

UPDATE FROM COLUMBUS

Remarks of Stephen N. Haughey, Esq.

*Partner and Environmental Practice Group
Government Services Group Leader*

FROST BROWN TODD LLC

301 East Fifth Street, Suite 3300

Cincinnati, OH 45202

(513) 651-6127

shaughey@fbtlaw.com

OHIO SANITARY ENGINEERS ASSOCIATION

Summer Conference

June 3, 2013

A. REGULATORY UPDATES.

1. Early Stakeholder Outreach - Numeric Nutrient Limits.

a. Trophic Index Criterion (TIC) for Rivers and Streams – Weight of Evidence Approach.

(1) Chart of scores for (a) biocriteria attainment status, (b) variability of DO concentration, (c) average benthic algae concentration (measured as chlorophyll a), and (d) average concentrations of nitrogen and phosphorus.

(2) Ranges of scores assigned to each of these four categories. A TIC score of 22-38+ is acceptable, a score of 14-22 is threatened, and a score of ≤ 13 is impaired.

(3) Acceptable scores receive permits with nutrient monitoring.

(4) Threatened scores may receive permits with default P limit of 1.0 mg/l and total N of 10 mg/l.

(5) Impaired cores will receive permits with, at a minimum, the default phosphorus limit and the total N limit, but if after two permit cycles the river/stream remains impaired, limits drop down to 0.06 mg/l for P and 3.0 mg/l for N for exceptional habitat streams, 0.13 mg/l for P and 3.0 mg/l for N for warmwater habitat streams with QHEI score of ≥ 12 , and 0.3 mg/l for P and 3.0 mg/l for N for all other aquatic life habitats regardless of QHEI score.

(6) Even if the river/stream is in full attainment for biocriteria, it can be still be classified as threatened or impaired if it has high DO variability, high chlorophyll a, and/or high nutrient concentrations.

(7) Very little, if any, weight given to the other non-POTW factors that can drive down biocriteria scores or drive up DO variability or increase nutrient concentrations or chlorophyll a concentrations. Examples include non-point source agricultural practices and agricultural and residential fertilizers, and stream physical factors such as canopy, quality of riparian area, stream flow augmentation, scouring, and washout of stream bedding or macroinvertebrates. The draft concept envisions that POTWs would have the opportunity to do habitat restoration to improve biocriteria scores, and to engage in trading with farmers to avoid expensive capital cost for nutrient removal.

b. Inland Lakes and Reservoirs – Continued reliance on the regional reference model approach, with nutrient limits based off of comparison to nutrient concentrations found in reference lakes and reservoirs in the region that are least impacted. Previous draft limits withdrawn in 2012, to be reissued after review of recent lake and reservoir data. Despite federal court decision in Florida rejecting the reference model approach, OEPA seems wedded to moving forward with that approach for inland lakes and reservoirs.

c. Comment deadline just expired. OWEA submitted comments, as did AOMWA. OWEA comments filed on its webpage. Next steps???

B. JUDICIAL UPDATES.

1. *Iowa League of Cities v. USEPA*, 8th Circuit Court of Appeals, March 25, 2013.

a. Impact on wet weather blending operations at POTWs in Ohio.

b. May 9, 2013, petition for reconsideration filed by USEPA.

c. Strategies for POTWs with blending operations

(1) NFA analysis

(2) Addition of treatment for the blending operation or reconnection of the flow before the disinfection stage.

(3) Definition of the term “bypass.”

2. *City of Cincinnati Waterworks v. City of Harrison*, Hamilton County Court of Common Pleas, March 1, 2013.

a. Impact on County water and sewer rights against encroaching municipalities.

3. *State of Ohio v. City of Washington Courthouse*, Fayette County Common Pleas, April 30-May 1 contempt trial.

a. Impact on others with consent orders that have not been terminated.

b. Financial analysis of affordability for wet weather improvement schedules.

4. *Board of Commissioners for Fairfield County v. Nally*, Tenth Appellate District Court, Columbus, Ohio, May 23, 2013.

a. Issues presented on appeal.

b. Impact of holding on current and future permit limits for POTWs.

C. WHATEVER IS CROSSING YOUR DESK OR OF CONCERN FOR YOUR COUNTY???