

2013 Ohio Legal Development Highlights

Jessica DeMonte
Squire Sanders (US) LLP

Highlights

- Nutrients
- Fairfield County Appeal
- Ohio Budget Bill, HB 59-
Watershed Amendments
- Integrated Planning

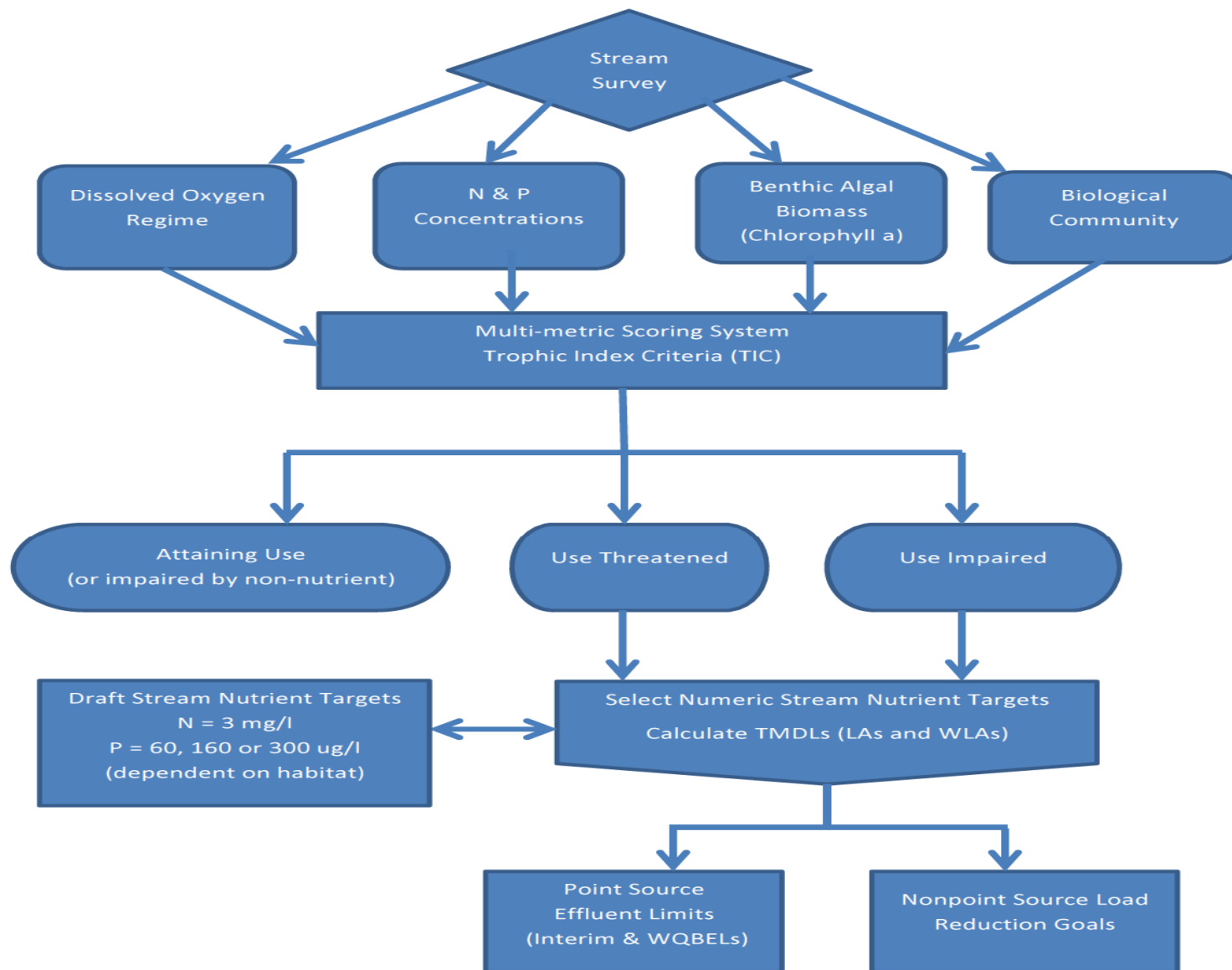
Nutrients, Nutrients, Nutrients....

- 3 Components:
 - Ohio Nutrient Reduction Strategy
 - Numeric Nutrient Standards Rule Development
 - Agricultural Nutrient Legislation (SB 150)

Nutrients, Nutrients, Nutrients....

Ohio EPA Nutrient Rule Development:

- Ohio issued Early Stakeholder Outreach Notice (ESO) in April 2013
 - Plan to develop numeric nutrient criteria in Ohio for streams and rivers
- Comments were due on ESO on May 22, 2013
 - First step in rule development process
 - Involves stakeholders before rules are developed in draft form
- Key components of ESO strategy:
 - Use of biologically-based multi-metric scoring system (Trophic Index Criteria or TIC) to determine attainment status
 - Attainment-no limits
 - Non-attainment or impaired--target limits would be established in TMDL
 - Point source limits would be derived from targets
 - Consideration to be given to point source contribution
 - 2-permit cycle implementation for final limits



Conceptual design of the Trophic Index Criterion

Nutrients, Nutrients, Nutrients....

POTWs: Generally supportive BUT concerns about specifics.

- Policy issues:

- Proposed target limits at limit of existing technology capabilities
- Costs if forced to implement reduction technologies are HIGH
- How are contributions going to be considered
 - Point sources want a state-wide mass balance so nonpoint sources are appropriately considered
 - If not significant source, costly reduction technologies should not be imposed
 - Concepts of adaptive management and integrated planning are crucial
- No specific requirements for nonpoint sources

- TIC Issues:

- Data: where and when and what quantity
- How will partial biological attainment be addressed
- How will TIC elements be weighted
- Are elements of TIC appropriate

- Implementation Issues:

- Length and flexibility of implementation process—time for evaluation
- Confirmation of causes of impairment (i.e., nonpoint, dams, toxic sediments, etc.)
- Existing TMDL derived nutrient limits

Nutrients, Nutrients, Nutrients....

- In June, Ohio EPA provided update on rule development:
 - POTWs will have up to 3 permit cycles with “initial limit” before having to comply with more stringent WQBELs
 - Two cycles of trading/other options for nutrient reduction
 - Third cycle with compliance schedule.
 - Phosphorous limits will not be imposed if receiving WQ improvement is not expected.
 - Not fully explained but sounds rationale
 - Ohio EPA will develop annual nutrient loading estimates for 6 watersheds and point sources
- Rule development expected to continue **through 2014**
 - Received over 200 comments
 - Still awaiting word on request for development of advisory group

Nutrients, Nutrients, Nutrients....

State-wide Nutrient Reduction Strategy:

- State reduction strategy in response to Mississippi River Gulf of Mexico Watershed Nutrient Task Force
- Combined effort of Ohio EPA/ Ohio Department of Natural Resources/Ohio Department of Agriculture
- Ohio EPA submitted draft to USEPA in November 2011
- Convened two workgroups of interested parties in 2011-2012
 - Directors' Agricultural Nutrients and Water Quality Working Group
 - Point Source & Urban Runoff Nutrient Workgroup
- Conducted Nutrient Forum in November 2012
- Workgroup reports issued in 2012 and 2013

Nutrients, Nutrients, Nutrients....

- **Point Source & Urban Runoff Nutrient Workgroup Final Report (8/2012)**

- Develop state-wide nutrient mass balance that accounts for point and nonpoint sources
- Encourage use and development of low cost nutrient removal strategies
- If contributors, POTWs should determine cost-effective reduction strategies
- Annual loading report by Ohio EPA
- Integrated watershed management and green infrastructure planning should be incorporated/encouraged

Nutrients, Nutrients, Nutrients....

- **Directors' Agricultural Nutrients and Water Quality Working Group Final Report (3/2013)**

- Three tiered watershed classification system to prioritize waters/ triggers for when nutrient management plans need to be developed
- Soil testing pilot where strong correlation between agricultural nutrients and water quality concerns exist
- Outreach and education
- Voluntary stewardship program for farmers
- Fertilizer applicator regulations
- Fertilizer data collection
- Increased enforcement authority for ODNR

NOTE: SB 150 incorporates many of these recommendations.

Nutrients, Nutrients, Nutrients....

- Expect final state-wide Nutrient Reduction Strategy Report to be issued by Ohio EPA any day
 - Purportedly already approved by USEPA

Nutrients, Nutrients, Nutrients....

- SB 150-Agricultural Nutrient Management (Sen. Cliff Hite/ R-Findlay)
 - Introduced 6/25/2013
 - Bill to abate agricultural pollution
 - Amends Agricultural Additives, Lime and Fertilizer Law
- Key Components:
 - Establishes certification program for fertilizer application under ODA
 - Certification required within 3 years
 - Continuing education requirements
 - Increased enforcement authority for violations
 - Increases fertilizer data collection to include amount and location of sales
 - Expands ODNR's authority to commercial fertilizers
 - Provides that nutrient management plans (NMPs) can be developed as part of O&M plans
 - Exempts NMP from Ohio's Open Records Laws
- Status: Before Senate Agriculture Committee
 - Hearings expected over the summer/fall

Nutrients, Nutrients, Nutrients....

- Prior to introduction, Ohio EPA/ODNR/ODA testified in support at Committee Hearing
 - Legislation largely developed in collaboration with these three agencies
- Initial review from POTW standpoint is generally positive, but... there are concerns:
 - A lot is left to rule development
 - ODA in charge of fertilizer certification program
 - Some discussion of moving O&M (and NMP) program from ODNR to ODA
 - Role of NMP is still voluntary
 - Lack of mandatory management standards (no BMPs in rules)
 - NO suggestion of development of mass-balance
- *Yet to be seen: agriculture's response?*

Fairfield County Appeal

- Appeal of NPDES permit limits for Phosphorous and Total Dissolved Solids (TDS)
- In May 2011, ERAC issued opinion in favor of Ohio EPA but remanded to Ohio EPA to consider technical feasibility and economic reasonableness of limits under R.C. 6111.03(J)(3)
- Fairfield County and Ohio EPA both appealed to Tenth District Court of Appeals
- In May 2013, Tenth District affirmed ERAC ruling
- Fairfield County seeking review by Ohio Supreme Court
 - Various interest groups have weighed in supporting jurisdiction of the appeal
 - Matter of great general interest and involves substantial constitutional question

Fairfield County Appeal

Facts:

- Phosphorous limit was derived from allocation in TMDL, which was developed by Ohio EPA and approved by USEPA.
- Ohio EPA claimed that inclusion in the TMDL was sufficient factual basis for limit, notwithstanding unrebutted contrary evidence that waterbody was in attainment and Fairfield County was not a significant contributor.
- Fairfield County also presented evidence that TDS limits unnecessary because waterbody would remain in full attainment.
- TDS limit also not technically feasible.
- Ohio EPA failed to consider technical feasibility or economic reasonableness of limits.

Fairfield County Appeal

Key Issues on Appeal:

- TMDLs must be promulgated as rules under R.C. Chapter 119's notice and comment procedures before they can form the basis for NPDES permit limits.
 - Treated by Ohio EPA as rules of general applicability and binding upon dischargers but Ohio EPA fails to follow notice and comment adoption procedures.
- Without notice and comment, there is no meaningful opportunity for review of TMDL allocations and derived permit limits. This results in a due process violation.
 - No review before incorporation into permit because issue is “not ripe”
 - Court of Appeals decision presumes that TMDL allocation is rational basis for allocation/limits by USEPA approval (even though generally ministerial in nature).
 - Accordingly, no meaningful opportunity to challenge scientific basis before or after incorporation.
 - Due process dilemma.

Fairfield County Appeal

Key Issues on Appeal:

- Ohio EPA has burden to demonstrate that POTW is significant contributing cause of a violation of water quality standards before it can impose permit limits.
 - Mere presence of allocation in TMDL does not meet this burden
 - Especially, in light of contrary evidence demonstrating that discharge does not have a reasonable potential to contribute to a violation (i.e., stream in attainment).
- Ohio EPA is required by R.C. 6111.03(J)(3) to consider technical feasibility and economic reasonableness of limits.
 - Where evidence presented that limits were neither technically feasible or economically reasonable, ERAC is required to make a factual finding. Remand in such a case is inappropriate.

Status: Jurisdictional briefs filed on July 8/ Responses due in August

Ohio Budget Bill-Watershed Amendments

- **"Sec. 743.50. (A) A municipal corporation that has established and implemented a watershed management program with regard to reservoirs for drinking water shall not include in the program any prohibition against mowing grass, weeds, or other vegetation on municipal property that constitutes a buffer around a body of water that is part of such a reservoir by owners of property contiguous to the buffer.**
- **(B) No peace officer or other official with authority to cite trespassers on municipal property described in this section may issue a civil or criminal citation to any individual who enters municipal property buffering a reservoir for the sole purpose of mowing grass, weeds, or other vegetation in an effort to beautify the municipal property that is contiguous to property owned by the individual."**

Ohio Budget Bill-Watershed Amendments

- Raised at last minute
- Amendments:
 - Direct impact on drinking water protection efforts
 - Raised compliance issues
 - Raised concerns with use of vegetated buffers as cost-effective management strategy for stormwater, CSOs and ... **NUTRIENTS**
 - Likely unconstitutional in any event
- Significant lobbying efforts by interested party organizations
 - AOMWA/ OWEA/ OWUC
 - OML
 - NGOs
- Amendments passed by the Conference Committee of the Ohio General Assembly
- But, were vetoed by Governor on June 30
 - **BIG WIN!**

Integrated Planning

- Ohio EPA has publically expressed support for integrated planning efforts of Ohio communities
 - Some indication of support in ESO in connection with nutrient standards
- Columbus-likely to be test case in Ohio
 - Ohio based consent decree
 - Ohio EPA will need to approve
- But others are also pursuing or considering.
 - Some on more limited scale:
 - Substituting green infrastructure for gray