop all of its Substantive Rules that Impact the Regulated Community in Ohio.

A rule by any other name is still a rule. Whether Ohio EPA calls the binding standards it established for the Big Walnut Creek watershed a “TMDL,” or merely guidance, policy, or recommendations, is irrelevant. It is the uniform, binding effect of the standards on the classes of impacted stakeholders that matters, not the choice of adjectives or nouns used to wrap the package. *See e.g. National Mining Association v. Jackson*, 880 F. Supp. 2d 119, 130 (D. D.C. 2012) (striking down U.S. EPA’s issuance of water quality standards for conductivity for the Appalachian-region states because they were not properly promulgated as rules under the federal APA, and rejecting as “boilerplate” EPA’s characterization of the standards as merely nonbinding guidance).

When Ohio EPA undertook its five-year process to develop the Big Walnut Creek watershed TMDL, it employed basically the same procedures that it and all other state and federal environmental agencies employ when developing a myriad of different rules that impact

the regulated community. In a process no different than, for example, when human health-based ambient air quality standards are developed, or technology-based air emission standards are developed for power plants, Ohio EPA undertook a lengthy process of (1) collecting data and information to assess existing discharge levels for phosphorus in the watershed, (2) collecting data and information to assess the aquatic health of the streams and develop a cause-effect link between discharges and aquatic impacts, (3) evaluating, selecting, and ranking sources of the impairment, and (4) developing standards to eliminate the existing impairment and prevent future impairment of the watershed. *See* J.E. 13 (TMDL).

The fact that the outcome of this process is a lengthy and comprehensive report termed a TMDL, that contains scientific data and analyses, and lots of graphs, charts, and colored pictures, is of no moment. The only real difference from traditional rulemaking is that the new standards in the case *sub judice* are buried in the body of a lengthy TMDL report, rather than set forth in a separate set of properly-proposed, properly-formulated rules. And the data, assumptions, conclusions, and policy choices that support the new rules are wrapped around the rules, instead of being set apart in an administrative record created for the purpose of supporting proposed rules undergoing proper notice and comment rulemaking.

C. Other States' Courts have Ordered that TMDLs Undergo Rulemaking Procedures, and Several Additional States Promulgate them as Rules even in the Absence of a Judicial Mandate.

The Court of Appeals' ruling that Ohio EPA need not undertake rulemaking before applying the Big Walnut Creek watershed TMDL to Fairfield County and other impacted parties has cast Ohio's jurisprudence adrift from that of other states. *See e.g. Asarco Incorporated v. State of Idaho, supra*, 69 P. 3d at 141 (Id. 2003); *South Carolina Commissioners of Public Works v. S.C. Dep't of Health & Environmental Control*, S.C. ALC No. 03-ALJ-07-0126-CC, 2003 SC

ENV LEXIS 92, **20-26 (Sept. 22, 2003) (“...[B]ecause the TMDL was not promulgated as a regulation under the South Carolina Code, it does not have the force or effect of law...Consequently DHEC is not authorized to rely on the TMDL to establish permit limits.”), *aff’d in part on other grounds Commissioners of Public Works v. South Carolina Dep’t of Health & Environmental Control*, 372 S.C. 351, 363-364 (2007); *Sierra Club v. U.S. EPA*, 162 F. Supp. 2d 406, 419-420 (D. Md. 2001) (“...[I]t is only the actual development of the list or load [by the state] that is the rule making.”); *City of Rehoboth v. McKenzie*, Del. Super. Ct. No. 98C-12-023, 2000 WL 303634, *1 (Feb. 29, 2000) (Delaware Department of Natural Resources and Environmental Cabinet acknowledging that TMDLs are regulations); *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W. 3d 10, 24 (Mo. 2003) (distinguishing between lists of impaired streams and TMDLs, stating that “TMDLs are developed and implemented through future regulations.”); *In re Adoption of Amendments to Ne., Upper Raritan, Sussex County & Upper Delaware Water Quality Mgmt. Plans*, N.J. Super. Ct. No. A-5266-07T3, 2009 WL 2148169 *5 n. 3 (July 21, 2009) (“[T]he DEP asserts in a footnote, without any supporting explanation, that ‘a TMDL is not a rule under the strict requirements of the APA.’ We question the correctness of this assertion.”).

In addition to the cases cited above that directly address TMDLs, the supreme courts in Wisconsin and Washington have held under circumstances very similar to the development of TMDLs that rulemaking is required. See *Wisconsin Electric Power Company v. Department of Natural Resources*, 93 Wis. 2d 222, 225-226 (Wis. 1980) (striking down water quality standards developed for power plants for certain waterbodies because they constituted binding rules that had not undergone APA rulemaking); *Simpson Tacoma Kraft Company v. the Department of Ecology*, 119 Wa. 2d 640, 642-648 (Wa. 1992) (striking down dioxin standards for pulp and

paper mills discharging into certain streams because they constituted binding rules that had not undergone APA rulemaking).

Finally, several other states' environmental agencies promulgate their TMDLs as formal rules despite the absence of a judicial mandate. *See e.g.* 23 C.C.R. 3904 (California TMDL for the Garcia River); 5 CCR 1002-35:35.2 *et seq.* (Colorado TMDLs for the Gunnison and Lower Dolores River Basins); Fla. Admin. Code r. 62-304.315 (Florida TMDL for the Chipola River Basin); Or. Admin. R. 340-041-0154 (Oregon TMDL for the Upper Grande Ronde Basin); and 9 VAC 25-720-90 (Virginia TMDL for the Tennessee-Big Sandy River Basin).

After a diligent review of other states' TMDL processes, Fairfield County was unable to locate a single state court holding that TMDLs were exempted from APA rulemaking.

D. When U.S. EPA Develops a TMDL for a State's Waterbody, It Must Undertake Notice and Comment Rulemaking Procedures before the TMDL Can Be Applied.

The rule-like nature of TMDLs is reflected in the fact that U.S. EPA itself proceeds through formal rulemaking when it establishes them. 33 U.S.C. 1313(d)(2); *see Telford Borough Authority v. United States EPA*, E.D. Pa No. 2:12-CV-6548, 2013 WL 6047569, *2 (Nov. 15, 2013) ("If the EPA administrator disapproves of the state TMDL, the EPA may establish its own TMDL or revise the state TMDL *but must follow notice-and-comment rulemaking provisions of the Administrative Procedure Act ("APA") in doing so.*") (emphasis added); *see also American Farm Bureau Federation v. U.S. E.P.A.*, M.D. Pa. No. 1:11-CV-0067, 2013 WL 5177530, **38-44 (Sept. 13, 2013) (explaining U.S. EPA's rulemaking obligations when promulgating TMDLs).

The fact that U.S. EPA is obligated to promulgate TMDLs as rules is not just relevant precedent, it also bears on Ohio EPA's obligations for the separate reason that R.C. 6111.03(S)(2) states that R.C. Chapter 6111 (Ohio's water pollution control statute) "*shall* be administered, consistent with the laws of this state and federal law, in the same manner that the

Federal Water Pollution Control Act is required to be administered” (emphasis added). Thus, because U.S. EPA itself is compelled to undertake rulemaking when it must step in to establish a TMDL for a state waterbody, R.C. 6111.03(S)(2) indicates the General Assembly’s intent that Ohio EPA do the same.

E. Requiring Ohio EPA to Follow Ohio’s Rulemaking Procedures when Developing TMDLs is the Only Means Available that Protects all Impacted Parties in the Watershed and the Public, and Provides Them the Means of Obtaining Meaningful Review of the Standards Imposed by the TMDL and the Data, Assumptions, and Policy Choices that Underlie the Standards.

The Court of Appeals below lost its way when it eschewed any meaningful discussion of the rulemaking requirements under Ohio law, and became enamored by the simple fact that the TMDL for the Big Walnut Creek watershed was approved by U.S. EPA, a review that is not only perfunctory and procedural, but more importantly has no legal significance whatsoever to whether Ohio law independently requires notice and comment rulemaking before the standards set forth in the TMDL can be imposed on the affected stakeholders. *See* App. Op. at ¶ 76, where the court opined: “The phosphorus limit...comes from a properly promulgated Big Walnut Creek TMDL. Here, a properly developed and federally approved TMDL allocation was incorporated into the NPDES permit for the Tussing Road plant.” Not only is a basis for the Court of Appeals’ statement that the TMDL was “properly promulgated” notably absent, the lower court’s enchantment with U.S. EPA’s approval process was misplaced.

As noted in the statutory/regulatory framework discussion *supra*, the approval/disapproval period by U.S. EPA for all state-submitted TMDLs is statutorily constrained by time to thirty days or less, and hence constrained substantively as well. In fact, states have no obligation to provide the underlying data, assumptions, *etc.* from the TMDL development to U.S. EPA at the time of the TMDL submittal. *Id.* Thus, U.S. EPA’s procedural

approval of the Big Walnut Creek watershed TMDL was not a “promulgation” of the TMDL in any meaningful sense of the word, nor did it operate to free Ohio EPA from the independent rulemaking obligations under Ohio law that apply to all Ohio agencies that develop binding uniform standards for the regulated community.

The Court of Appeals’ view that U.S. EPA’s stamp of approval somehow provided “meaningful, substantive review” of the standards set forth in the TMDL founders not only as a matter of law, but also as a matter of fact and common sense. U.S. EPA’s procedural review and approval not only did not involve seeking public input, it did not include any scrutiny whatsoever of the validity or sufficiency of the chemical and biological water quality data, water quality models, and scientific and legal assumptions that form the underpinnings for the standards established in the TMDL. *Id.* Whether a TMDL is a silk purse or a sow’s ear is not determined by a federal rubber stamp, but rather by being fully and openly examined (and adjudicated if necessary) by those affected by it in the context of a rulemaking proceeding under the applicable state’s administrative procedures act.

Thus, the Court of Appeals erred when it held that the standards set forth in the Big Walnut Creek watershed TMDL were “properly promulgated,” and that this case was different from its holding in *Jackson County Environmental Committee v. Schregardus*, 95 Ohio App. 3d 527 (10th App. Dist. 1994). *See* App. Op. at ¶ 76. The cases are factually and legally indistinguishable. In *Jackson County*, Ohio EPA developed a guidance document containing standards for land application of paper sludge and then sought to apply them in a permit issued to Mead Corporation. 95 Ohio App. 3d at 528-529. When neighbors of the land application site challenged the permit, asserting that the “guidance” constituted binding uniform standards that were invalid because they did not go through rulemaking, the Court of Appeals reversed ERAC,

holding that the standards in the guidance document were binding rules applicable not just to Mead, and should therefore have undergone the rulemaking procedures prescribed by R.C. Chapter 119. *Id.* at 529-530 (citing *Condee v. Lindley*, *supra*, 12 Ohio St. 3d at 93).

There is no meaningful difference between *Jackson County* and this case. In the TMDL for Big Walnut Creek watershed, Ohio EPA developed binding standards applicable to the waterbodies in the watershed and to different classes of sources allegedly contributing to the impairment, designed to permanently eliminate the impairment. *See* J.E. 13 (TMDL) at pp. 24, 52-53, 70-71 (standards for the waterbodies, including 0.11 mg/l for phosphorus), and pp. 104-109 (loading reduction-based standards for the sources). The Agency then, without first proceeding through rulemaking, imposed the new standards in Fairfield County's discharge permit. The Court of Appeals should have followed its own precedent in *Jackson County*, reversed the ERAC, and ordered the TMDL undergo proper rulemaking procedures under R.C. Chapter 119.

Although Fairfield County had a putative opportunity to challenge the new limits before the ERAC and the Court of Appeals, the decisions below demonstrate that both tribunals were unduly influenced by the fact that U.S. EPA approved the TMDL, causing them to simply brush aside the County's overwhelming and largely unrebutted evidence in favor of a blithe reliance upon the federal approval, effectively denying the County a meaningful opportunity to be heard. *See* 2011 WL 1841913 ¶¶ 76-84 (ERAC decision); App. Op. at ¶¶ 76-81 (Court of Appeals decision).

Importantly, because the TMDL never underwent the rigors of rulemaking pursuant to the requirements of Ohio's Revised Code, none of the following mandatory analyses of the standards embodied within the TMDL occurred, nor did all, or nearly all, of the following steps

for public input occur, and thus the results of these analyses and inputs never became part of the record for review before the ERAC and the Court of Appeals:

1. Conducting “early stakeholder outreach” to allow for early feedback from the public and impacted stakeholders before drafting and developing the rules, and if comments are received, considering them when drafting and developing the rules, as required by Executive Order 2011-01K;

2. While drafting rules, evaluating them against a “Business Impact Analysis” to determine if there will be an adverse impact on businesses, and then incorporating features into the draft rules to eliminate or reduce any adverse impacts to the extent feasible, as required under R.C. 121.82;

3. Subjecting draft rules to “interested party review,” an informal notice and opportunity for input provided to interested parties on Ohio EPA’s mailing list, as required by R.C. 3745.07;

4. Submitting draft rules to the Common Sense Initiative (CSI) Office which (i) assesses the balance between the critical objectives of the proposed rules and the estimated costs of compliance on the regulated parties, (ii) assesses the transparency, consistency, predictability, and flexibility in regulatory activities required by the draft rules and whether they prioritize compliance over punishment and use plain language, and (iii) provides recommendations to the submitting agency, as required by R.C. 121.82;

5. Submitting a Rule Summary and detailed Fiscal Analysis of the draft rules to the General Assembly’s Joint Committee for Agency Rule Review (“JCARR”), along with a copy of the Business Impact Analysis, as required by R.C. 127.18, after which JCARR holds a public hearing to take testimony on the rule;

6. Completing and submitting to JCARR an Environmental Amendment/Adoption Form, a requirement applying specifically to all rules dealing with environmental protection, which form must include a summary of how organizations that represent political subdivisions and other persons affected by the draft rules were consulted, identify the contact persons who were consulted, and summarize the impacts of the draft rules, as required by R.C. 121.39;

7. Filing a copy of the Business Impact Analysis, the Rule Summary and Fiscal Analysis and the Environmental Amendment/Adoption Form with the Secretary of State, and the Legislative Service Commission, as required by R.C. 111.15 and 121.83;

8. Publishing formal notice of the proposed rules in the Register of Ohio and the Ohio EPA Weekly Review, and inviting written comment on the proposed rules, as required by R.C. 119.03 and Ohio Adm. Code 3745-49-04 and 3745-49-05; and

9. Holding a public hearing to give the public an opportunity to provide oral testimony for the record on the proposed rules, as required by R.C. 119.03.

See generally Ohio EPA, *Guide to Rule-Making*, (March 2013), <http://www.epa.ohio.gov/portals/33/rules/guide.pdf> (accessed December 28, 2013) (Ohio EPA's Fact Sheet summarizing these steps). These protections apply independent of any procedural stamp of approval provided by U.S. EPA for an Ohio EPA-submitted TMDL.

It is also important to understand that Fairfield County is but one of many parties that are affected now, or will be affected in the future, by the standards established by the TMDL. *See* J.E. 13 (TMDL) at pp. 104-107 (listing numerous point and nonpoint sources and their loading allocations). Requiring that Ohio EPA undertake proper rulemaking procedures before applying the new standards set forth in the Big Walnut Creek TMDL simultaneously protects all of the affected stakeholders in the watershed, and minimizes the risk of a series of piecemeal ERAC

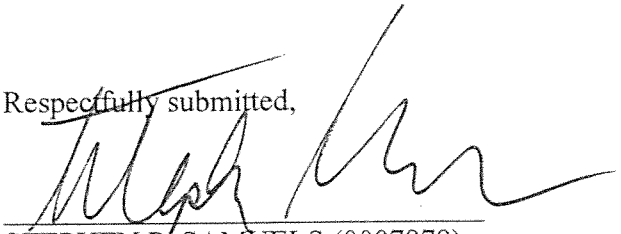
appeals as the Agency implements the TMDL over a period of many years.

Finally, because of the significant factual and policy issues involved in the development of the TMDL, and the large number of parties affected by it, the regulated community and the public must have the opportunity to present their case regarding the assumptions, data, logic, and policy choices (regarding who will be regulated and to what degree) that Ohio EPA has made in developing the standards established in the TMDL. Ohio's General Assembly has mandated through its statutory rulemaking procedures that it play an important role in the regulatory decisions of Ohio's agencies, particularly with respect to the procedural and substantive evaluations that are required when agencies develop rules to regulate Ohio's citizens. A ruling by this Court in Fairfield County's favor will place Ohio EPA back on the rightful path toward ensuring that these tenets of due process will be afforded to all stakeholders impacted by the development of the Big Walnut Creek watershed TMDL.

CONCLUSION

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. Ohio's APA requires no less. Ohio should march to the same drum as the rest of the country. 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.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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