



TMDL Redux: Just When You Thought It Was Safe to Go Back in the Water

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Presentation Overview

- TMDL Background
- TMDLs in Ohio
- *Fairfield County* Ohio Supreme Court Decision
- Implications of *Fairfield County* Decision

TMDL Background

The Clean Water Act requires states to:

1. Apply two types of limits: technology based limitations and water quality based effluent limits (WQBELs).
2. Determine which waters are “impaired.”
3. Develop TMDLs for the impaired waterways.

TMDL Background (cont'd)

A TMDL establishes the maximum amount of pollution from both point and non-point sources that may be discharged without causing a violation of water quality standards. It then imposes a “diet” among the sources contributing to the impaired condition.

TMDL Background (cont'd)

Basics of TMDL Creation

- State development of TMDLs.
 - A scientific study of the water body, pollution sources, and types of pollutants.
- 30 day U.S. EPA review.
- Incorporation of limits from approved TMDLs into NPDES permits.

TMDLs in Ohio (cont'd)

- Prior to *Fairfield County* decision, Ohio EPA applied a TMDL process that included four phases:
 - Assessment Phase
 - Development Phase
 - Implementation Phase
 - Validation Phase

TMDLs in Ohio

- As of 2014, based on US EPA's accounting methodology (stream segments x pollutants), Ohio had 1,761 approved TMDLs.
- 331 of those are for phosphorus.

Fairfield County Decision

Background

- Impairment finding for Big Walnut Creek Watershed.
- TMDL drafted for watershed without rulemaking procedures, and included:
 - 0.11 mg/l maximum standard for phosphorus for the entire watershed (derived directly from 1999 Associations Report)
 - Recommended 0.5 mg/l limit for phosphorus for County's WWTP (the "diet").
- County's renewal NPDES permit included P limit of 0.5 mg/l.

Fairfield County Decision (cont'd)

The County's Permit Appeal

- Issues before ERAC; ERAC Decision
- Tenth District Court of Appeals Decision
- Ohio Supreme Court Decision (March 24, 2015)

Fairfield County Decision (cont'd)

The Supreme Court's Holding:

- A TMDL qualifies as a “rule” subject to the rulemaking procedures of Ohio’s APA as it “prescribes a legal standard that did not previously exist.”
- The 1999 Report that Ohio EPA used to establish the numeric TMDL phosphorus limit is a de facto “water quality standard” subject to rulemaking under existing state law.

Fairfield County Decision (cont'd)

The Court's Remedy:

- Before submitting TMDLs to U.S. EPA for approval, Ohio EPA must follow rulemaking procedures in the APA.
- Ohio EPA cannot impose Association Report-based phosphorus limits without rulemaking.
- The phosphorus limit in the County's permit is vacated and the cause remanded to Ohio EPA.

Implications of *Fairfield County* Decision

- Applicability of decision on existing NPDES permits imposing TMDL-derived limits
 - Ability to challenge at ERAC
 - Permittee initiated modification/adjudication hearing
- Challenges to continued use of Association Report nutrient target values by OEPA unless they undergo rulemaking. (U.S. EPA must review/approve any new or modified WQS.)

Implications of *Fairfield County* Decision

- Cost-benefit analyses
- What will a TMDL rule and rulemaking look like?
Entire report, just the WLA/LA, other?
- Is there a better way to address the due process concerns?



Ohio EPA TMDL Proposed Legislation

As Introduced

131st General Assembly
Regular Session
2015-2016

H. B. No. _____

Representative _____

A BILL

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To amend section 6111.03, to enact new section 6111.561, and to repeal existing section 6111.03 of the Revised Code, to require the Director of Environmental Protection to establish total maximum daily loads by an action appealable to the Environmental Review and Appeals Commission, that the establishment by the Director of total maximum daily loads is not subject to rulemaking under Chapter 119 of the Revised Code, that all total maximum daily loads approved by the United States Environmental Protection Agency prior to the effective date of this Act shall remain in full force and effect, and to declare an emergency.

20 **BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:**

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22 **Section** 1. That section 6111.03 be amended and new section 6111.561 of
23 the Revised Code be enacted to read as follows:

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25 Sec. 6111.03. (T) Establish total maximum daily loads for those waters of the
26 state, or segments thereof, that are impaired and submit the established total
27 maximum daily loads to the United States environmental protection agency for
28 approval.

29 Sec. 6111.561. (A) It is the intent of the general assembly that the provisions of
30 this section shall be liberally construed and administered so that total maximum

31 daily loads shall be drafted, established, submitted and administered in accordance
32 with this section, and that the powers conferred by this section are in addition and
33 supplemental to the powers conferred on the director by other law.

34 (B) It is the intent of the general assembly the divisions (B) and (J) of this section
35 are remedial, in that total maximum daily loads submitted to and approved by the
36 United States environmental protection agency prior to the effective date of this
37 division shall remain in full force and effect as approved, but may be revised
38 pursuant to this section.

39 (C) Notwithstanding any provision of the Revised Code in existence immediately
40 prior to the effective date of this section, notwithstanding any judicial construction
41 prior to the effective date of this section of a statutory provision, and
42 notwithstanding the holding in any decision of a court of this state, the rulemaking
43 provisions of Chapter 119 of the Revised Code shall not apply to a draft or
44 establishment of a total maximum daily load, the submittal of an established total
45 maximum daily load to the United State environmental protection agency for
46 approval and the administration of established and approved total maximum daily
47 loads.

48 (D) The director shall establish for each impaired water of the state or segment
49 thereof, identified and listed under section 1313(d) of the Federal Water Pollution
50 Control Act, in accordance with the priority ranking, the total maximum daily load for
51 those pollutants which the administrator of the United States environmental
52 protection agency identifies under section 1314(a)(2) of the Federal Water Pollution
53 Control Act as suitable for such calculation. Such loads shall be established at a
54 level necessary to implement the applicable water quality standards with seasonal
55 variations and a margin of safety which takes into account any lack of knowledge
56 concerning the relationship between effluent limitations and water quality.

57 (E) Prior to the establishment of a total maximum daily load set forth in division (G)
58 of this section, the director may publish notices, provide opportunities for comment,
59 identify and maintain lists of interested persons, hold meetings, and perform such
60 other activities as the director deems appropriate to the preparation of a draft total
61 maximum daily load set forth in division (F) of this section.

62 (F) Prior to the establishment of a total maximum daily load set forth in division (G)
63 of this section, the director shall prepare a draft total maximum daily load for the
64 impaired water of the state or segment thereof, which draft shall provide, at a
65 minimum, the estimate of the total amount of each pollutant that causes the

66 impairment from all sources and the amount of pollutants that may be added to the
67 water of the state or a segment thereof while still allowing the water of the state or
68 segment thereof to achieve and maintain applicable water quality standards. In
69 addition, the director shall determine draft allocations among the point and non
70 point sources contributing to the impairment, that are sufficient to achieve the
71 applicable water quality standard. The director shall provide public notice of the
72 draft total maximum daily load, provide an opportunity for comments and hold a
73 public hearing in a manner consistent with draft actions. The notice of hearing shall
74 specify the water of state or segment thereof to which the total maximum daily load
75 relates, the time, date and place of the hearing, and be sent, at a minimum, to all
76 Ohio National Pollutant Discharge Elimination System permittees that discharge
77 into the water of the state or segment thereof to which the total maximum daily load
78 relates. After an opportunity for public comment has expired, the director shall
79 prepare and make available, as a public record, a written responsiveness summary
80 of the comments.

81 (G) After the notice, opportunity for comment, public hearing, expiration of public
82 comment period, and preparation and availability of the responsiveness summary,
83 set forth in division (F) of this section, the director may establish, as an action
84 appealable to the environmental review appeals commission in accordance with
85 division B of section 3745.04 of the Revised Code, the total maximum daily load.
86 The submittal of the established total maximum daily load to the United States
87 environmental protection agency pursuant to 1313(d) of the Federal Water Pollution
88 Control Act is a ministerial act that is not subject to appeal under division B of
89 section 3745.04 of the Revised Code and shall not be affected by any appeal of the
90 establishment of the total maximum daily load.

91 (H) The director may revise an established total maximum daily load to
92 accommodate new information.

93 (J) Any total maximum daily load submitted by the director to, and approved by the
94 United States environmental protection agency prior to the effective date of this
95 division, shall remain in full force and effect, until revised.

96 Section 2. That existing section 6111.03 of the Revised Code is hereby
97 repealed.

98 Section 3. This act is hereby declared to be an emergency measure
99 necessary for the immediate preservation of the public peace, health and safety.
100 The reason for such necessity is to enable the total maximum daily load program to
101 proceed in an orderly and timely manner so as to protect and preserve the waters
102 of the state. Therefore, this act shall go into immediate effect.

103 Section 4. It is the intent of the General Assembly that the amendment of
104 section 6111.03 and enactment of section 6111.561 of the Revised Code are to
105 supersede the effect of the holding of the Ohio Supreme Court in its March 24,
106 2015 decision in *Fairfield County Board of Commissioners v. Nally*, 2015-Ohio-991,
107 to make divisions(B) and (J) retroactive, to exclude from Chapter 119 of the
108 Revised Code rulemaking, the draft, established, submittal and administration of
109 total maximum daily loads, to make the establishment of a total maximum daily load
110 an action appealable to the Environmental Review Appeals Commission, and to
111 maintain in full force and effect, until revised, total maximum daily loads that have
112 been submitted to and approved by, the United States Environmental Protection
113 Agency prior to the effective date of division (J).

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Preliminary Comments & Considerations

- ◆ If the proposed legislation intends to validate all submitted and approved TMDLs prior to the bill's effective date without them going through the Chapter 119 rulemaking process, it should still provide permittees with the opportunity to weigh-in and/or challenge these existing TMDLs, either through the permit renewal process or upon a request for permit modification (perhaps subject to a reasonable sunset period?);
- ◆ The proposed legislation should retain flexibility in draft §§ 6111.561(D) & (J) so as to coordinate with the anticipated future nutrient WQS rules – as currently being developed and recommended by Ohio's Nutrient Technical Advisory Group. The legislation language should accommodate (not conflict with) implementation of an adaptive management approach to remedy nutrient-caused impairment as well as use of WQ Target values to establish wasteload allocations and TMDLs;

Preliminary Comments & Considerations (cont.)

- ◆ The proposed legislation should provide for weigh-in from affected NPDES permittees earlier in the TMDL process prior to the development of a draft TMDL report (i.e., during assessment of waterbodies, completion of TMDL support documents, identification of restoration targets—perhaps another level of Early Stakeholder Outreach?). Such early stakeholder interaction should include meeting with stakeholders (especially permit holders) in order to discuss the Agency's anticipated workplan and possible TMDL study outcomes based upon available WQ assessment information;
- ◆ Permittees should be provided the opportunity to supplement / update WQ assessment or discharge monitoring data relied upon in developing the TMDL, weigh-in on appropriateness of target values derived from any such TMDL and, if necessary, appeal a TMDL-derived permit limit upon the incorporation of any such limit into a NPDES permit;

Preliminary Comments & Considerations (cont.)


- ◆ If TMDLs are used to set new WQS target values, rather than just enforcing existing WQS not being met, then such limits must still be subject to the Chapter 119 rulemaking process just as would be a new or revised WQS (see §6111.041);
- ◆ TMDLs should be subject to something akin to the JCARR / Common Sense Initiative (CSI) economic affordability analyses applicable to other rulemakings (e.g., Rule Summary and Fiscal Analysis (R.C. 127.18); CSI Business Impact Analysis, etc.);

Preliminary Comments & Considerations (cont.)

- ◆ Consider using the proposed legislation to address discrepancies in the TMDL Rule (OAC 3745-2-12) regarding the allocations between point sources and non-point sources;
- ◆ Consider whether more appropriate forum for a TMDL appeal would be a court of common pleas;

Preliminary Comments & Considerations (cont.)

- ◆ Proposed draft §6111.561(D) should be revised to make clear that the Director's authority to establish TMDLs shall be exercised in accordance with the notice, comment and public hearing requirements set forth in draft §6111.561(E), (F) and (G); and
- ◆ The proposed legislation should clarify that, where applicable and to the extent necessary, any successful challenge of a draft TMDL would require Ohio EPA to submit a revised TMDL to U.S. EPA in accordance with the ruling upon appeal (draft §6111.561(G)).



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