



MEMORANDUM

TO: The Ohio Manufacturers Association

FROM: Frank Merrill, Bricker & Eckler LLP

DATE: May 18, 2017 (Revised)

RE: Proposed Total Maximum Daily Loads (TMDL) Law

On February 10, 2017, House Bill 49 was introduced into the Ohio House of Representatives. H.B. 49 included provisions for the revision of R.C. 6111.03 and 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. (These provisions can be found in H.B. 49 at pages 2972 through 2976). Since releasing H.B. 49, Ohio EPA has released several modified versions of the bill, most recently on May 10, 2017.

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.”

Proposed TMDL Language

The bill 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 General Assembly is to: (1) address potential implications of the *Fairfield County* decision; (2) ensure retroactive application of TMDLs submitted to and approved by USEPA prior to the *Fairfield County* decision; (3) exclude the TMDL process from rule adoption, amendment, and rescission procedures in R.C. Chapter 106, 111, 119, and 121 rulemaking procedures; (4) to set forth the preparation, adoption, submittal, and administration of TMDLs; (5) require TMDLs established subsequent to the *Fairfield County* decision to go through notice, comment, and public hearing procedure requirements and be appealable to the Environmental Review Appeals Commission (ERAC); (6) make TMDLs established prior to the *Fairfield County* decision appealable to ERAC; and (7) require the Director of the Ohio EPA to issue interim guidance and initiate rulemaking regarding TMDLs.

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) shall remain in full force and effect as approved (noting, however, that they may be revised or repealed in

accordance with the provisions of R.C. 6111.561). Persons may appeal permit limits containing water quality based effluent limitations derived from a TMDL approved prior to March 24, 2015 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 current NPDES permit from the Director, and, if such request is denied, appealing to ERAC within 30 days of such denial. The bill specifies that no such appeal shall be subject to dismissal on the grounds that it is not ripe for review, and that Ohio EPA shall notify permittees and all significant industrial users listed in a permittee's annual pretreatment program report of any TMDL-based limits.

TMDLs developed after March 24, 2015 shall not be subject to the formal rule adoption, amendment, and rescission procedures pursuant to R.C. Chapters 106, 111, 119, or 121. However, the bill requires that Ohio EPA shall provide opportunities for stakeholders to provide input during the development of a TMDL at various stages throughout the development process, including opportunities to review and comment on each aspect of the TMDL process and attend a meeting, if warranted by the level of interest or nature of the comments.

When determining wasteload and load allocations, pollution control measures to achieve pollutant load reductions, and implementation plans and schedules for each TMDL, proposed R.C. 6111.561 specifies various criteria that the Director shall consider and evaluate. 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 requires Ohio EPA to amend any TMDL that is subject to a successful appeal to ERAC to conform to the final appeal decision and resubmit to US EPA for approval. Further, the Director is to consider the existence of an appeal of a TMDL and the timeline of the appeal process when establishing compliance schedules in an NPDES permit to meet an effluent limit that is based on the TMDL. The bill also specifies that the Director may modify an established TMDL or a US EPA approved TMDL in accordance with the notice, comment, and public hearing process.

Lastly, the bill further requires the Director to adopt rules by no later than December 31, 2018, to address the procedures for providing notice to interested parties and criteria for determining significant public interest in TMDL development.

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 and every TMDL through the formal R.C. Chapter 119 process.