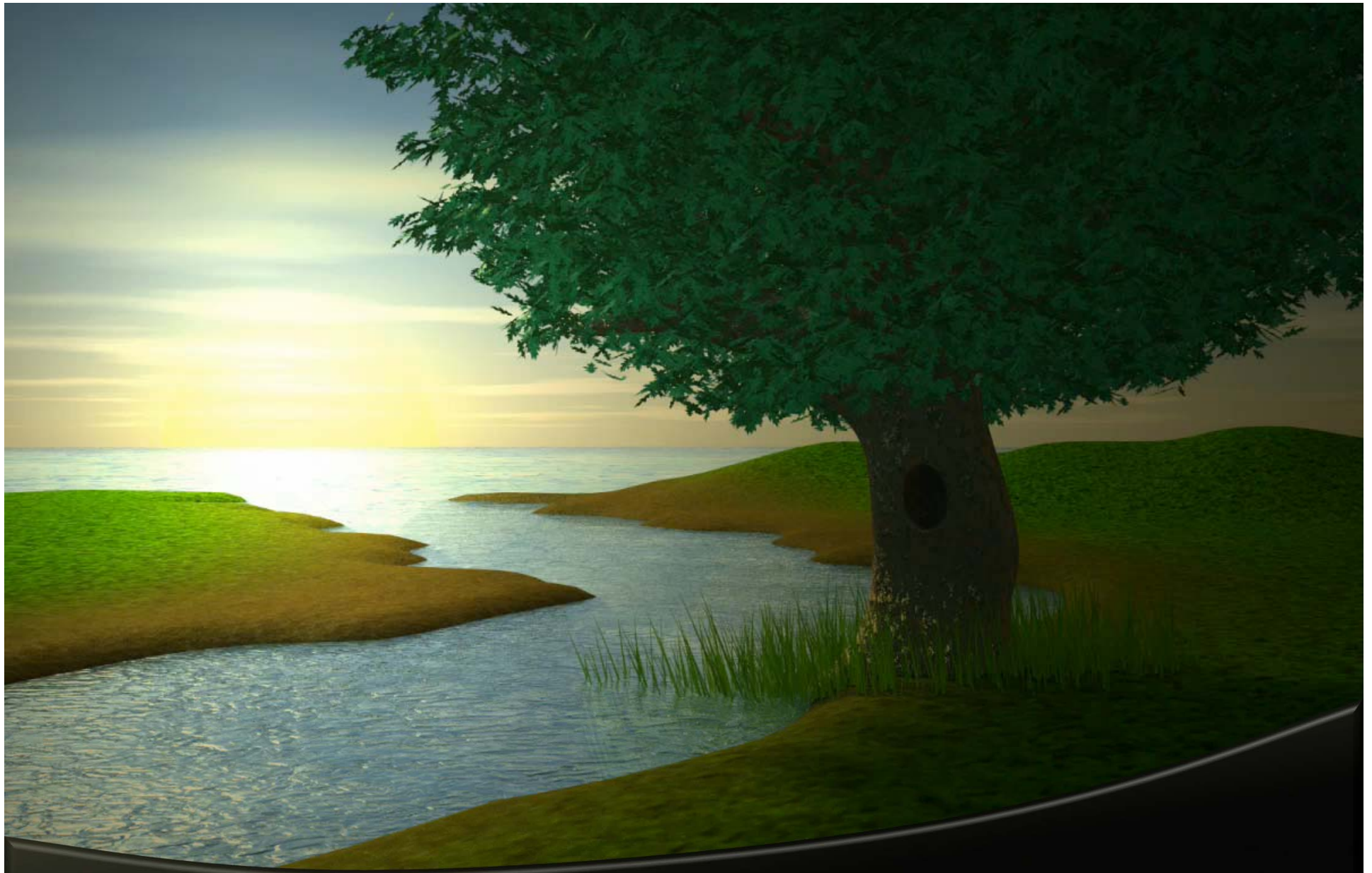


Hot Topics in Clean Water Law

June 17, 2015





Clean Water Rule

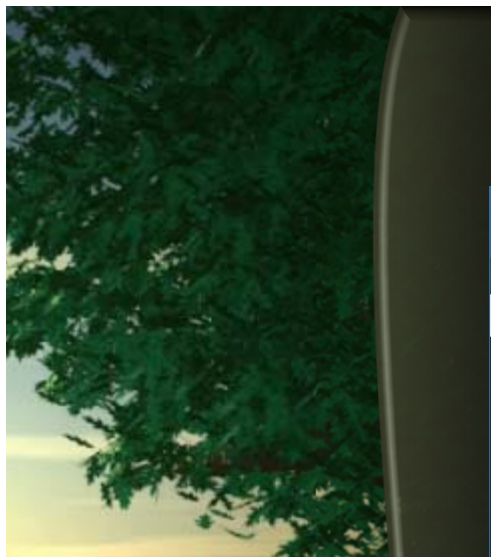
NACWA



Waters of the US (WOTUS) Rule

Clean Water Rule

- **Stated Intent: Provide clarity on jurisdictional waters**
- **Pre-publication release of rule – May 27**
- **Federal Register**
- **Effective Date – 60 days from publication**
- **Received over 1M comments**
- **Responses to comments coming soon...**
- **Complex rule:**
 - Tributaries**
 - Adjacent wetlands/waters**
 - Isolated waters**
 - Prairie potholes and wetlands**
 - Pocosins**
- **EPA Website - <http://www2.epa.gov/cleanwaterrule>**



Clean Water Rule

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Clear Protection for Clean Water

The Clean Water Rule protects streams and wetlands that we depend on for our health, communities, and economy.

- [Read the press release](#)
- [Read the rule](#)
- [Access the rule](#)
- [View the rule](#)

Subject	Old Rule	Proposed Rule	Final Rule
Navigable Waters	Jurisdictional	Same	Same
Interstate Waters	Jurisdictional	Same	Same
Territorial Seas	Jurisdictional	Same	Same
Impoundments	Jurisdictional	Same	Same
Tributaries to the Traditionally Navigable Waters	Did not define tributary	Defined tributary for the first time as water features with bed, banks and ordinary high water mark, and flow downstream.	Same as proposal except wetlands and open waters without beds, banks and high water marks will be evaluated for adjacency.
Adjacent Wetlands/Waters	Included wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments or tributaries.	Included all waters adjacent to jurisdictional waters, including waters in riparian area or floodplain, or with surface or shallow subsurface connection to jurisdictional waters.	Includes waters adjacent to jurisdictional waters within a minimum of 100 feet and within the 100-year floodplain to a maximum of 1,500 feet of the ordinary high water mark.
Isolated or "Other" Waters	Included all other waters the use, degradation or destruction of which could affect interstate or foreign commerce.	Included "other waters" where there was a significant nexus to traditionally navigable water, interstate water or territorial sea.	Includes specific waters that are similarly situated: Prairie potholes, Carolina & Delmarva bays, pocosins, western vernal pools in California, & Texas coastal prairie wetlands when they have a significant nexus. Includes waters with a significant nexus within the 100-year floodplain of a traditional navigable water, interstate water, or the territorial seas, as well as waters with a significant nexus within 4,000 feet of jurisdictional waters.
Exclusions to the definition of "Waters of the U.S."	Excluded waste treatment systems and prior converted cropland.	Categorically excluded those in old rule and added two types of ditches, groundwater, gullies, rills and non-wetland swales.	Includes proposed rule exclusions, expands exclusion for ditches, and also excludes constructed components for MS4s and water delivery/reuse and erosional features.

The Clean Water Rule FACT CHECK

#CleanWaterRules

The Clean Water Rule only protects the types of waters that historically have been covered under the Clean Water Act. The rule does not create any new permitting requirements for agriculture and maintains all previous exemptions and exclusions. It does not regulate most ditches and does not regulate groundwater, shallow subsurface flows, or tile drains. It does not make changes to current policies on irrigation or water transfers or apply to erosion in a field. The Clean Water Rule protects waters from pollution and destruction – it does not regulate land use or affect private property rights. These statements are supported by the text of the rule and its preamble.

FACT: THE CLEAN WATER RULE DOES NOT REGULATE MOST DITCHES

Rule Text § 230.3(s)(2)(iii): "The following are not 'waters of the United States... the following ditches: (A) Ditches with ephemeral flow that are not a relocated tributary or excavated in a tributary. (B) Ditches with intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands. (C) Ditches that do not flow, either directly or through another water, into [a traditional navigable water, interstate water, or the territorial seas.]"

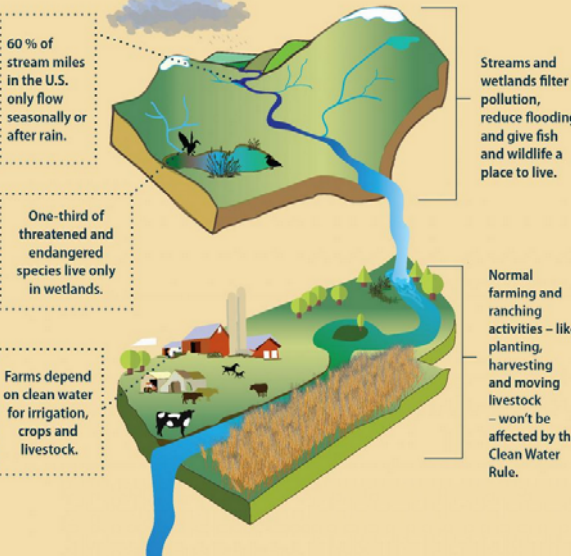
Preamble page 169: "Moreover, since the agencies have focused in the final rule on the physical characteristics of excluded ditches, the exclusions will address all ditches that the agencies have concluded should not be subject to jurisdiction, including certain ditches on agricultural lands and ditches associated with modes of transportation, such as roadways, airports, and rail lines."

A Clean Water Act permit is only needed if a protected water is going to be polluted or destroyed.

WHY #CleanWaterRules

Clean water upstream means cleaner water downstream.

Our Clean Water Rule protects the streams and wetlands that feed our rivers, lakes, bays and coastal waters. These waters are critical for agriculture, healthy communities, our economy and our way of life.



- 60% of stream miles in the U.S. only flow seasonally or after rain.
- One-third of threatened and endangered species live only in wetlands.
- Farms depend on clean water for irrigation, crops and livestock.
- Streams and wetlands filter pollution, reduce flooding and give fish and wildlife a place to live.
- Normal farming and ranching activities – like planting, harvesting and moving livestock – won't be affected by the Clean Water Rule.



NACWA's Position: Key Exemptions

Wastewater Treatment Systems

Stormwater Control Features

- **Constructed to convey, treat, or store SW that are created on dry land**
- **EPA encourages use of GI**
 - **Preamble: GI – rule designed to avoid disincentives to this environmentally beneficial trend in stormwater management**
 - **Press Release**
 - **EPA Webinar**
 - **No list of excluded features; exclude diverse range**

Wastewater Recycling Structures – Dry Land

- **Detention/Retention Basins**
- **GW Recharge Basins**
- **Percolation Ponds**
- **Water distributary structures built for wastewater recycling**

Groundwater



Ditch Exclusions

- Ephemeral flow that are not a relocated tributary or excavated in a tributary
- Intermittent flow that are not a relocated tributary, excavated in a tributary, or drain wetlands
- Ditches that do not flow, either directly or through another water, into a water identified in paragraphs (1)(i) through (iii) of the waters of the U.S. definition



NACWA's Concerns Addressed



Congressional Update

Congressional Action on WOTUS

Legislative efforts to restrict implementation & funding & require EPA to rewrite the rule

Senate

EPW Committee [S. 1140, the Federal Water Quality Protection Act](#)

Withdrawal & replacement

EPA Appropriations Bill
Policy Rider

House

[H.R. 1732, the Regulatory Integrity Protection Act of 2015](#)

Vote of 261-155

[H.R. 2028, the FY 2016 Energy and Water Appropriations bill](#)

Vote of 240-177

White House promised to veto any such measure
Votes to override veto?

Legal Challenges

Effective date for judicial review:

“In accordance with 40 CFR part 23, this regulation shall be considered issued for purposes of judicial review at 1 p.m. Eastern time on [INSERT DATE 2 WEEKS AFTER PUBLICATION IN THE FR].”

10-day clock for “venue shopping” under the appellate/circuit court lottery starts from that point





NACWA's Role Moving Forward

- Track implementation and litigation
- Solicit input from members
- Ensure exemptions properly applied
- k



Questions

Fairfield County v. Nally:
TMDL Impacts in Ohio and Beyond

Jessica DeMonte, Esq.
NACWA Webinar
June 17, 2015



In 2006, Fairfield County was issued a renewal NPDES permit with a new discharge limit for phosphorus which was “derived” from an Ohio TMDL

- TMDLs or “Total Maximum Daily Loads” are required for impaired waters.
- A TMDL sets the maximum amount of a pollutant that may be discharged without causing the receiving water to violate WQSS and allocates pollution reductions for all point and non point sources to the water based on this amount.
- Allocations known as a “pollution diet” for the water.

The Ohio TMDL process: 1) Developed by Ohio EPA, 2) Draft released for public comment, 3) Submitted to US EPA for approval and 4) upon federal approval, Ohio EPA utilized TMDL as basis for NPDES permit limits.

Fairfield appealed phosphorus limit in NPDES Permit and appeal worked its way through the administrative appellate process up to Ohio Supreme Court.

Background

Phosphorus limit violates due process because no meaningful opportunity to challenge scientific basis prior to incorporation into NPDES permit

- No opportunity to appeal TMDL development by Ohio EPA—can only challenge once limit is in NPDES permit
- Review of NPDES permit is not *de novo*/ but an appellate review standard—limited to record before the agency/ was agency’s decision arbitrary and capricious—no real review
- Ohio EPA contended that County could have appealed one-page USEPA approval

A TMDL constitutes a “rule” that should have been adopted under APA process in Ohio (RC Chapter 119)/ Failure to do so makes TMDL basis invalid

- TMDL is a standard of “general or uniform” operation that results in legal obligations—sets maximum load for a water body, creates “de facto” water quality standards and includes an allocation diet that is treated as mandatory (even though Ohio EPA contends it is merely “guidance”)
- Alternatively- TMDL establishes a WQS for pollutant that requires rulemaking under Ohio law.
- Rulemaking process provides opportunity for notice and comment and appeal of rule

Ohio Supreme Court agreed with Fairfield in March 24, 2015 opinion:

- TMDLs constitute rules under Ohio's APA
 - Standards that have "general and uniform operation"
 - Create new legal obligations: maximum limit and individual allocations (even if application is through incorporation into a permit)
 - TMDL also establishes WQS for phosphorus which is subject to APA rulemaking procedures under Ohio Law (RC 6111.041).
 - Court recognized that federally developed TMDLs are required to be adopted through the APA process. 33 USC 1313(d)(2) (*Telford Borough Auth. v. USEPA*, 2013 WL 6047569 (E.D. Pa Nov. 15, 2013))
 - Some other states also require TMDLs to be adopted as rules.
- Ohio EPA's failure to adopt TMDL as a rule under APA (RC Chapter 119) deprived County of meaningful review (or due process)
- TMDLs must be adopted by the APA process prior to being submitted to USEPA for approval.
- Court vacated "unpromulgated" phosphorus limit in Fairfield's permit- no valid legal basis

New TMDLs: What does the rulemaking process look like?

Ohio has 1,761 TMDLS which have been USEPA approved

- NOT adopted as Rules under APA
- Status: NOT Valid?

Permits with limits based on these TMDLs?

- Likely challengeable in a renewal or as permittee initiated modification

Under 2004 Consent Decree in TMDL litigation– Ohio EPA was to have developed a specific number of TMDLs.

- No longer in compliance? New litigation/ USEPA step-in?

Ohio EPA has said it will utilize WQBELs to replace TMDL limits on permit by permit basis (or other potential basis: nuisance?)

Ohio EPA argues that adoption by rule will result in much less flexibility to derive permit limits from TMDL.

- Modifications??

Ohio EPA has indicated to interested parties that it is likely going to seek legislative relief: TMDLs do not need to be adopted per RC 119.

- Relies on findings from other states:
 - Idaho- changed and obtained statutory exemption for TMDLs from rulemaking, but permits appeal of TMDL
 - Colorado: no rulemaking for TMDLs but permits appeals of TMDL
- But see SC/Delaware/Florida-which do adopt via rulemaking

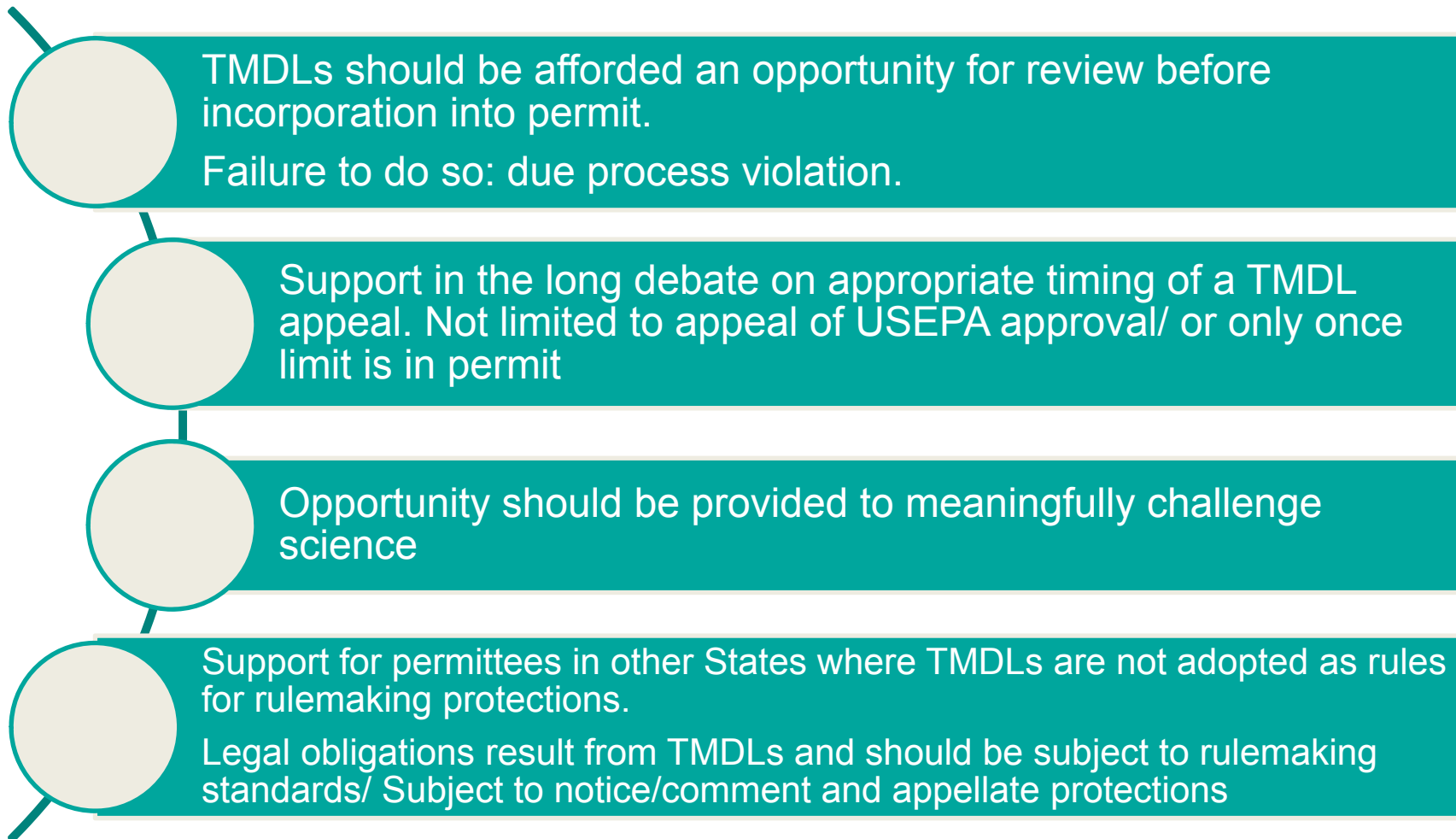
Ohio EPA has asked for input from interested parties, but not yet seen a draft of legislation

Some discussion amongst interested parties:

- Modified rulemaking process (less steps) might be acceptable if provided a right to *de novo* review on appeal
- Also need to include in process robust fiscal/economic analysis
- If TMDL under appeal, TMDL derived permit limit that is appeal should be stayed pending TMDL resolution

Bigger question is how to deal with existing TMDLs- should be entitled to appeal even if now incorporated into permits. How to accomplish this?

Broader Implications



Questions?

Effects of D.C. Circuit Emergency Demand Response Decision

NACWA

June 17, 2015

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Overview

- Clean Air Act Engine Regulations
- Emergency Engines & Demand Response
- 2010-11 Rules & Litigation
- 2013 Rules & Litigation
- D.C. Circuit Decision: Issues & Potential Impacts

Clean Air Act Regulations re: Internal Combustion Engines

- Part 60, Subparts IIII & JJJJ: New Source Performance Standards (NSPS) for Internal Combustion Engines
 - Apply to newly manufactured engines (mostly post-2012)
 - Emissions standards for: NO_x, NMHCs, HCs, CO, VOCs, PM
 - Compliance achieved through: catalyst devices, filters, engine modifications
- Part 63, Subpart ZZZZ: National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines (RICE NESHAP)
 - Apply to older engines (mostly pre-2012)
 - Emissions standards for: CO, formaldehyde
 - Compliance achieved through: oxidation catalysts

Emergency Engines

- Special category of engines (incl. pumps) based on infrequent operation
- Exempt from most NESHAP / NSPS requirements, including emission standards
- Unlimited use in “emergency” conditions (not fully defined)
- Limited use in “non-emergency” conditions: e.g., testing & maintenance; emergency demand response
- Lose exempt status if they exceed limits on “non-emergency” use

Emergency Demand Response

- Behind-the-meter operation of an emergency engine to alleviate demand on the grid, preventing a blackout
- Participants receive payments for committing to operate when called (within strict, pre-defined limits)
- Specific signals of imminent grid failure define qualifying events: NERC Level 2 Energy Emergency Alert, or $\geq 5\%$ voltage fluctuation
- In most locations, events are rare and brief: less-than-annual, averaging a few hours/year
- Distinct from economic DR (tied to pricing, not grid failure) and curtailment DR (reducing consumption) – neither of which uses emergency engines

2010–11 Rule Amendments & Litigation

- Expanded scope of rules to include area sources (previously unregulated)
- RICE NESHAP Amendments (2010): 100 hours non-emergency use, of which 50 hours maintenance & testing only; 15 hours of emergency DR
- Demand response coalition petitioned for reconsideration: EPA had not proposed the 15-hour limit and based it on a flawed rationale
- EPA agreed to reconsider the 15-hour limit under terms of settlement
- NSPS Amendments (2011): 100 hours non-emergency use, of which 50 hours maintenance & testing only, but silent on emergency DR

2013 Rule Amendments & Litigation

- Revised provisions for non-emergency use: the 100 hours can be used for maintenance, testing or emergency DR
- Equivalent provisions in RICE NESHAP and both NSPS
- Anti-DR coalition (power plants, DNREC, CLF) challenged the new rules as an increase from 15 to 100 hours of emergency DR
- Argued that the alleged increase would distort capacity markets, cause underinvestment in power plants, and diminish grid reliability, leading to more emergencies

D.C. Circuit Decision: May 1, 2015

- Agrees with Petitioners, finding 2013 Rule arbitrary & capricious: EPA should have consulted other agencies and considered other alternatives to the uniform 100-hour limit
- Orders vacatur of provisions that contain the 100-hour limit, including both emergency DR & testing & maintenance
- Does not preclude EPA from correcting rulemaking deficiencies & re-issuing 100-hour limit
- Invites EPA & other parties to move for a stay of the mandate, allowing development of interim rule or leaving 100-hour limit in place

D.C. Circuit Decision: Issues Raised

- Did the Court intend to vacate the provisions for testing & maintenance?
- What is the post-vacatur status of emergency DR?
 - Unregulated (unlimited)
 - 15 hours (previous final rule for RICE NESHAP, but never in effect)
 - Prohibited
- Some support for each interpretation, but none is clearly correct & none has ever been proposed for comment

D.C. Circuit Decision: Impact to NACWA Members

- Potential impact limited to emergency generators & pumps
- No impact, or delayed impact, if Court issues a stay
- If Court denies stay & issues mandate:
 - Unclear status of testing & maintenance
 - Existing emergency DR commitments would be in doubt
 - EPA would likely address both issues through guidance



Questions?

A blue ribbon banner with a central rectangular box containing the text "Save the Date!".

Save the Date!

Hot Topics in Clean Water Law

September 16, 2015
2:00 – 3:15 pm

The NACWA logo features the acronym "NACWA" in a large, blue, sans-serif font. Below it, the tagline "A Clear Commitment to America's Waters" is written in a smaller, blue, sans-serif font. The logo is positioned on the right side of the slide, above a decorative blue wave graphic.

NACWA
A Clear Commitment to America's Waters