In the

Supreme Court of Ohio

BOARD OF COMMISSIONERS OF FAIRFIELD COUNTY,	:	Case No. 2013-1085
Plaintiff-Appellant,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
CRAIG BUTLER, DIRECTOR OF ENVIRONMENTAL PROTECTION,	:	Court of Appeals Case No. 11AP-508
Defendant-Appellee.	:	

MERIT BRIEF OF APPELLEE OHIO DIRECTOR OF ENVIRONMENTAL PROTECTION

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INTRODUCTION

Protecting Ohio's water is a challenging task that requires the efforts of both the state and federal governments. Together, Ohio EPA and the U.S. EPA work cooperatively to ensure that Ohio's rivers, streams, and lakes will eventually attain the Clean Water Act's goal of having water that is clean enough to swim in and eat fish from. The ultimate goal of both the state and federal governments is to ensure that bodies of water in Ohio achieve and maintain Ohio's water-quality standards, which are measures of water quality that Ohio has adopted as rules pursuant to the provisions of R.C. Chapters 6111 and 119.

Two key tools for implementing and applying water-quality standards are: (1) Total Maximum Daily Load ("TMDL") reports, which are scientific studies that recommend a strategy by which the standards can be achieved, and (2) pollution discharge permits, which, by limiting the amount of pollution an entity can discharge, give legal force and effect to the standards. Both the approval of a TMDL report and the issuance of a permit may be challenged by parties who believe that they were issued or approved in error. Because the approval of a TMDL is a "final action" by the Administrator of the U.S. EPA, it may be challenged in federal court. The issuance of a specific pollution discharge permit, by comparison, is an action of the Director of Ohio EPA. Permits, including their corresponding limits, must therefore be challenged at the Environmental Review Appeals Commission, where appellants receive a de novo hearing.

The Fairfield County Board of Commissioners ("Fairfield County") received a pollution discharge permit for its Tussing Road wastewater treatment plant that limited the amount of phosphorus it could discharge into Blacklick Creek. Unhappy with that limit, Fairfield County challenged its permit, and the phosphorus limit, in proceedings before the Environmental Review Appeals Commission and the Tenth District. In both instances, Fairfield County lost on the

merits of its claims. Each tribunal concluded that the Director had a valid factual foundation for the phosphorus limit included in the challenged permit.

Dissatisfied with its losses below—and still unhappy about the phosphorus limit included in its permit—Fairfield County seeks to make this case about more than just its permit-specific complaints. In order to do so, it makes arguments that are not only legally incorrect, but that are in conflict with the arguments it made and the positions it took before the Environmental Review Appeals Commission and the Tenth District. The Court should reject those arguments, and should enter judgment in the Director's favor, for several reasons.

First, the development of a proposed TMDL report is not a state rulemaking. Regardless of whether a TMDL report has been prepared, the Director of Ohio EPA has an existing obligation to impose permit limits that will ensure attainment and maintenance of Ohio's water-quality standards. A TMDL report's recommendation of what discharge limits are necessary to meet those standards is just that: a recommendation. Those recommended limits impose no enforceable legal obligation on a discharger like Fairfield County—the only enforceable legal obligations flow from a permit's limits and the water-quality standards from which they are derived.

Second, the U.S. EPA's approval of a proposed TMDL report qualifies as federal—not state—action. Under the federal Administrative Procedure Act, parties wishing to challenge a final action of a federal agency may do so in federal district court. Fairfield County could have challenged the U.S. EPA's approval of the relevant TMDL report but chose not to do so. That it failed to avail itself of its available legal remedy (and that it also failed to comment during the provided notice-and-comment period) does not constitute the denial of due process.

Third, Fairfield County's arguments before this Court are in conflict with the arguments it made below. "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). This reason alone warrants a decision in the Director's favor: an affirmance of the decision below at the very least, if not a dismissal of the case as improvidently allowed.

Finally, as a practical matter, adopting Fairfield County's position would have a negative effect on businesses and industry in Ohio. Ohio EPA currently has the flexibility to depart from the recommended discharge limits contained in a TMDL report when issuing permits. This flexibility afforded to Ohio EPA was advocated for by Fairfield County and was a key consideration in the decisions below. If a TMDL report *must* be promulgated as a formal rulemaking, as Fairfield County now argues, Ohio EPA will lose that flexibility. It will be required to impose the limits contained in the final rule. No longer will it be able to work with permit recipients—like it worked with Fairfield County—to extend schedules of compliance or adjust limits based on source-specific considerations.

STATEMENT OF CASE AND FACTS

A. Ohio EPA, in partnership with the federal government, administers a set of programs designed to protect and enhance the quality of Ohio's waters

Ohio and the federal government together regulate and protect the quality of Ohio's water through an overlapping combination of federal law, state law, federal regulations, and state rules.

1. The federal Clean Water Act and Total Maximum Daily Loads

The starting point for regulation of surface water in Ohio is the Federal Water Pollution Control Act. That Act was amended in 1972 (and, as amended, is better known as the Clean

Water Act) with the lofty purpose of eliminating the "discharge of pollutants into navigable water … by 1985," and, in the interim, making all such waters clean enough to fish and swim in by 1983. *See* 33 U.S.C. 1251(a). In retrospect, those objectives were overly ambitious. Combating water pollution has been a significantly more difficult task than Congress ever imagined when it passed the Clean Water Act and the progress that has been made thus far has been hard earned. That progress has required the state and federal governments to work together closely, but even now, over thirty years after the originally planned for goal, many rivers and streams have still not attained the "swimmable and fishable" aims of the Clean Water Act. (This Court has itself set forth a fairly comprehensive overview of federal water pollution control legislation in the Appendix to the decision in *Columbus & Franklin County Metro. Park Dist. v. Shank*, 65 Ohio St. 3d 86, 111-131 (1992).)

The first step toward achieving the Clean Water Act's goals of fishable and swimmable water comes through the use of technology to limit the amount of pollution that a source is discharging. These types of limits are known as technology-based standards. But technology-based standards establish only the *minimum* level of pollution reduction required to meet the goals of the Clean Water Act. *See Columbus & Franklin County Metro. Park Dist.*, 65 Ohio St. 3d at 123. Technology-based standards are supplemented by standards based on water quality.

Water-quality standards are determinations that states make about how clean a body of water needs to be. They have two primary parts: 1) the water body's designated use (for example, whether the water should be clean enough for people to swim in, drink from, and what type of aquatic life it should be able to support) and 2) criteria (in either narrative or numeric form) explaining what must be done to attain and protect that designated use.

Ohio Adm.Code 3745-1-07; *see also Columbus & Franklin County Metro. Park Dist.*, 65 Ohio St. 3d at 123. Water-quality standards are more stringent than technology-based requirements and, as this Court has held, "a point source may not discharge effluent which would violate the applicable water-quality standards." *Id.* at 100. As required by statute, Ohio's water-quality standards are promulgated and adopted as rules pursuant to Revised Code Chapters 6111 and 119. *See* R.C. 6111.041; *see also* Ohio Adm.Code Chapter 3745-1.

If implementation of technology-based requirements are inadequate to attain a state's water-quality standards, state and federal law require additional measures be taken to meet those standards. *See* 33 U.S.C. 1313(d). The first step toward meeting applicable water-quality standards is to develop a list of bodies of water that have not attained them. This list of impaired waters is developed pursuant to the requirements of 33 U.S.C. 1313(d).

Next, rather than reinvent the wheel every time Ohio EPA issues a pollution permit that allows someone to discharge into an impaired body of water, the Clean Water Act requires Ohio EPA and the federal government to work together to come up with plans outlining a strategy for achieving the water-quality standards that the state has adopted through formal rulemaking. 33 U.S.C. 1313(d)(1)(C); see also Tr. Vol. IV p. 45. These strategic plans involve identifying target levels of pollution for a stream (the Total Maximum Daily Load) and are set forth in TMDL reports. See Tr. Vol. IV p. 36-37. Ohio develops its TMDL reports on a watershed-wide basis and supplements each TMDL report with an extensive technical support document. Tr. Vol. IV p. 33-36; see also Hearing Ex. 13 and 17. Together with the technical support document, each TMDL report contains the data, modeling and analysis necessary to justify the report's recommendations about how to comply with the existing water-quality standards. Tr. Vol. IV p. 35-36, 43-45; see also Hearing Ex. 13 and 17. By law, all draft TMDL reports

must be made available for public comment. 40 C.F.R. 130.7(c)(1)(ii); see also Tr. Vol. IV p. 57. Once completed, TMDL reports are submitted to the U.S. EPA for its review and approval. 33 U.S.C. 1313(d)(2). If a party objects to the U.S. EPA's approval of a TMDL report, they may challenge that approval in federal district court.

2. Ohio EPA studied Blacklick Creek and the Big Walnut Creek watershed and developed a TMDL report which recommended steps that should be taken to achieve existing water-quality standards.

Blacklick Creek, into which Fairfield County's Tussing Road wastewater treatment plant discharges pollution, has not yet met all of the applicable water-quality standards that appear in Ohio Adm.Code 3745-1-09. Tr. Vol. II p. 190; Tr. Vol. IV p. 33. As is relevant to this case, the amount of phosphorus found in certain segments of Blacklick Creek is too high. Tr. Vol. II p. 151-155; Tr. Vol. IV p. 38-40; Tr. Vol. V p. 60-62. Pursuant to State and federal law, Ohio EPA was therefore required to develop a TMDL report identifying a strategy for meeting the water-quality standards contained in the applicable state rule. *See* 33 U.S.C. 1313(d)(1)(C).

The development of a TMDL report is a complex process, *see* Ohio Adm.Code 3745-2-12; see also Tr. Vol. IV p. 12-13, 30, 43-59, and the Big Walnut Creek TMDL report was no exception. As a preliminary step in preparing that report, Ohio EPA first conducted a Biological and Water Quality Study of the Big Walnut Creek Basin. That study included a stream survey of Blacklick Creek. Hearing Ex. 17; see also Tr. Vol. IV p. 33-36. As part of that survey, Ohio EPA collected extensive biological and chemical data both upstream and downstream of Fairfield County's Tussing Road wastewater treatment plant. See *id*. Ohio EPA then evaluated the quality of the water in Blacklick Creek and identified the reductions in phosphorus that would likely be necessary to achieve the water-quality standards found in Ohio Adm.Code 3745-1-09. Tr. Vol. IV p. 45. When all was said and done, the final TMDL report required the efforts of nine Ohio EPA staffers (in addition to numerous part-time and full-time

field staff who helped to gather data), spanned nearly 200 pages, and was further supported by a technical support document which itself contained over 200 additional pages of information and data. See Hearing Ex. 13 and 17.

A draft of the TMDL report was released for public comment. Tr. Vol. IV p. 53; Hearing Ex. 34. Ohio EPA received numerous comments on the draft report, and in some instances revised the TMDL report in light of those comments. See Hearing Ex. 13 at 13-176—13-191. Fairfield County did not participate in the TMDL drafting process, and it provided no comments on the draft report. Tr. Vol. IV p. 58. The final TMDL report was issued on August 19, 2005 and was submitted to the U.S. EPA, which approved it on September 26, 2005. Tr. Vol. IV p. 30-31, 59-60; Hearing Ex. 13. Fairfield County did not appeal the U.S. EPA's final approval action.

B. Ohio EPA issued a permit for Fairfield County's wastewater treatment plant and relied on the data and analysis contained in the Big Walnut Creek TMDL report

Fairfield County's Tussing Road wastewater treatment plant is located on Blacklick Creek, and Ohio EPA determined that discharges from the plant were contributing to the Creek's failure to comply with the water-quality standards contained in Ohio Adm.Code 3745-1-09. Tr. Vol. II p. 153-55; Tr. Vol. V p. 37-38. Not only that, Ohio EPA also determined that discharges from Fairfield County's wastewater treatment plant were likely to increase by over one million gallons a day, and that when they did the overall risk to Blacklick Creek would likewise increase. Tr. Vol. II p. 154-55; Tr. Vol. III p. 195. Therefore, when the time came to renew Fairfield County's pollution discharge permit, Ohio EPA limited the amount of phosphorus that the wastewater treatment plant could discharge. As required by law, Ohio EPA set the permitted phosphorus discharge limit at a level that would eventually ensure that the Creek would attain the applicable water-quality standards—even when the wastewater treatment plant's level of

discharge increased. *See* Ohio Adm.Code 3745-1-01; *see also* 33 U.S.C. 1313(d)(4)(A), 40 C.F.R. 122.44(d)(1).

In determining how much phosphorus the wastewater treatment plant should be allowed to discharge, Ohio EPA referred to the studies conducted as part of the creation of the TMDL report for Big Walnut Creek, and it considered the data and analysis contained both in that report itself and in the corresponding technical support document. Tr. Vol. IV p. 81-89; Hearing Ex. 6. That data and analysis provided the basis on which Ohio EPA developed the final permit limits for Fairfield County's Tussing Road wastewater treatment plant. Tr. Vol. III p. 172-188; Tr. Vol. IV p. 81-89; Hearing Ex. 6

But Ohio EPA did not set the limits in Fairfield County's final permit based on a mechanical application of the discharge limits recommended in the Big Walnut Creek TMDL report. See Tr. Vol. IV p. 63-66. Instead, when preparing the permit for Fairfield County's wastewater treatment plant, Ohio EPA re-evaluated the earlier data and analysis contained in the TMDL report. Hearing Ex. 6; Tr. Vol. III p. 174-86; Tr. Vol. IV p. 80-89. As part of the permitting process, Fairfield County had raised questions about the limits recommended by the TMDL, and Ohio EPA re-evaluated the report's recommendations in light of those questions before establishing permit limits. See Tr. Vol. III p. 177-78; Hearing Ex. 6. Some of the data that Ohio EPA considered as part of its re-evaluation did not appear in the earlier TMDL report or technical support document. Tr. Vol. IV p. 82-83.

In the end, Ohio EPA established a phosphorus limit for Fairfield County's Tussing Road wastewater treatment plant that was different than the limit recommended by the Big Walnut Creek TMDL report. The TMDL report recommended that the wastewater treatment plant receive a phosphorus limit of 0.5 mg/l. Hearing Ex. 13 at 13-81. But the permit that Fairfield

County received, and that is the subject of this appeal, did not impose that limit. Hearing Ex. 4 at 4-6. Instead, the permit established a more lenient phosphorus limit of 1.0 mg/l. *Id.* The permit contained a compliance plan however, requiring Fairfield County to develop a plan to *eventually* comply with a limit of 0.5 mg/l, but any obligation to actually meet a limit of 0.5 mg/l did not take effect until after the permit expired. Tr. Vol. III p. 130. Even then, there is no guarantee that Fairfield County will be required to limit its discharge of phosphorus to 0.5 mg/l. The appealed permit suggests a variety of alternatives that Fairfield County can employ to avoid ever having to meet the 0.5 mg/l discharge limit recommended in the TMDL report. Hearing Ex. 4 at 4-17. The applicability of an enforceable 0.5 mg/l phosphorus limit is therefore contingent on future events, events over which Fairfield County has some control.

C. The Environmental Review Appeals Commission conducted a de novo hearing and, after weighing the evidence presented, concluded that the Director had a valid factual foundation for the phosphorus limit contained in Fairfield County's permit.

Fairfield County appealed the final pollution discharge permit to the Environmental Review Appeals Commission ("ERAC"). Among other things, the County challenged the phosphorus limit contained in its permit. With respect to that limit, Fairfield County alleged 1) that the Director lacked a valid factual foundation for imposing a phosphorus limit of 0.5 mg/l and 2) that Ohio EPA had failed to adequately consider the economic reasonableness and technical feasibility of the limit. ERAC held a five-day de novo hearing, at which both Fairfield County and Ohio EPA presented evidence regarding the quality of the water in Blacklick Creek, the data, assumptions, analyses, and conclusions contained in the Big Walnut Creek TMDL report, and the process by which Ohio EPA developed the phosphorus limit that was contained in the final permit for Fairfield County's wastewater treatment plant. At no point did ERAC prevent Fairfield County from introducing any evidence challenging the Big Walnut Creek TMDL report or the supporting technical support document; no motions in limine were granted

and no restrictions related to the TMDL report were placed on the scope of any witness's testimony.

At the de novo hearing, Fairfield County challenged its specific permit limit. In order to do so, it attacked the assumptions underlying the recommendations contained in the Big Walnut Creek TMDL report—including assumptions about the relationship between phosphorus and water quality and analysis of the data upon which Ohio EPA relied to set the challenged limit. It presented evidence in support of its contention that a phosphorus limit of 0.5 mg/l was unnecessary to achieve the applicable water-quality standards and that the Director did not have a valid factual foundation for imposing such a limit. (Notably however, almost none of Fairfield County's scientific evidence was provided to Ohio EPA *before* the permit was issued, and much of the data was actually generated well after the permit had been appealed. Compare Tr. Vol. I p. 124 and Hearing Ex. 28 with Hearing Ex. 4 (Studies were conducted in 2007 and 2008, even though permit was issued in August 2006.))

Among other things, as part of its challenge to the phosphorus permit limit, Fairfield County's witnesses challenged the assumptions underlying the Big Walnut Creek TMDL report and the report's recommended allocations. Fairfield County presented testimony disputing 1) Ohio EPA's conclusion the wastewater treatment plant contributed to impairment in Blacklick Creek, Tr. Vol. II p. 29-30, 2) the scientific evidence on which Ohio EPA relied when determining its specific permit limit, Tr. Vol. II p. 46-51, and 3) the relationship between phosphorus levels and water quality more broadly, Tr. Vol. II p. 51-62. While acknowledging that the wastewater treatment plant's permit authorized it to increase the amount of its discharge by one million gallons over and above the amount it was currently discharging, Fairfield County's witnesses were unable to testify about what would happen when the wastewater

treatment plant began discharging at its permitted rate, nor did they model the effects that that rate of discharge would have on water quality. Tr. Vol. I. p. 152-53, 163-64, 234; Tr. Vol. II p. 19, 82-85.

Fairfield County's evidence did not go unrebutted. Ohio EPA witnesses raised significant questions about the data used by Fairfield County's expert witnesses and disagreed with the conclusions that those witnesses reached. Tr. Vol. II p. 195-97; Tr. Vol. V p. 44-45. And Ohio EPA presented its own evidence supporting its conclusion both that the quality of the water in Blacklick Creek was impaired and that the phosphorus limit in Fairfield County's permit was necessary to address that impairment. See Tr. Vol. II p. 153-55. Among other things, one witness testified about studies he participated in and analysis he did regarding Blacklick Creek's water quality. Tr. Vol. V p. 7-46. He specifically testified that Fairfield County's wastewater treatment plant was having a negative impact on the overall water quality of Blacklick Creek. Tr. Vol. V. p. 34-39, 61-62. That same conclusion was echoed by other Ohio EPA witnesses. See Tr. Vol. II p. 153-54, 192-96.

In addition to rebutting Fairfield County's evidence, Ohio EPA introduced evidence that affirmatively demonstrated that it had a valid factual foundation for the challenged phosphorus limit. It presented evidence describing the general relationship between phosphorus levels and water quality and the basis for its overall target level for phosphorus. Tr. Vol. II p. 143-53. Ohio EPA witnesses also testified about the process by which the recommendations contained in the Big Walnut Creek TMDL report were generated, Tr. Vol. II p. 120-154; Tr. Vol. IV p. 30-62, 80-89, and how those recommendations were independently evaluated before being translated into final permit limits, Tr. Vol. IV p. 80-89. Finally, Ohio EPA witnesses testified that, at the increased level of permitted discharge, Fairfield County's wastewater treatment plant would have

an increasingly negative effect on Blacklick Creek. Tr. Vol. II p. 153-55; Tr. Vol. IV p. 42, 88-89.

In the end, after weighing the evidence presented, the Environmental Review Appeals Commission determined that the Director had a valid factual foundation for the phosphorus limit included in Fairfield County's permit. ERAC Op. ¶ 84. It also determined, however, that the Director had failed to adequately consider whether that limit was, to the extent consistent with the Clean Water Act, technologically feasible and economically reasonable. ERAC Op. ¶ 88-89. It therefore vacated the phosphorus limit contained in the permit and remanded the permit to the Director for further consideration. ERAC Op. ¶ 100.

Fairfield County appealed ERAC's conclusion that Ohio EPA had a valid factual foundation for the phosphorus limit included in its permit. Ohio EPA cross-appealed. In its cross-appeal Ohio EPA argued that it was required to impose the specific phosphorus limits that were recommended in the Big Walnut Creek TMDL report as approved by U.S. EPA.

D. The Tenth District affirmed ERAC's decision, holding that the evidence presented at the de novo hearing demonstrated that the Director had a valid factual foundation for the phosphorus limit included in Fairfield County's permit.

The Tenth District affirmed ERAC's conclusion that the Director had a valid factual foundation for the phosphorus limit that he included in the permit for Fairfield County's Tussing Road wastewater treatment plant. It held that "[d]espite Fairfield County's challenges to the analysis of the data collected, the underlying evidence relied upon by the Director via the Big Walnut Creek TMDL provides a sufficient factual foundation for the phosphorus limitation" in the permit issued for Fairfield County's wastewater treatment plant. App. Op. ¶ 66. The court rejected the argument that the Director had mechanically applied the recommendations contained in the Big Walnut Creek TMDL report, holding that "[c]ontrary to Fairfield County's assertion, ERAC's decision neither states nor implies that the presence of an allocation in a TMDL

automatically translates to the imposition of that exact limitation in the NPDES permit." App. Op. ¶ 69. Ultimately, the Tenth District concluded that "Fairfield County had the opportunity to challenge the phosphorus limitation during the . . . permitting process." App. Op. ¶ 80.

The Tenth District rejected Ohio EPA's argument that it was obligated to adhere strictly to the recommendations contained in the Big Walnut Creek TMDL report however. It held that "[n]either the BigWalnut Creek TMDL report nor U.S. EPA's approval documents require automatic enforcement of the individual TMDL allocations, and thus they are not 'set in stone.'" App. Op. ¶ 142. The Director acquiesced in that decision and chose not to seek further review in this Court.

Fairfield County, however, appealed to this Court and the Court accepted the county's petition for discretionary review on issues related to the phosphorus limit contained in its permit.

ARGUMENT[1]

Appellee Ohio Director of Environmental Protection's Proposition of Law No. 1:

> *The development of a TMDL report is not a state rulemaking and does not need be developed pursuant to the rulemaking requirements of R.C. Chapter 119.*

A TMDL report is a collaborative document that reflects the work of both Ohio EPA and the U.S. EPA. Each TMDL report contains two primary components. First, it sets a general strategy for reducing pollution by identifying how much pollution a given body of water is able to absorb. Second, a TMDL report contains recommendations about limits that should be placed on entities that discharge pollution into the body of water. Parties may challenge all aspects of a final TMDL report, but they cannot necessarily bring every challenge in the same court.

A party may challenge the first part of a TMDL report, the general capacity of a stream, when the U.S. EPA approves that report. Because approval of a report is a federal action, that

[1] Because of the overlapping nature of the arguments presented in Fairfield County's three propositions of law, the Director has consolidated his arguments into just two propositions.

approval must be challenged in federal court. The opportunity to challenge the second part of a TMDL report—the recommended limits on pollution discharge—occurs at the state level. The discharge limits recommended as part of a TMDL report are not binding on dischargers and can be adjusted as part of the permitting process. Until a permit is issued, it is not certain what discharge limits Ohio EPA will ultimately impose. And until a permit is issued, a discharger cannot be legally required to limit the amount of pollution it discharges. A discharger's legal obligations to limit pollution therefore flow from the permit and not from the recommendations contained in a TMDL report.

Neither aspect of a TMDL report requires state rulemaking. To the extent that the U.S. EPA's approval imposes any obligations, those obligations are imposed on Ohio EPA *not* regulated entities like Fairfield County. Furthermore, U.S. EPA's approval qualifies as federal—not state—action. At the state level, there is no rulemaking related to a TMDL report because it is the permit—not the report—that is the source of any legal obligations.

A. The text of the Revised Code shows that the General Assembly did not intend Ohio EPA to develop TMDL reports as formal rules

As an initial matter, there is no legislative command that requires Ohio EPA to develop TMDL reports pursuant to the requirements of R.C. Chapter 119. The General Assembly has shown that when it wishes to require formal rulemaking it knows what language to use; it has not used such language with respect to TMDL reports. The plain language of the Revised Code provides two statutory indications that the General Assembly did not intend for TMDL reports to go through rulemaking. *First*, the General Assembly has explicitly required rulemaking in other instances, but not with respect to TMDL reports. *Second*, the General Assembly has imposed other requirements on the development of TMDL reports, but it has not required rulemaking. The Director does not dispute that, if it chose to, the General Assembly could have required Ohio

EPA to promulgate TMDL reports as formal rules pursuant to the requirements of R.C. Chapter 119. It simply has not chosen to do so.

The General Assembly has explicitly required formal rulemaking in water pollution control contexts other than those related to TMDL reports. One of the primary ways in which Ohio EPA regulates water quality in the State of Ohio is through the development and implementation of water-quality standards. *See* R.C. 6111.041. The General Assembly has said that development of water-quality standards must go through formal rulemaking. *See id.*; *see also Northeast Ohio Reg'l Sewer Dist. v. Shank*, 58 Ohio St. 3d 16, 22 (1991). If the General Assembly had likewise intended for Ohio EPA to develop TMDL reports through formal rulemaking it could have said so. It did not.

The General Assembly has also demonstrated a willingness to impose requirements related to TMDL reports when it believes necessary—but it has not required that such reports be developed in accordance with R.C. Chapter 119. The General Assembly has required that the rules about how to prepare a TMDL report go through rulemaking but, once those rules have been established, it has not required additional rulemaking every time a TMDL report is itself developed. *See* R.C. 6111.12(D)(2) (defining "appropriate total maximum daily load procedures" as "the procedures, policies, and guidelines used by the director prior to July 1, 1993, or subsequent revisions to those procedures established in rules adopted in accordance with Chapter 119 of the Revised Code."). The General Assembly has also imposed other (non-rulemaking) requirements related to the development of TMDL reports. It has required that Ohio EPA consider only the most reliable sources of data when generating a report, *see* R.C. 6111.52(E), and it has placed restrictions on when Ohio EPA may develop a TMDL report for certain bodies of water, *see* R.C. 6111.56 (A) and (B). These statutory provisions show that

General Assembly made a decision to impose some requirements—but not others—on the development of TMDL reports. One of the requirements it chose *not* to impose was a formal rulemaking requirement for a final report.

B. The development of a TMDL report does not require state rulemaking because a TMDL report's recommended discharge limits are not binding and do not themselves create any legal obligations

Not only is there no explicit statutory requirement that Ohio EPA develop TMDL reports as rules, there is no equitable reason to impose such a requirement either. In this case, Fairfield County would have been subject to the same legal obligations even if no TMDL report had been developed for the Big Walnut Creek watershed. Ohio EPA had an existing legal obligation to ensure that Fairfield County's permit contained limits that would ensure that Blacklick Creek would achieve and maintain existing water-quality standards. *See* R.C. 6111.03(H)(4). Ohio EPA fulfilled that obligation by issuing a permit whose limits were supported by data and scientific analysis. Regardless of whether a TMDL report had ever been prepared, the water-quality standards—together with the very same data upon which Ohio EPA relied below—independently justified the imposition of the permit limit that Fairfield County challenges in this case.

1. An agency need not follow the R.C. Chapter 119 procedures when it interprets an existing statute or rule; it must do so only when its policies create or expand upon existing legal obligations

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" is required to be promulgated pursuant to the procedures found in R.C. Chapter 119. *See* R.C. 119.01(C). It is the effect of an agency action—not how the agency chooses to characterize it—that is relevant when determining whether formal rulemaking is required. *Ohio Nurses Ass'n, Inc. v. Ohio State Bd. of Nursing Ed. & Nurse Registration*, 44 Ohio St. 3d 73, 76 (1989).

This Court has recognized that not every broadly applicable agency policy requires formal rulemaking. Documents that do nothing more than explain existing law fall outside the scope of R.C. Chapter 119. *State ex rel. Saunders v. Indus. Comm'n*, 101 Ohio St. 3d 125, 2004-Ohio-339 ¶ 33. Similarly, guidelines that control the procedure by which existing legal duties are performed do not need to go through formal rulemaking. *Id.* at ¶ 35 *quoting Princeton City Sch. Dist. Bd. of Ed. v. Ohio State Bd. of Ed.*, 96 Ohio App. 3d 558, 563-564 (1st Dist. 1994). An agency does not need to engage in formal rulemaking when it seeks to merely "advise those affected of the meaning that it attaches to one of its rules." *See OPUS III-VII Corp. v. Ohio St. Bd. of Pharmacy*, 109 Ohio App. 3d 102, 112 (10th Dist. 1996) *citing Ohio Nurses Ass'n, Inc.*, 44 Ohio St. 3d 73.

On the other hand, this Court has concluded that an agency must follow formal rulemaking procedures when those procedures are explicitly required by statute. Such a statutory requirement was the primary basis for the decisions in *Ohio Dental Hygienists Ass'n v. Ohio State Dental Bd.*, 21 Ohio St. 3d 21 (1986) and *Ohio Nurses Ass'n, Inc*., 44 Ohio St. 3d 73. In both cases, the Court found that rulemaking was required *not* simply because of the effects of an agency policy but because rulemaking was explicitly required by the applicable statute. *See Ohio Dental Hygienists Ass'n*, 21 Ohio St. 3d at 24 (interpreting applicable statute to mean that "Unlicensed personnel may not be assigned *any* dental procedure without an authorizing board rule." (emphasis in original)) and *Ohio Nurses Ass'n, Inc.*, 44 Ohio St. 3d at 75-76 (statutory language "reflects the General Assembly's intent that the board follow the rule-making procedures set forth in R.C. 119.01 to 119.13, *and* that nursing procedures or limitations not already established or set forth in the statutes be promulgated by rule" (emphasis in original)).

Absent a statutory command to conduct rulemaking, this Court has also determined that an agency should have engaged in rulemaking when its policies themselves had independent legal effects. But an examination of the relevant case law shows that, as a practical matter, this Court has held that policies should have been promulgated as formal rules only in situations where the policies were applied in lieu of a case-by-case analysis. *See Condee v. Lindley*, 12 Ohio St. 3d 90, 93 (1984) (holding that the challenged policy "was adopted in lieu of a case-by-case analysis of each taxpayer's liability"); *see also Progressive Plastics, Inc. v. Testa*, 133 Ohio St. 3d 490, 2012-Ohio-4759 ¶ 27 (finding that an agency policy was in reality an unpromulgated rule because there was *neither* a formal rule *nor* "particularized findings based on specific evidence"). Such was the case as well in *McLean Trucking Co. v. Lindley*, where the Court concluded that an agency policy constituted an unpromulgated rule because it applied in a "general, across-the-board, all-encompassing manner" and did not "reflect the *particularized* . . . approach which . . . the General Assembly intended." 70 Ohio St. 2d 106, 114 (1982) (emphasis added). Thus, as this Court's precedent demonstrates, it is not merely the fact that an agency generally refers to a specific policy that triggers a rulemaking requirement. Rulemaking is only triggered when the agency policy replaces a case-by-case analysis and *itself* is given independent legal force or effect.

An excellent example of how this Court's rulemaking precedent works in practice can be seen in the Tenth District Court of Appeals' application of that precedent in the *Textileather Corp. v. Korleski* decision. 2007-Ohio-4129 (10th Dist.). In that case, the Tenth District was confronted with the question of whether an Ohio EPA guidance document was an unpromulgated rule. The court concluded that it was not. *Id.* at ¶ 40. It held that "in translating the general to the specific" Ohio EPA policy was "interpreting—not enlarging" the applicable Ohio

Administrative Code provision. *Id.* at ¶ 46. Relying heavily on this Court's decision *Saunders*, which likewise stands for the principle that "[d]ocuments that explain rather than expand, fall outside R.C. Chapter 119," 101 Ohio St. 3d 125 at ¶ 33, the Tenth District held that the agency policy in question was not an unpromulgated rule, *Textileather*, 2007-Ohio-4129 at ¶ 44.

This Court's rulemaking jurisprudence is consistent with that of other courts which have confronted similar questions. For example, the D.C. Circuit has articulated a helpful test for distinguishing between substantive rules (which require rulemaking) and general statements of policy (which do not). That court concluded that "[a] general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed." *Pacific Gas & Elec. Co. v Fed. Power Comm'n*, 506 F.2d 33, 38-39 (D.C. Cir. 1974). Instead, "[w]hen the agency applies [a] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." *Id*. By comparison, the D.C. Circuit determined that a policy should be considered a substantive a rule if the policy "establishes a standard of conduct which has the force of law." *Id*. at 38. By clearly identifying the difference between guidelines and substantive rules, the D.C. Circuit's decision explicitly addresses that which is implicitly dealt with in this Court's own decisions.

In the end, the question the Court must answer when considering whether an agency policy is an unpromulgated rule is: does the challenged practice interpret existing legal obligations? Or does it, standing alone, have independent legal force and effect? Where, as here, an agency document does nothing more than assist in the application of existing law, then it is the underlying law—not the agency document—that has legal force. In such cases, an agency must still independently justify its action, but it does not violate the rulemaking requirements found in R.C. Chapter 119 when it relies on the policy to assist in carrying out its existing legal

duties. *See Ohio Podiatric Med. Ass'n v. Taylor*, 2012-Ohio-2732 ¶ 35-38 (10th Dist.) *applying Saunders,* 101 Ohio St. 3d 125.

2. A TMDL's recommended discharge limits do not impose any legal duties

a. TMDL reports merely are tools that assist the Director in fulfilling his existing legal obligations

Perhaps the clearest indication that TMDL reports are not rules is the fact that the Director has the power (and obligation) to impose discharge limits even if no TMDL exists. The Director is legally obligated to set permit limits at a level necessary to achieve and maintain existing water-quality standards. *See* R.C. 6111.03(H)(4). Whether those limits are recommended by a TMDL report, or are developed on a case-by-case basis as part of the permitting process, is ultimately irrelevant. The only relevant question is whether the Director has determined that the limit imposed will achieve or maintain the applicable water-quality standards and whether he had a valid factual foundation for that determination. *See Northeast Ohio Reg'l Sewer Dist*., 58 Ohio St. 3d at 25 ("[ERAC] does not stand in place of the Director in considering an appeal, and may not substitute its judgment for that of the Director, but may consider only whether the Director's actions were unlawful or unreasonable."). Thus, the limits recommended by TMDL reports are like the guidance documents discussed in *Pacific Gas & Elec. Co.*: they do not have their own legal force or effect, and if imposed they must be independently justified. *See* 506 F.2d at 38-39.

Water-quality standards, *not* TMDL reports, provide the legal basis for establishing enforceable discharge limits in the water-pollution permits that Ohio EPA issues. Ohio EPA is required to adopt water-quality standards that are designed "to improve and maintain the quality of [the waters of the state] for," among other things, "the purpose of protecting the public health

and welfare." R.C. 6111.041. As required by statute, the Director follows the rulemaking requirements of R.C. Chapters 6111 and 119 when developing water-quality standards. *See id.*

Once promulgated, the water-quality standards are implemented through "the issuance, revocation, modification, or denial of permits." The Director has an independent obligation when issuing permits to include "water quality related effluent limitations" which will "achieve and maintain applicable standards of quality for the waters of the state." R.C. 6111.03(J)(3). TMDL reports assist in translating existing water-quality standards into specific permit limits, but they do not themselves dictate what the limits should be. It is the rule-based water-quality standards that provide the legal basis for the phosphorus limit in the permit that Fairfield County challenges in this case.

TMDL reports are merely tools that the Director uses to implement his legal obligations. *See* 33 U.S.C. 1313(d)(1)(C) (requiring that TMDLs be established at levels "necessary to *implement* the applicable water quality standards)(emphasis added)); *see also Ctr. For Biological Diversity v. U.S. EPA*, No. C13-1866JLR, 2014 WL 636829 (W.D. Wash. Feb. 18, 2014) ("TMDLs themselves do not regulate specific sources of pollutants, but instead inform the design and implementation of other pollution control measures, such as individual discharge permits and state water quality management plans."). Because they simply assist in implementing existing legal requirements, they do not "establish a standard of conduct which has the force of law." *See Pacific Gas & Elec. Co.*, 506 F.2d at 38. Instead, TMDL reports are tools that "interpret[] the language used in an existing rule, but [do] not establish a new, rule, standard or regulation." *Saunders*, 101 Ohio St. 3d 125 at ¶ 40 *quoting OPUS III-VII Corp.*, 109 Ohio App. 3d at 113.

TMDL reports impose no independent requirements because they are technical—not legal—documents. "[T]he statutory role of the TMDL [is] to identify the load necessary, *as a matter of engineering*, to implement the water quality standards." *Pronsolino v. Marcus (Pronsolino I)*, 91 F. Supp. 2d 1337, 1355 (N.D. Cal. 2000) (emphasis added). TMDL reports are "informational tools utilized by EPA and the States to coordinate necessary responses to excessive pollution in order to meet applicable water quality standards." *Anacostia Riverkeeper, Inc. v. Jackson*, 798 F. Supp. 2d 210, 216 (D.D.C. 2011). They provide "crucial information for federal, state, and local actors in furtherance of the cooperative efforts to improve water quality envisioned in the [Clean Water Act]." *Id*. at 217. The purpose of the TMDL process is ultimately to provide "[a] rational method for weighing the competing pollution concerns and developing an integrated pollution reduction strategy for point and non-point sources." *Idaho Sportsmen's Coalition v. Browner*, 951 F. Supp. 962, 966 (W.D. Wash. 1996), *quoting* "Guidance for Water Quality Based Decisions: The TMDL Process," EPA Office of Water Regulations,[2] April 1991.

TMDL reports are also not self-executing. A TMDL report "does not, by itself, prohibit any conduct or require any actions." *City of Arcadia v. U.S. EPA*, 265 F. Supp. 2d 1142, 1144 (N.D. Cal. 2003). And while a TMDL report contains recommendations, it does not ultimately dictate "the load of pollutants that may be received from particular parcels of land or describe what measures the state should take to implement the TMDL." *Pronsolino v. Nastri (Pronsolino II)*, 291 F.3d 1123, 1140 (9th Cir. 2002). Additional action by Ohio EPA or the U.S. EPA is necessary before a discharger can be required to comply with the limits recommended by a TMDL report.

[2] Available at http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/decisions_index.cfm (last visited March 27, 2014).

That additional agency action typically is the issuance of a pollution discharge permit. Individual states implement the recommendations contained in a TMDL report by issuing permits. A discharger's enforceable legal obligations flow from the pollution discharge permit that it receives from Ohio EPA—not from a TMDL report. *Cf. Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA*, 690 F.3d 9, 14 (1st Cir. 2012) ("[P]ermits bring both state ambient water quality standards and technology-based effluent limitations to bear on individual discharges of pollution."); *see also EPA v. California ex rel. State Water Res. Bd.*, 426 U.S. 200, 205 (1976).

b. The recommended discharge limits contained in a TMDL report are not binding

As Fairfield County argued below, and as the Tenth District correctly held, the limits recommended by a TMDL report are not binding. *See* Fairfield County 10th Dist. Merits Br., p. 22-23; *see also* App. Op. ¶ 142. When issuing a permit, the Director is not obligated to strictly adhere to those recommended limits. *See Pronsolino I*, 91 F. Supp. 2d at 1355 ("Nothing . . . requires that the TMDL be uncritically and mechanically passed through to every relevant parcel of land."). Instead, he has the power to adjust discharge limits as part of the permitting process. *See* App. Op. ¶ 141-43. This flexibility and discretion is further evidence that a TMDL report does not create or expand legal obligations and therefore should not be required to go through formal R.C. Chapter 119 rulemaking.

The Director acknowledges that below he argued (in part) for a different interpretation of TMDL reports. At both ERAC and the Tenth District, the Director partially argued that he was bound by the discharge limits recommended by the Big Walnut Creek TMDL report. Had that argument carried the day—and had the courts treated a TMDL report's recommendations as strictly binding on dischargers—then the argument that such reports are not unpromulgated rules

would be significantly weaker. But the Director did not prevail. Neither ERAC nor the Tenth District gave preclusive effect to the recommendations in the Big Walnut Creek TMDL report. See App. Op. ¶ 69-70, 140-143. The Director has abandoned that argument and has not appealed the decision below.

C. Requiring Ohio EPA to engage in formal rulemaking when developing a TMDL report would limit its flexibility and would reduce the Director's ability to account for discharger-specific concerns

As a practical matter, there are reasons why the General Assembly would not have wanted TMDL reports to be promulgated as rules—and why this Court should also not impose such a requirement. This case provides a perfect example. As it currently stands, the recommended discharge limits contained in a TMDL report are just that: recommended. If, however, TMDL reports were promulgated as rules pursuant to the requirements of R.C. Chapter 119, then they would become more than just recommendations—they would become binding legal requirements to which Ohio EPA and dischargers would have to strictly adhere.

As part of the permitting process, the Director currently has the flexibility to adjust or entirely depart from a TMDL report's recommended discharge limits if necessary. See App. Op. ¶ 69-71. That flexibility benefits dischargers like Fairfield County. Indeed, that flexibility *directly* benefited Fairfield Count in this case. The Big Walnut Creek TMDL report recommended that Ohio EPA limit Fairfield County's phosphorus discharge to 0.5 mg/l. See Hearing Ex. 13 at 13-81. But Ohio EPA did not impose a phosphorus limit of 0.5 mg/l in Fairfield County's permit; it imposed a limit of 1.0 mg/l instead. Hearing Ex. 4 at 4-6. (Ohio EPA did require Fairfield County to develop a plan to eventually comply with a 0.5 mg/l phosphorus limit, but any requirement to actually meet that limit extended beyond the effective date of the permit at issue in this case. Hearing Ex. 4 at 4-17. Fairfield County's permit also

contained a provision that allowed Fairfield County to avoid the later imposition of a 0.5 mg/l phosphorus limit if it submitted data and evidence to Ohio EPA showing that such a future limit was unnecessary. Hearing Ex. 4 at 4-18.)

If Ohio EPA is required to develop TMDL reports pursuant to the rulemaking requirements of R.C. Chapter 119, then the Director would lose the flexibility that benefitted Fairfield County in this case. The argument advanced by Fairfield County is therefore not only inconsistent with statutory requirements and with this Court's precedent; it is also bad policy.

D. The development of a TMDL report does not require state rulemaking because approval of the overall stream capacity outlined in a report is a federal—not state—action

While a state's role in the TMDL process imposes no legal obligations, the same cannot necessarily be said for the federal role. The U.S. EPA has an independent role to play in the development of a final TMDL report. It is responsible for approving a state's proposed report but it also has the power to modify or replace the report as it deems necessary. 33 U.S.C. 1313(d)(2). Once the federal government takes a final action with respect to a state's proposed TMDL report, federal law requires that the state act in a way that is consistent with (but not identical to) the overall pollution-reduction strategy approved as part of that action. *See* 40 C.F.R. 122.44(d)(1)(vii)(B). The only venue to challenge the U.S. EPA's final approval is in federal court. (Although Fairfield County may dispute this conclusion now before this Court, it agreed with it below. See Fairfield County's Reply to the Director's Post-Hearing Br. p. 6 ("The public notice, comment and review process for TMDLs . . . is a federal process. There is no final action by the Director.").)

1. The development of a TMDL report is a joint state/federal process

The preparation of a TMDL report begins at the state level, but it is not an exclusively state-driven process. The responsibilities for developing a final approved TMDL report are

shared between the states and federal government. In the end, it is the federal government, through the U.S. EPA, that is responsible for ensuring that the recommendations in a final TMDL report will implement a state's water-quality standards. *See* 33 U.S.C. 1313(d)(2).

States are responsible for determining which bodies of water need to be analyzed as part of the TMDL process and they are likewise responsible for preparing the initial TMDL reports that are submitted to the U.S. EPA. As part of the overall process, the U.S. EPA requires states to provide a wealth of information to justify its actions (or inaction). *See* 40 C.F.R. 130.7(b)(6) Among other things, a state must provide: 1) documentation to support the State's determination about whether a TMDL report for a body of water will be necessary, 40 C.F.R. 130.7(b)(6), 1) a description of the state's methodology for making that determination, 40 C.F.R. 130.7(b)(6)(i), and 3) a description of the data and information that the state both used and chose not to use as part of the initial process, 40 C.F.R. 130.7(b)(6)(ii) and (iii). Federal law also requires states to involve the public in the later TMDL report development process, specifically mandating that "[c]alculations to establish TMDLs shall be subject to public review." 40 C.F.R. 130.7(c)(1)(ii). The U.S. EPA also requires states to include with a proposed TMDL report "the supporting information that the [U.S. EPA] Region will need to evaluate the State's water quality analysis and determine whether to approve or disapprove the submitted TMDLs." *See* "Guidance for Water Quality Based Decisions: The TMDL Process, Chapter 4 – EPA and State Responsibilities" EPA Office of Water Regulations,[3] April 1991

Although states begin the TMDL report development process, the federal government—through the U.S. EPA—completes it. After states perform their analysis and subject a draft TMDL report to public notice and comment, they must submit their proposed TMDL reports to

[3] Available at http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/dec4.cfm (last visited March 27, 2014)

the Administrator of the U.S. EPA for review and approval. 33 U.S.C. 1313(d)(2) While the Administrator may choose to approve a state's submission, that is not the only option. The Administrator may also disapprove a TMDL report and develop a federal report to take its place. *See* 22 U.S.C. 1313(d)(2). Because the U.S. EPA retains the ability to change or disregard it entirely, a state's submission of a proposed TMDL report to the U.S. EPA is not a final action. *See Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992) (finding no final agency action where a report carried no direct consequences and served "more like a tentative recommendation than a final and binding determination."). The *only* final action occurs when the U.S. EPA approves a report or issues its own substitute report.

2. U.S. EPA's approval of a TMDL report is a final action under the federal Administrative Procedure Act and may be challenged in federal district court

a. Approval of a proposed TMDL report (or the development of a replacement report) is a federal action

It is well-established that, for purposes of the federal Administrative Procedure Act, the U.S. EPA's approval of a TMDL report is a final agency action. *See Anacostia Riverkeeper, Inc.*, 798 F. Supp. 2d at 222 ("[U.S.] EPA's approval of [a] Final TMDL is an act taken pursuant to the [Clean Water Act] and is thus subject to challenge under the APA."); *see also Natural Resources Defense Council, Inc. v. Fox*, 30 F. Supp. 2d 369, 380 (S.D.N.Y. 1998) ("[U.S.] EPA's handling of the TMDLs constitutes final agency action which may be set aside only if 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"); *Bravos v. Green*, 306 F. Supp. 2d 48, 56 (D. D.C. 2004) (stating that approval of TMDL is a final action).

The appropriate venue to challenge U.S. EPA's approval of a TMDL is therefore in federal district court. *See U.S. Steel Corp v. Train*, 556 F.2d 822, 835 (7th Cir. 1977)

("Authority to approve or disapprove a state's identification of polluted waters and calculation of total maximum daily loads is conferred on the Administrator by 303(d)(2). These determinations are reviewable in an action in the district court under the judicial review provisions of the APA."); *see also Friends of the Earth v. U.S. EPA*, 333 F.3d 184, 193 (D.C. Cir. 2003) (holding that challenges to U.S. EPA's approval of a TMDL must be brought in federal district court, not a federal court of appeals); *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1309-1314 (9th Cir. 1992) (holding that review of U.S. EPA's approval of a TMDL belongs in federal district court, not state court or a federal court of appeals); *Hayes v. Browner*, 117 F. Supp. 2d 1182, 1192 (N.D. Okla. 2000) ("[E]ven if the EPA improperly approves invalid TMDLs, the appropriate action is a case brought pursuant to the APA, not under the CWA."). Consistent with settled precedent, district courts regularly entertain properly presented challenges to U.S. EPA's approval of a state-developed TMDL report. *See Natural Resources Defense Council v. Muszynski*, 268 F.3d 91, 93-94 (2nd Dist. 2001) (appeal from federal district court challenge to U.S. EPA's approval of a New York TMDL report for phosphorus); *see also Friends of the Wild Swan v. U.S. EPA*, 130 F. Supp. 2d 1184, 1195 (D. Mont. 1999); *Conservation Law Found., Inc. v. U.S. EPA*, C.A. 10-11455-MLW, 2013 WL 4581218, *1 (D. Mass. Aug. 29, 2013).

b. US EPA's approval of a TMDL report is the final (and only) action that affords legal significance to such a report

It is the U.S. EPA's action—either the approval of a TMDL report or the promulgation of a new one—that is the legally significant event in the TMDL development process. Any enforceable legal obligations that exist with respect to a TMDL report flow exclusively from the U.S. EPA's final approval action, not from generation of the report itself. And those enforceable obligations apply to Ohio EPA *not* to members of the regulated community like Fairfield County. *See Pronsolino I*, 91 F. Supp. 2d at 1355 (States are free to "moderate or to modify the

TMDL reductions, or even refuse to implement them, in light of countervailing state interests." But a decision to do so might imperil federal environmental grant money.).

Additionally, to the extent that state and federal law give any weight to TMDL reports, they give weight only to *approved* TMDL reports *as a matter of federal law*. For example, the federal requirement that states issue permits containing limits "consistent with the assumptions and requirements" of a TMDL report applies only to TMDL reports that were "*approved* by EPA pursuant to 40 C.F.R. 130.7." *See* 40 C.F.R. 122.44(d)(1)(vii) (emphasis added). State law similarly emphasizes that it is only approved TMDL reports that are relevant for purposes of carrying out Ohio's water pollution control laws. *See* Ohio Adm.Code 3745-5-09(A) (addressing the baseline of water quality for areas where there is an *approved* TMDL report); Ohio Adm.Code 3745-5-10(B) (addressing water-quality trading in the context of *approved* TMDL reports); Ohio Adm.Code 3745-39-03(A)(4)(a) (addressing permit requirements for municipal storm sewers when there is a "*United States EPA approved or established* total maximum daily load."); and Ohio Adm.Code 1501:15-5-20(A)(1) (allowing a watershed to be designated as in distress if waters are identified as impaired as part of "an *approved* 'Total Maximum Daily Load Report.'") (emphases added).

The West Virginia Supreme Court's decision in *Monongahela Power Co. v. Chief, Officer of Water Res., Div. Envtl. Prot.*, 567 S.E.2d 629 (W. Va. 2002), recognized that the approval of a TMDL report was a federal, not state action. The court in that case emphasized that TMDL reports become final and effective only after they are approved by the U.S. EPA. It held that "a Total Maximum Daily Load becomes an order only upon approval of the EPA." *Id.* at 639. Consistent with that conclusion, the West Virginia Supreme Court also concluded that, because the only action that is legally relevant is the U.S. EPA's approval of a TMDL report,

"the establishment of Total Maximum Daily Loads for pollutants of impaired waters within the State by the West Virginia . . . are not actions that are appealable" to courts in West Virginia. *Id.*

In addition to the West Virginia Supreme Court, courts in at least two other states have also recognized that the federal role in the TMDL report development process is the predominant one. The Alabama Court of Civil Appeals has held that a precursor step to the development of a TMDL report, the preparation of an impaired waters list, "is a creature of *federal* law, not state law." *Alabama Dept. of Envtl. Mgmt. v. Legal Envtl. Assistance Found.*, 922 So.2d 101, 112 (Ala. Civ. App. 2005) (emphasis in original). And a Pennsylvania court has also recognized that it is the U.S. EPA's action that matters. *See Upper Gwynedd Towamencin Mun. Auth. v. Dept. of Envtl. Prot.*, 9 A.3d 255, 267-268 (Pa. Commw. Ct. 2010) (Stating that the Clean Water Act "itself places with [U.S.] EPA the ultimate power to approve TMDLs.").

E. None of Fairfield County's arguments in support of its contention that TMDL reports must be promulgated pursuant to the formal rulemaking requirements of R.C. Chapter 119 are persuasive

1. Fairfield County makes arguments in this Court that are in conflict with the arguments that it made below

Several of the arguments that Fairfield County makes now are in conflict with arguments that it made below before ERAC and the Tenth District. Although it now argues that TMDL reports are unpromulgated rules because they impose new legal obligations, Fairfield County below argued that the Director had no obligation to follow the recommendations contained in such reports. Despite the fact that Fairfield County argues that it should be able to challenge the overall pollution-reduction strategy set out in a TMDL report as approved by the U.S. EPA, it explicitly disclaimed such a challenge below and recognized that approval of a TMDL report is a federal—not state action. Having made (and in some cases prevailed on) contradictory arguments below, Fairfield County should not be able to argue the opposite in this Court.

a. Contrary to its arguments in this Court, Fairfield County successfully argued below that a TMDL report's recommended discharge limits are not binding

Fairfield County successfully argued below that the recommendations contained in a TMDL report are not binding on Ohio EPA. *See* Fairfield County 10th Dist. Appellant Br. p. 21-23; *see also* App. Op. ¶ 69 and 143 (holding that "Automatic implementation of the individual TMDL allocations exactly 'as is' is not required in the NPDES permit."). Fairfield County also argued that the permit issued to Fairfield County was "the first action of the Director implementing the [Big Walnut Creek] TMDL as it relates to Fairfield County." Fairfield County 10th Dist. Appellant Br. p. 26. As a result, Fairfield County argued that it should be able to challenge the evidentiary and scientific basis for the phosphorus permit limit as part of its appeal of the permit to ERAC. Fairfield County prevailed on both arguments at ERAC and at the Tenth District. The Director has chosen not to appeal those aspects of the decision below—and, indeed, has changed his position on this issue.

The arguments that Fairfield County makes now are in conflict with those that it made below. Fairfield County now argues that a TMDL report "establishes a mandatory, quantitative pollution budget . . . ." Fairfield County Amended Br. p. 16-17. But it argued for the opposite rule in the Tenth District. There it argued that "[a] TMDL does not, by itself, prohibit any conduct or require any actions," and that a TMDL report only "'represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits.'" Fairfield County 10th Dist. Appellant Br. p. 22-23 *quoting City of Arcadia*, 265 F. Supp. 2d at 1144. Even at the ERAC hearing, at least one Fairfield County witness testified that a TMDL report is not enforceable, but merely serves as guidance for other activities. Tr. Vol. II p. 88.

Admittedly, the Director in these proceedings is also taking a legal position that is different from the one that he took below. But his decision to do so can be easily explained in a

way that Fairfield County's shifting legal arguments cannot. The Director's decision to adopt a different interpretation of the effect of a TMDL report's recognizes the law established by the Tenth District's decision. The Director concedes that the Tenth District is correct and that the recommended discharge limits in a TMDL report are not binding. He is here to defend that judgment as the Appellee. Fairfield County however, asks this Court to reverse by taking the opposite position it argued—and won—below.

b. Fairfield County explicitly rejected below any challenge to the stream's overall pollution capacity approved by U.S. EPA as part of its approval of the Big Walnut Creek TMDL report

Fairfield County argues for the first time in its brief that it should have been able to challenge not just its permit limits, but also the stream's overall pollution capacity that the U.S. EPA signed off on when it approved the Big Walnut Creek TMDL report. However, Fairfield County expressly disclaimed such a challenge in the proceedings below.

Fairfield County did not contest below the basis for Ohio EPA's determination of how much total pollution Blacklick Creek can receive (or the U.S. EPA's approval of that determination) and it should not be able to raise that issue now for at least two reasons. First, that issue has not been adequately preserved. The record on that issue was not developed nor was that issue addressed by the tribunals below. Second, it should come as no surprise that ERAC and the Tenth District limited the scope of their review to the specific phosphorus limit included in Fairfield County's permit—Fairfield County explicitly asked them to do so. Fairfield County cannot fail to bring a challenge and then fault the reviewing courts for never addressing the challenge that was never brought.

Fairfield County's pleadings below confirm that the only challenge that was ever brought was to the specific phosphorus limit contained in its permit. In its response to a motion in limine filed by the Director at ERAC, Fairfield County clearly stated that "[t]his action is not about the

TMDL or the 208 plan. This action is about the individual NPDES permit granted to the County to operate [its wastewater treatment plant]." Fairfield County Response to the Director's Motion in Limine, p. 7. It emphasized that "the County *does not challenge the TMDL for Blacklick Creek*." *Id*. (emphasis added). In its proposed findings of fact and conclusions of law, Fairfield County also challenged only the specific phosphorus limitation imposed in its permit—did not argue that it should have been able to bring a challenge to the stream's overall pollution capacity adopted by the U.S. EPA as part of its approval of the Big Walnut Creek TMDL report. See Fairfield County Proposed Findings of Fact and Conclusions of Law, p. 40-41. Finally, in its reply to the Directors post-hearing pleadings, Fairfield County again emphasized that it was only challenging the specific phosphorus limit contained in its permit—that it was challenging only the *implementation* of the overall strategy set forth in the Big Walnut Creek TMDL report, that is to say, the permit, *not* the overall pollution capacity of Blacklick Creek. See Fairfield County Reply to Director's Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law, p. 2-6.

Not only did Fairfield County explicitly reject any challenge to the overall Big Walnut Creek TMDL report as approved by U.S. EPA, it conceded that the appropriate venue to bring a challenge to the approval of the report was in federal district court—and that ERAC was without jurisdiction to hear such a challenge. Fairfield County stated: "An appeal from U.S. EPA's approval [of the Big Walnut Creek TMDL report] would be under the federal Administrative Procedure Act, and not to this Commission. Although this Commission does not have jurisdiction to hear challenges to actions of U.S. EPA such as its approval of TMDLs, it may hear challenges to state-issued NPDES permits." See Fairfield County Reply to Director's Post-Hearing Brief and Proposed Findings of Fact and Conclusions of Law, p. 7.

2. The authorities that Fairfield County cites in support of its rulemaking argument are unpersuasive

Fairfield County cites authority from Ohio and other states that it contends support its argument that TMDL reports must go through formal R.C. Chapter 119 rulemaking procedures. Those authorities are unpersuasive and do not compel the result for which Fairfield County advocates.

a. The court of appeals decision in *Jackson County Environmental Committee v. Schregardus* does not persuasively address when an agency policy rises to the level of an unpromulgated rule

The intermediate court of appeals decision in *Jackson County Envtl. Comm. v. Schregardus*, 95 Ohio App. 3d 527 (10th Dist. 1994), is of little value when considering whether TMDL reports should have to go through formal rulemaking procedures. Fairfield County cites to that decision as persuasive authority, calling it "factually and legally indistinguishable" from this case. Appellant's Merits Br. p. 23. The decision is anything but.

The court of appeals decision in *Jackson County* provides no guidance for courts considering whether an agency policy should be treated as an unpromulgated rule. The decision in that case did not involve TMDLs and is entirely conclusory, providing absolutely no analysis to explain its result. The decision provides no details about the agency guidelines that were at issue, making it impossible to compare the challenged policy in that case to any other agency policy. As a result, there is simply no way to determine whether or how the decision should apply in future cases. Therefore, whatever the reasoning behind the *Jackson County* decision, that case is of no assistance when attempting to determine whether the TMDL report at issue here should have been promulgated as a rule.

b. The practices of other states regarding the creation of TMDL reports is varied and provides no clear consensus about how such reports should be developed

Fairfield County's reference to the practices of other states, while perhaps interesting, is not controlling when considering whether TMDL reports in Ohio should be required to go through R.C. Chapter 119 rulemaking. It is true that some other states issue TMDL reports as part of a formal rulemaking process; in some states formal rulemaking is required by statute or rule, and in other states it has been judicially mandated. In many other states, however, rulemaking is not required. And Fairfield County is in many instances wrong about whether a state does or does not require rulemaking.

Several of the states that Fairfield County identifies as requiring TMDL rulemaking do not actually impose such a requirement. First and foremost among these misidentified states is Idaho. Fairfield County relies heavily on the decision from the Idaho Supreme Court in *Asarco Inc. v State of Idaho*, 69 P.3d 139 (Idaho 2003), but fails to mention that that case has been legislatively overruled. Shortly after the *Asarco* decision was announced, the legislature in Idaho passed a statute for the purpose of explicitly exempting TMDLs from the state's rulemaking requirements. Idaho Code § 39-3611(2) (stating that development of a TMDL is a final action of the Director of the Idaho Department of Environmental Quality but that generally "the rulemaking provisions in [the Idaho Code] shall not apply to TMDLs"). Fairfield County cites Oregon as another state that requires TMDL reports to go through formal rulemaking. But Oregon is like Idaho: it may have at one time imposed a rulemaking requirement but it currently does not. See Or. Admin. R. 340-042-0060 (stating that TMDL reports are issued by order of the Director of the Oregon Department of Environmental Quality).

Fairfield County's survey of states supporting its new position also mistakenly includes Missouri, which does not require TMDL reports to go through formal rulemaking. The decision

in *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10 (Mo. 2003), did not hold that TMDL reports must follow formal rulemaking procedures. If anything, its conclusion that "TMDLs are 'primarily informational tools that allow the states to proceed from the identification of waters requiring additional planning to the required plans,'" *id.* at 18 (*quoting Pronsolino II*, 291 F.3d at 1129), actually supports the Director's contention that TMDL reports do not themselves impose any legal requirements or obligations. Fairfield County overlooks that portion of the decision however, just as it overlooks the Missouri Supreme Court's conclusion that no legal obligations exist until "after TMDLs are developed *and implemented*." *Missouri Soybean Ass'n*, 102 S.W.3d at 29 (emphasis added). As the Missouri Supreme Court held, it is the implementation that matters and an "implementation plan is put into effect through further permit restrictions or other regulations." *Id*. at 24.

Fairfield County admittedly does not incorrectly identify all of the states that it lists as requiring TMDL reports to go through formal rulemaking procedures; some of those states unquestionably require formal rulemaking. But some of the authorities that Fairfield County cites from those states are not persuasive to the resolution of this case. Those cases do not engage with or directly answer the question of whether the development of TMDL reports requires rulemaking. For example, Fairfield County cites the decision in *City of Rehoboth v. McKenzine*, No. CIV.A. 98C-12-023, 2000 WL 303634 (Del. Super. Ct., Feb. 29, 2000) as evidence that a TMDL report should be required to go through rulemaking—but the question of whether rulemaking was required was never contested in that case. *See id.* at *1 (stating that "all agree[d]" that a TMDL was a regulation). Equally unpersuasive is the decision in *In re Adoption of Amendments to Northeast, Upper Raritan, Sussex County & Upper Delaware Water Quality Mgmt. Plans*, 2009 WL 2148169 (N.J. Super. Ct. App. Div., July 21, 2009). While the court in

that case questioned in dicta the assertion that a TMDL report is not a rule, it held that "the issue does not need to be resolved in order to decide this appeal." *Id.* at *5 n.3.

Fairfield County also does not mention the states that do not require formal TMDL rulemaking. In a vast majority of states there is no statutory or judicial requirement that TMDL reports be promulgated as rules. (Indeed, if this Court were to require TMDL reports to go through formal rulemaking, Ohio would be one of only a handful of states in the country to explicitly impose such a requirement.) In at least some of those states, the legislative silence has been reasonably interpreted as not requiring rulemaking. *See* Total Maximum Daily Loads (TMDLs) Basics, Massachusetts Executive Office of Energy and Environmental Affairs[4] (stating that a permit limit may be appealed but that "TMDLs themselves are not subject to appeal to MassDEP."). Even where states have provided some rights of appeal at the state level, they have chosen to provide an opportunity to appeal that falls short of requiring state agencies to adhere to involved rulemaking requirements. *See* Vt. Code R. 16-3-504:3 (allowing for appeal, but not requiring formal rulemaking). Finally, the Supreme Court of at least one state, West Virginia, has held that the generation of TMDL reports is not a state rulemaking. Instead, it recognized that it is only upon approval by U.S. EPA that a TMDL report has any legal consequence. *Monongahela Power Co.*, 567 S.E.2d at 639.

3. The requirement that the U.S. EPA provide an opportunity for public participation when it independently develops a TMDL report does not mean that a state's proposed report constitutes a formal rulemaking

Whether a proposed TMDL report is initially developed by a state or by U.S. EPA, the overall process is the same. When states and the federal government cooperatively develop TMDL report, the responsibilities for doing so are shared. In those instances, the U.S. EPA

[4] Available at http://www.mass.gov/eea/agencies/massdep/water/watersheds/total-maximum-daily-loads-tmdls-basics.html#CanaTMDLbeappealed (last visited March 27, 2014)

might be the entity that actually approves a final TMDL report, but the states are the entities that provide the opportunity for public participation. *See* 40 C.F.R. 130.7(c)(1)(ii). When the federal government acts unilaterally, however, no opportunity for public participation on the proposed TMDL report existed. The U.S. EPA must therefore provide the opportunity for public participation that would have otherwise been available at the state level. In either instance, the overall process is the same: there is an opportunity for public participation followed by the chance to appeal the U.S. EPA's approval to federal district court.

The opportunity for public participation is what the court in *Sierra Club v. U.S. EPA*, 162 F. Supp. 2d 406, 419-420 (D. Md. 2001), was focusing on when it said that rulemaking occurs at the state level. The *Sierra Club* court's dicta about state rulemaking must be understood in the context of the challenge that the Sierra Club had brought. In that case, the Sierra Club argued that an additional opportunity for public participation should have been provided prior to the U.S. EPA's approval of several proposed TMDL reports that Maryland submitted. *Id.* at 419. The court rejected that argument, finding that no additional public notice and comment period was required. *Id*. at 420. Although the court used overly broad language, the context of its statement about state rulemaking shows that it was referring to the opportunity for notice and comment. *Id*. at 419-420. If the court had meant that the rulemaking process occurred entirely at the state level it would have done more than hold that the U.S. EPA "was under no requirement to provide for public notice and comment." It would have instead dismissed the case for lack of a final federal action.

4. Fairfield County's other arguments are inconsistent with the plain language of the statutes governing water-quality standards and TMDL reports

a. TMDL reports are not water-quality standards and the rulemaking requirement of R.C. 6111.041 does not apply

It should go without saying that water-quality standards and TMDL reports are two entirely different things. To suggest otherwise is to ignore the plain language of existing state and federal law. For example, 33 U.S.C. 1313(d)(1)(C) compels states to establish total maximum daily loads at a level "necessary to implement the applicable water quality standards." State law similarly distinguishes between water-quality standards on one hand and TMDLs on the other. *See* R.C. 6111.56(B) (treating TMDLs as separate from water-quality standards).

Fairfield County also seems to suggest that any time a narrative water-quality standard is used to justify a numeric permit limit, the process by which the numeric limit was developed constitutes the creation of a new water-quality standard. See Appellant's Amended Merit Br. p. 16-17. But there is nothing special about narrative standards that would require additional rulemaking. *Every* water-quality standard, whether numeric or narrative, must be translated from a general standard into a specific permit limit. Whether a water-quality standard is expressed as a narrative or numeric standard, parties have the same opportunities to challenge both the standard and its implementation in a permit. First, a party may challenge the rulemaking process that developed the standard. Second, as discussed above, a party may challenge the U.S. EPA's approval of a TMDL report recommending strategies for achieving that standard (if a TMDL is developed and submitted to the U.S. EPA). Third and finally, a party may challenge the implementation of that water-quality standard through the imposition of a permit limit by appealing the relevant permit to ERAC. For all intents and purposes then, narrative and numeric standards are functionally the same. They both provide a legal foundation upon which Ohio EPA may legitimately rely to set permit limits.

b. The requirement to enforce Ohio's water pollution control consistent with the Clean Water Act does not mean that TMDL reports must go through R.C. Chapter 119 rulemaking

The requirement that Ohio's water pollution control laws "shall be administered, consistent with" federal law and the Clean Water Act, see R.C. 6111.03(S)(2), cannot bear the weight that Fairfield County seeks to put on it. First, the process for developing a TMDL report is the same regardless of whether it begins at the state or federal level. In both instances there is an opportunity for public participation followed by the availability of an appeal to federal district court. In the strictest sense then, Ohio EPA is *already* administering the TMDL development process in a manner "consistent with" federal law and the Clean Water Act.

Second, as discussed above, if the General Assembly had wished to require that TMDL reports be developed pursuant to the requirements of R.C. Chapter 119, it would have clearly said so. It would have not used only the vague language that appears in R.C. 6111.03(S)(2). To paraphrase the United States Supreme Court, the General Assembly does not "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *See Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001).

Appellee Ohio Director of Environmental Protection's Proposition of Law No. 2:

Due process requires notice and an opportunity to be heard; a party's failure to avail itself of that opportunity does not constitute a denial of due process.

A. It is not a denial of due process when a party fails to avail itself of a legal remedy or when it fails on the merits of a legal challenge

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner." *See Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quotations and citations omitted). Thus a denial of due process does not exist if there was an opportunity to be heard—even if a party failed to take advantage of that opportunity. "An

opportunity squandered does not make out a due process claim." *Equal Employment Opportunity Comm'n v. Bay Shipbuilding Corp.*, 668 F.2d 304, 310 (7th Cir. 1981). Furthermore, a failure to prevail on the merits of an argument also does not constitute the denial of due process. "The right to due process does not equate to the right to be the prevailing party." *Planey v. Mahoning County Court of Common Pleas*, 154 Ohio Misc. 2d 1, 2009-Ohio-5684 ¶ 19 (Mahoning Cty. Ct. of Common Pleas).

B. Fairfield County challenged the phosphorus limit included in its permit at the de novo hearing before ERAC; its failure to prevail was not a denial of due process

At the de novo ERAC hearing, Fairfield County had a full opportunity to challenge the bases for the Big Walnut Creek TMDL report. Yet Fairfield County now asks for exactly that which it received: the opportunity to challenge the basis for the recommendations in the Big Walnut Creek TMDL as part of a de novo hearing before ERAC. See Appellant's Br. p. 28.

Fairfield County acknowledges that the de novo hearing provided it with the opportunity to challenge the basis for the recommendations contained in the Big Walnut Creek TMDL report. It admits, for example, that Ohio EPA's actions are consistent with the position that a TMDL report's recommendations are "nonbinding" until they are "applied to the affected stakeholders as limits in their permits." Appellant's Amended Merit Br. p. 28 c*iting Pronsolino II*, 291 F.3d at 1129; *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002); *Missouri Soybean Ass'n v. U.S. EPA*, 289 F.3d 509, 512 (8th Cir. 2002); *City of Arcadia*, 265 F. Supp. 2d at 1144-1145. But it suggests that the de novo hearing in this case was somehow flawed. That suggestion is contradicted by the facts of what actually occurred below.

The arguments that TMDLs are not binding, that the Director has flexibility in permitting, and that, regardless of what a TMDL report recommends, a permit limit must be supported by adequate evidence are arguments that Fairfield County made below *and prevailed*

on. What Fairfield County did not prevail on was its challenge to the *evidentiary* basis for the phosphorus limit the Director ultimately included in its permit

1. Fairfield County failed to carry its evidentiary burden in the proceedings below

At the de novo hearing before ERAC and again on appeal before the Tenth District, the Director successfully defended the limits contained in Fairfield County's permit as being supported by a valid factual foundation. Director's 10th Dist. Response Br., p. 11-16. The Director presented evidence describing the general relationship between phosphorus levels and water quality, Tr. Vol. II p. 143-53, as well as testimony that with the increased level of permitted phosphorus discharge, Fairfield County's wastewater treatment plant would have an increasingly negative effect on Blacklick Creek, Tr. Vol. II p. 153-54, 194-96; Tr. Vol. IV p. 42, 88-89. Specifically, the Director's evidence showed that when Fairfield County began discharging at its maximum capacity, the amount of phosphorus being discharged would exceed the capacity of Blacklick Creek to absorb it. See Hearing Ex. 6, Figure 3; see also Tr. Vol. II p. 154-55.

While the Director certainly *considered* the recommendations contained in the Big Walnut Creek TMDL report, he independently evaluated those recommendations and the support for them before imposing a phosphorus limit in Fairfield County's permit. He introduced evidence related to that individual reevaulation at the de novo hearing. See Hearing Ex. 6; Tr. Vol. III p. 174-86; Tr. Vol. IV p. 80-89. Thus it is simply incorrect to say (as Fairfield County does) that its evidence was "largely unrebutted" and that the decisions below were based on a reflexive application of the recommendations contained in the Big Walnut Creek TMDL report.

The Tenth District considered all of the evidence introduced at the de novo hearing in detail. See App. Op. ¶ 14-39, 64-66. It ultimately concluded that the evidence that the Director

introduced at the hearing provided a valid factual foundation for limit placed on Fairfield County's ability to discharge phosphorus. App. Op. ¶ 66. The Tenth District rejected Fairfield County's evidentiary claims, noting that "[w]hile Fairfield County may disagree with the [Director's] analysis, it is not speculative." App. Op. ¶ 65. In the end, both the Tenth District and ERAC ultimately evaluated all of the evidence introduced at the de novo hearing and determined *as an evidentiary matter* that the Director had established that he had a valid factual foundation for imposing that limit. *See* App. Op. ¶ 66; ERAC Op. ¶ 84.

Thus, as was the case in *Saunders*, Fairfield County's loss below did not result from the application of an Ohio EPA policy. It lost instead because it was unable to show that the Director lacked a valid factual foundation for the phosphorus limit contained in its permit. *Cf. Saunders*, 101 Ohio St. 3d 125 at ¶ 42 ("It is important to remember that it was not [the agency policy] that prevented claimant's [disability] award but claimant's failure to submit medical evidence that attributed a percentage of disability exclusively to claimant's allowed injury.")

2. Its failure to prevail below does not mean that Fairfield County was denied the opportunity to challenge its permit limits at a de novo hearing

Fairfield County's characterization of the proceedings below bears little resemblance to what actually occurred. It was not denied an opportunity to present evidence or to challenge the witnesses, assumptions, data, logic, and policy choices supporting *either* the recommendations contained in the Big Walnut Creek TMDL report *or* the phosphorus limit included in its permit. Neither ERAC nor the Tenth District treated U.S. EPA's approval of the Big Walnut Creek TMDL report as dispositive of Fairfield County's permit challenge. Indeed, the Tenth District explicitly rejected Fairfield County's argument that it was denied meaningful review. App Op. ¶ 77-81, ("Fairfield County had the opportunity to challenge the phosphorus limitation during the NPDES permitting process.") It *also* explicitly rejected Fairfield County's argument that ERAC

failed to adequately review the basis for the challenged phosphorus limit. App. Op. ¶ 69 ("Contrary to Fairfield County's assertion, ERAC's decision neither states nor implies that the presence of an allocation in a TMDL automatically translates to the imposition of that exact limitation in the NPDES permit.") This Court should likewise reject both arguments.

C. Fairfield County had a full and fair opportunity to challenge the U.S. EPA's approval of the Big Walnut Creek TMDL report; its failure to do so was not a denial of due process

1. The U.S. EPA's approval of a TMDL report is not State action and the appeal requirements of R.C. 3745.05 therefore do not apply

Due process and the provisions of R.C. 3745.05 do not require that Fairfield County be afforded an opportunity to appeal the development of a TMDL report prior to it being approved by the U.S. EPA. As even Fairfield County recognized below, the State's submission of a TMDL report to the U.S. EPA is not a final action of the Director of Ohio EPA. See Fairfield County's Reply to the Director's Post-Hearing Br. p. 6 ("The public notice, comment and review process for TMDLs . . . is a federal process. There is no final action by the Director."). The appeal requirements of R.C. Chapter 3745 only apply to final actions of the Director of Ohio EPA—and therefore do not apply in this case. *See* R.C. 3745.04.

Fairfield County spends significant time arguing that the provisions of the Clean Water Act do not preempt state appeal rights. See Appellant's Amended Merit Br. p. 36-39. But that argument misses the point entirely—preemption is not a relevant consideration in this case. The only question is whether the Director's submission of a proposed TMDL report to the U.S. EPA is a final state action. For the reasons discussed above, it is not. Only the U.S. EPA's approval of a report (or issuance of its own report) is a final action, and that action is a federal one. Fairfield County agreed with that position below, and like the Director is arguing now, argued that the TMDL development process is a federal one and that "[t]here is no final action by the

Director," when a proposed TMDL report is submitted to the U.S. EPA. See Fairfield County 10th Dist. Appellant Br. p. 25.

2. Fairfield County's failure to avail itself of available legal remedies does not constitute a denial of due process

Fairfield County received an opportunity to comment on the proposed Big Walnut Creek TMDL report and to challenge it in federal court. Fairfield County lists a variety of possible reasons to challenge a state's recommended TMDL report and the U.S. EPA's corresponding approval. Those challenges could have been raised in comments when the draft report was issued for public comment. They could also have been raised in federal district court. The fact that Fairfield County chose not to comment and did not bring a challenge under the federal Administrative Procedure Act does not translate into a denial of due process. After all, "[a]n opportunity squandered does not make out a due process claim." *Bay Shipbuilding Corp.*, 668 F.2d at 310.

a. The Big Walnut Creek TMDL report was made available for public notice and comment, but Fairfield County did not comment

A draft of the Big Walnut Creek TMDL report was submitted for public notice and comment. Hearing Ex. 13, Appendix E; Tr. Vol. IV, p. 53, 58. A variety of stakeholders commented on the report at that time, and Ohio EPA made revisions to the report in light of those comments. Hearing Ex. 13, Appendix E. Fairfield County chose *not* to comment on the report however. Tr. Vol. IV, p. 58. That is a failure on Fairfield County's part. It is not a failure on the part of the Ohio EPA and it is most certainly not a failure of due process.

The fact that Fairfield County had an opportunity to comment at the State level, but not at the federal level, also does not violate the provisions of the Administrative Procedure Act. Fairfield County was provided with a full panoply of rights; they were just split between the State and federal parts of the process. As the Tenth Circuit Court of Appeals held in a case

involving water-quality standards, when there was an opportunity for public participation at the state level, "the purpose of public notice and comment under the APA is satisfied under the Clean Water Act without requiring the EPA to receive additional comments." *City of Albuquerque v. Browner*, 97 F.3d 415, 425 (10th Cir. 1996). In rejecting the argument that an additional opportunity for comment was required, the court in that case held that "[t]o require yet another detailed notice, comment and hearing process by EPA would be to inject more bureaucracy, delay and expense into an already lengthy process that allows ample opportunity for public input." *Id.* Such would be the case here. To require an additional level of state rulemaking and review, when review is already available in federal court, would simply add more bureaucracy, delay, and expense for all stakeholders, including the regulated community.

b. Fairfield County could have challenged in federal court U.S. EPA's approval of the Big Walnut Creek TMDL report

A party that objects to U.S. EPA's approval of a TMDL report can challenge in federal district court any aspect of the TMDL development process that the party believes was flawed. As discussed above, federal district courts regularly hear challenges to the U.S. EPA's approval of a state's recommended TMDL report. *See Anacostia Riverkeeper, Inc.*, 798 F. Supp. 2d at 213; *see also Minnesota Ctr. for Envtl. Advocacy v. U.S. EPA*, No. CIV03-5450, 2005 WL 1490331, *1 (D. Minn. June 23, 2005). The cases that Fairfield County cites in support of its claim that a challenge would have been dismissed do not say otherwise.

In the two cited cases, the challenging parties were challenging something *other* than the U.S. EPA's final approval of a TMDL report. In *City of Arcadia*, the plaintiffs did not directly challenge the U.S. EPA's approval of a state's TMDL report. Instead, they challenged the procedures by which the TMDL report was developed. *City of Arcadia*, 265 F. Supp. 2d at 1153-1154. The court in that case simply held that the challenged *procedures* were not final

agency actions. *Id*. at 1154-1155. Similarly, the decision in *Sierra Club v. Meiburg* did not involve the U.S. EPA's approval of a TMDL report. It instead involved interpretation and application of a consent decree. *See generally*, 296 F.3d 1021. Thus neither of the two cases that Fairfield County cites suggests that a federal district court would have dismissed a challenge by Fairfield County to the U.S. EPA's approval of the Big Walnut Creek TMDL report.

There have been instances where federal courts have dismissed challenges to a TMDL report as premature. But in those instances, the challenges were not to the TMDL report itself, but to its implementation. Those cases actually support the Director's position in this case. They reflect the balance that was struck by the tribunals below: those cases require challenges to the stream's capacity as set forth in an approved TMDL report to be brought in federal district court, while deferring review of the TMDL report's implementation until after a report's recommendations are carried into effect through the issuance of a permit. *See Bravos*, 306 F.Supp. 2d at 56 ("The action challenged here is not the EPA's approval of the TMDL limits, but rather, the agency's alleged approval of the State's implementation plan . . .").

* * *

In the end, the Director concedes that a permit recipient—like Fairfield County—must be given a full and fair opportunity to challenge the scientific basis for the limits in its permit. That is not what this case is about; Fairfield County had—and availed itself of—that opportunity. Instead, as the foregoing shows, many of the arguments that Fairfield County now makes in support of its propositions of law are contradicted by its own arguments and statements below. These inconsistencies reveal that this case is *not* about illegal rulemaking, or the denial of due process. It is about a permit recipient who did not like its permit limits and who is now unhappy about how the two lower tribunals weighed the evidence submitted at a de novo hearing.

Because Fairfield County now directly contradicts the arguments that it explicitly made below, the Court should consider dismissing this case as improvidently allowed. By virtue of its contradictory statements, the arguments that Fairfield County would have this Court consider cannot now be raised. *Davis v. Wakelee*, 156 U.S. 680, 689 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."). In the alternative, this Court should affirm the Tenth District's conclusion that the Director had a valid factual foundation for the phosphorus limit included in Fairfield County's permit.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Tenth District Court of Appeals. In the alternative, the Court should dismiss this case as improvidently allowed.

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