



MEMORANDUM

TO: The Ohio Manufacturers Association

FROM: Frank Merrill, Bricker & Eckler LLP

DATE: March 7, 2017

RE: H.B. 49 Total Maximum Daily Loads (TMDL) Rule

On February 10, 2017, House Bill 49 was introduced into the Ohio House of Representatives. H.B. 49 includes a provision for the addition of Ohio Revised Code 6111.561 in response to the March 24, 2015 Ohio Supreme Court decision in *Fairfield Cty. Bd. of Commrs. v. Nally*, 143 Ohio St.3d 93, 2015-Ohio-991. (This provision can be found in H.B. 49 at pages 2972 through 2976). In the *Fairfield County* decision, the Supreme Court ruled that the Ohio EPA must adhere to Ohio's statutory rulemaking procedure prior to establishing pollutant limits for a body of water.

The Ohio Supreme Court Decision in *Fairfield Cty. Bd. of Commrs. v. Nally*:

The *Fairfield County* case stemmed from the Ohio EPA's issuance of a 2006 wastewater discharge renewal permit for the Tussing Road Water Reclamation Facility ("Tussing plant"), owned by Fairfield County, Ohio. Because the wastewater treatment plant discharges pollutants into nearby Blacklick Creek, part of the Big Walnut Creek watershed, the plant is required to obtain a National Pollutant Discharge Elimination System ("NPDES") permit from the Ohio EPA, pursuant to the federal Clean Water Act and state law. The Clean Water Act also requires each state to establish a total maximum daily load ("TMDL") for certain bodies of water. The TMDL establishes the maximum amount of a pollutant that may be discharged without causing the receiving body of water to violate water-quality standards.

Based upon Ohio EPA's TMDL for the Big Walnut Creek watershed, the renewal permit for the Tussing plant included a new condition limiting the discharge of phosphorus. The Ohio EPA imposed this new limit based on a survey in which the Ohio EPA collected biological and chemical data for the area. Its survey suggested that the Tussing plant was contributing to a negative environmental situation in Blacklick Creek. Fairfield County appealed Ohio EPA's imposition of the new phosphorus limit in its NPDES permit to the Ohio Environmental Review Appeals Commission, and subsequent appeals were made to the Tenth District Court of Appeals and eventually the Ohio Supreme Court.

In the opinion, written by Justice Judith Ann Lanzinger, the Court held that a TMDL established by the Ohio EPA, pursuant to the Clean Water Act, is a “rule”. Therefore, the Ohio EPA must abide by the procedures outlined in Ohio Revised Code (“R.C.”) Chapter 119, which provide for, among other procedures, public notice, comments and a public hearing prior to a rule being adopted.

Justice Lanzinger explained that a TMDL is a “rule” as defined in R.C. 119.01 because it is a “standard” that has “a general and uniform operation” and creates new legal obligations. Although the TMDL was specific to the Tussing plant, the Court provided that “[t]he TMDL applies to all current and future discharges in the Big Walnut Creek watershed.” The opinion further explains that “[r]equiring Ohio EPA to undertake rulemaking procedures before applying the new standards set forth in the TMDL ensures that all stakeholders in the watershed have an opportunity to express their views on the wisdom of the proposal and to contest its legality if they so desire.” As a result, the phosphorus limit cannot be included as part of the Tussing plant’s NPDES permit because it did not undergo the R.C. Chapter 119 administrative rulemaking process. Because the phosphorus TMDL was part of impermissible rulemaking, the standard for the Tussing plant was vacated, and the case was remanded to the Ohio EPA.

In his concurring opinion, Justice Terrence O’Donnell provided that the “decision is far-reaching in that Ohio EPA has issued 1,761 TMDLs for watercourses throughout Ohio, including 132 TMDLs for phosphorus alone”, none of which have been promulgated through the R.C. 119 administrative process. “[T]hus the majority’s decision invalidates all of them, leaving the enforceability of numerous permits in question.”

H.B. 49 – Pages 2972 to 2975

House Bill 49 outlines the scope of the Director of Ohio EPA’s authority in establishing TMDLs for pollutants for each impaired water of the state or segment thereof as identified and listed in the Clean Water Act section 1313(d). The stated intent of the bill is to supersede the effect of the *Fairfield County* decision, excluding the TMDL process from rulemaking procedures and making the establishment of a final TMDL appealable to the Environmental Review Appeals Commission (ERAC).

The bill provides that TMDLs established by the Director and submitted to and approved by the U.S. EPA prior to March 24, 2015 (the date of the *Fairfield County* decision) will be valid and remain in full force and effect as approved. However, holders of NPDES permits that contain water quality based effluent limitations derived from a TMDL approved prior to March 24, 2015 may appeal the lawfulness and reasonableness of these permit limits in one of two ways: (1) filing an appeal with ERAC within 30 days of the first eligible NPDES permit renewal date subsequent to the effective date of the bill’s provision; or (2) seeking a modification of the water quality based effluent limitation in the NPDES permit from the Director, and, if such request is denied, appealing to ERAC.

The bill specifies that TMDLs developed after March 24, 2015 will not be subject to the formal rulemaking process pursuant to R.C. Chapters 106, 119, or 121. However, Ohio EPA shall provide opportunities for interested parties to provide input during the development of a

TMDL, including commenting on and meeting with interested parties. Prior to establishing a final TMDL, the Director is obligated to prepare an official draft TMDL and provide public notice, an opportunity for comment, and an opportunity for a public hearing on the draft TMDL, as well as prepare a written responsiveness summary of the comments submitted. Following this public notice and comment process and issuance of a final TMDL, the final TMDL is appealable to ERAC.

The bill further requires the Director to adopt rules pursuant to R.C. Chapter 119, by no later than December 31, 2018, that (1) allocate pollutant load between and among nonpoint sources and point sources in a TMDL report; (2) establish procedures and requirements for developing and issuing a new TMDL; (3) establish procedures and requirements for revising and updating a TMDL; and (4) establish procedures and requirements for validation of existing TMDLs following implementation and additional assessment.

In sum, the bill does not require that each and every TMDL go through formal rulemaking pursuant to R.C. Chapter 119. However, each TMDL must go through the public notice, public comment, and public hearing process, and is subject to appeal at ERAC, therefore providing for due process considerations in a similar manner as the R.C. Chapter 119 process, while conserving the considerable amount of agency resources that would otherwise be spent on taking each TMDL through the formal R.C. Chapter 119 process.