



MEMORANDUM

TO: The Ohio Manufacturers Association

FROM: Frank Merrill, Bricker & Eckler LLP

DATE: June 15, 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). 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.

Since releasing H.B. 49, Ohio EPA has released several modified versions of the bill. On June 14, 2017, following a public comment period and several meetings with stakeholders in which The OMA took part, Ohio EPA submitted final revised bill language to Senator Troy Balderson, requesting that the language be included in the H.B. 49 Omnibus Amendment.

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."

Final Proposed TMDL Bill 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). It includes revisions to R.C. 3745.03 to require the environmental review appeals commission to adopt or amend regulations governing procedure to be followed to govern expedited hearings, expedited decisions, and stays. It also includes the addition of Revised Code Sections 6111.561 through 6111.564.

The proposed additions in R.C. 6111.561 clarify that the development, establishment, or modification of a TMDL is not subject to rule adoption, amendment, or rescission procedures pursuant to R.C. Chapters 106, 111, 199, and 121. Rather, the Director is to develop plans or actions necessary for implementing a TMDL in accordance with R.C. Chapter 6111. R.C. 6111.561 further sets forth that the establishment of a final TMDL by the director is not a final

action of the director and does not have the force and effect of law, but may be challenged in accordance with the provisions of R.C. 6111.564.

R.C. 6111.562 and 6111.563 contain provisions governing notice and opportunity for comment. R.C. 6111.562 obligates the director to provide notice and opportunity for input from potentially affected dischargers, county soil and water conservation districts, and other stakeholders at various enumerated stages of development of those TMDLs established after March 24, 2015, and that not less than 30 days shall be allowed for such input at each stage. Further, the director is to make available to stakeholders documentation that he relied upon during each stage of development of a TMDL. R.C. 6111.562 also sets forth the factors the director shall consider and evaluate when determining wasteload and load allocations, pollution control measures to achieve pollutant load reductions, and implementation plans and schedules for each TMDL.

R.C. 6111.563 obligates the director to prepare an official draft TMDL prior to establishing a final TMDL and plans and actions necessary for TMDL implementation. At a minimum, public notice of the official draft TMDL is to be provided to all individual NPDES permit holders that discharge into the water of the state to which the official draft TMDL relates, all significant industrial users listed in the permit holders' annual report, and any other stakeholder that has provided input in accordance with R.C. 6111.562. The time period for comment is to be not less than 60 days, and the director is to provide the opportunity for a public hearing on the official draft TMDL if there is significant public interest. Any modifications to a TMDL are subject to the same notice, comment, and public hearing requirements that apply to official draft TMDLs established after March 24, 2015.

R.C. 6111.563 further clarifies that any TMDL that is successfully challenged pursuant to R.C. 6111.564 is to be modified to conform to the final appeal decision of the highest tribunal of competent jurisdiction and resubmitted to US EPA for approval. The director is to consider the likelihood of a legal challenge based on comments received during the development of the TMDL and public comment period when establishing a compliance schedule in an NPDES permit to meet an effluent limit that is based on a TMDL. Finally, R.C. 6111.563 requires the Director to adopt rules by no later than December 31, 2018, to address the procedures for providing notice to stakeholders and criteria for determining significant public interest in TMDL development.

Lastly, R.C. 6111.564 addresses challenges to appeals of final TMDLs. A final TMDL may be challenged during the appeal of an NPDES permit containing TMDL-based effluent limits, pretreatment limits derived therefrom, or other terms and conditions before the environmental review appeals commission. If a publicly owned treatment works appeals a TMDL-based permit, R.C. 6111.564 directs the environmental review appeals commission to join as parties to the appeal (subject to the right of voluntary dismissal) all significant industrial users listed in those NPDES permit holders' annual pretreatment program reports who are known to discharge a significant amount of a pollutant limited by the TMDL into the publicly owned treatment works. Moreover, the director is to notify the NPDES permit holder and all significant industrial users of an NPDES permit issued in draft or final form to a publicly owned treatment

works that contains TMDL-based effluent limits, pretreatment limits derived therefrom, or other terms and conditions based on that TMDL.

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, including modified TMDLs, must go through the public notice, public comment, and public hearing process. While the rule specifies that TMDLs are not final actions of the director, and therefore not independently appealable to ERAC, the rule allows for appeals to ERAC of any permit containing limits based on a TMDL, and specifies that indirect dischargers as well as direct dischargers may appeal. The rule therefore provides 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.