

ORIGINAL

IN THE SUPREME COURT OF OHIO

Board of Commissioners of Fairfield County,	:	
	:	CASE NO. <u>13-1085</u>
	:	
Plaintiff-Appellant,	:	On Appeal from the Franklin
	:	County Court of Appeals
v.	:	Tenth Appellate District
	:	
[Scott J. Nally], Director of Environmental Protection,	:	Court of Appeals
	:	Case No. 11AP-508
	:	ERAC No. 235929
Defendant-Appellant.	:	

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT BOARD OF COMMISSIONERS OF FAIRFIELD COUNTY**

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**FILED**  
 JUL 08 2013  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

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## I. STATEMENT OF THE CASE AND FACTS

This case presents three distinct albeit related issues, two of which are critical to thousands of industrial and publically owned wastewater treatment facilities in this State. The first is whether the Ohio Environmental Protection Agency (“Ohio EPA”) can require industries, cities, and counties to spend hundreds of millions, perhaps billions, of dollars to further polish the quality of their wastewater when the bodies of water into which they discharge have already achieved their regulatory-determined quality. The second is whether Ohio EPA can, through the artifice of an unreviewable preliminary step, completely prevent meaningful legal challenges by the people who are affected by this egregious overregulation. The third issue is whether and how the Environmental Review Appeals Commission (the “Commission”) should act to correct these abuses by Ohio EPA.

### A. Overview of Pertinent Provisions of Federal Law

The regulation of water pollution is driven by the federal Clean Water Act (the “Act”), the objective of which was to restore and maintain the health of the nation’s waterways.<sup>1</sup> This goal is accomplished principally through the permit program known as National Pollutant Discharge Elimination System (“NPDES”).<sup>2</sup> NPDES permits are issued to individual dischargers, both public and industrial, and authorize the discharge of substances into state waters at levels that meet water quality standards. In Ohio, Ohio EPA has been delegated the authority from U.S. EPA to issue NPDES permits.

Section 303(d) of the Act established the Total Maximum Daily Load (“TMDL”) program, which focuses on identifying and restoring polluted streams, rivers, and other surface waters. A TMDL describes the maximum amount of a pollutant that a body of water can

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<sup>1</sup> 33 U.S.C. §§ 1251, *et seq.*

<sup>2</sup> 33 U.S.C. § 1311.

receive from all sources—point sources (such as wastewater treatment plants and factories), non-point sources (such as golf courses and stormwater runoff) and naturally occurring background—while still meeting water quality standards.<sup>3</sup> The process for creating a TMDL in Ohio can be summarized in four steps. First, Ohio EPA must identify, list, and prioritize the water bodies in the State that do not meet Ohio’s water quality standards. The watersheds are then targeted for TMDL development. Second, Ohio EPA then prepares the TMDL documents for the targeted watersheds. Next, U.S. EPA reviews and approves the TMDL. However, U.S. EPA guidelines do not require the submission or review of the underlying data that Ohio EPA used to prepare the TMDL. Finally, once the TMDL is approved, Ohio EPA is then responsible for implementing the TMDL.

As of May 9, 2013, there were approximately 86 TMDLs in Ohio, either in place or in the process of being prepared and submitted. Each TMDL can include recommended limits on numerous types of pollutants: chlorine, coliform bacteria, detergents, and dissolved oxygen, to name a few.

#### **B. Facts Specific to this Appeal**

Appellant Fairfield County owns and operates a wastewater treatment plant (the “Plant”) located on Blacklick Creek in Pickerington, Ohio. On June 30, 2006, the Ohio EPA issued a renewal NPDES Permit for the Plant, but for the first time included limits for the discharge of phosphorus and Total Dissolved Solids.<sup>4</sup> The County timely appealed to the Environmental Appeals Review Commission (the “Commission”), setting forth multiple reasons why these discharge limitations were unlawful and unreasonable.

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<sup>3</sup> See OAC 3745-2-02(B)(67).

<sup>4</sup> Total dissolved solids is a generic term for certain salts, metals, and other substances that dissolve in water.

Following a five day adjudication hearing, the Commission issued its decision, which was not only completely unsupported by the facts introduced *at the hearing*, it was completely contradicted by the unrebutted testimony from six supremely qualified experts, including Ohio EPA's testifying expert. The unequivocal evidence proved that the Plant's current discharge of phosphorus at a level in excess of 1.0 milligram per liter (mg/l) was not having an adverse impact on the biota in Blacklick Creek and that the \$5 million price tag to meet 0.5 mg/l effluent limit in the Permit was totally unnecessary.

Ohio EPA admitted that the sole reason that the phosphorus limit was included in the Permit was because it was recommended in the TMDL prepared for Big Walnut Creek.<sup>5</sup> Without first promulgating the TMDL as a rule, Ohio EPA simply lifted the number from the TMDL and plugged it into the Permit. No one at Ohio EPA evaluated the biological impact—or, more accurately, the lack thereof—of current or future discharges of phosphorus from the Plant. At the hearing, Fairfield County presented overwhelming and uncontradicted evidence that the phosphorus limit was unreasonable. However, the Commission refused to consider Fairfield County's evidence, and instead treated the unpromulgated TMDL-recommended limit as *ipso facto* creating a valid, and unchallengeable, factual foundation for the permit limitation.

Following a different, but equally esoteric, line of reasoning, the Commission held that Ohio EPA had a valid factual foundation for requiring Fairfield County to reduce the amount of total dissolved solids discharged by the Plant. In direct contravention of Ohio law, the Commission upheld the imposition of a technically infeasible, fabulously expensive permit limit, despite an unrebutted and thoroughly documented demonstration that the amount of total

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<sup>5</sup> Blacklick Creek, and several score other streams, discharge directly or indirectly into Big Walnut Creek. Big Walnut Creek, and numerous other streams, flow into the Scioto River.

dissolved solids being discharged from the Plant has not and will not harm aquatic life in Blacklick Creek.

The Commission did sustain Fairfield County's contention that Ohio EPA violated R.C. 6111.03(J) by failing to consider the technical feasibility and economic reasonableness of imposing the total dissolved solids and phosphorus limitations. However, rather than affirmatively making the factual findings compelled by the unrebutted expert testimony, as it is required to do by law—to wit, that it is not technically feasible for the County to treat for total dissolved solids, and the \$5,400,000 cost of achieving compliance with the phosphorus limit is not justified—the Commission erroneously returned the matter to Ohio EPA.

On June 8, 2011, Fairfield County filed its appeal of the Commission's decision to the Tenth District Court of Appeals. On May 23, 2013, the court erroneously affirmed the Commission's decision, largely parroting the Commission's reasoning.

## **II. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

The decision of the Tenth District establishes erroneous precedent on a number of novel (in Ohio) and important environmental and due process issues that will adversely impact cities and industries throughout the state and, indeed, the nation.

First, the court of appeals erroneously held that the imposition of a discharge limit that was lifted directly from a TMDL into a NPDES permit does not equate to regulation based on unpromulgated standards. The court's justification—that the permit limit came from the TMDL, which was "properly developed and federally approved"—is constitutionally insufficient. Those portions of a TMDL that are functionally used as rules must be promulgated as a rule under Ohio law before they can be enforced through permit limitations.

This holding empowers Ohio EPA to end-run Ohio law requiring administrative agencies to regulate through legally promulgated rules. Countless municipalities and businesses throughout Ohio will be affected by the agency's ability to impose limits based on unpromulgated TMDLs. Just in the Scioto River Watershed, there are currently thirteen TMDLs either already approved or in preparation, each of which affects numerous public and privately-owned wastewater dischargers. The TMDL at issue in this appeal affects twelve dischargers in addition to Appellant Fairfield County.

Second, the appellate court has effectively declared that the mere presence of a recommended discharge limit in a TMDL *ipso facto* means that the limit is reasonable, even where unrebutted expert testimony demonstrates that Ohio EPA's assumptions putatively supporting the limit are invalid. This faulty conclusion robs a permittee of its day in court, as it prevents any *real* challenge to the assumptions, data, and logic underlying permit limits when they are based on a TMDL. As the TMDL and NPDES programs are national, and intertwined, the lower court's holding and analysis will affect vast numbers of dischargers, in Ohio and nationwide. Wastewater dischargers will be subject to functionally unreviewable, and frequently vastly expensive, TMDL-recommended discharge allocations even when they are based upon inadequate or faulty data and questionable science.

Third, because the Commission, and now the appellate court, upheld a permit limit on the sole basis that it was derived from the TMDL and without consideration of any evidence presented by Fairfield County, this case raises a substantial constitutional question. The Commission denied Appellant Fairfield County its due process rights, and the appeals court held that the U.S. EPA's approval of the TMDL was due process enough. If allowed to stand, the

decision will operate to prevent thousands of Ohio businesses, cities, and counties from having their “day in court.”

Fourth, the Tenth District held that Ohio EPA may impose extraordinarily expensive discharge limits even where conclusive evidence demonstrates that such limits are totally unnecessary to protect the receiving stream’s designated use (*i.e.*, that aquatic life is not being harmed). The court arrived at this conclusion despite unrebutted evidence that the receiving stream was and would remain in full attainment of its designated use. This decision is flatly inconsistent with Ohio law, which states that if aquatic life is not being harmed by a particular pollutant, Ohio EPA may not require the discharger to pay for further unnecessary pollutant reductions.

This decision will cost Ohio dischargers millions or possibly billions of dollars in unnecessary improvements. In the case of municipal dischargers, these needless costs will be borne by the public, in the form of increased user fees. For industrial dischargers, these costs will be passed on to the purchasers of their products, with a corresponding economic impact that can result in lost jobs and productivity in Ohio and around the country.

Finally, the appeals court erroneously affirmed the Commission’s failure to make the factual finding that the permit limits were neither technically feasible nor economically reasonable despite a thorough and uncontested factual record so demonstrating. Although Ohio law requires the Commission to make factual findings based on the evidence before it, the Commission disregarded its statutory duty and simply remanded the case back to Ohio EPA. This holding also has wide-reaching implications. Under the appellate court’s strained reasoning, uncontroverted evidence presented to the Commission by a permit holder is utterly disregarded. Instead, the appellate court allows remanding the case to Ohio EPA, even in the



face of the permit holder's evidence proving that a remand is futile. This is an egregious waste of resources of the Ohio EPA, of the Commission, of the permit holder, and ultimately, of the public.

In sum, this case will have a major impact on many thousands of cities, counties, and industries throughout Ohio and, undoubtedly, across all fifty states. The significant and far-reaching environmental and due process issues presented by the decision of the Court of Appeals have already found resonance among the national environmental bar and the regulated community. This Court should grant jurisdiction to hear this case and review the erroneous decision of the court of appeals.

In support of its position on this issue, the Board presents the following arguments:

### III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: A TMDL is a rule that must be promulgated in accordance with Ohio law before it can be used as the basis for a NPDES permit limit.**

Under Ohio law, if a standard has general and uniform operation, it must first be formally promulgated as a rule before an agency can enforce it. *See, Ohio Nurses Ass'n, Inc. v. State Bd. of Nursing Educ. & Nurse Registration* (1989), 44 Ohio St.3d 73, 540 N.E.2d 1354 (holding that an agency's issuance of a "position paper" that had the effect of establishing a new standard constituted a "rule" that should have been adopted in accordance with Chapter 119); *Jackson Cnty. Env'tl. Comm. v. Schregardus* (1994), 95 Ohio App.3d 527, 642 N.E.2d 1142 (holding that Ohio EPA cannot regulate through unpromulgated "guidelines").

R.C. 119.01(C) defines a rule as "any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule." This Court has previously explained why the rule promulgation process is necessary. "The rulemaking requirements set

forth in R.C. Chapter 119 are designed to permit a full and fair analysis of the impact and validity of a proposed rule.” *Condee v. Lindley*, 12 Ohio St.3d 90, 93, 465 N.E.2d 450 (1984). The failure of any agency to comply with the rule promulgation procedure shall invalidate any rule adopted. *Id.*, quoting R.C. 119.02.

Every single TMDL impacts *all* current and future cities and industries that discharge into a watershed, not just one entity. Collectively, TMDLs impact virtually all dischargers. They are generally and uniformly applicable. Therefore, permit limits derived from a TMDL are invalid unless and until the TMDL is promulgated through proper rulemaking procedures.

The Tenth District decision below is an anomaly. Other state supreme Courts that have addressed this issue have held that TMDLs may not be implemented through NPDES permit limits until promulgated. *Arasco, Inc. v. Idaho*, 138 Idaho 719, 69 P.3d 139 (2003)(holding that permit limits were invalid because the TMDL was not promulgated as a rule); *Comm’rs of Pub. Works v. S.C. Dep’t of Health and Envtl. Control*, 372 S.C. 351, 641 S.E.2d 763 (2007)(holding that the state was not authorized to rely on the TMDL to set permit limits because the TMDL had not been promulgated as a regulation).

By plucking a recommended permit limit from the TMDL and inserting it into the NPDES permit, Ohio EPA is acting as if the TMDL is a rule of general applicability for all present and future dischargers to the Blacklick Creek watershed. However, the TMDL at issue was never promulgated pursuant to and as required by R.C. Chapter 119.

The appellate court erroneously held that the mere fact that the TMDL was federally approved satisfies Ohio’s rulemaking procedures. However, U.S. EPA’s approval of a document, the TMDL, cannot supplant the rule promulgation process. That outcome completely ignores the rulemaking procedure’s “full and fair analysis” supported by this Court. *Condee*, 12

Ohio St.3d at 93. Ohio EPA's rule promulgation procedure requires, *inter alia*, JCARR approval, Common Sense Initiative review, and the ability to challenge the rule in an adjudication hearing. The TMDL process that has been approved by the Commission and the court of appeals strips the public, and the regulated community, of these rights. If this decision is allowed to stand, state agencies can sidestep Ohio rule promulgation requirements as long as the policies they wish to enforce have a federal stamp of approval. Such an expansion of agency regulation violates Ohio law and should be prevented.

**Proposition of Law No. 2: The mere presence of a proposed discharge limit in a TMDL does not *ipso facto* create a valid, much less un rebuttable, factual foundation for a NPDES permit limit, and should not be afforded more weight than other evidence.**

At a hearing challenging an action of Ohio EPA, the Commission must consider the evidence presented in order to determine whether a valid factual foundation exists for the challenged action. *Citizens Comm. To Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 70, 381 N.E.2d 661 (10th Dist. 1977). In order to establish a valid factual foundation for the imposition of permit limitations, the Director must demonstrate that there is a direct correlation between pollution control requirements and regulatory standards. *Gen. Elec. Lighting v. Koncelik*, 10th Dist. No. 05AP-310, *et seq.*, 2006-Ohio-1655 at ¶ 37.

In this case, Ohio EPA was required to prove that there was a direct correlation between the proposed permit limits and the attainment of the water quality standards applicable to Blacklick Creek. It utterly failed to do so. Instead, Ohio EPA, the Commission, and now the appellate court relied solely on the TMDL, which is a wholly insufficient substitute.

The appellate court has effectively declared that the mere presence of a recommended discharge limit in a TMDL *ipso facto* means that the limit is reasonable, even where unrebutted expert testimony conclusively demonstrates that Ohio EPA's assumptions putatively supporting

the limit are invalid. The court relied heavily on the fact that the TMDL was approved by the U.S. EPA, as if the mere fact that an agency of the federal government has approved a document makes it automatically reliable. However, the appellate court's conclusion is bereft of *any* legal authority and is further undercut by the fact that U.S. EPA guidelines do not require the submission, let alone review, of the underlying data that purportedly support the permit limits recommended in a TMDL.<sup>6</sup>

This faulty conclusion of the appellate court will subject wastewater dischargers to functionally unreviewable—and extremely expensive—discharge limits merely because they were based on a TMDL. The court's decision must be reversed.

**Proposition of Law No. 3: The Commission's failure to consider evidence in opposition to a NPDES limit derived from a TMDL unconstitutionally insulates Ohio EPA's actions from meaningful review and denies the challenging party its right to due process.**

The Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution require that administrative proceedings comport with due process. *Village of Harbor View v. Jones*, 10th Dist. 10AP-356, *et seq.*, 2010-Ohio-6533, ¶ 36. A “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful place and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also State ex rel. Plain Dealer Publishing Co. v. Floyd*, 111 Ohio St.3d 56, 2006-Ohio-4437, ¶ 45.

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<sup>6</sup> By way of example, Matt Fancher, the author of the portion of the TMDL pertaining to Blacklick Creek, was not qualified as an expert at the hearing before the Commission, and acknowledged that due to his inexperience at the time he performed his work on the TMDL he was forced to use a less accurate water quality model to produce the recommended allocations. Mr. Fancher's work on the allocations in the TMDL that formed the basis for the recommended phosphorous limit in the permit was rife with speculation, including changing an allocation from 80% to 90% simply because he believed the numbers “just didn't add up.”

Appellant Fairfield County has been denied the right to be heard in a meaningful manner. The extant case law indicates that a party does not have the right to obtain meaningful review of a TMDL's policy choices, data, or logic at the time it is issued or approved. TMDLs are not self-executing; they are merely planning documents. *See, e.g., Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002). Because of that, permittees' attempts to challenge TMDLs have routinely been dismissed because such challenges are not ripe. *City of Arcadia v. EPA*, 265 F. Supp.2d 1142, 1155 (N.D. Cal. 2003)(holding claim challenging TMDL was unripe because the "TMDLs impose[d] no present, affirmative duties on [the cities] and require[d] no immediate changes in [the cities'] conduct.")

Therefore, parties must have the right to a meaningful review when a NPDES permit is issued. *Dayton Power & Light Co., v. Schregardus*, 123 Ohio App. 3d 476, 480, 704 N.E.2d 589 (10th Dist. 1997)(holding that the Commission must accept a party's appeal of the Director's decision to place a property on the Master Sites List, which identifies property that is contaminated or is suspected of being contaminated, because the party was not afforded any other opportunity to comment on or challenge the decision). The appellate court decision, finding that the mere presence of a draft allocation in a TMDL constitutes a sufficient factual foundation for a NPDES permit limit, despite the presence of overwhelming evidence to the contrary, makes such permit limits functionally unreviewable. This constitutes a clear denial of due process.

The appellate court held that Fairfield County was not denied due process because it was afforded the opportunity to challenge the permit limits during the permitting process. However, due process requires not just the ability to obtain review of an agency's decision, but to obtain a *meaningful* review. *Mathews*, 424 U.S. at 333. The review of a permit limit by the Commission

is entirely illusory if, as the appellate court held here, the TMDL automatically creates a valid factual foundation for a permit limit, despite mountains of un rebutted evidence to the contrary.

Under this tortured reading of the law, permit limits based on a TMDL are functionally insulated from meaningful review. If allowed to stand, this decision will unconstitutionally prevent thousands of public and industrial dischargers from having their day in court.

**Proposition of Law No. 4: Where a discharger is not harming aquatic life, Ohio EPA may not impose unnecessarily stringent water quality standards.**

Water quality standards in Ohio have two distinct elements: (1) designated uses, and (2) numerical criteria that are used to measure attainment of the designated uses. Ohio Adm. Code 3745-1-07(A). Designated uses are identified by taking into consideration the use and value of the water body for public water supply, for protection of fish, shellfish, and wildlife, and for recreational, agricultural, industrial, and navigational purposes. The numerical criteria include both biological and chemical criteria.

The chemical standards establish numeric goals for specific parameters (*e.g.*, a stream shall have a minimum dissolved oxygen concentration of 5.0 mg/l, a chlorine concentration less than 19 µg/l, etc.) that usually are an approximate measurement of the capability of a stream to support a specific aquatic ecosystem. However, per Ohio Adm. Code 3745-1-07(A)(6), the biological criteria “provide a direct measure of attainment of the” designated use. If a watershed is meeting or exceeding the biological criteria established for that watershed’s particular designated use, then it is considered to be in attainment. *See*, Ohio Adm. Code 3745-1-07(A)(6) and Table 7-15.

Ohio Adm. Code 3745-1-07(A)(6)(a) explicitly states that if a watershed is in attainment of biological criteria, that takes precedence over the application of chemical criteria. In lay terms,

if aquatic life is not being materially harmed by a particular pollutant, Ohio EPA may not require a discharger to pay for further, unnecessary, reductions in the discharge of that pollutant.

Ohio EPA has, by regulation, adopted a chemical-specific water quality standard for total dissolved solids of 1500 mg/l. It then used that standard to calculate the 1,646 mg/l total dissolved solids limit in Appellant's permit. However, Ohio EPA did not determine whether that limit, or any limit on total dissolved solids, was having or would have an adverse impact on aquatic life, or whether the total dissolved solids being discharged by Appellant was having an adverse effect on the biology of Blacklick Creek. Ohio EPA based the limit on a rote arithmetic calculation.

Unrebutted evidence presented at the hearing conclusively proved that Appellant's plant has discharged total dissolved solids into Blacklick Creek for years in amounts substantially higher than the newly added permit limit, and that the Creek has nevertheless continued to meet, and will continue to meet, the applicable biological criteria. Under these circumstances, Ohio EPA is not required—indeed, it is not legally authorized—to impose a chemical specific water quality standard, and the Commission and the Court of Appeals should have so held.

Instead, the appeals court disregarded Ohio EPA's own rule and held that Ohio EPA may impose unlawful and unnecessarily stringent permit limits, even where they are demonstrably unnecessary. If allowed to stand, cities, counties, and businesses will be forced to implement improvements to their facilities, even if demonstrably unnecessary for the protection of the aquatic ecosystem, something the Ohio Administrative Code never contemplated or intended. Such a holding will cost public and industrial dischargers millions or possibly billions of dollars in superfluous improvements.

**Proposition of Law No. 5: The Commission is required to make findings based on the evidence presented to it and, where a party presents probative and uncontested factual evidence in support of its challenge, the Commission may not remand the issue back to Ohio EPA.**

The Commission is required to make findings based on the evidence presented to it. R.C. 3745.05(G); Ohio Adm. Code 3746-11-03. However, it failed to do so in this case, and the appellate court upheld the Commission's erroneous decision.

Appellant challenged Ohio EPA's failure to properly consider the technical feasibility and economic reasonableness prior to its issuance of the permit limitations. R.C. 6111.03(J)(3) requires such a determination "to ensure that the balance between regulation and encouragement of business is properly struck." *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274, 2005-Ohio-4982, 834 N.E.2d 786, ¶ 20. However, the evidence Appellant submitted to the Commission went much farther than merely demonstrating Ohio EPA's failure to properly evaluate the technical and economic information presented to it by the Appellant during the pre-permit issuance (comment) stage of the proceedings. Appellant presented unrebutted evidence at the hearing that the total dissolved solids limit is not technically feasible, the cost to reduce the phosphorus to the permitted level is not economically reasonable, and there is no benefit to Blacklick Creek that would result from reduction of either total dissolved solids or phosphorus.

The evidence relevant to the determination was presented to the Commission, and it is the Commission that is required to make the factual findings consistent with the facts presented to it at the hearing. *Salem v. Koncelik*, 164 Ohio App.3d 597, 2005-Ohio-5537, 853 N.E.2d 799, ¶ 20 (10th Dist.)(remanding the case back to the Commission because it failed to make required findings, and it is the Commission's duty to make its determinations given the evidence presented at the *de novo* hearing). Instead, the appellate court completely ignored the evidence and remanded the case back to the Ohio EPA. This is clear error. Ohio EPA should be treated

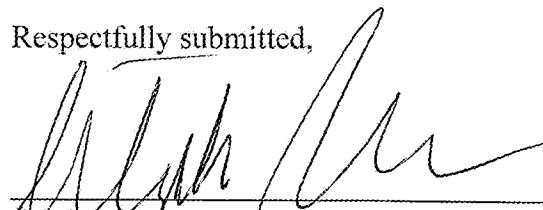


the same as any other litigant: if it fails to prove its case, or rebut the evidence presented by an adverse party, the Commission should rule against it.

**IV. CONCLUSION**

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. Therefore, Appellant Fairfield County requests that this Court accept jurisdiction in this case so the vital issues presented will be reviewed on the merits.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon the following persons this 8th day of July, 2013 via regular U.S. Mail, postage prepaid:

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\_\_\_\_\_  
Stephen P. Samuels

# APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Board of Commissioners of  
Fairfield County, :

Appellant-Appellant/  
[Cross-Appellee], :

No. 11AP-508  
(ERAC No. 235929)

v. :

(REGULAR CALENDAR)

[Scott J. Nally], Director of  
Environmental Protection, :

Appellee-Appellee/  
[Cross-Appellant]. :

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D E C I S I O N

Rendered on May 23, 2013

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*Michael DeWine, Attorney General, L. Scott Helkowski and  
Alana R. Shockey, for appellee.*

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APPEAL from the Environmental Review Appeals Commission

CONNOR, J.

**I. INTRODUCTION**

{¶ 1} Appellant-appellant and cross-appellee, Board of Commissioners of Fairfield County ("Fairfield County"), appeals from an order of the Environmental Review Appeals Commission ("ERAC") in which ERAC found there was a valid factual foundation for the limits set forth in the permit issued by appellee-appellee and cross-appellant, [Scott J. Nally], Director of Environmental Protection ("the Director"). Fairfield County also appeals ERAC's decision to vacate and remand the matter to the Director for further action.

APPX. 001

{¶ 2} The Director has filed a cross-appeal challenging the determination that the Director's actions of imposing certain limits in the permit without satisfying the technical feasibility and economic reasonableness mandates of R.C. 6111.03(J)(3) was unlawful. The Director also challenges ERAC's consideration of evidence obtained from certain data collectors, claiming the data fails to meet the requirements of the credible data rule.

{¶ 3} Because the order is supported by reliable, probative, and substantial evidence and in accordance with law, we affirm.

## II. REGULATORY FRAMEWORK

{¶ 4} This case involves the imposition of limitations placed in the renewal of a National Pollutant Discharge Elimination System ("NPDES") permit issued to Fairfield County for its wastewater treatment plant ("the Tussing Road plant" or "plant"), located on Blacklick Creek off Tussing Road in Pickerington, Ohio. In Ohio, the discharge of sewage, industrial waste, or other waste into the waters of the state, or the placement of sewage, industrial waste, or other waste in a location where it enters the waters of the state is prohibited without a permit issued by the Director authorizing said discharge. See R.C. 6111.04 (acts of pollution prohibited; exceptions). Permits that authorize discharge to waters of the state are known as NPDES permits.

{¶ 5} The NPDES permit program arises from Section 402 of the Federal Water Pollution Control Act. 33 U.S.C. 1342. The Federal Water Pollution Control Act is also known as the Clean Water Act ("CWA"). The CWA, 33 U.S.C. 1251-1387, uses two approaches to control water pollution: (1) technology-based regulations; and (2) water quality standards. *Arcadia v. United States EPA*, 265 F.Supp.2d 1142, 1143 (2003). "Technology-based regulations seek to reduce pollution by requiring a discharger to effectuate equipment or process changes, without reference to the effect on the receiving water; water quality standards fix the permissible level of pollution in a specific body of water regardless of the source of pollution." *Id.* at 1143-44. The NPDES permit program is a means of implementing both approaches. *Id.* at 1144.

{¶ 6} The objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." See 33 U.S.C. 1251 et seq. States may apply for delegated authority to implement NPDES permitting in their state and if the United States Environmental Protection Agency ("U.S. EPA") approves, the state has delegated authority over the program. In Ohio, the Ohio Environmental Protection

Agency ("Ohio EPA") has been delegated the authority to issue NPDES permits for the discharge of pollutants into Ohio waters.

{¶ 7} "Permits cannot control all sources of pollution. They are aimed only at pollution coming from a 'point source,' " such as a waste water treatment plant. *Sierra Club v. Meiburg*, 296 F.3d 1021, 1024 (11th Cir.2002), quoting 33 U.S.C. 1362(14). Pollution also comes from non-point sources, such as runoff from farmlands. *Id.* at 1025.

{¶ 8} The effluent (or discharge) limits set forth in NPDES permits are established via regulatory controls. Pursuant to Ohio Adm.Code 2745-33-05, the director shall determine and specify in the permit the maximum levels of pollutants that may be discharged to ensure compliance with, inter alia, applicable water quality standards and applicable effluent limitations. Water quality-based limits are included in NPDES permits if technology-based limits are not sufficient to achieve or maintain compliance with water quality standards. Ohio Adm.Code 3745-33-05(A).

{¶ 9} Water quality standards have two distinct elements: (1) designated uses; and (2) numerical or narrative criteria fashioned to protect and measure the attainment of the uses. Ohio Adm.Code 3745-1-07(A). Furthermore, each waterbody in Ohio is assigned one or more aquatic habitat use designations and may be assigned one or more water supply use designations and/or one recreational use designation. Ohio Adm.Code 3745-1-07(A)(1).

{¶ 10} The Ohio EPA is responsible for monitoring the waters of the state. If a waterbody is not meeting water quality standards, and thus it is considered "in nonattainment," and, based upon the current pollution controls, it is not expected to "attain" the applicable water quality standards, it is placed on a list of impaired waterways, pursuant to Section 303(d) of the CWA, and submitted to the U.S. EPA. The approved list is then used by the Ohio EPA to identify and rank impaired waterways and to prepare a Total Maximum Daily Load ("TMDL") assessment.

{¶ 11} "TMDLs must be established for every waterbody within the state for which ordinary technology-based point-source limits will not do enough to achieve the necessary level of water quality." *Sierra Club* at 1025, citing 33 U.S.C. 1313(d)(1)(A) and (C). A TMDL is "a calculation of the maximum quantity of a given pollutant that may be added to a waterbody from all sources without exceeding the applicable water quality standard for that pollutant." Mark A. Ryan, *The Clean Water Act Handbook*, Chapter 10, at 205

(2d Ed.2003). *See also Sierra Club* at 1025, citing 33 U.S.C. 1313(d)(1)(C) ("A TMDL is a specification of the maximum amount of a particular pollutant that can pass through a waterbody each day without water quality standards being violated"), and Ohio Adm.Code 3745-2-02(B)(67) ("the sum of the existing and/or projected point source, nonpoint source, and background loads for a pollutant to a specified watershed, water body, or water body segment. A TMDL sets and allocates the maximum amount of a pollutant that may be introduced into the water and still ensures attainment and maintenance of water quality standards").

{¶ 12} "[E]ach TMDL represents a goal that may be implemented by adjusting pollutant discharge requirements in individual NPDES permits or establishing nonpoint source controls." *Arcadia* at 1144. A TMDL serves as the goal for the level of the pollutant at issue in the waterbody and allocates the total "load" (the amount of the pollutant introduced into the water) specified in that TMDL among contributing point sources as well as non-point sources. *Sierra Club* at 1025. "The theory is that individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL." *Id.* at 1025.

{¶ 13} To determine whether a waterway is attaining its designated use, the Ohio EPA has developed biocriteria to assess the waterway. These include the Invertebrate Community Index ("ICI"), which measures aquatic macroinvertebrates such as worms and insects, and the Index of Biotic Integrity ("IBI") and the Modified Index of well-being ("MIwb"), which assess fish communities. If the biocriteria results demonstrate that a waterbody is meeting or exceeding the numeric standards for its designated use, it is considered to be "in attainment."

### III. FACTUAL AND PROCEDURAL HISTORY

{¶ 14} In 2000, the Ohio EPA conducted a study of the Big Walnut Creek Basin, which also included a stream survey of Blacklick Creek.<sup>1</sup> As part of the survey, it collected biological and chemical data from upstream and downstream of the Tussing Road plant. Based on the results of the survey, the Ohio EPA concluded the Tussing Road plant was contributing to organic and nutrient enrichment in Blacklick Creek. Ohio EPA determined there was a nutrient enrichment defect downstream from the plant, based upon the findings regarding the macroinvertebrate community. Specifically, the survey

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<sup>1</sup> Blacklick Creek is located in the Big Walnut Creek Basin.

demonstrated that the ICI score (which measures macroinvertebrate communities) declined ten points after passing the Tussing Road plant's discharge point, going from 48 at river mile ("RM") 11.3 to 38 at RM 11.0, just past the plant's outfall. The survey report stated that the decline indicated mild organic and/or nutrient enrichment due to the discharge from the plant. The survey also indicated impairment of the MIwb.

{¶ 15} After the stream survey of Blacklick Creek in 2000, the Tussing Road plant's NPDES permit was modified, effective July 1, 2003. The new permit required monitoring for phosphorus and total dissolved solids ("TDS") at the final outfall location. It also included language stating the permit may be reopened and modified upon completion of any TMDL study as required by Section 303(d) of the CWA.

{¶ 16} During 2005, Fairfield County completed a \$6 million improvement to the Tussing Road plant. The improvements increased the volume of wastewater being treated from 2 to 3 million gallons per day.

{¶ 17} On August 19, 2005, the Ohio EPA issued the "Total Maximum Daily Loads for the Big Walnut Creek Watershed" report ("Big Walnut Creek TMDL report") and submitted it to the U.S. EPA. The U.S. EPA approved the report in September 2005. The Big Walnut Creek TMDL report found that among the primary causes of impairment in the Big Walnut Creek Watershed was nutrient enrichment. To address the nutrient enrichment issues in the Big Walnut Creek Watershed, the Big Walnut Creek TMDL report set forth allocations for various sources of phosphorus (including discharge locations) and the required reductions. It also established a specific total phosphorus limit of .5 mg/l for the Tussing Road plant.

{¶ 18} Subsequently, Fairfield County submitted an application to renew its NPDES permit for the Tussing Road plant on Blacklick Creek. The Ohio EPA publicly noticed a draft NPDES permit. Fairfield County submitted comments, to which the Ohio EPA issued a written response. The draft permit proposed adding monthly concentration and loading limits for total phosphorus and an effluent limitation for TDS.

{¶ 19} On June 30, 2006, the Ohio EPA issued a final renewal NPDES permit to Fairfield County for the Tussing Road plant. This permit included concentration and loading limits for total phosphorus consistent with those set forth in the Big Walnut Creek TMDL report, as well as limits for TDS, which were included after the monitoring referenced in the 2003 permit modification.



{¶ 20} On July 27, 2006, Fairfield County filed a notice of appeal with ERAC setting forth multiple assignments of error and arguing the discharge limitations in the permit regarding phosphorus and TDS were unlawful and unreasonable. A hearing was held beginning February 9 and ending February 13, 2009. Multiple witnesses, including expert witnesses, were presented by both Fairfield County and the Director. The following testimony is most relevant to these appeals.

{¶ 21} Matthew Fancher ("Fancher") testified he wrote the portion of the Big Walnut Creek TMDL report pertaining to Blacklick Creek that was eventually used, along with other documents, as a basis for the .5 mg/l phosphorus limit included in the NPDES permit. Fancher testified he also prepared an interoffice communication in April 2006 for Eric Nygaard in the permit compliance section, explaining how he arrived at the .5 mg/l phosphorus limit for the Tussing Road plant.

{¶ 22} Fancher testified some of the information in the April 2006 memorandum came from the technical support document<sup>2</sup> that went along with the Big Walnut Creek TMDL report. In the memorandum, Fancher noted: (1) based upon the technical support document, there was a ten-point difference in the ICI scores upstream and downstream of the Tussing Road plant; (2) the ICI score decline indicated mild organic and/or nutrient enrichment from the Tussing Road plant; (3) the larger diurnal fluctuation (in dissolved oxygen) recorded at the downstream site was characteristic of excessive algae production associated with nutrient enrichment; (4) the annual total phosphorus load from the Tussing Road plant increased every year since 2001; and (5) a general concern that the increased loading from the plant had exacerbated the enriched condition in Blacklick Creek, which could cause deterioration in the future and cause the waterbody to be in nonattainment. Fancher further testified his knowledge of the stream was based upon data presented to him and that he never personally visited Blacklick Creek.

{¶ 23} Fancher used the "simple model" to calculate the loads for Blacklick Creek in the Big Walnut Creek TMDL report. He calculated the phosphorus loading for Blacklick Creek by using a "target value" of .11 mg/l, based upon the fact that said value was contained in the "Association Between Nutrients, Habitat, and the Aquatic Biota in Ohio Rivers and Streams" report (Ohio EPA, 1999) ("associations report"), which was co-

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<sup>2</sup> The technical support document is titled "Biological and Water Quality Study of the Big Walnut Creek Basin 2000."

authored by several Ohio EPA employees. Fancher initially performed a wasteload allocation ("WLA") for point source dischargers using a 1.0 mg/l phosphorus limit. Under this calculation, non-point sources would be required to reduce their phosphorus discharge by 90 percent in order to meet the goal. Because he believed those numbers "didn't add up" and failed to create an allocation scenario that was balanced, he next performed the analysis using a .5 mg/l phosphorus limit as a technology-based standard, based upon a recommendation from an Ohio EPA colleague. Fancher testified that number reduced the percent reduction necessary but also reduced the load that point sources (such as the plant) could discharge.

{¶ 24} John Owen ("Owen") of the Ohio EPA testified he was responsible for developing the permit limits. In assigning the limits for phosphorus in the NPDES permit, Owen testified he determined the limits based upon the limit set forth in the Big Walnut Creek TMDL report for the Tussing Road plant. Owen testified that "[a]fter reviewing that document, we determined that the appropriate numerical limit was determined, and it was incorporated." (Tr. Vol. III, 137.) As to the limits for TDS, Owen testified he determined those limits using a modeling procedure codified in the Ohio Administrative Code in which a spreadsheet is used to calculate the limits based upon the input of certain data. TDS were calculated at 1,646 mg/l. Owen did not conduct an independent analysis to determine what the phosphorus and TDS limits should be or if they were necessary.

{¶ 25} Rhonda Mendel ("Ms. Mendel") testified she is employed by EnviroScience and does macroinvertebrate evaluations. In 2007, EnviroScience did a stream sampling of Blacklick Creek. As part of that stream sampling, she compiled ICI scores and found a score of 34 at the upstream site and a score of 36 at the downstream site. Both sites were in attainment. In comparing those scores with the scores from the Ohio EPA's 2000 sampling, Ms. Mendel testified that the downstream score was comparable, while the upstream score was lower than the Ohio EPA's score. Based upon the two downstream scores, Ms. Mendel testified the measured biological community had not changed much in the downstream area.

{¶ 26} Ms. Mendel also analyzed other biological attributes in the stream, including pollution-sensitive (also known as "pollution-intolerant") species. In doing so, she looked at organisms known as Ephemeroptera, Plecoptera, and Trichoptera ("EPT

taxa"), which are pollution-sensitive organisms. She testified there are likely to be more pollution-intolerant species in waterbodies that have fewer influences or that have a more unaffected condition (e.g., waterbodies that are more "pristine"). Thus, as more factors influence the stream, the number of EPT taxa organisms, in theory, decreases.

{¶ 27} Using the data from the 2000 survey, Ms. Mendel testified the percentage of EPT taxa in the upstream sample was 21 percent, while the percentage of EPT taxa in the downstream sample was 28.3 percent. Thus, she concluded the EPT taxa percentages downstream were higher than the percentages upstream. She further testified that if there was something going on in the stream that was impacting the communities downstream of the Tussing Road plant, she would expect to see the reverse effect—more EPT taxa at the upstream site, and fewer EPT taxa at the downstream site. However, that is not what was discovered here. Furthermore, in collecting data for EnviroScience's 2007 survey, she found the EPT taxa percentage at the upstream site to be 47.9, while the downstream site was 58.1. Ms. Medel opined that the ICI upstream score of 48 from Ohio EPA's 2000 survey seemed to be a "data anomaly" or an "outlier." (Tr. Vol. I, 216.) With respect to the discharges of TDS, Ms. Mendel testified that effluent from the Tussing Road plant was not toxic to aquatic organisms and was not having an adverse effect on the stream.

{¶ 28} Michael J. Bolton ("Bolton"), an Environmental Specialist 2 at the Ohio EPA, testified regarding the results of the 2000 stream survey, which were contained in the technical support document. Based upon the results of the survey, Bolton testified there was a nutrient enrichment defect downstream from the Tussing Road plant, based upon the findings regarding the macroinvertebrate community.

{¶ 29} For example, Bolton testified that the total sensitive taxa and the EPT taxa numbers decreased from 18 and 13, respectively, at RM 11.3, to 14 and 11 at RM 11.0. And at RM 8.90, the total sensitive taxa stayed at 14, while the EPT taxa decreased to 9. Bolton further testified there were typically higher taxa numbers in higher quality streams, so if the numbers were declining, it could indicate an impacted stream. Bolton also disagreed with the opinion of some of the Fairfield County witnesses who believed the ICI score of 48 at RM 11.3 was an "outlier," stating there were other ICI scores which were similar, such as an upstream site with a score of 44 and a downstream site with a score of 42.

{¶ 30} Daniel V. Markowitz, Ph.D. ("Markowitz"), an employee of Malcolm Pirnie, Incorporated, an environmental consulting firm, and an expert in aquatic ecology and aquatic biology, disagreed with the conclusions reached by Fancher in his memorandum. Markowitz testified that the ICI and dissolved oxygen data used by Fancher was not sufficient to establish nutrient enrichment downstream of the Tussing Road plant. Markowitz also testified the evidence demonstrating the dissolved oxygen diurnal swing was not sufficient to establish that the fluctuation was being caused by the discharge of phosphorus from the plant. Markowitz did not believe Fancher's reliance upon only two days of data from two points was enough data to properly conclude that the phosphorus was having an adverse impact upon Blacklick Creek.

{¶ 31} Furthermore, Markowitz opined that Fancher's conclusion—that an increase in discharge from the plant from 2 million gallons to 3 million gallons would interfere with the maintenance of water quality standards—was not supported for several reasons: (1) there had already been an increase in discharge since the Ohio EPA's study was conducted and Blacklick Creek is still in attainment downstream of the plant; (2) there is no nuisance growth of algae either upstream or downstream of the plant; and (3) there are no characteristics of nonattainment related to an increased phosphorus load. Markowitz concluded to a reasonable degree of scientific certainty that the Tussing Road plant did not have a reasonable potential to cause nonattainment of water quality standards in Blacklick Creek if the flow increased to 3 million gallons per day.

{¶ 32} In addition, Markowitz testified that in his opinion, the TDS were not having an adverse affect on aquatic life, given that the fish and bug standards downstream of the plant were within the warm water habitat standard. Thus, Markowitz concluded that the TDS were not affecting attainment of the overall biological community.

{¶ 33} Robert Miltner ("Miltner"), an environmental specialist in the ecological assessment section of the Ohio EPA, testified he participated in the 2000 survey involving Blacklick Creek by collecting fish samples. Miltner also wrote the biological assessment of fish communities and physical habitat for aquatic life sections of the technical support document. Miltner described the technical support document as a report written after the survey which analyzed and interpreted the data collected from the survey. Miltner testified the technical support document is used to assist in permit renewal decisions or

other agency decisions. The information from the technical support doctrine is also used in the TMDL.

{¶ 34} Michael J. Mendel, Ph.D. ("Dr. Mendel"), a professor of environmental science, a special projects consultant for EnviroScience, and an expert in macroinvertebrate ecology, aquatic biology, and biological statistics, testified the upstream and downstream ICI data collected by the Ohio EPA in 2000 was not sufficiently credible to be used as a basis for determining the phosphorus permit limits for the Tussing Road plant. He cited the following three reasons for his opinion: (1) the sampling methodology used by the Ohio EPA to develop the ICI score has "within site variability;" (2) the Ohio EPA's subsampling procedure (as opposed to identifying and processing everything in the sample) introduces sampling error; and (3) there are inconsistencies with the ICI data in comparison with other data.

{¶ 35} James R. Krejsa ("Krejsa"), vice president and director of ecological services at EnviroScience, was admitted as an expert in aquatic biology, aquatic ecology, biological survey, impact evaluation, biological criteria, and water quality. Krejsa analyzed the fish data collected by the Ohio EPA in 1996 and 2000. This included an analysis of the IBI and MIwb scores. Krejsa testified the IBI scores from both studies increased downstream of the Tussing Road plant.

{¶ 36} Krejsa analyzed the macroinvertebrate studies from the surveys. With respect to the ten-point variation in the upstream and downstream ICI scores from the Ohio EPA's 2000 survey, Krejsa testified the variation could be attributed to natural variability. EnviroScience also conducted its own sampling survey in 2007 but used sites different from those used by the Ohio EPA, with the intention of eliminating other environmental stressors (e.g., runoff from a bridge). The average ICI score from all three studies was determined to be 39.25. Krejsa testified the purpose of determining the average score was to determine whether the upstream sampling sites were representative (i.e., not an anomaly), since natural variability needed to be taken into consideration.

{¶ 37} With respect to the dissolved oxygen data referenced in Fancher's memorandum (which he obtained from the technical support document), Krejsa testified the Ohio EPA failed to follow proper protocols in obtaining representative data for the analysis. Because only two days worth of data (rather than the required seven days of data) were obtained, Krejsa testified the data was not sufficient to establish that it was the

phosphorus discharge from the Tussing Road plant that was causing greater diurnal fluctuations at RM 10.2, in comparison to RM 11.3.

{¶ 38} Krejsa also testified that pursuant to the data, Blacklick Creek is in attainment. Furthermore, any variability in the data did not necessarily mean there was a direct connection or a cause-and-effect relationship between the variability and TDS and/or phosphorus. For example, Krejsa testified there were a lot of different factors which could constitute environmental stressors, such as the location of the golf course on top of the area where the downstream sampling sites are located. These factors, rather than just the phosphorus discharge, could contribute to variability. Kresja also agreed that fish are more sensitive than macroinvertebrates and he testified the fish data actually increased downstream of the discharge, rather than decreased, and that such a finding was not necessarily indicative of phosphorus. Krejsa further opined there was not enough scientific data to support the appropriateness or necessity of imposing phosphorus or TDS limits for the Tussing Road plant for the purposes of attaining or maintaining water quality in Blacklick Creek.

{¶ 39} David Frank ("Frank"), an employee of ARCADIS and the engineer who designed the Tussing Road plant expansion, testified it was technically feasible to meet the total phosphorus limit of .5 mg/l. However, he testified the cost to do so would be more than 5 million. Frank further testified it was not technically feasible to meet the TDS limit of 1,646 mg/l.

{¶ 40} ERAC issued a decision on May 12, 2011, finding there was a valid factual foundation for imposing the phosphorus permit limit. ERAC further found the Director had a valid factual foundation for the limit imposed for TDS as well. Finally, ERAC held the Director violated R.C. 6111.03(J) by failing to consider the technical feasibility and economic reasonableness of imposing the TDS and phosphorus limits and, as a result, ERAC ordered that the portions of the permit relating to phosphorus and TDS limits be vacated and remanded to the Director for further proceedings.

{¶ 41} On June 8, 2011, Fairfield County filed a notice of appeal in this court. The Director filed a notice of cross-appeal on June 16, 2011.

#### **IV. ASSIGNMENTS OF ERROR AND CROSS-ASSIGNMENTS OF ERROR**

{¶ 42} Fairfield County appeals ERAC's order and asserts the following assignments of error:

1. THE COMMISSION'S RULING THAT THE DIRECTOR HAD A VALID FACTUAL FOUNDATION FOR THE PHOSPHORUS EFFLUENT LIMITS IN FAIRFIELD COUNTY'S NPDES PERMIT LIMIT IS NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE, AND IS NOT IN ACCORDANCE WITH LAW.
2. THE COMMISSION'S RULING THAT THE DIRECTOR HAD A VALID FACTUAL FOUNDATION FOR THE TOTAL DISSOLVED SOLIDS EFFLUENT LIMITS IN FAIRFIELD COUNTY'S NPDES PERMIT LIMIT IS NOT SUPPORTED BY RELIABLE, PROBATIVE AND SUBSTANTIAL EVIDENCE, AND IS NOT IN ACCORDANCE WITH LAW.
3. THE COMMISSION'S MERE RECITATION OF EVIDENCE, RATHER THAN MAKING FINDINGS OF FACT, AND SPECIFICALLY, ITS FAILURE TO FIND THAT THE TOTAL DISSOLVED SOLIDS AND PHOSPHORUS EFFLUENT LIMITATIONS WERE, RESPECTIVELY, TECHNICALLY INFEASIBLE AND ECONOMICALLY UNREASONABLE, IS NOT IN ACCORDANCE WITH LAW.

{¶ 43} Additionally, the Director has filed a cross-appeal, in which he asserts the following two assignments of error for our review:

1. The Environmental Review Appeals Commission improperly interpreted the Director's obligations under R.C. 6111.03(J)(3) as requiring the Director to evaluate the economic reasonableness and technical feasibility of a pollutant limitation even where the Director is obligated, pursuant to the Clean Water Act, to impose the specified pollutant limitation.
2. The Environmental Review Appeals Commission improperly considered biological data submitted by Fairfield County that was not considered credible pursuant to the requirements of Ohio Administrative Code Section 3745-4-01.

## V. STANDARD OF REVIEW

{¶ 44} On appeal, this court must determine whether ERAC's order as to the lawfulness and reasonableness of the Director's action is supported by reliable, probative, and substantial evidence and in accordance with law. *Salem v. Koncelik*, 164 Ohio App.3d 597, 2005-Ohio-5537, ¶ 8 (10th Dist.), citing *Red Hill Farm Trust v. Schregardus*, 102 Ohio App.3d 90, 95 (10th Dist.1995); R.C. 3745.06. The Supreme Court of Ohio has defined reliable, probative, and substantial evidence as follows:

- (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) "Substantial" evidence is evidence with some weight; it must have importance and value

(Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

{¶ 45} ERAC does not stand in the place of the Director on appeal and is not entitled to substitute its judgment for that of the Director. *Citizens Commt. to Preserve Lake Logan v. Williams*, 56 Ohio App.2d 61, 69-70 (10th Dist.1977). ERAC is limited to a determination of whether the action taken by the Director is unlawful or unreasonable. *Id.* at 69. "Unlawful" means "not in accordance with law." *Id.* at 70. "Unreasonable" means "that which is not in accordance with reason, or that which has no factual foundation." *Id.* "The reasonableness standard requires \* \* \* ERAC to consider whether the actions it reviews have a valid factual foundation." *Washington Environmental Servs. v. Morrow Cty. Dist. Bd. of Health*, 10th Dist. No. 09AP-920, 2010-Ohio-2322, ¶ 24.

{¶ 46} If the evidence demonstrates the Director's action is reasonable and lawful (i.e., the evidence reasonably supports the Director's action), ERAC must affirm the Director, even though it may have taken a different action. *Citizens Commt. to Preserve Lake Logan* at 69. Additionally, if the evidence demonstrates it is reasonably debatable as to whether or not the permit should be granted, ERAC must affirm the Director. *Id.* at 69-70. However, if ERAC properly determines the Director's action is unreasonable or unlawful, it can vacate or modify the action and implement the appropriate action as supported by the evidence. *Id.* at 70.

{¶ 47} "An appellate court must affirm an ERAC order if it 'is supported by reliable, probative, and substantial evidence and is in accordance with law.'" *Helms v. Koncelik*, 187 Ohio App.3d 231, 2010-Ohio-1782, ¶ 20 (10th Dist.), quoting R.C. 3745.06. In deciding whether an ERAC order is supported by reliable, probative, and substantial evidence, an appellate court must weigh and evaluate the credibility of the evidence. *Helms* at ¶ 20, citing *Parents Protecting Children v. Korleski*, 10th Dist. No. 09AP-48, 2009-Ohio-4549, ¶ 10. Appellate courts "must recognize that administrative bodies consist of members with special expertise, and we must respect that expertise." *Helms* at



¶ 20. Therefore, we give due deference to ERAC's resolution of evidentiary conflicts. *Id.*, citing *Parents Protecting Children* at ¶ 10.

## VI. FIRST ASSIGNMENT OF ERROR—IS THERE A VALID FACTUAL FOUNDATION FOR THE PHOSPHORUS LIMITS IMPOSED IN THE PERMIT?

### A. Fairfield County's Arguments

{¶ 48} In its first assignment of error, Fairfield County submits ERAC's determination that the Director has a valid, factual foundation for imposing the phosphorus limits set forth in Fairfield County's NPDES permit is not supported by reliable, probative, and substantial evidence and is not in accordance with law. Specifically, Fairfield County argues that the .5 mg/l phosphorus limit imposed in the permit was arbitrarily established. Fairfield County objects because an Ohio EPA employee with virtually no experience in the pertinent disciplines established the limit for the Tussing Road plant allocation within the TMDL for Big Walnut Creek Watershed, which includes Blacklick Creek. Using the limit set forth in the Big Walnut Creek TMDL report for the Tussing Road plant, another Ohio EPA employee then imposed that phosphorus limit in the NPDES permit for the Tussing Road plant.

{¶ 49} Fairfield County argues that the Big Walnut Creek TMDL does not require the Director to impose the .5 mg/l phosphorus limit in the NPDES permit. Fairfield County asserts ERAC erred in finding that the mere presence of the .5 mg/l limitation in the TMDL constitutes reliable, probative, and substantial evidence that it is a reasonable and lawful limitation for the NPDES permit. Under this interpretation, Fairfield County contends ERAC has, in essence, improperly determined that if a proposed permit limit appears in an approved TMDL, a discharger cannot challenge the limit when it is imposed in the discharger's NPDES permit.

{¶ 50} Fairfield County also argues there is no "direct correlation" between the limitation imposed in the permit and the attainment of the biocriteria standards applicable to Blacklick Creek, given that the plant has been discharging phosphorus at a higher level than set forth in the TMDL, but without an adverse affect on the biota in Blacklick Creek, since it is still in attainment. Fairfield County argues that a direct correlation is required pursuant to *Gen. Elec. Lighting v. Koncelik*, 10th Dist. No. 05AP-310, 2006-Ohio-1655.

{¶ 51} Additionally, because there is not a numerical water quality standard for phosphorus from which Ohio EPA derived the permit limit, Fairfield County submits the .5 mg/l phosphorus limitation is unlawful because it is based upon an unpromulgated "target value" for phosphorus that simply appears in the associations report. Fairfield County argues the data in the association report does not serve as a valid factual foundation for the phosphorus limit, as it does not establish a cause-and-effect relationship. Fairfield County argues it is unlawful for Ohio EPA to regulate on the basis of unpromulgated standards.

{¶ 52} Finally, Fairfield County argues the mere presence of a draft allocation in a TMDL does not ipso facto create a valid factual foundation for a permit limit and that whether or not there is a valid, factual foundation for the permit limit must be determined based upon all of the evidence presented; to hold otherwise constitutes a denial of due process because it makes the permit limits functionally unreviewable. Because the public notice, comment, and review process for TMDLs is a federal process, Fairfield County argues there is no procedure for meaningful review at the time of submission to the U.S. EPA and, therefore, parties must have the right to pursue meaningful review at the time the NPDES permits are issued if those permits contain effluent limits based on the TMDL. Fairfield County submits ERAC's decision has insulated the Ohio EPA's actions from administrative review and made it impossible for point source dischargers to challenge limitations in NPDES permits.

#### **B. The Director's Response**

{¶ 53} The Director, on the other hand, argues that the .5 mg/l phosphorus limitation included in the Tussing Road plant permit was consistent with the Big Walnut Creek TMDL report and that as a publicly noticed and federally approved document, the TMDL should be considered reliable, probative, and substantial evidence upon which the Director may base his decision. Because the TMDL is based upon data gathered directly from Big Walnut Creek, the Director argues that fact alone should be enough to demonstrate a significant, foreseeable relationship between the reduction in phosphorus and a reduction in nutrient enrichment in Big Walnut Creek Watershed.

{¶ 54} The Director submits he was required to establish a pollutant limitation consistent with the federally approved Big Walnut Creek TMDL, pursuant to 40 C.F.R. 122.44(d)(1)(vii)(B). One available option that would fulfill the consistency requirement

is to take the .5 mg/l phosphorus limit in the Tussing Road plant TMDL allocation and impose it in the NPDES permit. The Director argues this decision was an exercise of his independent judgment that was reasonable and supported by law. Because the .5 mg/l phosphorus limit for the Tussing Road plant was based upon actual studies of the Big Walnut Creek Watershed and incorporated into its federally approved TMDL, the Director argues this phosphorus limitation is supported by reliable, probative, and substantive evidence.

{¶ 55} The Director also contends this appeal is not an appropriate forum in which to challenge the facts underlying the Big Walnut Creek TMDL, claiming any challenge would be governed by the Administrative Procedure Act. The Director points out that Fairfield County has never challenged the U.S. EPA's approval of the TMDL limits and argues it is not a denial of due process to require such a challenge to be governed by the Administrative Procedure Act. The Director asserts courts cannot allow the facts underlying a TMDL to be collaterally attacked via individual NPDES permit challenges. Instead, the Director submits the appropriate way to challenge the facts underlying the TMDL is through a challenge to the TMDL itself.

{¶ 56} The Director further argues the evidence relied upon in developing the Big Walnut Creek TMDL report was reliable, probative, and substantial. Big Walnut Creek Watershed was placed on the Ohio EPA's Section 303(d) list because it failed to meet water quality standards and was in need of restoration. Thus, a TMDL plan was required. During the process of developing the TMDL, the Director contends a direct correlation was found between reduction in point-source discharges of phosphorus and bringing the watershed into attainment, as well as a reasonable association between nutrient enrichment and discharges from the Tussing Road plant.

{¶ 57} Contrary to Fairfield County's assertions, the Director argues utilization of the associations report as a guidance document was proper. The Director contends the use of guidance documents, such as the associations report, does not rise to the level of regulating on the basis of an unpromulgated standard.<sup>3</sup> Instead, the Director submits the phosphorus limitation included in the Tussing Road plant permit comes from the

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<sup>3</sup> Notably, the associations report states that it is a technical bulletin and that it does not represent the EPA policy.

properly promulgated Big Walnut Creek TMDL. He argues it is not an unpromulgated guideline.

{¶ 58} Finally, the Director argues that in developing the TMDL for the Big Walnut Creek Watershed, Ohio EPA identified the sources of phosphorus for the stream and the amount the sources were contributing and then determined the loading capacity of the stream, leaving a margin of safety. Thus, the Director submits the limit was not arbitrarily derived and the evaluation considered point sources, including the Tussing Road plant, as well as non-point sources, such as agricultural land and residential sources. Based upon that evaluation, and after reviewing several scenarios involving both point and non-point sources, limits were imposed. The Director contends the Ohio EPA's analysis was far from speculative.

### **C. Analysis**

{¶ 59} In general, Fairfield County's arguments asserting the Director lacked a valid factual foundation for the phosphorus limit set forth in the Tussing Road permit can be simplified and described as follows: (1) there was no direct correlation between the phosphorus limitation set forth in the Tussing Road plant permit and the attainment of the biocriteria standards applicable to Blacklick Creek, particularly since the portion of the stream impacted by the Tussing Road plant is in attainment, despite the fact the plant has been discharging phosphorus at a higher level than set forth in the NPDES permit; (2) the Ohio EPA was not required to include a .5 mg/l phosphorus limit in the permit simply because it appears in the TMDL because its presence in the TMDL does not constitute sufficient or probative evidence of its reasonableness or lawfulness; (3) the .5 mg/l phosphorus limit is unlawfully based upon an unpromulgated "target value" that appears in the associations report, which does not provide a valid factual foundation for the limit; (4) use of the associations report constitutes regulating on the basis of unpromulgated standards; and (5) imposition of the phosphorus limit from the TMDL fails to provide Fairfield County with meaningful review.

#### **1. Direct Correlation**

{¶ 60} Fairfield County argues there is no "direct correlation" between the phosphorus limits imposed in the NPDES permit and the attainment of the biocriteria standards applicable to Blacklick Creek. We disagree.

{¶ 61} In *General Elec. Lighting*, we found the crux of the "direct correlation" requirement in that case to be that power input alone, without consideration of any other factors that affect emissions, had to have a significant, foreseeable relationship to emissions in order for the limitation on power input to be based on a valid factual foundation. *Id.* at ¶ 39. Expert testimony and data demonstrated that different operational restrictions would not necessarily increase or decrease emissions and that power input alone, without consideration of other factors affecting emissions, did not have a significant relationship to emission controls. Thus, there was no direct correlation between the emission controls and the operational restrictions sought to be imposed by the Ohio EPA.

{¶ 62} As that theory applies to this case, Fairfield County argues the Ohio EPA failed to prove that the phosphorus limits in the NPDES permit were based on a significant, foreseeable, causal relationship between those limits and the attainment of biocriteria standards for Blacklick Creek. However, we believe there is evidence demonstrating otherwise.

{¶ 63} To review, a TMDL sets forth "the sum of the existing and/or projected point source, nonpoint source, and background loads for a pollutant to a specified watershed, water body, or water body segment." Ohio Adm.Code 3745-2-02. Furthermore, a TMDL "sets and allocates the maximum amount of a pollutant that may be introduced into the water and still ensures attainment and maintenance of water quality standards." Ohio Adm.Code 3745-2-02. TMDLs are established and implemented through a TMDL implementation plan, which addresses attainment of applicable water quality standards for each pollutant for which a TMDL is established. Ohio Adm.Code 3745-2-12.

{¶ 64} Here, the Big Walnut Creek Watershed had been placed on the Section 303(d) list as an impaired waterway because it was not meeting water quality standards. Its placement on the list required that a TMDL be performed. As part of the development of the Big Walnut Creek TMDL, the Director initiated an analysis of the watershed, including Blacklick Creek, and eventually determined there was a reasonable association between nutrient enrichment and the discharges from the Tussing Road plant, and that the problem could be addressed by limiting the phosphorus discharges from the plant. During the development of the TMDL, it was determined there was a direct correlation

between a reduction in point-source discharges of phosphorus and reaching attainment. The analysis set forth in the TMDL plan proposed by the Ohio EPA and adopted by the U.S. EPA supports this conclusion. The sources of phosphorus identified for Blacklick Creek included both point sources and non-point sources, and the .5 mg/l phosphorus limit was determined after conducting an analysis of how to allocate the pollutant loads among all of the sources.

{¶ 65} The TMDL was approved by the U.S. EPA as an effective plan to reduce phosphorus loading and consequently reduce nutrient enrichment via reductions in phosphorus discharge into the Big Walnut Creek Watershed. The TMDL was based on data taken directly from Big Walnut Creek and incorporated into the federally approved TMDL. Fairfield County criticizes the Ohio EPA's analysis and conclusions regarding the role of the Tussing Road plant in causing nutrient enrichment in Blacklick Creek. While Fairfield County may disagree with the analysis, it is not speculative. It was supported by the work conducted by Fancher and reflected in his April 2006 memorandum, which reports a fluctuation in dissolved oxygen levels, typically associated with nutrient enrichment, based on data collected upstream of the plant at RM 11.25 and downstream of the plant at RM 10.20.

{¶ 66} Despite Fairfield County's challenges to the analysis of the data collected, the underlying evidence relied upon by the Director via the Big Walnut Creek TMDL provides a sufficient factual foundation for the phosphorus limitation in the Tussing Road permit (subject to any possible required consideration of the technical feasibility and economic reasonableness of it, which shall be discussed later) and constitutes reliable, probative, and substantial evidence to support ERAC's order as to the lawfulness and reasonableness of the Director's action. Moreover, the TMDL plan used to establish the NPDES permit limit for phosphorus was developed in accordance with state and federal law.

## **2. Imposition of Limits Based On TMDL**

{¶ 67} ERAC, in essence, determined that the Director's issuance of the NPDES permit containing the .5 mg/l phosphorus limit set forth in the Big Walnut Creek TMDL was consistent with the parameters of the TMDL and the NPDES process as established in

the CWA and the applicable Ohio statutes and regulations. We agree with that determination.<sup>4</sup>

{¶ 68} Pursuant to 40 C.F.R. 122.44(d)(1)(vii)(B), the Director, in developing water quality-based effluent limits for an NPDES permit is required to ensure that the effluent limits developed to protect a narrative water quality criterion and/or a numeric water quality criterion are consistent with the "requirements of any available wasteload allocation for the discharge prepared by the State and approved by the EPA pursuant to 40 CFR 130.7." Therefore, because the U.S. EPA approved 60 TMDLs in the TMDL plan for the Big Walnut Creek Watershed, and that TMDL plan specifically assigned a total phosphorus limit of .5 mg/l to the Tussing Road plant, the Director was required to set an effluent limit that is "consistent" with that TMDL plan.

{¶ 69} Contrary to Fairfield County's assertion, ERAC's decision neither states nor implies that the presence of an allocation in a TMDL automatically translates to the imposition of that exact limitation in the NPDES permit. In fact, ERAC's decision properly cited to the "Decision Document for Approval of Big Walnut Creek Watershed TMDL Report" ("decision document") that accompanied the U.S. EPA's September 26, 2005 approval of the TMDL plan for Big Walnut Creek Watershed. The decision document states in relevant part as follows:

5. Wasteload Allocations (WLAs)

EPA regulations require that a TMDL include WLAs, which identify the portion of the loading capacity allocated to individual existing and future point source(s) (40 C.F.R. §130.2(h), 40 C.F.R. §130.2(i)). In some cases, WLAs may cover more than one discharger, e.g., if the source is contained within a general permit.

The individual WLAs may take the form of uniform percentage reductions or individual mass based limitations for dischargers where it can be shown that this solution meets WQSS and does not result in localized impairments. *These individual WLAs may be adjusted during the NPDES permitting process. If the WLAs are adjusted, the individual effluent limits for each permit issued to a discharger on the impaired water must be consistent with the assumptions and requirements of the adjusted WLAs in the TMDL. If the*

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<sup>4</sup> This is without considering the technical feasibility and economic reasonableness component, which shall be addressed separately with the third assignment of error and the first cross-assignment of error as raised in Fairfield County's brief and the Director's cross-brief, respectively.

*WLAs are not adjusted, effluent limits contained in the permit must be consistent with the individual WLAs specified in the TMDL. If a draft permit provides for a higher load for a discharger than the corresponding individual WLA in the TMDL, the State/Tribe must demonstrate that the total WLA in the TMDL will be achieved through reductions in the remaining individual WLAs and that localized impairments will not result. All permittees should be notified of any deviations from the initial individual WLAs contained in the TMDL. EPA does not require the establishment of a new TMDL to reflect these revised allocations as long as the total WLA, as expressed in the TMDL, remains the same or decreases, and there is no reallocation between the total WLA and the total LA.*

(Emphasis added.)

{¶ 70} Notably, as ERAC pointed out, individual WLAs may be adjusted during the NPDES permitting process, if the adjustments were made pursuant to the U.S. EPA's prescribed standards. Again, these standards require that: (1) any individual adjustments are "consistent with the assumptions and requirements of the adjusted WLAs in the TMDL;" (2) where a draft permit allows a higher discharge load than a corresponding individual WLA in the TMDL, the Ohio EPA must show that the total WLA will be met via adjustments in other individual WLAs and that localized impairments will not occur due to the adjustment; (3) if an adjustment is made to an individual WLA, all permittees must be notified of the changes; and (4) if allocations are revised, the Ohio EPA is not required to establish a new TMDL, so long as the total WLA remains the same or a reallocation between load adjustments and WLAs does not occur. ERAC decision, at ¶ 77.

{¶ 71} Based upon the foregoing analysis, it is clear that the U.S. EPA granted the Ohio EPA authority to make adjustments to the WLA in the NPDES permitting process, so long as certain guidelines were followed. Although modifying the individual WLAs is *not a requirement, it is an option available* to the Ohio EPA, which allows the Ohio EPA to then modify individual WLAs for point sources. However, the total WLA must remain the same and a reallocation between load adjustments and WLAs cannot occur. Yet, the Director also clearly has the option to simply impose in the NPDES permit the limitation set forth in the TMDL, since the effluent limits must be consistent with the WLA approved in the TMDL plan.



### **3. The Associations Report**

{¶ 72} Next, Fairfield County argues the .5 mg/l phosphorus limit is unlawful because it is based on an unpromulgated "target value" for phosphorus that merely appears in the associations report.<sup>5</sup> Fairfield County argues it is unlawful for Ohio EPA to regulate on the basis of unpromulgated standards. Fairfield County further argues the associations report is not a valid factual foundation for the phosphorus limit, stating the associations report fails to establish a cause-and-effect relationship between a particular amount of phosphorus in a stream and the viability of a healthy population of aquatic organisms. Fairfield County asserts other factors, such as habitat and urbanization, also have a significant effect on the biological community.

{¶ 73} The Director, on the other hand, argues that the associations report was simply used as a guidance document to craft a plan to reach attainment of water quality standards. As such, the Director submits its utilization to develop the Big Walnut Creek TMDL was proper and does not constitute a regulation on the basis of an unpromulgated standard.

{¶ 74} The associations report documents a study showing the relationship between nutrients and their effect on aquatic biota in Ohio's rivers and streams. It includes proposed total phosphorus target concentrations based upon concentrations of nutrients observed in communities with an acceptable range of biological performance. This information (particularly the .11 mg/l "target value") was then used as a tool to assist in developing the Big Walnut Creek TMDL.

{¶ 75} The associations report does in fact suggest an association between phosphorus loading and aquatic communities. However, because the data in the associations report is abstract evidence which is not specific to Blacklick Creek, Fairfield County argues the data in the associations report itself fails to establish a direct causal relationship between the particular discharge of phosphorus by the Tussing Road plant and attainment in Blacklick Creek, and therefore its usage is improper. Notably, Fairfield County has not demonstrated that such a relationship is required when the report establishes that there is a general association between phosphorus loading and aquatic

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<sup>5</sup> The associations report states that it is a "technical bulletin," *not* the Ohio EPA policy. It sets forth the conclusions of a study examining the relationship between nutrients and aquatic communities based upon the collection of biological and water quality samples from Ohio rivers and streams. It contains nutrient chemistry, biological community performance, and habitat data from various sites.

communities and when it is simply used as a tool to assist in developing a TMDL for a waterbody. Furthermore, as noted in the associations report, the report is a "technical bulletin," not an Ohio EPA policy.

#### **4. Unpromulgated Standards**

{¶ 76} Furthermore, use of the associations report here does not rise to the level of regulating based upon unpromulgated standards. The phosphorus limit in the NPDES permit comes from the properly promulgated Big Walnut Creek TMDL. Here, a properly developed and federally approved TMDL allocation was incorporated into the NPDES permit for the Tussing Road plant. The Director did not impose an unpromulgated guideline directly into the permit. This distinguishes this case from that of *Jackson Cty. Environmental Commt. v. Schregardus*, 95 Ohio App.3d 527 (10th Dist.1994), in which we found that the guidelines in that case, which set standards for the "safe" application of paper mill sludge under certain conditions, were in fact "rules" that should have been formally promulgated. In *Jackson Cty.*, unpromulgated guidelines were placed directly into a permit. That is not what occurred here. Therefore, we reject Fairfield County's argument.

#### **5. Meaningful Review**

{¶ 77} Finally, Fairfield County argues ERAC's conclusion that the TMDL functionally imposes a mandatory limit for the NPDES permit means that as a consequence, the NPDES permit limitations are not subject to meaningful review. Because there is no procedure to obtain meaningful review at the time the Director submits the TMDL to the U.S. EPA (a federal process), Fairfield County argues parties must have the right to a review when the NPDES permit is issued, if the permit contains effluent limits based upon the TMDL. Fairfield County argues that ERAC's decision does not allow this and thus, it fails to meet due process requirements.

{¶ 78} The Fourteenth Amendment of the United States Constitution and Article I, Section 16, of the Ohio Constitution require that administrative proceedings comply with due process. *Mathews v. Eldridge*, 424 U.S. 319 (1976). To comply with the requirements of procedural due process, government agencies must provide notice and an opportunity for a hearing before depriving individuals of their protected property interests. *Id.*, citing *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985). A "fundamental requirement of due process is the opportunity to be heard 'at a meaningful

time and in a meaningful manner.' " *Mathews* at 333, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See also *State ex rel. Plain Dealer Publishing Co. v. Floyd*, 111 Ohio St.3d 56, 2006-Ohio-4437, ¶ 45.

{¶ 79} "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' " *Mathews* at 348, quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Black, J., concurring). "All that is necessary is that the procedures be tailored, in light of the decision to be made, to 'the capacities and circumstances of those who are to be heard,' \* \* \* to insure that they are given a meaningful opportunity to present their case." *Mathews* at 349, quoting *Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970).

{¶ 80} Fairfield County had the opportunity to challenge the phosphorus limitation during the NPDES permitting process. Furthermore, Fairfield County has not demonstrated how the process here violates due process. The mere fact that the Ohio EPA is required to impose effluent limitations in NPDES permits which are consistent with the TMDLs approved by the U.S. EPA, pursuant to 40 C.F.R. 122.44(d)(1)(vii)(B) and the U.S. EPA's decision document, does not translate into a denial of due process, in light of the decision to be made by the Ohio EPA. See *Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140, 143 (D.C.Cir.2006) ("Once approved by EPA, TMDLs must be incorporated into permits allocating effluent discharges among all pollution sources, including point sources \* \* \* and non-point sources"). See also 40 C.F.R. 122.44(d)(1)(vii)(B) (permitting authority required to establish effluent limits "consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA").

{¶ 81} In conclusion, we find ERAC did not err in ruling the Director had a valid factual foundation for the phosphorus limit set forth in the Tussing Road permit. Therefore, we overrule Fairfield County's first assignment of error.

## **VII. SECOND ASSIGNMENT OF ERROR—IS THERE A VALID, FACTUAL FOUNDATION FOR THE TDS LIMITS IMPOSED IN THE PERMIT?**

### **A. Fairfield County's Argument**

{¶ 82} In its second assignment of error, Fairfield County argues ERAC erred in finding the Director had a valid factual foundation for the TDS effluent limits imposed in

the NPDES permit because the ruling is not supported by reliable, probative, and substantial evidence and is not in accordance with law.

{¶ 83} More specifically, Fairfield County argues that the TDS limit is unrelated to the attainment of the applicable biological criteria, since Blacklick Creek is currently in attainment without a TDS limit, and therefore, the imposition of the TDS limit is unlawful and unreasonable. In essence, Fairfield County argues that because the aquatic life is not being materially harmed by TDS, it is unnecessary to impose a TDS limit to protect Blacklick Creek and keep it in attainment when it is already in attainment. Thus, Fairfield County argues there is no "direct correlation" between limiting TDS from the Tussing Road plant and the attainment of water quality standards, and ERAC should have found the limitation imposed was not supported by a valid factual foundation.

#### **B. The Director's Argument**

{¶ 84} The Director argues the TDS limit for the Tussing Road plant is supported by reliable, probative, and substantial evidence and meets the statewide water quality standard for TDS. The Director asserts he is not prohibited from imposing restrictions on TDS. He submits that the Ohio EPA established a proper water quality based effluent limit for TDS by assessing the reasonable potential for TDS to cause or contribute to an excursion of an applicable water quality standard and by using the formula found in Ohio Adm.Code 3745-2-06. Even though Ohio Adm.Code 3745-01-07(A)(6)(a) allows the Director to develop or approve a justification for a site-specific water quality criterion or variance, in this situation, neither the Director nor Fairfield County chose to exercise that option. In the absence of a variance, the Director submits he was not required to establish a site-specific standard, and thus he possessed a valid, factual foundation for establishing a TDS limit in accordance with the statewide water quality standard for TDS.

#### **C. Analysis**

{¶ 85} Fairfield County's basic argument is that there is no direct correlation between limiting TDS from the Tussing Road plant and the attainment of water quality standards, since Blacklick Creek is in attainment, despite the fact that the Tussing Road plant has discharged in amounts higher than permitted for several years. Because Blacklick Creek is in attainment, Fairfield County submits the permit limit, which is based upon a statewide water quality standard for TDS, is unnecessary, lacks a valid factual foundation, and it should not be imposed, pursuant to Ohio Adm.Code 3745-1-

07(A)(6)(a). Fairfield County argues that, if the Director wishes to impose a TDS limit in the permit, the Director should follow the procedures in Ohio Adm.Code 3745-1-07(A)(6)(a)(i) or (ii) to develop a justification for a site-specific water quality criterion or to establish water quality based effluent limits that are consistent with attainment of the designated use.

**1. Ohio's Statewide Water Quality Standard and Ohio Adm.Code 3745-1-07**

{¶ 86} The Ohio EPA has, by regulation, a chemical-specific water quality standard for TDS of 1500 mg/l. This water quality standard was used to formulate the 1,646 mg/l TDS limit set forth in the Tussing Road permit, along with a monthly average loading limitation of 18,692 kg per day.

{¶ 87} Fairfield County argues imposition of this statewide standard lacks a valid factual foundation, based upon Ohio Adm.Code 3745-1-07. In relevant part, Ohio Adm.Code 3745-1-07 states as follows:

(A) Water quality standards contain two distinct elements: designated uses; and numerical or narrative criteria designed to protect and measure attainment of the uses.

\* \* \*

(6) Biological criteria presented in table 7-15 of this rule provide a direct measure of attainment of the warmwater habitat, exceptional warmwater habitat and modified warmwater habitat aquatic life uses. Biological criteria and the exceptions to chemical-specific or whole-effluent criteria allowed by this paragraph do not apply to any other use designations.

(a) Demonstrated attainment of the applicable biological criteria in a water body will take precedence over the application of selected chemical-specific aquatic life or whole-effluent criteria associated with these uses **when the director**, upon considering appropriately detailed chemical, physical and biological data, **finds that one or more chemical-specific or whole-effluent criteria are inappropriate**. In such cases the options which exist include:

(i) The director may develop, or a discharger may provide for the director's approval, a justification for a site-specific water quality criterion according to methods described in "Water

Quality Standards Handbook, 1983, U.S. EPA Office of Water”;

(ii) The director may proceed with establishing water quality based effluent limits consistent with attainment of the designated use.

(Emphasis added.)

{¶ 88} Ohio Adm.Code 3745-1-07 sets forth the Director's options in choosing a chemical-specific or whole-effluent criteria where there is demonstrated attainment of the applicable biological criteria in a particular waterbody. It provides that where there is such demonstrated attainment, that *attainment takes precedence* over the application of selected chemical-specific aquatic life or whole-effluent criteria *when the director*, upon considering certain data, *finds that one or more chemical-specific or whole-effluent criteria are inappropriate.* (Emphasis added.) Under those circumstances, the following options exist: (1) the director may develop a justification for a site-specific water quality criterion; (2) the discharger may provide to the director for approval a justification for a site-specific water quality criterion; or (3) the director may establish water quality based effluent limits consistent with attainment.

{¶ 89} In its decision, ERAC found the following:

Certainly in reviewing the data before him and selecting a TDS limit above the statewide water quality criterion for TDS, the Director established a water quality based effluent limit "consistent with attainment of the designated use." The limit for TDS is 1500 mg/l \* \* \* In selecting the TDS design flow limit of 1646 mg/l and monthly average loading limitation of 18,692 kg per day, the Director observed, that although Fairfield County's TDS discharge exceeded 1500 mg/l, the portion of the stream affected by Fairfield County was considered in attainment for the water's designated uses and data at the site routinely demonstrated that TDS discharged from the Tussing Plant was not negatively affecting the water body.

ERAC decision, at ¶ 95.

{¶ 90} In its brief, Fairfield County argues ERAC's analysis regarding TDS was flawed in two ways: (1) ERAC erred by noting that the permit limit of 1,646 mg/l of TDS is greater than the numeric water quality standard of 1,500 mg/l, since the concentration of solids downstream of the plant meets water quality standards; and (2) ERAC failed to

recognize the lack of a direct correlation between limiting TDS from the Tussing Road plant and the attainment of water quality standards, given that there is un rebutted evidence that Blacklick Creek is in attainment. Therefore, Fairfield County submits ERAC should have concluded the TDS permit limit, which was based upon chemical specific criterion (i.e., the 1,500 mg/l water quality standard), was not supported by a valid factual foundation.

{¶ 91} Fairfield County disputes the Director's claim that Fairfield County was required to develop a justification for a site-specific water quality criterion to use as a substitute. Instead, Fairfield County argues this was an obligation of the Director, not Fairfield County. Fairfield County argues it met its burden of showing the TDS limit was unrelated to the attainment of the applicable biological criteria, and thus elimination of the TDS limit is required because it is unlawful and unreasonable.

## **2. Water Quality Based Effluent Limits**

{¶ 92} Effluent limits in NPDES permits fall into two categories: technology-based effluent limits and water quality-based effluent limits ("WQBELs"). *Catskill Mts. Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir.2006). WQBELs are based on the impact a particular discharge has on its receiving waters. Mark A. Ryan, *The Clean Water Act Handbook*, Chapter 2, at 26 (2d Ed.2003). "Water quality standards are retained as a supplementary basis for effluent limitations \* \* \* so that numerous point sources, *despite individual compliance with effluent limitations*, may be further regulated to prevent water quality from falling below acceptable levels." (Emphasis added.) *Ford Motor Co. v. United States EPA*, 567 F.2d 661, fn. 12 (6th Cir.1977), citing the Clean Water Act, Sections 301(e), 302, 303, 33 U.S.C. 1311(e), 1312, 1313 (1970 Ed., Supp. IV).

{¶ 93} "An NPDES permit must contain a WQBEL for any discharge that either will cause or has the reasonable potential to cause or to contribute to an excursion above a water quality standard." *American Iron & Steel Inst. v. EPA*, 115 F.3d 979, 999 (D.C.Cir.1997), citing 40 C.F.R. 122.44(d)(1). Pursuant to the U.S. EPA regulations, a permitting authority " 'must use all relevant available data, including facility-specific effluent monitoring data where available' " and apply " 'procedures which account for existing controls on point and non-point sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing ... and, where appropriate, the dilution of the effluent in the receiving water' "

when determining whether a pollutant discharge has the reasonable potential to cause an excursion above the water quality standard. *Id.* at 999, quoting 40 C.F.R. 122.44(d)(1)(ii).

### **3. Applicable Statutes and Rules: Selection of a TDS Limit**

{¶ 94} Ohio Adm.Code 3745-1-04 sets forth criteria applicable to all surface waters in Ohio. Specifically, under Ohio Adm.Code 3745-1-04(A), these waters must be free from suspended solids or other substances that enter the waters due to human activity and that will settle and form objectionable sludge deposits or that will adversely affect aquatic life. Also, Ohio Adm.Code 3745-33-05(A)(1)(a) requires that NPDES permits specify the maximum levels of pollutants that may be discharged in order to ensure compliance with applicable water quality standards. Furthermore, pursuant to R.C. 6111.041, the Director must establish state water quality standards to apply to the various waters of the state and adopted in accordance with Section 303 of the CWA. In addition, R.C. 6111.03(J)(3) requires the Director to impose effluent limits as conditions of NPDES permits where necessary and appropriate and to achieve and maintain water quality standards adopted under R.C. 6111.041.

{¶ 95} The federally approved statewide water quality standard for TDS is 1,500 mg/l. Here, based on testimony from Owen, the Director used data submitted by Fairfield County during the last permitting process, as well as monitoring data since the last permit was issued, and determined the TDS were at a level that would exceed the waste allocation for Blacklick Creek and cause violations of the statewide water quality standard for TDS. (Tr. Vol. III, 133.)

{¶ 96} Under Ohio Adm.Code 3745-33-07(A)(1)(a), final effluent limitations are required for pollutants that are assigned to group five of the pollutant assessment. In the instant case, the Director presented evidence, through the testimony and evidence introduced by Owen, which demonstrated that the TDS for the Tussing Road plant were in group five. (*See* Tr. Vol. III, 144-51; Joint exhibit No. 11 (Fact Sheet for NPDES Permit) at 11-43; and Joint exhibit No. 8 (2005 Tussing Road WLA information) at 8-6/8-7). Ohio Adm.Code 3745-2-06(B)(1) states that water quality-based effluent limits shall be recommended for any group five pollutant. *See also* former Ohio Adm.Code 3745-33-01(GG)(5) (" 'Group five' pollutants have the highest potential based on water quality data to cause or contribute to a water quality excursion; permit limitations are generally warranted based solely on water quality considerations").



{¶ 97} Based upon this, the Ohio EPA determined it was necessary to include an effluent limitation for TDS. In order to incorporate such a limit into the NPDES permit, the Ohio EPA established a water quality-based effluent limit using the formula set forth in Ohio Adm.Code 3745-2-06 to determine the reasonable potential of the TDS to cause or contribute to an excursion of any applicable water quality standard. A limitation of 1,646 mg/l of TDS was established, as well as a monthly average loading limitation of 18,692 kg per day.

{¶ 98} Fairfield County takes issue with ERAC's notation that the Director "select[ed] a TDS limit above the statewide water quality criterion for TDS." However, we do not interpret this observation to be indicative of a misunderstanding on the part of ERAC and further believe it is of no consequence. Instead, we believe ERAC was simply supporting its finding that the Director had established a water quality-based effluent limit which was "consistent with attainment of the designated use." See Ohio Adm.Code 3745-1-07(A)(6)(a)(ii).

{¶ 99} As noted by Fairfield County, Ohio Adm.Code 3745-01-07(A)(6)(a) does provide that demonstrated attainment takes precedence over the application of certain chemical-specific aquatic life or whole-effluent criteria, but it also imposes the following condition: "*when the director, upon considering appropriately detailed chemical, physical and biological data, finds that one or more chemical-specific or whole effluent criteria are inappropriate.*" (Emphasis added.) It further states that in such cases, there are three available options, one of which permits the Director to develop a site-specific water quality criterion. The second option permits the discharger (Fairfield County) to develop a justification for a site-specific water quality criterion. The third option allows the Director to proceed with establishing water quality-based effluent limits consistent with the attainment of the designated use. None of these prohibit the Director from imposing restrictions on TDS.

{¶ 100} Pursuant to Ohio Adm.Code 3745-01-07(A)(6)(a), the language allowing for the development of a site-specific criterion is not mandatory, but instead permissive. The Director has the authority to create such a standard on his own, but he is not required to do so pursuant to this administrative rule. Here, the Director did not exercise that authority or make the finding that "one or more chemical-specific or whole effluent criteria are inappropriate." Alternatively, a discharger also has the authority to develop a

justification for a site-specific water quality criterion and submit it to the Director for approval. Fairfield County did not exercise this option.

{¶ 101} Finally, we find Fairfield County's argument regarding the lack of a direct correlation between limiting TDS from the Tussing Road plant and the attainment of water quality standards to be without merit. While it is true that there is unrebutted evidence that Blacklick Creek is in attainment, in spite of the fact that the discharge of TDS was above the chemical specific criterion, there is reliable, probative, and substantial evidence demonstrating the reasonable potential for TDS to cause or contribute to an excursion of this water quality standard, based upon our analysis as set forth above.

{¶ 102} Therefore, despite Fairfield County's claims to the contrary, Fairfield County did not demonstrate that the TDS permit limit lacked a valid factual foundation, given that there was reliable, probative, and substantial evidence and testimony supporting a reasonable potential to cause or contribute to an exceedance of water quality standards. Accordingly, Fairfield County's second assignment of error is overruled.

**VIII. FAIRFIELD COUNTY'S THIRD ASSIGNMENT OF ERROR AND THE DIRECTOR'S FIRST CROSS-ASSIGNMENT OF ERROR—THE TECHNICAL FEASIBILITY AND ECONOMIC REASONABLENESS ANALYSIS.**

{¶ 103} In its third assignment of error, Fairfield County asserts ERAC's failure to find that the TDS and phosphorus effluent limits imposed in the NPDES permit were technically infeasible and economically unreasonable is not in accordance with law. The Director has filed a cross-appeal containing a cross-assignment of error which also addresses technical infeasibility and economic reasonableness and, in essence, argues a technical feasibility and economic reasonableness analysis is not required because it is inconsistent with the CWA. Because we believe the two arguments are intertwined, we shall address this assignment of error and the Director's first cross-assignment of error together.

{¶ 104} By way of background, the Director did not engage in an analysis of technical feasibility and economic reasonableness in establishing a water quality-based effluent limit for phosphorus and TDS in the NPDES permit issued to Fairfield County. On appeal to ERAC, ERAC found that the Director was required to conduct an economic reasonableness and technical feasibility analysis of the phosphorus and TDS limitations

prior to issuing a permit imposing these limitations. ERAC further determined these issues should be returned to the Director for his consideration.

#### **A. The Director's Argument**

{¶ 105} The Director disagrees with ERAC's determination that a technical feasibility and economic reasonableness analysis was required and argues this finding is contrary to law. The Director asserts he was not required to evaluate the economic reasonableness and technical feasibility of the phosphorus and TDS limitations. The Director makes two general arguments in support of his position: (1) under the authority delegated to him by the CWA, the Director does not have the ability to consider economic reasonableness or technical feasibility in making pollutant limitation determinations; and (2) even if that analysis were consistent with the purpose of the CWA, no analysis is required here because R.C. 6111.03(J)(3) provides an exemption from the analysis where it would be contrary to the CWA, which it is in these circumstances, due to the existence of the limitations set forth in the TMDL.

{¶ 106} First, the Director argues he was not required to perform an economic reasonableness or technical feasibility analysis because neither the CWA nor Ohio law requires such an analysis in establishing a water quality-based effluent limit unless that limit is being approved in conjunction with a site-specific water quality variance. The Director argues the analysis would be inconsistent with the requirements of the CWA unless it was conducted in the context of a request from the county for a water quality variance. Because no such variance was requested here, the Director argues a technical feasibility and economic reasonableness analysis was not legally required. The Director submits ERAC improperly interpreted his obligations under R.C. 6111.03(J)(3) when it determined the Director was required to conduct this analysis.

{¶ 107} Even if such an analysis were required outside the context of a variance, the Director further argues he is without authority to perform the analysis because he only possesses delegated authority, which does not authorize this analysis, since it is contrary to the purpose and the mandates of the CWA. The Director contends the federal/state partnership would be threatened if he set limits which were less protective than those required to reach attainment and/or to maintain the designated use. Furthermore, the Director submits it is contrary to the purpose of the CWA to require an analysis of economic reasonableness or technical feasibility because a statute cannot be technology-

forcing while still allowing a technical feasibility analysis. The Director argues this analysis would be inconsistent with the requirements of the CWA.

{¶ 108} Next, the Director submits that the Ohio General Assembly intended for the economic reasonableness and technical feasibility analysis set forth in R.C. 6111.03(J)(3) to be applied to technology-based limits and that it cannot be considered when developing water quality-based effluent limits that are protective of designated uses. The Director argues it would be inconsistent with the CWA to require the Director to conduct this analysis with respect to the imposition of the water quality-based effluent limitations in this permit because effluent limitations designed to meet water quality standards are more stringent than technology standards, and are not subject to a cost-benefit analysis. The Director relies on *In re Perfect Packed Prods. Co.*, EPA GCO 37, to support its position.

{¶ 109} The Director further submits that he is obligated, pursuant to the CWA and the authority delegated to him, to impose the specified limitations set forth in the TMDL for Big Walnut Creek Watershed. The Director asserts he is required to establish a pollutant limitation consistent with the TMDL and that integrating the TMDL into the NPDES permit does not allow for an economic reasonableness and technical feasibility analysis. The Director argues he is obligated by the CWA to impose the pollutant limitations set forth in the TMDL for the Big Walnut Creek Watershed. Therefore, any consideration of economic reasonableness and technical feasibility would be irrelevant, because regardless of the results, the TMDL limit must be incorporated into the permit. The Director adds that this court does not have jurisdiction to review a TMDL after it is approved and argues that Fairfield County did not challenge the U.S. EPA's final approval of TMDL limits.

{¶ 110} Additionally, the Director contends the plain language of R.C. 6111.03(J)(3) exempts him from conducting the analysis where it would be contrary to the CWA. The Director argues that adopting a limitation inconsistent with the TMDL would be contrary to the CWA.

{¶ 111} Moreover, the Director argues ERAC effectively substituted its judgment for that of the Director in determining that the Director was required to engage in an economic reasonableness and technical feasibility analysis. The Director submits that decision by ERAC essentially determined that the Director should have evaluated whether

to increase the pollutant limitation for the plant and reduce the limitations for a different point source, rather than allowing the Director to implement the limitations exactly as set forth in the TMDL. The Director contends his decision to choose one option over the other is an exercise of his independent judgment and that his decision was supported by law and was reasonable under these circumstances. Once the Director decides to incorporate the TMDL limit into the NPDES permit, the Director argues he cannot look at the economic reasonableness and/or technical feasibility of the limitation because an adjustment cannot be made to the pollutant limitation, since it could require use of a standard inconsistent with the TMDL, and a less restrictive limit would violate the Director's obligations.

{¶ 112} With respect to TDS, the Director argues the TDS limitation he imposed was also required by the CWA because he was required to establish an effluent limit that was protective of the statewide water quality standard. The Director asserts the federally approved statewide water quality standard for TDS dictates the pollutant limitation set forth in the permit.

{¶ 113} In converting the federally approved statewide water quality standard into an effluent limit that can be integrated into an individual NPDES permit, the Director established a water quality-based effluent limit for TDS using the formula set forth in Ohio Adm.Code 3745-2-06. The Director argues that formula established the pollutant discharge limit that would allow Blacklick Creek to comply with the standard, and implementation of a less stringent limit would violate the requirement to control all pollutants which are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion about the statewide water quality standard. Again, the Director submits that consideration of the economic reasonableness or technical feasibility of a pollutant limitation is only required by R.C. 6111.03(J)(3) when it is consistent with the CWA, and that it would not be consistent here, since he is required to establish a limit consistent with the statewide water quality standard for TDS.

{¶ 114} In conclusion, the Director contends it was not unlawful for him not to consider the economic reasonableness and/or technical feasibility of either the phosphorus or TDS limitations. Nevertheless, while the Director submits that an economic reasonableness and technical feasibility analysis is not required, he also argues that, in the event this court determines that such an analysis is in fact required, the

appropriate remedy is to remand the permit back to the Director for the analysis, rather than having ERAC make a determination on the issue.

### **B. Fairfield County's Argument**

{¶ 115} Fairfield County argues the plain language of R.C. 6111.03(J)(3) requires the Director to consider technical feasibility and economic reasonableness. Based upon the language in the statute, Fairfield County contends that when setting the permit limits, the Director must give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of the permit limits, along with evidence relating to conditions calculated to result from that action and any related benefits to the people of Ohio. Fairfield County argues the Director's statutory requirement to consider technical feasibility and economic reasonableness is consistent with the CWA and disputes the Director's contention that the CWA prohibits him from conducting this analysis. Fairfield County cites to *Salem*, and asserts the Director must comply with all applicable statutory mandates in issuing permits.

{¶ 116} Fairfield County argues the TMDL does not override R.C. 6111.03 or other state laws and regulations by automatically becoming the standard that the Director is absolutely required to enforce without any discretion to make adjustments. Fairfield County asserts the Director's claims to the contrary are incorrect because: (1) any attempt by Fairfield County to challenge the TMDL prior to this would have been unripe, resulting in a dismissal; (2) 40 C.F.R. 122.44(d)(1)(vii)(B) does not require the phosphorus limit to be included in the permit because the limit was not developed to protect a narrative or numeric water quality criterion, and because the WLAs are not requirements; (3) the Director failed to promulgate a TMDL implementation plan, which is required; and (4) under the Director's interpretation that the TMDL is a binding standard that requires compliance, it is therefore a rule, which must be properly promulgated before it can be enforced.

{¶ 117} Moreover, Fairfield County specifically argues Section 303(d) of the CWA does not require the imposition of specific effluent limitation in NPDES permits. Fairfield County disputes the Director's claim that 33 U.S.C. 1313(d) requires that permits must be consistent with the terms of the TMDL *and with the WLA therein*. Fairfield County argues the TMDL establishes the total amount of a pollutant that should be present in the stream, but it does not *require* the imposition of the specific WLAs in NPDES permits.

Instead, Fairfield County argues Section 303(d)(1)(C) only requires that the load be established at a level necessary to implement the applicable water quality standards. Fairfield County submits that the Director's rigid adherence to the phosphorus allocation as a "requirement" is contradicted by the U.S. EPA document approving the TMDL.

{¶ 118} Additionally, Fairfield County disputes the Director's claim that his decision to include a phosphorus limit is a matter of discretion that is functionally unreviewable. Fairfield County argues that the Director's decision cannot be upheld if it was unlawful or unreasonable. Fairfield County argues neither the TMDL nor any provision of federal law requires the imposition of the .5 mg/l phosphorus limit in the permit.

{¶ 119} Finally, Fairfield County disagrees with ERAC's approach to the technical feasibility and economic reasonableness issue. Rather than returning this matter to the Director for his consideration, Fairfield County argues it is ERAC's duty to make this determination, based upon the evidence presented to it by Fairfield County, which it asserts demonstrates that the limits are not technically feasible and/or are economically unreasonable. Otherwise, Fairfield County complains that the Director in essence receives two bites at the apple, since the Director initially failed to rebut this evidence. Fairfield County cites to R.C. 3745.05(G), Ohio Adm.Code 3746-11-03, and *Salem*, in support of its position that ERAC is required to make the findings based on the evidence presented.

### **C. Analysis**

#### **1. R.C. 6111.03**

{¶ 120} R.C. 6111.03 sets forth the powers of the Director of the Ohio EPA. Under R.C. 6111.03(J)(1), the Director may issue permits for the discharge of wastes "into the waters of the state, and for the installation or modification of disposal systems or any parts thereof in compliance with all requirements of the Federal Water Pollution Control Act and mandatory regulations." R.C. 6111.03(J)(2) provides that an application for a permit or renewal shall be denied if, inter alia, the Director determines that "the proposed discharge or source would conflict with an areawide waste treatment management plan adopted in accordance with section 208 of the Federal Water Pollution Control Act." R.C. 6111.03(J)(3) further provides as follows:

To achieve and maintain applicable standards of quality for the waters of the state adopted pursuant to section 6111.041 of

the Revised Code, the director shall impose, where necessary and appropriate, as conditions of each permit, *water quality related effluent limitations* in accordance with sections 301, 302, 306, 307, and 405 of the Federal Water Pollution Control Act and, to the extent consistent with that act, shall give consideration to, and base the determination on, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties from those wastes and to evidence relating to conditions calculated to result from that action and their relation to benefits to the people of the state and to accomplishment of the purposes of this chapter.

(Emphasis added.)

{¶ 121} The Director attempts to argue that the General Assembly intended for the economic reasonableness and technical feasibility analysis, as set forth in R.C. 6111.03(J)(3) to apply to technology based limits, not water quality-related effluent limits. +However, that is clearly not what the plain language of the statute says. See R.C. 6111.03(J)(3) ("the director shall impose, \* \* \* as conditions of each permit, *water quality related effluent limitations in accordance with* \* \* \* the Federal Water Pollution Control Act and, to the extent consistent with that act, shall give consideration to, and base the determination on, evidence relating to the technical feasibility and economic reasonableness"). (Emphasis added.)

{¶ 122} It is clear that the statute applies to water quality-based effluent limits. Thus, the issue becomes whether the requirement in R.C. 6111.03(J)(3), which applies to water quality-effluent limitations, is inconsistent with the CWA. If it is consistent, the analysis is required. If it is not consistent, then the Director is exempted from performing the analysis. The Director, in essence, argues that a technical feasibility and economic reasonableness analysis is not required because it is not consistent with the CWA.

## **2. Consideration of Technical Feasibility and Economic Reasonableness; Consistency with the CWA**

{¶ 123} The Director submits that consideration of technical feasibility and economic reasonableness is inconsistent with the requirements and purpose of the CWA. We disagree for the reasons set forth in our analysis below.



**(a) Historical Sources**

{¶ 124} The Director cites to an environmental treatise,<sup>6</sup> as well as various historical sources indicating that the CWA was implemented with the intention that it would be technology-forcing, rather than accepting of only water quality standards which were technologically feasible, and with the goal of finding the best technology to reduce water pollution to zero. Because of this intention and the corresponding goal, the Director argues it is contrary to the purposes of the CWA to require an analysis of economic reasonableness and/or technical feasibility of a pollutant limitation determination under R.C. 6111.03(J)(3).

{¶ 125} Fairfield County, however, argues that the statutorily required consideration of technical feasibility and economic reasonableness is consistent with the CWA. Citing to its own historical sources<sup>7</sup> and going back to the 1970's, Fairfield County asserts that the language requiring consideration of technical feasibility and economic reasonableness was part of Ohio's NPDES program when it was reviewed and approved by the U.S. EPA in March 1974. Fairfield County also cites to the statutory language contained in R.C. 6111.03(J)(4) in 1973, which required the Director, in imposing water quality-related effluent limitations in permits, to "give consideration to, and base his determination on, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties from such wastes." Am.Sub. S.B. No. 80; former R.C. 6111.03(J)(4).

{¶ 126} Consequently, Fairfield County argues these considerations were required by Ohio's NPDES program when the U.S. EPA first approved it and delegated authority to Ohio to issue permits and, thus, the Director's argument that the analysis is inconsistent with the CWA and the state will lose its delegated authority if the Director considers these factors, is without merit.

{¶ 127} Fairfield County further argues the consideration of costs versus benefits is consistent with the CWA, citing to a report by the Senate Committee on Public Works regarding the 1971 amendments to the Federal Water Pollution Control Act, in which the Committee stated there must be a reasonable relationship between costs and benefits and the state must make that determination on a case-by-case basis. The Director, on the

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<sup>6</sup> 2 Frank P. Grad, *Treatise on Environmental Law*, 3.03 (2009).

<sup>7</sup> *Discharges of Pollutants to Navigable Waters, Approval of State Programs*, 39 Fed.Reg. 26061 (July 16, 1974).

other hand, argues that this legislative history is inapplicable to the water quality-based effluent limits in dispute because it only applied in a limited situation used solely in attaining the 1983 goal of "fishable and swimmable" waters.

{¶ 128} Technology-forcing means that it compels industry to meet standards it cannot presently meet with the known standards available. Thus, it forces the development of new and better technology. We acknowledge that, as noted by the Director, the amendments to the 1972 legislation abandoned the idea that excessive effluent limits could make the water "too clean" because the limits would not be economically cost effective. See 2 Frank P. Grad, *Treatise on Environmental Law*, 3.03, 3-102 (2004). After that, "[t]he question is no longer how high must effluent standards be set in order to accomplish ambient water quality standards, but what technology can best be used, and how soon, to reduce water pollution to zero." *Id.*, citing S. Rep. No. 414 at 42.

{¶ 129} However, it is noteworthy that, although the 1977 amendments continued to include the statement of the policies and purposes of the 1972 Act, including the "zero pollution" goal, the 1977 amendments also demonstrate a partial relinquishment of that goal, in both the substantial postponement of earlier mandated standards, and in also dealing with "conventional" pollutants, where the law accepts continuing pollution on some level. 2 Frank P. Grad, *Treatise on Environmental Law*, 3.03, 3-103 (2004).

#### **(b) Other Federal Sources**

{¶ 130} The Director repeatedly argues that an economic reasonableness and technical feasibility analysis is not required for water quality-based effluent limits. The Director submits he may not, consistent with the CWA, consider economic reasonableness and technical feasibility when setting water quality-based effluent limits. The Director relies upon *In re Perfect Packed Prods. Co.*, to advance the position that a cost-benefit, or more specifically, a technical feasibility and economic reasonableness analysis is not required because the analysis would not be consistent with the CWA in these circumstances. In *In re Perfect Packed Prods. Co.*, the general counsel of the U.S. EPA stated that water quality standards must be applied by the U.S. EPA without resorting to a cost-benefit analysis of the type set forth in Section 302.

{¶ 131} However, in *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), the Supreme Court of the United States concluded that it was within the bounds of reasonable

interpretation to conclude that a cost-benefit analysis was not categorically forbidden and therefore it was permissible to have relied upon a cost-benefit analysis in some regulations under one of the CWA provisions, even though the analysis was not explicitly required. The court found: "As early as 1977, the agency determined that, while § 1326(b) does not require cost-benefit analysis, it is also not reasonable to 'interpret Section [1326(b)] as requiring use of technology whose cost is wholly disproportionate to the environmental benefit to be gained.'" *Id.* at 224, quoting *In re Public Serv. Co. of New Hampshire*, 1 E.A.D. 332, 340 (1977).

{¶ 132} The *Entergy Corp.* court further concluded: "[E]xtended consideration of the text of § 1326(b), and comparison of that with the text and statutory factors applicable to four parallel provisions of the Clean Water Act, lead us to the conclusion that it was well within the bounds of reasonable interpretation for the EPA to conclude that cost-benefit analysis is not categorically forbidden." *Id.* at 223.

{¶ 133} Granted, *Entergy Corp.*, referred to utilization of a cost-benefit analysis in the context of the use of technology-based limits, rather than water quality-based effluent limits. Nevertheless, the Director has failed to point to any provision of the CWA which explicitly or implicitly prohibits a cost-benefit analysis involving water quality based standards. Nor has the Director adequately explained how such an analysis is inconsistent under the circumstances here. The fact that an economic reasonableness and technical feasibility analysis is not explicitly *required* by federal law under the CWA does not mean that it is forbidden or inconsistent with the CWA. Moreover, Ohio law specifically provides for a technical feasibility and economic reasonableness analysis with respect to water quality-based limits, so long as it is not inconsistent with the CWA.

{¶ 134} Furthermore, other provisions of the CWA have allowed a balancing between economic costs and benefits. Even if the provision of the CWA cited by Fairfield County above was only applicable in the limited circumstances of attaining the 1983 goal of "fishable and swimmable" waters, there are other provisions which do permit a cost-benefits analysis. With the possible exception of the 1983 "fishable and swimmable" waters goal, however, we do acknowledge that the circumstances in which these analyses were permitted differs from the circumstances here (i.e., those involved technology based effluent limits, not water quality-based effluent limits). Notably, we have previously

required consideration of technical feasibility and economic reasonableness in an Ohio case involving the Clean Air Act.

**(c) Ohio Case Law**

{¶ 135} In *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274, 2005-Ohio-4982, the Supreme Court of Ohio reviewed the modification of a permit to operate issued by the Ohio EPA to a coal-loading facility. The Supreme Court determined the modification was issued without formal consideration of technical feasibility and economic reasonableness, in violation of R.C. 3704.03(R) and that "[c]onsideration of these factors is necessary to ensure that the balance between regulation and encouragement of business is properly struck." *Id.* at ¶ 20.

{¶ 136} We note that R.C. 3704.03 governs the powers of the director of environmental protection as they relate to air pollution. However, R.C. 3704.03(R) contains language that is substantially similar to that found in the statute at issue here, R.C. 6111.03(J)(3), which applies to water pollution. The relevant portion of R.C. 3704.03(R) states, in relevant part:

In the making of such orders, the director, to the extent consistent with the federal Clean Air Act, shall give consideration to, and base the determination on, evidence relating to the technical feasibility and economic reasonableness of compliance with such orders and their relation to benefits to the people of the state to be derived from such compliance.

{¶ 137} The *Sandusky Dock Corp.* court went on to find:

The director did not \* \* \* consider evidence relating to the technical feasibility and economic reasonableness of the action. Because the director's action was unlawful, and because ERAC took no steps to cure the defects in the director's action, but also failed to comply with R.C. 3704.03(R) by refusing to consider evidence relating to the technical feasibility and economic reasonableness of the director's action during its de novo hearing, ERAC's order affirming the director's action is not in accordance with law and must be reversed.

{¶ 138} We believe the analysis in *Sandusky Dock Corp.* is instructive here, even though it applies to the Clean Air Act, rather than the CWA, and that the technical feasibility and economic reasonableness analysis is required here as well.

**(d) The Incorporation of Specific Limits from the TMDL  
and Based on Statewide Water Quality Standards**

{¶ 139} The Director argues it is impossible and inconsistent with the CWA to perform a technical feasibility and economic reasonableness analysis because he is required to incorporate into the NPDES permit a phosphorus pollutant limitation that is consistent with the WLA established for the Tussing Road plant in the TMDL. Fairfield County, however, argues Section 303(d) of the CWA does not require the imposition of specific effluent limitations from the TMDL in NPDES permits and disputes the Director's claim that permits must be consistent with the terms of the TMDL *and with the WLA therein*. Fairfield County submits the TMDL establishes the total amount of a pollutant that should be present in the stream, but it does not require the imposition of the specific WLAs in the NPDES permits. Instead, Fairfield County argues Section 303(d)(1)(C) only requires that the load be established at a level necessary to implement the applicable water quality standards.

{¶ 140} Pursuant to the decision document accompanying the U.S. EPA's approval of the TMDL plan for Big Walnut Creek, the Director has the authority to adjust the individual allocations set forth in the TMDL during the NPDES permitting process as applied to a specific point source identified in the permit, so long as the total allocation in the TMDL is achieved. The decision document, as noted previously, states, in relevant part, as follows:

The individual WLAs may take the form of uniform percentage reductions or individual mass based limitations for dischargers where it can be shown that this solution meets WQs and does not result in localized impairments. These individual WLAs may be adjusted during the NPDES permitting process. If the WLAs are adjusted, the individual effluent limits for each permit issued to a discharger on the impaired water must be consistent with the assumptions and requirements of the adjusted WLAs in the TMDL. If the WLAs are not adjusted, effluent limits contained in the permit must be consistent with the individual WLAs specified in the TMDL. If a draft permit provides for a higher load for a discharger than the corresponding individual WLA in the TMDL, the State/Tribe must demonstrate that the total WLA in the TMDL will be achieved through reductions in the remaining individual WLAs and that localized impairments will not result.

{¶ 141} Furthermore, as previously noted, "each TMDL represents a goal that may be implemented *by adjusting pollutant discharge requirements in individual NPDES permits* or establishing nonpoint source controls." (Emphasis added.) *Arcadia* at 1144. "The theory is that *individual-discharge permits will be adjusted and other measures taken* so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL." (Emphasis added.) *Sierra Club* at 1025.

{¶ 142} Neither the Big Walnut Creek TMDL report nor the U.S. EPA's approval documents require automatic enforcement of the individual TMDL allocations, and thus they are "not set in stone." In fact, the Big Walnut Creek TMDL report states that some nutrient targets, such as phosphorus, "are not codified in Ohio's water quality standards; therefore, there is a certain degree of flexibility as to how they can be used in a TMDL setting." (Joint exhibit No. 13, 13-30.)

{¶ 143} Automatic implementation of the individual TMDL allocations exactly "as is" is not required in the NPDES permit. The TMDL and the other approval documents allow for adjustments to be made. Thus, the TMDL-derived phosphorus allocation for the Tussing Road plant is not mandatory, so long as any adjustments made to it still allow it to be consistent with the TMDL and the overall sum of the phosphorus pollutant in the waterbody complies with the TMDL. The TMDL does not confine the Director to simply implementing the limitation exactly as set forth in the TMDL. Instead, the Director has the option of increasing the limit for one point source and reducing the limit for a different point source within the waterbody. Because of this, neither the TMDL nor federal law requires the imposition of the .5 mg/l phosphorus limit in the permit. Rather, the limitation imposed for phosphorus must be consistent with the TMDL, meaning that adjustments could be made. Because the Director is not automatically required to implement the TMDL allocations into the NPDES permit, consideration of economic reasonableness and technical feasibility is not irrelevant or impossible with respect to the phosphorus limit.

{¶ 144} The Director also argues the TDS limitation he imposed in the permit is required by the CWA. He contends he is required to establish an effluent limit that is protective of the statewide water quality standard of 1,500 mg/l. Here, the formula set forth in Ohio Adm.Code 3745-2-06 was used to calculate the discharge limit that would allow Blacklick Creek to comply with this standard. The Director submits that if he

established a less-restrictive limit, it would be inconsistent with the CWA and 40 C.F.R. 122.44(d)(1)(i), which requires that the pollutant limitation "control" all pollutants which are or may be discharged at a level which will cause, has the reasonable potential to cause, or will contribute to an excursion above a state water quality standard, and because TDS are a group five pollutant, it has the highest likelihood of causing excursions or violations of water quality standards. The Director further argues this standard has been federally approved and therefore it dictates the limit that must be in the permit.

{¶ 145} Fairfield County, however, submits that the Director can consider economic reasonableness and technical feasibility and that it is not inconsistent with the CWA. Fairfield County points to Ohio Adm.Code 3745-33-7(D)(10), in which the Director promulgated a variance with respect to a tough new mercury standard on the grounds that the increased risk to human health and the environment associated with granting the variance versus compliance with the water quality standard without the variance was consistent with the protection of public health and welfare.

{¶ 146} Here, Fairfield County did not request a variance based on the fact that there was demonstrated attainment despite the discharge, and, although he could have, the Director did not find, pursuant to Ohio Adm.Code 3745-01-07(A)(6)(a), that the criteria was inappropriate and/or develop its own site-specific water quality criterion. Under this administrative rule, the Director could (and in fact did) proceed to establish a water quality-based effluent limit consistent with the attainment of the designated use. However, as shall be explained more fully below, the Director is also required to comply with all applicable statutory mandates, including the language in R.C. 6111.03(J)(3). The Director has not adequately demonstrated how consideration of technical feasibility and economic reasonableness is inconsistent with the CWA and/or 40 C.F.R. 122.44(d)(1)(i) in this circumstance.

**(e) Compliance With Applicable Statutory Mandates;  
Discretion and Substitution of Judgment**

{¶ 147} The Director is required to comply with all applicable statutes, regulations, and rules, including R.C. 6111.03(J)(3), which requires consideration of technical feasibility and economic reasonableness to the extent it is consistent with the CWA.

{¶ 148} In *Sandusky Dock Corp.*, the Supreme Court of Ohio analyzed R.C. 3704.03, which governs the powers of the director of environmental protection as it

applied to air pollution, and determined it could not consider two provisions of the statute, R.C. 3704.03(G) and (R), independent of one another. *See also Salem* at ¶ 13 (finding the Director must comply with all statutory mandates when issuing a permit; looking at the language of one statute in isolation without considering the mandatory language of additional applicable statutes is inadequate). Thus, the Director is required to follow all statutory mandates when issuing a permit. He does not have the discretion to ignore statutory mandates.

{¶ 149} Based upon the reasoning set forth in *Sandusky Dock Corp.*, the language in R.C. 6111.03(J)(3) requiring consideration of evidence relating to technical feasibility and economic reasonableness cannot be ignored to the extent it is consistent with the CWA.

{¶ 150} Given that we have established that the specific allocation for the Tussing Road plant set forth in the Big Walnut Creek TMDL is not an absolute requirement (because adjustments can be made), it is not inconsistent with the CWA for the Director to be held to the statutory requirement that he *give consideration to*, and base his determination regarding the imposition of water quality related effluent limitations on evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties.

{¶ 151} This same reasoning applies to the TDS limitation as well. The Director had options available to him which would allow compliance with all applicable statutes, rules and regulations.

{¶ 152} The Director, nevertheless, contends that because he has been given discretion, he should be able to choose how he wishes to comply with the requirements of the TMDL. In essence, he claims that if he chooses to simply implement the limitations set forth in the TMDL "as is" (which results in making it impossible to consider economic reasonableness or technical feasibility), rather than making adjustments, it is an abuse of discretion for ERAC to essentially find that he must consider the option of making adjustments so that he can then consider the economic reasonableness or technical feasibility analysis. However, we find the Director does not have the discretion to ignore statutory mandates.

{¶ 153} Notwithstanding that it is significant to note that the Director does have broad discretion in determining *how* he will comply with the economic reasonableness



and technical feasibility analysis requirements, given that the statute does not offer guidance on how this evaluation is to be performed. R.C. 6111.03(J)(3) simply states that the Director "shall give consideration to, and base the determination on, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties from those wastes" as well as to "evidence relating to conditions calculated to result from that action and their relation to benefits to the people of the state and to accomplishment of the purposes of this chapter."

**(f) Jurisdiction to Review**

{¶ 154} The Director argues this court does not have jurisdiction to review a TMDL after it has been approved. The Director submits that by approving the TMDL for the Big Walnut Creek Watershed, the U.S. EPA approved the limits for phosphorus in the Big Walnut Creek Watershed, including the area of Blacklick Creek at issue in this case and that such approval is a "final action" by the U.S. EPA, which cannot be reviewed now.

{¶ 155} The Big Walnut Creek TMDL was approved by the U.S. EPA on September 26, 2005, which included specific limits for phosphorus in Blacklick Creek. While this court may not be able to review the Big Walnut Creek TMDL, we do have the authority to review whether or not ERAC's decision finding the Director acted unlawfully in failing to conduct a technical feasibility and economic reasonableness analysis is supported by reliable, probative, and substantial evidence and is in accordance with law. We find that it is. Accordingly, we overrule the Director's first cross-assignment of error.

**3. Responsibility for Analyzing Technical Feasibility and Economic Reasonableness**

{¶ 156} Having now determined that consideration of technical feasibility and economic reasonableness are required, we must address the issue of who should perform the analysis. In doing so, we disagree with Fairfield County's contention that because the Director did not initially consider technical feasibility and economic reasonableness, ERAC is now required to make these findings instead of the Director.

{¶ 157} Fairfield County, as noted above, cited to R.C. 3745.05(G) and Ohio Adm.Code 3746-11-03 in support of its position. While both of these require that every order issued by ERAC shall contain a written finding of the facts upon which the order is based, this does not advance Fairfield County's proposition that ERAC must perform the technical feasibility and economic reasonableness analysis. Citing to *Salem*, Fairfield

County further argues it is ERAC's duty to make the findings regarding technical feasibility and economic reasonableness. However, we believe that case does not stand for the proposition that ERAC should perform the analysis that the Director neglected to do.

{¶ 158} In *Salem*, the court reiterated that in reviewing a decision of the Director, ERAC has the duty to determine whether the Director's action was unreasonable or unlawful, based on the evidence presented at the de novo hearing. Here, ERAC found that the Director, in imposing water quality-related effluent limitations in a permit, failed to give consideration to and base his determination upon evidence introduced regarding technical feasibility and economic reasonableness. R.C. 6111.03(J)(3) lists this as one of the powers of the Director. However, the statute does not grant that power to ERAC.

{¶ 159} In this case, ERAC determined that the Director's failure to conduct this analysis and make a determination on the issue was unlawful, based upon the statutory requirements set forth in R.C. 6111.03(J)(3) and upon the evidence presented by Fairfield County. While ERAC does have the duty to determine whether the Director's action was unreasonable or unlawful based on applicable law and the evidence presented at a de novo hearing, nothing within the decision in *Salem* indicates that ERAC also has a duty to conduct the analysis for the Director.

{¶ 160} Therefore, we find ERAC's decision to return this matter to the Director for consideration of technical feasibility and economic reasonableness is not error. Accordingly, Fairfield County's third assignment of error is overruled.

#### **X. THE DIRECTOR'S SECOND CROSS-ASSIGNMENT OF ERROR— CREDIBLE DATA RULE**

{¶ 161} In his second cross-assignment of error, the Director argues ERAC erred by improperly considering biological data submitted by Fairfield County that was not credible data under the requirements of Ohio Adm.Code 3745-4-01. We disagree.

##### **A. The Director's Argument**

{¶ 162} The Director argues that the data submitted by Fairfield County via EnviroScience in 2007 to assess Blacklick Creek, and to determine if the discharge from the Tussing Road plant was having a negative impact on Blacklick Creek, failed to comply with the requirements of Ohio Adm.Code Chapter 3745-4. The Director argues the data submitted was classified as level 3 data because it was to be used for regulatory purposes

and, therefore, it was required to be collected by a level 3 data collector. Because the data collected by EnviroScience in the 2007 macroinvertebrate survey on Blacklick Creek was not collected by a level 3 qualified data collector, and because the individual (Markowitz) who prepared the report analyzing and interpreting the data was also not a level 3 data collector, the Director asserts the data and the corresponding report are not credible under the regulations and consequently, they cannot be considered by ERAC to invalidate a regulatory decision. The Director further argues the data at issue does not meet any of the exceptions set forth in Ohio Adm.Code 3745-4-01(D).

### **B. Fairfield County's Response**

{¶ 163} Fairfield County raises the following three arguments in response to the Director's credible data argument: (1) the credible data rule is not applicable here because Ohio Adm.Code 3745-4-03 applies to data submitted to the *Director* as credible data, not to data submitted to *ERAC*, as is the case here; (2) it would violate due process to require that data collected by Fairfield County for use in litigation against Ohio EPA be approved by its adversary prior to its use; and (3) the evidence submitted by Fairfield County to ERAC is admissible because it is reliable and relevant and satisfies the Ohio Rules of Evidence.

### **C. Analysis—Credible Data Rule**

{¶ 164} Credible data is "scientifically valid chemical, physical, or biological water quality monitoring data concerning surface waters, including qualitative scoring of physical habitat characteristics and the sampling of fish, macroinvertebrates, and water quality, that have been collected by or submitted to the director and that comply with the requirements established in this chapter." Ohio Adm.Code 3745-4-02(B).

{¶ 165} "The director of environmental protection shall adopt rules that establish criteria for three levels of credible data related to surface water monitoring and assessment." R.C. 6111.51(A)(1). Ohio Adm.Code Chapter 3745-4 governs credible data and qualified data collectors. Ohio Adm.Code 3745-4-01, which is titled "purpose and applicability," reads in relevant part as follows:

(A) The purpose of this chapter, credible data rules, is to establish criteria for three levels of credible data *for a surface water quality monitoring and assessment program established by the director* and to establish the necessary training and experience for persons to submit credible data, *thereby increasing the information base upon which to*

*enhance, improve and maintain water resource quality in Ohio.*

(B) *Participation in this program is voluntary, except for the requirement under section 6111.54 of the Revised Code that each state agency in possession of surface water quality data shall submit the data to the environmental protection agency in a format designated by the director.*

(Emphasis added.)

{¶ 166} Ohio Adm.Code 3745-4-03, which governs qualified data collectors, states, in relevant part, as follows:

(A) Criteria to become a qualified data collector (QDC).

(1) All data submitted to the director for consideration as credible data shall originate from studies and samples collected by, or under the supervision of, a QDC.

{¶ 167} Ohio Adm.Code 3745-4-06, which governs level 3 data requirements and reporting, states, in relevant part, as follows:

(A) Except as provided by paragraph (D) of rule 3745-4-01 of the Administrative Code, all data submitted to the director for consideration as level 3 credible data shall be collected and submitted by level 3 qualified data collectors (QDCs) approved by the director.

{¶ 168} Level 3 data is the highest level of credible data and is used for various regulatory purposes. Ohio Adm.Code 3745-4-01(C)(3). Level 3 data must be collected by a level 3 qualified data collector. Ohio Adm.Code 3745-4-06(A).

{¶ 169} The Director claims it is illogical to require data submitted to the Director for regulatory matters to meet a certain standard of credibility, but not to require the same standard for data challenging the factual basis of the Director's regulation or permitting decision as presented before ERAC. However, we disagree with the Director's assessment.

{¶ 170} In reading the language used in Ohio Adm.Code 3745-4-03 and 3745-4-06, as well as the other related administrative rules in this section which refer to credible data, it is apparent that these rules apply to data submitted to the *Director*, *not* to data submitted to *ERAC*. As set forth in Ohio Adm.Code 3745-4-02(E), " 'Director' means the director of the Ohio environmental protection agency." Nothing within these

administrative rules refers to data submitted to ERAC. In fact, there is no reference at all to data that is submitted to ERAC.

{¶ 171} If it had been the intention to apply the credible data rules to data presented to ERAC, the administrative rules could have easily been written to reflect such an intention. They were not so written. Instead, the rules on the submission of credible data were developed as a result of "a program that classifies surface water monitoring performed by watershed groups, state agencies, schools, local volunteers and other organizations. Ohio EPA uses the data submitted under the program in ways prescribed by State law." *See* Ohio Environmental Protection Agency, *Ohio Credible Data Program*, [http://www.epa.state.oh.us/dsw/credibledata/how\\_OEPA\\_uses\\_data.aspx](http://www.epa.state.oh.us/dsw/credibledata/how_OEPA_uses_data.aspx) (accessed May 23, 2013). The motivation behind the credible data rules is the idea that the state should have as much good scientific information about Ohio's surface waters as possible in order to properly manage them. *Id.* The rules allow for the submission of data to the Ohio EPA from various sources, including volunteer and citizen groups. *Id.*

{¶ 172} As stated above, there is no indication that the rules applying to the submission of this data are intended to be applied to the submission of evidence before ERAC. The Director is not ERAC. ERAC is an administrative body created to facilitate the administration of environmental law and made up of members with special expertise whose interpretation of rules and regulations and whose resolution of evidentiary conflicts are afforded due deference. *See Columbus Steel Castings Co. v. Nally*, 10th Dist. No. 11AP-932, 2012-Ohio-4417. The Ohio EPA, on the other hand, is a state environmental agency whose primary functions are the protection, management, study or assessment of the environment. *See* Ohio Adm.Code 3745-4-02(S).

{¶ 173} Furthermore, the credible data rules do not appear to be applicable to the circumstances here, where Fairfield County submitted its data and testimony to ERAC in response to the Director's actions regarding the permit at issue, rather than as part of a monitoring program administered by the Ohio EPA.

{¶ 174} Finally, the evidence and testimony submitted by Fairfield County met the requirements of the Ohio Rules of Evidence and was admissible for consideration by ERAC. *See generally Village of Harbor View v. Jones*, 10th Dist. No. 10AP-356, 2010-Ohio-6533, ¶ 55 (although strict rules of civil procedure and rules of evidence do not bind ERAC, all of ERAC's decisions must be predicated upon the testimony of witnesses who

are sworn and upon papers or documents that are properly authenticated in some fashion). It is up to ERAC to use its discretion to weigh the evidence received and decide whether or not it finds the evidence to be credible. Consequently, we do not find that ERAC erred in admitting the data collected on behalf of Fairfield County via the 2007 macroinvertebrate survey of Blacklick Creek.

{¶ 175} Accordingly, the Director's second cross-assignment of error is overruled.

#### **XI. DISPOSITION**

{¶ 176} In conclusion, we overrule Fairfield County's first, second, and third assignments of error. We also overrule the Director's first and second cross-assignments of error. The final order of ERAC is affirmed. As ordered by ERAC, the portions of the NPDES permit relating to phosphorus and TDS limits are vacated and remanded to the Director for further proceedings consistent with that decision.

*Judgment affirmed;  
cause remanded.*

BROWN and SADLER, JJ., concur.

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BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

BOARD OF COMMISSIONERS FAIRFIELD COUNTY	:	Case No. ERAC 235929
	:	
Appellant,	:	
	:	
v.	:	
	:	
JOSEPH KONCELIK, DIRECTOR OF ENVIRONMENTAL PROTECTION	:	
	:	
Appellee.	:	

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DECISION

Rendered on May 12, 2011

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*Stephen P. Samuels, Esq., Elizabeth E. Tulman, Esq., Joseph Reidy, Esq., Linda Mindrutiu, Esq.,* for Appellants

*Mike DeWine, Attorney General, Jessica B. Atleson, Esq. and L. Scott Helkowski, Esq.,* for Appellee Director of Ohio Environmental Protection

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This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon the July 27, 2006 Notice of Appeal filed by Appellant Board of Commissioners of Fairfield County ("Fairfield County"). The action underlying the instant appeal is the Director of Ohio Environmental Protection Agency's ("OEPA," "Ohio EPA," "Agency," "Director") June 30, 2006 issuance of a National Pollutant Discharge Elimination System ("NPDES") permit to Fairfield County. A de novo hearing in this matter was held before the Commission from February 9 through February 13, 2009, during which all documents in the certified record were moved into the record and

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admitted into evidence. Based on a review of the evidence admitted at the de novo hearing and applicable laws and regulations, the Commission finds the Director's final action of issuing the NPDES permit to Fairfield County unlawful for failure to satisfy the requirements of Ohio Revised Code ("R.C") 6111.03(J)(3).

## FINDINGS OF FACT

### Background on Water Quality

{¶1} The United States Congress established the Clean Water Act ("CWA") in 1972. Section 101(a) of the CWA declared that the purpose of the CWA was to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

{¶2} States are required to adopt water quality standards to protect public health or welfare, enhance the quality of water, and serve the purposes of the Clean Water Act. As such, Ohio EPA oversees Ohio's State Water Quality Management ("WQM") Plan as promulgated under Sections 303 and 208 of the Federal Water Pollution Control Act ("FWPC"). State WQM plans describe and promote efficient and comprehensive programs for controlling water pollution from point and nonpoint sources within defined geographic areas as designated by state governors. 33 U.S.C Section 1288(a); [www.epa.state.oh.us/dsw/mgmtplans/208whatiswqmpm.asp](http://www.epa.state.oh.us/dsw/mgmtplans/208whatiswqmpm.asp); 40 CFR 131.2.

{¶3} The Areawide Water Quality Management Plan, or "208 Plan," is a discrete component of Ohio's WQM Plan. Named after Section 208 of the CWA, a 208 Plan framework authorizes the development and implementation of numerous 208

Plans to address pollution in certain regional areas as identified by the governor of each state. Once developed, 208 Plans are subject to a formal adoption process during which Ohio EPA submits a 208 Plan to the governor, who certifies the plan to the U.S. EPA Administrator. The U.S. EPA Administrator then reviews the state's 208 Plan and either approves or rejects the plan. 33 U.S.C. Section 1288(a).

{14} Relevant to the instant appeal, Section 303 of the CWA requires each 208 Plan to address nine (9) distinct elements, including setting total maximum daily loads ("TMDL") for water pollutants. The TMDL program, established under Section 303(d) of the CWA, focuses on identifying and restoring polluted rivers, streams, lakes, and other surface water bodies by requiring a written, quantitative assessment of water quality problems and contributing sources of pollution. This quantitative assessment specifies the amount a pollutant must be reduced to meet water quality standards, allocates pollutant load reductions, and provides the basis for taking actions necessary to restore a water body. 33 U.S.C. Section 1228(A)(3); 33 U.S.C. 1313.

#### **Fairfield County's Waste Water Treatment Works**

{15} Fairfield County operates a waste water treatment works facility ("WWTW," "Tussing Plant" "Plant") located at 10955 Tussing Road, Violet Township, Fairfield County in Pickerington, Ohio. The Tussing Plant serves approximately six thousand, mostly residential, customers and also treats the filter backwash water from the County's nearby water treatment plant. The Tussing Plant is located on the east side of Blacklick Creek, a few hundred yards west of State Route 256 and

approximately one-half mile south of I-70. The Tussing Plant's effluent is discharged at River Mile ("RM") 11.0. Testimony Vogel.

{16} Two golf courses are located in the vicinity of the Tussing Plant. Blacklick Creek Golf Course is located along the west bank of Blacklick Creek, approximately one-quarter of a mile north of the WWTW, while Turnberry Golf Course, also located on the west bank, is situated just upstream of the Plant's discharge point between RM 11.0 and RM 9.5. Several large culvert pipes drain the Turnberry Golf Course into Blacklick Creek at various points along the course. Appellant's Exhibits ("Ex.") C, D; Testimony Vogel.

{17} Just downstream from the Plant's outfall, on the east bank of Blacklick Creek, is a ravine that drains a shopping mall complex. Further downstream at RM 10.3, a tributary drains a large residential area of Violet Township. The areas north, south, and east of the Plant are also developed with residences and commercial buildings. Testimony Markowitz, Vogel.

{18} Fairfield County believes that the location and entities surrounding the WWTW have a significant impact on the overall water quality in the area. According to Ohio EPA's Robert Miltner, who was admitted at the hearing as an expert in water quality standards and aquatic biology, and Mike Bolton, who was admitted as an expert in macroinvertebrate ecology, non-point source discharges such as commercial and residential development can adversely influence water quality. It is undisputed that the greater amount of urbanization along a stream, the greater the potential impact on

water quality, including nutrients and pesticides flowing from a golf course. Testimony Bolton, Markowitz, Mendel, Miltner.

{¶9} In 2005, Fairfield County made six million dollars worth of improvements to the Plant, including improving the level of water treatment at the facility and increasing the volume of water that could be treated from two million gallons per day ("MGD") to three MGD. Kerry Hogan, former Director of Public Utilities for Fairfield County and current Director of Water Resources in the Wastewater Group of the Columbus office of URS (an engineering firm), testified at the hearing as an expert in wastewater treatment design. Mr. Hogan, who was involved in the planning and design of the 2005 improvements, testified that representatives of Fairfield County consulted with Ohio EPA regarding plant design and function throughout this expansion. Upon completion of the 2005 expansion, the Tussing Plant was rendered land-locked by commercial and residential development. Testimony Hogan, Vogel.

{¶10} David Frank, who was accepted at the hearing as Fairfield County's expert in wastewater treatment plant design and water treatment plant design, testified that he was responsible for the design of the Tussing Plant expansion that was completed in 2005. He also prepared and submitted to Ohio EPA the permit to install application and plans associated with this expansion. Mr. Frank testified that the 2002 permit to install application issued for the expansion did not include any provision for direct phosphorus or total dissolved solids ("TDS") removal and that Ohio EPA issued the permit to install without requiring such provisions. He further testified that current monitoring data demonstrate that the phosphorus and TDS limits imposed in the 2006

NPDES permit can not be met by the Tussing Plant as currently configured. Testimony Frank.

### **2006 NPDES Permit**

{¶11} Fairfield County submitted an application for an NPDES permit renewal.<sup>1</sup> Ohio EPA employee John Owen, Environmental Specialist 2, Division of Surface Water, Central Office, reviewed Fairfield County's application for completeness, drafted the NPDES permit, and developed the 2006 Permit limits, including permit limits for phosphorus and TDS. Testimony Owen.

{¶12} Mr. Owen testified that Fairfield County's previous NPDES permit, issued prior to Ohio EPA's development of the 2005 TMDL report for the Big Walnut Creek, only required monitoring for phosphorus. In establishing a phosphorus limit in the current NPDES permit for the Tussing Plant, Mr. Owen referred to Ohio EPA's TMDL for Big Walnut Creek and selected the numerical limit for phosphorus, 0.5 mg/l, as stated in the TMDL. Because he believes that Ohio EPA is required to implement the pollution control measures set out in the TMDL, Mr. Owen believes did not conduct an independent analysis to evaluate whether a phosphorus limit was necessary for the Tussing Plant. Testimony Owen.

{¶13} Mr. Owen selected the TDS limit for the permit by inputting specific parameters, such as estimated (low) stream flow, upstream TDS concentration, and Tussing Plant flow into a software program that generated a calculated TDS limit. As with setting limits for phosphorus, Mr. Owen did not engage in any site-specific

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<sup>1</sup> The record does not contain a copy of Fairfield County's application for permit renewal, as such the Commission is unable to pinpoint a precise date on which it was submitted to Ohio EPA.

biological or technical analysis to determine if a TDS limit was necessary or what that limit should be. Testimony Owen.

{¶14} In December 2005, Ohio EPA issued the draft NPDES permit to Fairfield County. On February 7, 2006, Fairfield County timely submitted comments regarding the draft NPDES for the Tussing Plant to Ohio EPA. Of particular relevance to the instant matter are the following comments regarding effluent limits of phosphorus and TDS:

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The County suggests that the Agency eliminate the 0.5 mg/l **phosphorus** limit for Tussing Road WRF. This overly stringent limit would require the County to implement a chemical feed (or other measures), which would in turn mandate the installation of additional biosolids handling infrastructure. Blacklick Creek is in full attainment of WQS for the area in the vicinity of the Tussing Road WRF and actually improves downstream of the effluent outfall. To the County's knowledge, there have been no algae outbreaks in Blacklick creek. The Water Quality Report (2004) fails to include the largest source of nutrient and organic enrichment to Blacklick Creek in this stretch, the Turnberry Golf Course. In addition, there are several field tiles that discharge to Blacklick Creek along the stretch (upstream and down stream) of the Tussing Road outfall. Imposing a restrictive phosphorus limit on the Tussing Road WRF will not solve a situation created by others; nor should Fairfield County customers be held financially responsible for correcting a 'problem' caused by others. The County believes that more information is needed to determine the cause and extent of nutrient issues, if any, within this stretch of Blacklick Creek. Fairfield County would be amenable to discussing with OEPA a joint cooperative sampling program of Blacklick Creek to determine the extent and causes of any nutrient impairment. Regardless of the final concentration limit, the County requests the monthly loading limit be rounded to the nearest tenth to be consistent with the other permit limits.

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**Total Dissolved Solids. (TDS)** As of the date of preparing these comments the County has not had the opportunity to **fully** evaluate the WLA that serves as the basis for this (and other) effluent limits. In

addition, as noted above, the County believes that stream flow used by the OEPA in the model is incorrect. Also, it appears that the Agency used 2004 plant data. Although certainly not unreasonable on its face, the Tussing Road facility was in 'shakedown' mode during part of this year, which likely also impacts the quality of the data set. Finally, before an effluent limit is imposed on the facility, the County would request that it be given an opportunity to gather additional upstream data and evaluate certain housekeeping measures that the County believes may obviate the 'need' for a TDS limit in the permit. (Emphasis sic.) Certified Record ("CR") Items 5, 7, 9; Joint Ex. 11.<sup>2</sup>

{¶15} To address the concerns outlined in Fairfield County's letter, Eric Nygaard, Environmental Specialist, Division of Surface Water ("DSW"), Permits and Compliance section of Ohio EPA, asked Matt Fancher, Ohio EPA, DSW employee in the Modeling and Assessment section, to prepare a memorandum reviewing the basis for the phosphorus limit in the NPDES permit. Mr. Nygaard testified that he did not perform an in-depth evaluation of the biological impact of current or future discharges of phosphorus or TDS from the Tussing Road outfall. He did, however, rely on Mr. Fancher's memorandum dated April 11, 2006, which included a table demonstrating, that based on a 2002 assessment of the Big Walnut Creek basin, Blacklick Creek was in "full-attainment" of its Warm Water Habitat designation. The table also documented sampling results at various river miles upstream and downstream of the Tussing Plant and appeared as follows:

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<sup>2</sup> In preparation for hearing, Fairfield County engaged the expert services of Mr. Frank, the engineer who designed the 2005 plant expansion. Mr. Frank's December 2007 report entitled "Fairfield County Utilities, Tussing Road Water Reclamation Facility (WRF), Permit Compliance Study" examined the Tussing Plant's existing effluent data and the 2006 NPDES permit limits; Total Phosphorus data, reduction costs, and alternatives; and TDS data and reduction alternatives. Based on his data and analysis, Mr. Frank determined that the final permit limit for phosphorus of 0.5 mg/l could only be met with the installation of five million dollars of additional equipment and the TDS limit was not technically feasible. Testimony Frank; Joint Ex. 30.

River Mile Fish/Invert.	IBI	MIwb	ICI	QHEI	Attainment Status	Comment
13.7	46.0	8.5	MG	71.5	FULL	Main St.
11.3	39.0	8.0	48	76.5	FULL	Ust. Tussing WRF
11.14/11.10	40.0	7.0	F/F	NA	NA	Tussing WRF Mixing Zone
11.0	44.0	8.6	38	70.5	FULL	Dst. Tussing WRF
8.8/8.9	46.0	9.4	40	70.5	FULL	Refugee Rd.

Testimony Nygaard; CR Item 6 (emphasis sic).

{¶16} Mr. Fancher's memorandum first began by stating that the Big Walnut Creek TMDL Study recommended a 2,073 kg/yr wasteload allocation for the Tussing Road Plant. Additionally, Mr. Fancher's memorandum outlined the stream conditions as assessed in 2000 and documented in a report titled Biological and Water Quality Study of the Big Walnut Creek Basin. The Commission summarizes and comments on key points in Mr. Fancher's memorandum, as follows:

- 1) A 10-point decline in the ICI<sup>3</sup> score immediately downstream from the Tussing Road outfall. "The decline was caused by an increased predominance of pollution-tolerant taxa \* \* \*" and "indicated mild organic/nutrient enrichment from the Tussing WRF." Despite the 10-point swing, both the upstream and downstream ICI scores met the biocriteria standard used to measure attainment;
- 2) A greater fluctuation in diurnal dissolved oxygen ("DO") at RM 10.2 than at RM 11.25. Despite the greater fluctuation, all DO levels met numerical DO water quality standards;
- 3) A conclusion that the "larger diurnal fluctuation recorded at the downstream site is characteristic of the excessive algal production association with a nutrient enriched condition";

<sup>3</sup> Invertebrate Community Index, or ICI, is a scoring system developed by Ohio EPA to assess the health of aquatic macroinvertebrates in a stream. An ICI is one of the three biocriteria standards Ohio EPA employs to measure attainment of aquatic uses. The other indices measure the health of the fish community in the stream: 1) the Index of Biotic Integrity or IBI; and 2) the Modified Index of well being or MIwb. Ohio Adm.Code 3745-1-07(B) and Table 7-15.



- 4) A "dramatic" increase in total phosphorus immediately downstream of the Tussing Plant; and
- 5) A generalized concern that future violations of water quality might occur if the flow through the Plant increases at some point in the future. No calculations or documents were included to fully substantiate Ohio EPA's concern. CR Item 6.

{¶17} Additionally, Mr. Fancher conducted the modeling for Fairfield County's NPDES permit employing a simple model, rather than the more complex "receiving stream" model, to calculate loads from nonpoint sources and other sources to Blacklick Creek. The "receiving stream" model, used further upstream from the Tussing Plant but not in the calculations for the NPDES permit, "estimates the changes in chemical constituent or physical parameter in the water quality and sometimes the transport of constituents along with the flow." Unlike the simple model, the "receiving stream" model accounts for assimilation consistent with the biological community. In other words, the "receiving stream" model accounts for the stream's natural ability to assimilate the constituent, thus the number produced by the simple method may be too conservative given the conditions of the stream. Testimony Fancher.

{¶18} When testifying at the hearing, Mr. Fancher stated that his conclusions were based upon his interpretation of data summaries, and he had never visited Blacklick Creek. He acknowledged that his "knowledge of the stream is limited to what the presented data shows" and that he has never personally witnessed any nuisance growths of algae at Blacklick Creek. Testimony Fancher.

{¶19} During the hearing, Fairfield County responded to several points raised by Mr. Fancher's memorandum, specifically to Ohio EPA's position on phosphorus, dissolved oxygen, and future impairments to the stream.

{¶20} Mr. Markowitz, an expert for Fairfield County, explained the relationship between phosphorus and dissolved oxygen as they impact the stream and its inhabitants. Phosphorus, Mr. Markowitz testified, is essential to plants and aquatic life because without its presence, streams would be unable to support the plant life on which fish and bugs feed. Excessive amounts of phosphorus, however, will produce an overgrowth of plants, and potentially result in a "nuisance."<sup>4</sup> When plants grow in excess, too much dissolved oxygen is generated during the daytime because the plants are photosynthesizing, taking in CO<sub>2</sub> and releasing dissolved oxygen. Then, at night, when the plants no longer engage in photosynthesis, they begin taking in dissolved oxygen and releasing CO<sub>2</sub>, a process known as respiration. Thus, in water bodies where excessive plant growth is present, known as eutrophic lakes and streams, the concentration of dissolved oxygen can plummet to very low levels at night as it is adsorbed, yet be very high during the day as it is released. The change between nighttime and daytime dissolved oxygen levels is known as "diurnal swing." Mr. Markowitz further testified that he is unaware of any study or report generating a specific number or phosphorus limit that can be universally applied in all situations. He

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<sup>4</sup> Ohio Adm. Code 3745-1-04 provides:

[t]he following general water quality criteria shall apply to all surface waters of the state including mixing zones. To every extent practical and possible as determined by the director, these waters shall be: \* \* \* (E) Free from nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae.

believes a stream's assimilative capacity, or ability to use phosphorus effectively without generating a eutrophic condition, is dependent on several factors including the stream's habitat, flow, existing aquatic life, and temperature. Testimony Markowitz.

{¶21} Fairfield County also asserted that the dissolved oxygen data cited in Mr. Fancher's memorandum do not establish the presence of a nutrient rich environment downstream of the Tussing plant. In support, Fairfield County cited several concerns about the quality of the data and Mr. Fancher's interpretation. Additionally, Mr. Krejsa, Fairfield County's expert witness who testified about impact evaluation, aquatic biology and ecology, water quality, biological surveys, and biological criteria, asserted that collection of the dissolved oxygen data did not comport with Ohio EPA's own protocol for sampling dissolved oxygen. Specifically, the data reviewed in Mr. Fancher's memorandum was collected over a two day period, rather than the seven day period generally required by Ohio EPA. Sampling over a longer period of time reduces the wide-swinging variables that can affect dissolved oxygen results. Testimony Krejsa.

{¶22} Mr. Markowitz disagreed with Mr. Fancher's conclusion that the larger diurnal swing at RM 10, which is about one mile downstream of the Plant, was determinative that the WWTW was causing excessive nutrient enrichment. Mr. Markowitz explained that in areas where nutrient enrichment is a problem a dense algal mass can be observed, along with a nighttime dissolved oxygen level that violates the water quality standards. By comparison, Mr. Markowitz had recently reviewed an extensive data set of dissolved oxygen measurements in the Columbus area, 38 sites monitored over a summer period. Within the data set he found differences comparable

to those found in Blacklick Creek and observed that such differences were not indicative of algal growth. Notably, in this instance, all dissolved oxygen data collected from Blacklick Creek met the warm water habitat water quality standards applicable Blacklick Creek, and no nuisance growths of algae have ever been observed in the creek downstream of the Plant. Testimony Markowitz.

{¶23} Fairfield County also asserted that the locations selected for sampling dissolved oxygen would not likely lead to an accurate determination of whether the effluent from the Tussing Plant was impacting water quality. Mr. Michael Mendel, Fairfield County's witness admitted in this hearing as an expert in aquatic biology, macroinvertebrate ecology, and biostatistics, testified that golf courses adjoin well over one mile of Blacklick Creek. Golf courses are known contributors of significant quantities of nitrogen and phosphorus into nearby water bodies, and he has personally observed excessive algal growth resulting from run-off from golf courses. Mr. Mendel believes that the golf courses closely located to Blacklick Creek are a likely explanation for the diurnal swings observed in the stream downstream of the Tussing Plant. Testimony Mendel.

{¶24} In his final analysis, Mr. Fancher also expressed concern about future impairment of Blacklick Creek due to increased Plant flows. Mr. Fancher analyzed Ohio EPA's concerns about increased Plant flow and stated the following:

\* \* \* It is possible the increased loading from the Tussing WRF has exacerbated the enriched condition found in Blacklick Creek. That possibility is what the TMDL recommendation is intended to protect against. Should the instream condition below the Tussing WRF discharge in fact deteriorate, then it could very likely be found in nonattainment when next assessed. \* \* \* CR Item 6.

{¶25} Fairfield County counters by arguing that the basis for imposing a phosphorus limit can not be whether some worsening might occur, rather Ohio EPA must present a valid factual foundation to establish that limiting the concentration of phosphorus to the final limit of 0.5 mg/l is necessary to assure that phosphorus will not cause or contribute to a violation of biocriteria. To demonstrate that Ohio EPA did not engage in independent analysis of the phosphorus, Fairfield County points to Nygaard's testimony where he states the following:

Q: And you did not independently evaluate the biological impact that discharge of phosphorus from the plant would have on the stream at 3 million gallon per day flow, did you?

A: I did not.

Testimony Nygaard, Transcript Volume III, p. 198.

{¶26} It is undisputed that nutrient enrichment in the form of algal growth has never been observed below the Tussing Plant and neither have other characteristics of nonattainment typically associated with an increased phosphorus load. Testimony Krejsa, Markowitz, Mendel, Vogel.

{¶27} Ultimately, on June 30, 2006, the Director issued NPDES permit number 4PU0004\*HD ("Permit") to Fairfield County for its wastewater treatment plant. The NPDES permit became effective on August 1, 2006 and contained a phosphorus limit of 0.5 mg/l and a TDS limit of 1646 mg/l concentration and 18692 mg/l monthly loading. Joint Ex. 4.

{¶28} On July 27, 2006, Fairfield County timely appealed the Director's issuance of the 2006 Permit and later amended its Notice of Appeal on October 11, 2007.

Fairfield County's Amended Notice of Appeal sets out the following eleven assignments of error:

- The discharge limitation of Total Dissolved Residue (Solids) ('TDS') are unreasonable and unlawful.
- The discharge limitations on Total Phosphorus [("TP")] are unreasonable and unlawful.
- The schedule of compliance for TDS is unreasonable and unlawful.
- The schedule of compliance for Phosphorus is unreasonable and unlawful.
- Ohio EPA acted unlawfully, in violation of OAC 3745-33-04(C)(3), when it issued the renewal permit to Tussing Road WRF in 2006 with limits more stringent than those developed by Ohio EPA when it issued the PTI for Fairfield County's construction of new facilities in 2002.
- Ohio EPA acted unlawfully and unreasonably in imposing water-quality based limits for TP and TDS in the renewal permit for Tussing Road WRF because the receiving stream, Blacklick Creek, is already in attainment of [Warm Water Habitat].
- Ohio EPA acted unlawfully and unreasonably in imposing limits for TP and TDS in the renewal permit for Tussing Road WRF without consideration of the numerous non-point sources contributing these pollutants to Blacklick Creek.
- Ohio EPA acted unlawfully and unreasonably in imposing a TDS limit in the renewal permit for Tussing Road WRF because there is no technology that can be added to the recently constructed Tussing Road WRF to meet the TDS limit.
- Ohio EPA acted unlawfully and unreasonably in imposing TP limits in the renewal permit for Tussing Road WRF because the cost of compliance to Fairfield County and its users is economically unreasonable and would impose an undue financial hardship on the County and its residents out of proportion to the benefits, if any, that would be achieved by meeting the limits.
- Ohio EPA acted unlawfully and unreasonably in imposing TP and TDS limits in the renewal permit for Tussing Road WRF because Ohio EPA has

not demonstrated that the Tussing Road WRF is the primary source of nonattainment of WQS in Blacklick Creek, as required by OAC 3745-1-07(A)(6)(b).

- Ohio EPA acted unlawfully and unreasonably, and in violation of ORC 6111.03(J)(3), in imposing a (sic) TP and TDS limits in the renewal permit for Tussing Road WRF because Ohio EPA did not give consideration to or base its decision on the economic reasonableness and technical feasibility of removing either TP or TDS from the waste water treated at the Tussing Road WRF to meet the limits in the 2006 renewal permit. Case File Items A, U.

{¶29} At the outset it is important to recognize a critical distinction in this matter is how the Director and Fairfield County view the TMDL process and its impact on NPDES permitting in the state of Ohio. The Director asserts that in geographic areas where TMDLs have been established, NPDES permits must be consistent with the limits set out in the TMDL. Conversely, Fairfield County believes that current in-stream data should be evaluated and incorporated into the Director's decision to impose a discharge limit, even if the limit Ohio EPA selected is precisely the limit expressed in the TMDL. Fairfield County further argues, that when selecting a discharge limit, the Director must consider economic reasonableness and technical feasibility of removing the pollutant from the discharge. The Director counters that he is required to issue permits consistent with the CWA and need only consider the economic and technical factors to the extent consistent with the CWA.

{¶30} Substantively, the assignments of error in this matter can be divided into two categories - those relating to phosphorus limits and those relating to TDS limits. Before addressing Fairfield County's assignments of error, the Commission will first examine the overall condition of Blacklick Creek.

**Condition of the Blacklick Creek**

{131} At hearing, both Fairfield County and Ohio EPA presented data regarding the condition of Blacklick Creek. Biological surveys and Ohio EPA's biocriteria assessments involve evaluating the health of fish and macroinvertebrates, as well as an assessment of their habitats. As briefly noted earlier in this opinion, the principal biological evaluation tools employed by Ohio EPA are the Index of Biotic integrity (IBI), the Modified Index of Well-Being (MIwb), and the Invertebrate Community Index (ICI). These three indices assess numerous factors, including species richness, trophic composition, diversity, presence of pollution-tolerant individuals or species, abundance of biomass, and the presence of diseased or abnormal organisms. "Habitat drives everything," and the impact of a discharger on aquatic life can be assessed by selecting appropriate sample locations upstream and downstream of the discharger. Testimony Bolton, Krejsa.

{132} A good upstream data collection point, or "reference site," is a location that is representative of stream conditions, absent the pollutant source being evaluated, and yet, is otherwise similar to the conditions found downstream of the discharge source. Ohio EPA chose RM 11.3, which is just north of the Tussing Plant, as a reference site for macroinvertebrates. For fish data, Ohio EPA chose as its reference sites RM 13.7 and RM 11.3 in 2000 and RM 11.3 in 1996. Testimony Krejsa, Markowitz.

{133} Fairfield County also collected data in the stream and contracted with EnviroScience in 2007 to assess whether the discharge from the Tussing Plant was causing an adverse impact on Blacklick Creek and to determine whether a direct



correlation between water quality and TDS or phosphorus discharges was present. At the time of EnviroScience's work, the Tussing Plant discharge flows were near 2.0 MGD, which is approximately 50% higher than the discharge flows during Ohio EPA's 2000 study. Testimony Krejsa, Markowitz.

{¶34} Though EnviroScience followed Ohio EPA macroinvertebrates sampling procedures, it believes it enhanced the accuracy of the data results by placing Hester-Dendy<sup>5</sup> samplers in locations more carefully designed to isolate the Tussing Plant's impact on Blacklick Creek. Specifically, Fairfield County asserted that Ohio EPA's upstream reference site, placed upstream of a tributary that drains surface water from a residential community and road run-off, failed to accurately reflect the quality of the water reaching the Tussing Plant. Thus, because Ohio EPA's upstream data did not account for all pollutants already in the stream just prior to the water reaching the Plant, Fairfield County believes Ohio EPA's assessment of the impact of the Tussing Plant effluent was skewed such that it depicted the Tussing Plant as having a greater impact on water quality than was actually occurring. Testimony Vogel.

{¶35} In contrast, EnviroScience situated its upstream reference site below the tributary at the Tussing Road Bridge to better account for the impacts of residential development and road run-off. In other words, Fairfield County believes that EnviroScience's upstream reference point more accurately assessed water quality as it reached the Tussing Plant because it included the external impacts of road run-off and

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<sup>5</sup> A Hester-Dendy sampler is a multiple plate device designed for substrata sampling of macroinvertebrate organisms found in rivers, streams, lakes, and tidal flats. Testimony Mendel.

residential activity that was present, whereas Ohio EPA's reference site excluded those impacts. Testimony Markowitz.

{¶36} EnvironScience's downstream sampling site was located in essentially the same place as Ohio EPA's. Neither Ohio EPA's nor EnviroScience's downstream sampling site could fully isolate effects of the Plant's effluent, because a shopping center parking lot and nearby golf course both drain into the Tussing Plant's mixing zone. Testimony Markowitz.

{¶37} In addition to selecting different reference points, Ohio EPA and EnviroScience employed slightly different data collection procedures and calculations for sampling macroinvertebrates. Ohio EPA counted and identified a portion of the organisms in the collected samples, about 2%, and then multiplied the hand-counted results by a specific factor to calculate expected percentages and make outcome predictions. Conversely, in an attempt to more precisely characterize the sample, EnviroScience's Mr. Mendel counted and identified each organism collected in the Hester-Deny sampling devices. Testimony Mendel.

{¶38} Predictably, the results gathered from EnvironScience's and Ohio EPA's reference sites showed great disparity due to the distinctly different upstream Hester-Dendy placements. EnviroScience reported an ICI score of 34, while Ohio EPA reported an ICI score of 48. The results from the downstream sampling were similar to each other; Ohio EPA's ICI score downstream was 38 in their 2000 study, while in 2007, EnviroScience documented an ICI score of 36. Significantly, both upstream and

downstream ICI scores are considered in attainment for water quality standards for that area. Appellant's Ex. Q; Testimony Mendel.

{¶39} Mr. Mendel's hand-count of ICI-related taxa provided great insight into the types of macroinvertebrates thriving in the stream. In the upstream reference location, Mr. Mendel found fewer pollution-sensitive species than he did in the downstream location, and predictably, the upstream location had more pollution-tolerant species than the downstream location. Mr. Mendel testified that if the Tussing Plant were adversely impacting the Blacklick Creek downstream, he would have observed the opposite outcome, an increase in the pollution sensitive taxa downstream of the WWTW's outfall. Appellant's Ex. O; Testimony Mendel.

{¶40} Fairfield County also argued that, when evaluating the upstream fish and macroinvertebrate data, Ohio EPA neglected to account for a concept called "within site" variability. "Within site" variability is a phenomenon documented in benthic communities in watershed studies conducted by Ohio EPA employee, Jeff DeShon. Mr. DeShon leads Ohio EPA's fish and macroinvertebrates biosurvey group, in which Mike Bolton is also employed. At the hearing, Fairfield County submitted an Ohio EPA field sampling manual, which included a field study conducted in 1987, titled "Biological Criteria for the Protection of Aquatic Life: Volume III: Biological Field Sampling and Laboratory Methods for Assessing Fish and Macroinvertebrate Communities." In this volume of the study, Mr. DeShon obtained ICI scores from 19 juxtaposed Hester-Dendy samplers in an anthropogenically unimpacted area of Darby Creek with similar natural conditions to assess whether there was any natural variability between the samples

themselves. Mr. DeShon reported an ICI score range of 28 to 44, revealing a 16-point difference between the high and low ICI scores and a 10-point difference between the median and high ICI score. Testimony Krejsa, Mendel.

{¶41} Mr. Krejsa, Fairfield County's expert, believes because a stream is a dynamic biological system, the wide range of the ICI scores represents the natural variability that is present in valid, but wide ranging, ICI data scores. Mr. Mendel also reviewed Ohio EPA's Darby Creek ICI scores and compared the score range to the ICI results compiled by Ohio EPA in Blacklick Creek upstream of the Plant. Looking at the scope of natural variability, Mr. Mendel believed that the ICI score of 48 upstream of the Tussing plant was a number consistent with a "within site" median ICI score of 39.25<sup>6</sup>. The difference between the high ICI score and the median ICI score in Darby Creek was 14 points, while in Blacklick Creek the difference was only 10 points. To Mr. Mendel, the ICI score of 48, though an anomaly when considered with the other data points in the stream, was within the site's natural variability. Thus, the 10 point drop observed downstream from the Tussing Plant was not remarkable or uniquely definitive of the Blacklick Creek's condition - and certainly not so given that the downstream site was also considered in attainment as defined by Ohio EPA. Appellant's Ex. Q; Testimony Krejsa, Mendel.

{¶42} Additionally, Mr. Mendel testified about an inherent error that can occur if a pilot study is not conducted prior to subsampling, the technique used by Ohio EPA to calculate ICI scores. Mr. Mendel asserted that subsampling, by its nature, introduces

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<sup>6</sup> The median ICI score for all data points immediately downstream and those upstream and in attainment in Blacklick Creek is 39.25 Testimony Krejsa.

errors; therefore, the samples must be randomized and a pilot study must be first conducted to assess how well the subsampling represents the total sample. He further argued that because Ohio EPA did not randomize the samples or conduct a pilot study, Ohio EPA's ICI data from its upstream and downstream points are insufficient to draw a reliable conclusion regarding the differences between the two macroinvertebrate populations. Testimony Markowitz, Mendel.

{¶43} Mr. Mendel's final point regarding the ICI data collected by Ohio EPA addressed biological consistency. He queried whether the data "makes sense" when viewed in light of the other data collected in and known about the stream. Mr. Mendel asked the Commission to consider Ohio EPA's own fish data, the IBI and MIwb scores, along with Ohio EPA's classification of the stream as in attainment. Both the IBI and MIwb numbers improved downstream of the Tussing Plant, which is highly significant because as all the testifying experts agreed, fish communities are more sensitive to phosphorus conditions than are macroinvertebrate communities. Testimony Mendel.

{¶44} Further, Robert Miltner, one of the authors of a report titled, "Associations Between Nutrients, Habitat, and the Aquatic Biota in Ohio Rivers and Streams," commonly referred to as the Associations Report, demonstrated the presence of a strong direct correlation between habitat and biocriteria and correspondingly, a lesser direct correlation between nutrients (predominately phosphorus) and biocriteria. In the Blacklick Creek at the upstream sampling location the Qualitative Habitat Evaluation Index<sup>7</sup> ("QHEI") is 76.5, while downstream the QHEI is 70.0. Mr. Mendel believes the

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<sup>7</sup> The Qualitative Habitat Evaluation Index is an index based on the following six metrics: 1) substrate; 2) instream cover; 3) channel morphology; 4) riparian and bank condition; 5) pool and riffle

drop in the QHEI score is a more plausible explanation for the differentiation between the upstream ICI scores and the 10-point lower downstream ICI score. Joint Ex. 21; Testimony Mendel.

{¶45} And finally, in his expert capacity, Mr. Mendel concluded that to a reasonable degree of scientific certainty he believes Ohio EPA lacked sufficient data to support imposing a phosphorus limit of 0.5 mg/l. Testimony Mendel.

{¶46} Based on the evidence presented at hearing, the Commission constructed the following chart to better understand the health of the fish communities in Blacklick Creek:

<u>River Mile</u>	<u>IBI/Mlwb in 1996</u>	<u>IBI/Mlwb in 2000</u>
RM 13.7	—	46/8.5
RM 11.3	38/7.8	39/8.0
Plant	—	—
RM 11.0	39/8.6	44/8.6

{¶47} Fairfield County did not conduct in-stream data collection and analysis for the fish community, as it did for the macroinvertebrate population. Instead, Fairfield County assembled the information previously collected by Ohio EPA and asked an expert to review and interpret the data.

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quality; and 6) gradients. These metrics have been shown to correlate with stream fish communities. "Highest scores are assigned to the habitat parameters that have been shown to be correlated with streams that have high biological diversity and biological integrity, with progressively lower scores assigned to less desirable habitat features. [www.epa.ohio.gov/portals/35/documents/BioCr188\\_QHEIIntro.pdf](http://www.epa.ohio.gov/portals/35/documents/BioCr188_QHEIIntro.pdf)

{¶48} Of the three biocriteria utilized by Ohio EPA to assess stream conditions, ICI, IBI, and MIwb, the fish-related indices, IBI and MIwb, are more sensitive to the impacts of phosphorus, meaning excess phosphorus would present itself sooner in the fish-related data and have a greater impact on the fish community than on the macroinvertebrates population. Or, as Mr. Krejsa opined, fish are more adversely affected by excess phosphorus than are macroinvertebrate organisms. Appellant Exs. R, S; Joint Ex. 21; Testimony Krejsa, Mendel.

{¶49} After reviewing the data compiled by Ohio EPA, Mr. Krejsa concluded to a reasonable degree of scientific certainty that phosphorus discharged from the Tussing Plant was not having an adverse impact on the fish community downstream of the WWTW's discharge point. Ohio EPA presented no data to contradict this assertion. Testimony Krejsa.

#### **Big Walnut Creek TMDL History/Phosphorus**

{¶50} The presence of a TMDL in the underlying matter is relevant to the ultimate question of whether the Director acted lawfully and reasonably by including in Fairfield County's NPDES permit a Phosphorus limit of 0.5 mg/l. As such, the Commission finds it helpful to review the background and development of Big Walnut Creek's TMDL.

{¶51} Ohio EPA performed a study of the Big Walnut Creek Watershed and developed a TMDL and implementation strategy titled Total Maximum Daily Loads for the Big Walnut Creek Watershed ("TMDL Report") dated August 19, 2005. The TMDL Report identified areas of nonattainment of water quality standards in the Big Walnut

Creek Watershed, which were mostly attributed to nutrient enrichment or excess phosphorus. Further, the TMDL Report stated that, within Big Walnut Creek, a total phosphorus concentration reduction of 62% is necessary to achieve phosphorus targets for that water body. Ohio EPA submitted the TMDL Report to the governor, who then certified the report and forwarded it to U.S. EPA. On September 26, 2005, U.S. EPA notified the Director, via letter and enclosed "decision document," that it had approved the TMDL Report for the Big Walnut Creek Watershed. Appellant Ex. M, N. Joint Ex. 13.

{¶52} To address nutrient enrichment in the Big Walnut Creek Watershed, Ohio EPA's TMDL included specific numeric limits for phosphorus for numerous discharge locations, including the Tussing Plant. Based on the data gathered and the calculations set out in Table 5.2F of the Big Walnut Creek TMDL, Ohio EPA assigned to Fairfield County a total phosphorus limit of 0.5 mg/l for the Tussing Road WWTW. Appellant Ex. M, N; Joint Ex. 13.

{¶53} Ohio EPA maintains that the limits set out in the TMDL are limits that are legally required to appear in an applicable NPDES permit. And, because Fairfield County failed to object to the TMDL report, Ohio EPA believes Fairfield County is now precluded from challenging the phosphorus limit established in the TMDL and subsequently incorporated into the NPDES permit.

{¶54} As noted above, the TMDL program focuses on identifying and restoring polluted rivers, streams, lakes, and other surface water bodies. The TMDL for the Big Walnut Creek Watershed listed certain areas of Blacklick Creek as in nonattainment



and certain areas as in attainment. None of the sections identified as being in nonattainment, however, were near the Tussing Plant; most nonattainment locations were sited in the headwaters of Blacklick Creek, approximately ten miles upstream of Fairfield County's WWTW. Noting that the area of greatest impairment was upstream and due mostly to residential sewage treatment failures, Mr. Markowitz argued that imposing a phosphorus limit of 0.5 mg/l would not correct problems occurring in the headwaters of Blacklick Creek. Joint Ex. 8; Testimony Markowitz.

{¶55} In response to Ohio EPA's assertion that it is required by law to impose 0.5 mg/l Phosphorus limit in the NPDES permit, Fairfield County argues that U.S. EPA's decision document accompanying its approval of the Big Walnut Creek TMDL Report provides the Director with flexibility in imposing limits by stating that:

#### 5. Wasteload Allocations (WLAs)

EPA regulations require that a TMDL include WLAs, which identify the portion of the loading capacity allocated to individual existing and future point sources (40 C.F.R. §130.2(h), 40 C.F. R. §130.2(j)). \*\*\*

The individual WLAs may take the form of uniform percentage reductions or individual mass based limitations for dischargers where it can be shown that this solution meets WQSS and does not result in localized impairments. *These individual WLAs may be adjusted during the NPDES permitting process.* If the WLAs are adjusted, the individual effluent limits for each permit issued to a discharger on the impaired water must be consistent with the assumptions and requirements of the adjusted WLAs in the TMDL. If the WLAs are not adjusted, effluent limits contained in the permit must be consistent with the individual WLAs specified in the TMDL. If a draft permit provides for a higher load for a discharger than the corresponding individual WLA in the TMDL, the State/Tribe must demonstrate that the total WLA in the TMDL will be achieved through reductions in the remaining individual WLAs and that localized impairments will not result. All permittees should be notified of any deviations from the initial individual WLAs contained in the TMDL. EPA does not require the establishment of a new TMDL to reflect these revised

allocations as long as the total WLA, as expressed in the TMDL, remains the same or decreases, and there is no reallocation between the total WLA and the total LA.<sup>8</sup> \* \* \* (Emphasis added.) Appellant Ex. N

### **Total Dissolved Solids**

{156} The second main issue in the instant matter involves the limits Ohio EPA placed on TDS in Fairfield County's NPDES permit. Total Dissolved Solids is the generic name for substances that dissolve in water. If the concentrations of certain TDS substances are too high, TDS can harm or kill aquatic life. Both the draft and final NPDES permits set TDS limits at 1646 mg/l on a monthly average and an average loading limit of 18,692 kg/day to be effective on August 1, 2009, approximately 36 months after issuance of the permit. Joint Ex. 4, 8.

{157} In 2000, Ohio EPA conducted two sampling events in the Tussing Plant mixing zone<sup>9</sup> to determine if the effluent was toxic to aquatic life. Ohio EPA found that it was not. Testimony Bolton.

{158} At hearing, Mr. Owen testified that when selecting effluent limits for an NPDES permit, the Director first determines which applies - a federally-established treatment-technology based limit or a state-imposed water quality effluent limit, a WQBEL<sup>10</sup>. If U.S. EPA has established a treatment-technology based limit for a

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<sup>8</sup> The term load allocation ("LA") relates to the loading capacity attributed to existing and future non-point sources and to the natural background data of the water body. Appellant's Ex. N.

<sup>9</sup> "Mixing zone" means an area of a water body contiguous to a treated or untreated wastewater discharge. The discharge is in transit and progressively diluted from the source concentration to the receiving system concentration. The mixing zone is a place where wastewater and receiving water mix, not a place where wastes are treated." Ohio Adm. Code 3745-1-02(B)(58)

<sup>10</sup> "Water quality based effluent limitation" or "WQBEL" means an effluent limitation determined on the basis of water quality standards (contained in Chapter 3745-1 of the Administrative Code) or waste

particular pollutant, that limit is the minimum level the Director must incorporate into the permit. Absent a U.S. EPA treatment-technology based limit for a particular pollutant, the Director must establish a WQBEL for that pollutant. In reaching a WQBEL determination, the Director first assesses the "reasonable potential for that pollutant to cause or contribute to an excursion of any applicable water quality standard" set forth in Ohio Adm.Code 3745-1. Reasonable potential is determined by comparing the preliminary effluent limit ("PEL"), or waste load allocation, to the projected effluent quality ("PEQ"). Ohio EPA relied on Fairfield County's monitoring data to calculate the PEQ. In simplest form, Ohio EPA calculates "reasonable potential" by comparing the average PEL to the average PEQ and the maximum PEL to the maximum PEQ. Then, based on the outcome of the PEQ-PEQ comparisons, the pollutant is placed in one of five groups.<sup>11</sup> Ohio Adm.Code 3745-2-06, 3745-33-01; Joint Ex. 8; Testimony Owen.

{¶59} Mr. Owen explained that TDS is classified as a Group Five Pollutant and detailed the calculations Ohio EPA employed to assess TDS at the Facility. Additionally, Mr. Owen noted the survey data compiled for TDS indicated that TDS would exceed the statewide water quality standard of 1500 mg/l. Joint Ex. 8; Testimony Owen.

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load allocation procedures (contained in Chapter 3745-2 of the Administrative Code)." Ohio Adm.Code 3745-33-01(VV).

<sup>11</sup> Each of the five groups is assigned a water-quality based permit condition recommendation. Pollutants assigned to Group Five represent the highest likelihood of excursions, or violations, of the water quality standards and require the inclusion of a WQBEL in an NPEDES permit. Monitoring requirements may be imposed for pollutants assigned to Groups One through Four, as these groups represent the lowest likelihood of excursions and therefore, do not require the imposition of permit limits as do the pollutants assigned to Group Five. Ohio Adm.Code 3745-2-06; Testimony Owen.

{¶60} Ohio EPA arrived at TDS limits by using a loading test, set out in Ohio Adm.Code 3745-2-06-(b)(1)(b) (sic), that determines how much of a pollutant can be discharged without exceeding water quality criteria. Specifically, Mr. Owen calculated the effluent load by multiplying the design flow of the Plant by the permissible concentration and the background concentration of the stream to determine the amount of TDS that can be discharged into the stream. Mr. Owen made no assessment of the biological data when assigning the TDS limit. Joint Ex. 8; Testimony Owen.

{¶61} Fairfield County's expert, Mr. Mendel, reviewed Ohio EPA sampling data and assessed the biological impact of TDS discharges into the stream; he did not, however, attempt to replicate the computer-generated, calculated TDS limits established by Mr. Owen. Testimony Mendel.

{¶62} Fairfield County believes the inclusion of the selected TDS limit in the NPDES permit was unlawful, and further, the Director lacked a valid factual foundation for its inclusion in the Permit. Fairfield County asserts that TDS discharged from the Plant is not toxic to aquatic life as evidenced by Ohio EPA's own data. Ohio EPA conducted two TDS sampling events in the Tussing Plant mixing zones as part of the 2000 Big Walnut Creek assessment. Ohio EPA concluded that the effluent was not toxic, a conclusion supported by the IBI, MIwb, and ICI scores near the site. Mr. Mendel reviewed the Whole Effluent Toxicity<sup>12</sup> ("WET") tests performed by Ohio EPA on the Plant's effluent and noted that the WET tests revealed that the effluent was "not toxic to aquatic organisms." He further stated that if the effluent were toxic, the toxicity

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<sup>12</sup> Whole Effluent Toxicity tests evaluate the toxicity of undiluted effluent on aquatic organisms. Testimony Markowitz.

would have presented itself in lower IBI, MIwb and ICI scores. Indeed, finding no toxicity threat in the mixing zone, Ohio EPA no longer requires Fairfield County to perform WET tests on the Plant's effluent. Joint Ex. 4; Testimony Bolton, Markowitz, Mendel.

{¶63} Mr. Frank, who was responsible for the design of the Plant's 2005 expansion, concluded that Fairfield County lacked any technically feasible options to treat or remove TDS. He first considered the most common method of treating TDS, reverse osmosis membrane, which filters the wastewater at the molecular level to remove the salt ions. Mr. Frank stated that if Fairfield County utilized this method several hundred gallons of TDS-heavy wastewater would need to be hauled from the facility daily. Mr. Frank also reviewed the no-discharge alternative, which requires storing then land-applying the treated wastewater. He calculated that approximately 130 acres of land would be necessary to construct an adequate number of storage ponds to house about 90 or 120 days worth of wastewater, which he concluded would be adequate storage to ensure that land application could occur in an appropriate manner. And finally, Mr. Frank evaluated Ohio EPA's suggestion that Fairfield County could dilute the wastewater with water from the wells the County uses to supply its water treatment plant. Mr. Frank discarded this solution because the groundwater itself contains TDS, and the aquifer from which the wells draw is already depressed due to current operational standards and more stress on the aquifer would not be an advisable solution for Fairfield County. Testimony Frank.

{¶64} Mr. Frank testified that although he was aware that in arid states such as Arizona TDS is being removed from water so that the water can be reused, he knew of none in Ohio. Notably, Mr. Owen, Ohio EPA's NPDES permit drafter, was unaware of whether any publicly owned treatment plants in Ohio were treating TDS. Testimony Frank, Owen.

{¶65} The Director asserts that he is not required to consider the economic reasonableness or the technical feasibility of phosphorus or TDS removal. Relying on Ohio Revised Code (R.C.) 6111.03(J)(3), the Director asserts that he is only required to consider economic reasonableness or technical feasibility "to the extent consistent with" the CWA and that any economic reasonableness or technical feasibility analysis that might have been considered could not override the Director's obligation to impose water quality criteria promulgated in the CWA. Testimony Owen.

### CONCLUSIONS OF LAW

{¶66} Revised Code 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Director. The statute provides, in relevant part, that "[i]f, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from." R.C. 3745.05.

{¶67} The term "unlawful" means "that which is not in accordance with law," and the term "unreasonable" means "that which is not in accordance with reason, or that

which has no factual foundation." *Citizens Committee to Preserve Lake Logan v. Williams* (1977), 56 Ohio App.2d 61, 70. This standard does not permit ERAC to substitute its judgment for that of the Director as to factual issues. *CECOS Internatl., Inc. v. Shank* (1992), 79 Ohio App.3d 1, 6. "It is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by [ERAC] upon the de novo hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether the board would have taken the same action." *Id.*

{¶68} In cases "[w]here qualified, credible expert witnesses disagree on a matter within their expertise, the Commission defers to the decision of the Director." *Tube City Olympic of Ohio v. Jones* (Mar. 5, 2003), Case No. 994681, 203 WL 1154125 \*6. See also, *Copperweld Steel Co. v. Shank* (Oct 24, 1989, Case No. EBR 781787, 1989 WL 137282, \*8 (where "the question of what levels of treatment or design are necessary to protect public health or ground water are the subject of legitimate debate or dispute between qualified experts, the Board will defer to the action of the Director where that action is otherwise reasonable and lawful").

{¶69} The Commission is required to grant "due deference to the Director's 'reasonable interpretation of the legislative scheme governing his Agency.'" *Sandusky Dock Corp. v. Jones* (2005), 106 Ohio St.3d, 274, citing *Northwester Ohio Bldg. & Constr. Trades Council v. Conrad* (2001), 92 Ohio St.3d 282; *State ex rel. Celebrezze v. National Lime & Stone Co.* (1994), 68 Ohio St.3d 377; *North Sanitary Landfill, Inc. v.*

*Nichols* (1984), 14 Ohio App. 3d. The deference is not, however, without limits. (See e.g., *B.P. Exploration and Oil, Inc., et al v. Jones*, Ruling on Motion for Summary Adjudication and Final Order, issued March 21, 2001, in which the Commission noted that such deference must be granted to the Director's interpretation and application of his statutes and rules, "particularly if the Director's interpretation is not at variance with the explicit language of the regulations.")

{¶70} Ohio Revised Code 6111.03(J)(1) authorizes the Director to issue permits for the discharge of wastes into "waters of the state, and for the installation or modification of disposal systems or any parts thereof in compliance with all requirements of the Federal Water Pollution Control Act \* \* \*." The Director shall deny a permit or renewal if, among other things, the "director determines that the proposed discharge or source would conflict with an areawide waste treatment management plan adopted in accordance with section 208 of the Federal Water Pollution Control Act; \* \*

\*" R.C. 6111.03(J)(2)(b).

{¶71} Ohio Revised Code 6111.03(J)(3) states the following:

To achieve and maintain applicable standards of quality for the waters of the state adopted pursuant to section 6111.041 of the Revised Code, the director shall impose, where necessary and appropriate, as conditions of each permit, water quality related effluent limitations in accordance with sections 301, 302, 306, 307, and 405 of the Federal Water Pollution Control Act and, *to the extent consistent with that act, shall give consideration to, and base the determination on, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties* from those wastes and to evidence relating to conditions calculated to result from that action and their relation to benefits to the people of the state and to accomplishment of the purposes of this chapter. (Emphasis added.)



{¶72} Similarly, state regulations governing the issuance of NPDES permits require the Director to deny an application for a permit or renewal thereof if the Director "determines that the proposed discharge or source would conflict with an areawide waste treatment management plan adopted in accordance with section 208 of the act; \* \* ." Ohio Adm.Code 3745-33-04(A)(2)(b). Further, the criteria for decision by the Director require that the permit not "result in a violation of any applicable laws." Ohio Adm.Code 3745-42-04(A)(2).

{¶73} A required component of a 208 Plan, a TMDL for a particular pollutant is defined as:

"the sum of the existing and/or projected point source, nonpoint source, and background loads for the pollutant to a specified \* \* \* water body segment. A TMDL sets and allocates the maximum amount of a pollutant that may be introduced into the water and still ensures attainment and maintenance of water quality standards." 40 C.F.R. 130.6(c)(1); Ohio Adm.Code 3745-2-02(A)(63).

{¶74} Simply stated, a TMDL plan establishes TMDLs for a particular water body or watershed. Ohio Adm.Code 3745-12-2(A)(2). Section 303(d) of the CWA does not specifically require an implementation plan for TMDLs, but does, however, require that wasteload allocations be implemented through NPDES programs. More specifically, a TMDL plan "shall be determined as the sum of all significant existing or projected loads of a pollutant to the TMDL assessment area from point sources, nonpoint sources, and background sources. The sum of the loads shall not be greater than the loading capacity of the receiving water for the pollutant minus the sum of a specified margin of safety and any capacity reserved for future growth." Ohio Adm.Code 3745-2-12(B).

{¶75} A TMDL plan need not bring the water body into attainment all at once.

A TMDL implementation plan may be based on attaining water quality standards over a period of time, with specific controls on individual sources being implemented in stages. Where implementing a TMDL implementation plan will not immediately attain water quality standards, the TMDL implementation plan shall reflect reasonable assurances that water quality standards will be attained in a reasonable period of time. Ohio EPA shall determine the reasonable period of time in which water quality standards will be met considering, at a minimum, the following factors:

- (1) Receiving water characteristics;
- (2) Persistence, behavior and ubiquity of pollutants of concern;
- (3) Type of remediation activities necessary;
- (4) Available regulatory and non-regulatory controls; and
- (5) Other requirements for attainment of water quality standards. Ohio Adm.Code 3745-2-12(E).

{¶76} As noted in our Findings of Fact, U.S. EPA's decision document accompanying its approval of Ohio EPA's Big Walnut Creek TMDL provides the Director with authority to adjust individual WLAs and states the following:

\*\*\*

The individual WLAs may take the form of uniform percentage reductions or individual mass based limitations for dischargers where it can be shown that this solution meets WQSs and does not result in localized impairments. *These individual WLAs may be adjusted during the NPDES permitting process. If the WLAs are adjusted, the individual effluent limits for each permit issued to a discharger on the impaired water must be consistent with the assumptions and requirements of the adjusted WLAs in the TMDL. If the WLAs are not adjusted, the effluent limits contained in the permit must be consistent with the individual WLAs specified in the TMDL. If a draft permit provides for a higher load for a discharger than the corresponding individual WLA in the TMDL, the State/Tribe must demonstrate that the total WLA in the TMDL will be achieved through*

*reductions in the remaining individual WLAs and that localized impairments will not result. All permittees should be notified of any deviations from the initial individual WLAs contained in the TMDL. EPA does not require the establishment of a new TMDL to reflect these revised allocations as long as the total WLA, as express in the TMDL, remains the same or there is no reallocation between the total WLA and the total LA.*

\*\*\* (Emphasis added.)

{¶77} In dissecting the above text, it is clear that individual WLAs may be adjusted during the NPDES permitting process in accordance with U.S. EPA's prescribed standards for adjustments. The guidelines and requirements for adjustments are as follows: 1) any individual adjustments must be "consistent with the assumptions and requirements of the adjusted WLAs in the TMDL"; 2) "[i]f a draft permit allows for a higher discharge load than corresponding individual WLA in the TMDL, Ohio EPA must demonstrate that the total WLA in the TMDL will be met through adjustments in other individual WLAs and localized impairments will not occur as a result of the adjustment"; 3) if an adjustment to an individual WLA is made, Ohio EPA must notify all permittees of the changes; and 4) if allocations are revised, Ohio EPA is not required to establish a new TMDL, as long as the total WLA remains the same or reallocation between LAs and WLAs does not occur. (Emphasis added.)

{¶78} Based on a plain reading of U.S. EPA's decision document, U.S. EPA granted to Ohio EPA the authority to make adjustments to the WLA in the NPDES permitting process. Altering individual WLAs is not a mandate, but an option available to Ohio EPA allowing it to modify individual WLAs for point sources, providing that other established requirements are satisfied. United States EPA is clear, however, that

should the Director decide to alter individual WLAs, the total WLA must remain the same and no reallocation between WLAs and LAs may occur.

{¶79} Fairfield County's appeal of the phosphorus limit imposed in its NPDES permit centers around two basic claims. First, Fairfield County asserts the Director lacked a valid factual foundation for selecting a 0.5 mg/l phosphorus limit for the Tussing Plant, and the Director unreasonably and unlawfully failed to consider the technical feasibility and economic reasonableness of the phosphorus limits. And second, it was unlawful and unreasonable for the Director to impose the phosphorus limit as it appeared in the TMDL for Big Walnut Creek without allowing Fairfield County an opportunity to appeal that specific discharge limit.

{¶80} In summary, Fairfield County's fundamental question regarding the phosphorus limit is simple: Noting that the portion of the stream impacted by the Tussing Plant is deemed in attainment, how can the imposition of phosphorus restrictions on the County result in a reduced phosphorus impact in the water body upstream from the Tussing Plant or further downstream from the Plant away from the Plant's potential influence? The Commission is unable to answer this question squarely, but must rest its decision on an analysis of the laws relating to TMDLs and implementation of those limits in a NPDES permit.

{¶81} As to whether the Director lacked a valid factual foundation for selecting the phosphorus limit, Fairfield County argues that regardless of what limits are contained in the TMDL neither the in-stream data gathered by Ohio EPA nor the more recent data gathered by Fairfield County supports the imposition of a 0.5 mg/l

phosphorus limit. Thus, the limit is unreasonable because the Director lacked a valid factual foundation for imposing the phosphorus limit. The data collected by both entities revealed that the applicable stream conditions below the discharge point were deemed in attainment, while the nonattainment portions of the stream were either several river miles upstream from the Tussing Plant or sufficiently downstream so that intervening factors greatly affected the condition of the stream.

{¶82} Fairfield County also argues that the Director's action of imposing a 0.5 mg/l phosphorus limit was unlawful or unreasonable because he failed to give consideration to the technical feasibility or economic reasonableness of the phosphorus limit. Fairfield County estimated the cost of meeting the phosphorus limit would be greater than five-million dollars. Ohio EPA employee, Mr. Owen, testified he could not recall if he gave consideration to the technical feasibility or economic reasonableness of whether Fairfield County could meet the 0.5 mg/l phosphorus limit appearing in the NPDES permit. Similarly, Mr. Fancher did not conduct an analysis of whether the phosphorus limit could be met or what those costs might include. Testimony Fancher, Owen.

{¶83} A final concern articulated by Fairfield County was its inability to appeal the 0.5 mg/l phosphorus limit contained in the TMDL prior to that limit appearing in their NPDES permit. Ohio EPA argued that Fairfield County could have either commented on the 208 Plan or appealed U.S. EPA's approval of the Big Walnut Creek TMDL. The Commission notes that neither the documents inviting comment to the 208 Plan nor U.S. EPA's approval and accompanying decision document contains explicit language

authorizing any specific appeal rights. To the Commission, it appears that the first clear opportunity for Fairfield County to appeal the Director's action imposing 0.5 mg/l phosphorus limit was when that limit appeared in the instant NPDES permit.

{184} In the instant matter, the Director's issuance an NPDES permit containing the 0.5 mg/l phosphorous limit articulated in the Big Walnut Creek TMDL fits squarely within the designs of the TMDL and NPDES process as set out in the CWA and applicable state statutes and regulations. Further, the Director's action appears not to be "at variance with the explicit language" of the applicable regulations regarding TMDLs and NPDES permits. As evidenced by the testimony surrounding Mr. Fancher's memorandum, which was written and reviewed prior to the Director's issuance of the Permit, the Director considered the overall impact that phosphorus discharge from the Tussing Plant was having on the water body. It was at this point that the Director could have exercised the option to adjust the WLA as detailed in U.S. EPA's decision document. Based on his own review of Fairfield County's impacts on the phosphorus levels in the stream and the totality of the Big Walnut Creek TMDL, the Director left in tact the phosphorus limit approved by U.S. EPA and articulated in the TMDL. Thus, the Commission believes the Director possessed a valid factual foundation when he selected for Fairfield County's NPDES permit a phosphorus limit of 0.5 mg/l.

{185} Regarding the Director's alleged failure to consider the technical feasibility and economic reasonableness of complying with the phosphorus limit, the Director counters that in addition to his duty to comply with the U.S. EPA-approved limits set out

in the TMDL, he is required to impose conditions in NPDES permits that are necessary and appropriate to achieve and maintain the state's water quality standards and that he need only consider technical and economic matters to "the extent consistent with" the Federal Water Pollution Control Act ("FWPCA").

{¶86} The Commission disagrees with the Director's interpretation of R.C. 6111.03(J)(3) and believes that a plain reading of the statute make the Director's duties clear. As previously cited, Ohio Revised Code 6111.03(J)(3), in pertinent part, states the following:

To achieve and maintain applicable standards of quality for the waters of the state \* \* \*, the director shall impose, where necessary and appropriate, \* \* \* water quality related effluent limitations \* \* \* and, *to the extent consistent with that act, shall give consideration to, and base the determination on, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties from those wastes and to evidence relating to conditions calculated to result from that action and their relation to benefits to the people of the state and to accomplishment of the purposes of this chapter.* (Emphasis added.)

{¶87} The relevant phrases of R.C. 6111.03(J)(3) begin, "\* \* \* the Director shall impose \* \* \* limits" and "\* \* \* to the extent consistent with" the FWPCA, he "*shall give consideration to, and base the determination on, evidence relating to the technical feasibility and economic reasonableness of removing the polluting properties from those wastes and to evidence relating to conditions calculated to result from that action and their relation to the benefits of the people of the state and to accomplishment of the purposes of this chapter.*"

{¶88} The facts support that the Director did not give consideration to or base his decision on information regarding the technical feasibility and economic

reasonableness of removing phosphorus nor did he "give consideration to, and base his decision on, \* \* \* evidence relating to conditions calculated to result from that action and their relation to the benefits to the people of the state and to accomplishment of the purposes of this chapter."

{¶89} Therefore, the Commission must conclude that the Director's action of imposing a phosphorus limit without satisfying the mandates of R.C. 6111.03(J)(3) was unlawful. After considering these factors, the Director may indeed determine the 0.5 mg/l phosphorus limit as identified in Big Walnut Creek TMDL satisfies the requirements of R.C. 6111.03(J)(3), but a technical feasibility and economic reasonableness analysis must be conducted for Fairfield County's NPDES permit to be lawful.

{¶90} Regarding TDS, Fairfield County asserts that the Director lacked a valid factual foundation to impose in Fairfield County's NPDES permit a TDS design flow limit of 1646 mg/l and a monthly average loading limitation of 18,692 kg per day. In support, Fairfield County highlighted the results of the WET testing, the numerous years of compliant downstream biocriteria measurements, the absence of toxicity in the mixing zone, the expert testimony of Ms. Mendel and Dr. Markowitz, and the lack of contrary testimony from Ohio EPA. Fairfield County also cites Ohio Adm.Code 3745-1-07(A)(6)(a) arguing that the Director failed to consider the following:

(a) Demonstrated attainment of the applicable biological criteria in a water body will take precedence over the application of selected chemical-specific aquatic life or whole-effluent criteria associated with these uses when the director, upon considering appropriately detailed chemical, physical and biological data, finds that one or more chemical-specific or whole-effluent criteria are inappropriate. \* \* \*



{¶91} Citing to its duty to achieve and maintain the state's water quality standards under R.C. Chapter 6111, Ohio EPA countered that because the compiled stream survey data indicated that TDS would exceed the statewide water quality standard of 1500 mg/l, regardless of what other stream assessments revealed, the Director was required to assign a TDS limit to Fairfield County.

{¶92} In response to Fairfield County's reference to Ohio Adm.Code 3745-1-07(A)(6)(a), the Director urged the Commission to consider the entirety of the regulation. In pertinent part, Ohio Adm.Code 3745-1-07 states the following:

(A) Water quality standards contain two distinct elements: designated uses; and numerical or narrative criteria designed to protect and measure attainment of the uses.

\* \* \*

(6) Biological criteria presented in table 7-15 of this rule provide a direct measure of attainment of the warmwater habitat, exceptional warmwater habitat and modified warmwater habitat aquatic life uses. Biological criteria and the exceptions to chemical-specific or whole-effluent criteria allowed by this paragraph do not apply to any other use designations.

(a) Demonstrated attainment of the applicable biological criteria in a water body will take precedence over the application of selected chemical-specific aquatic life or whole-effluent criteria associated with these uses when the director, upon considering appropriately detailed chemical, physical and biological data, finds that one or more chemical-specific or whole-effluent criteria are inappropriate. In such cases the options which exist include:

(i) The director may develop, or a discharger may provide for the director's approval, a justification for a site-specific water quality criterion according to methods described in "Water Quality Standards Handbook, 1983, U.S. EPA Office of Water";

(ii) The director may proceed with establishing water quality based effluent limits consistent with attainment of the designated use.

{¶93} Fairfield County asserts that because the applicable biological criteria in the water body were deemed in attainment, attainment status should take precedent over selection of a limit on TDS. While that may be true, our inquiry does not end here. The Commission must consider the entirety of the applicable regulation, and as such, finds support for the Director's position in the balance of Ohio Adm.Code 3745-1-07.

{¶94} More specifically, Ohio Adm.Code 3745-1-07, among other things, outlines the Director's options regarding what may occur when selecting a chemical-specific or whole-effluent criteria if a water body is deemed in attainment of applicable biological criteria. The applicable portion of the rule begins by stating that in water bodies deemed in attainment, biological criteria will take precedence over a chemical specific or whole-effluent criteria "*when the director, upon considering appropriately detailed chemical, physical and biological data,*" finds that chemical-specific or whole-effluent criteria are inappropriate. (Emphasis added.) Ohio Adm.Code 3745-1-07(A)(6)(a). The rule continues and offers two options on how to proceed - the "director may develop, or a discharger may provide for the director's approval," justification for site-specific criterion; or the director may establish effluent limits consistent with attainment of the water's designated uses. Id.

{¶95} Certainly in reviewing the data before him and selecting a TDS limit above the statewide water quality criterion for TDS, the Director established a water quality based effluent limit "consistent with attainment of the designated use." The limit for

TDS is 1500 mg/l. Ohio Adm.Code 3745-1-07 Table 7-1. In selecting the TDS design flow limit of 1646 mg/l and monthly average loading limitation of 18,692 kg per day, the Director observed, that although Fairfield County's TDS discharge exceeded 1500 mg/l, the portion of the stream affected by Fairfield County was considered in attainment for the water's designated uses and data at the site routinely demonstrated that TDS discharged from the Tussing Plant was not negatively affecting the water body.

{¶96} Based on the facts offered at hearing, Fairfield County did not "provide for the Director's approval a justification for site-specific water quality criterion," and it is unclear whether the Director's review of TDS impacts would rise to the level of a "justification" as set out in the Ohio Adm.Code 3745-1-07.

{¶97} Fairfield County's also argues that the Director's action was unreasonable and/or unlawful because he failed to consider the technical feasibility and economic reasonableness of meeting the TDS limit established in the NPDES permit. Fairfield County asserted that none of the treatment methods it evaluated were technically feasible or economically reasonable ways to dispose of the excess TDS. Ohio EPA does not claim to have evaluated the technical feasibility or economic reasonableness of the TDS limit prior to issuing the permit and was unaware whether any publicly owned treatment plants in Ohio were treating TDS; but, as with the phosphorus limit, the Director asserts he was only required to consider technical feasibility and economic reasonableness so long as the limit imposed was consistent with the FWPCA.

{¶98} Again, the facts are clear that the Director did not give consideration to or base his decision on information regarding the technical feasibility and economic

reasonableness of meeting the TDS limit nor did he "give consideration to, and base his decision on, \* \* \* evidence relating to conditions calculated to result from that action and their relation to the benefits to the people of the state and to accomplishment of the purposes of this chapter."

{199} The Commission finds that the Director failed to satisfy the full requisites of R.C. 6111.03(J)(3). Therefore, the Commission must conclude that the Director's action of imposing a TDS limit without satisfying the mandates of R.C. 6111.03(J)(3) was unlawful.

#### FINAL ORDER


Based upon the foregoing, the Commission finds Appellee Director acted unlawfully in issuing the NPDES permit to Fairfield County without full consideration of the technical feasibility and economic reasonableness of the phosphorus and TDS limits contained in the permit, as required by R.C. 6111.03(J)(3). Accordingly, the portions of Fairfield County's NPDES permit relating to phosphorus and TDS limits are hereby VACATED AND REMANDED to the Director for further action consistent with the decision as issued herein.

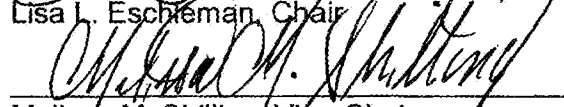
The Commission, in accordance with Ohio Adm.Code Section 3746-13-01, informs the parties that:


Any party adversely affected by an order of the commission may appeal to the Court of Appeals For Franklin County, or if the appeal arises from an alleged violation of law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. Such notices shall

be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

**THE ENVIRONMENTAL REVIEW  
APPEALS COMMISSION**

  
\_\_\_\_\_  
Lisa L. Eschleman, Chair

  
\_\_\_\_\_  
Melissa M. Shilling, Vice-Chair

  
\_\_\_\_\_  
Shaun K. Petersen, Member

Entered into the Journal of the  
Commission this 10<sup>th</sup>  
day of May, 2011.

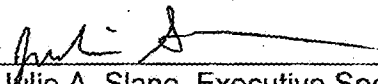
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Jessica B. Atleson, Esq.  
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[CERTIFIED MAIL]  
[CERTIFIED MAIL]

**CERTIFICATION**

I hereby certify that the foregoing is a true and accurate copy of the DECISION in **Board of Commissioners Fairfield County v. Joseph Koncelik, Director of Environmental Protection**, Case No. ERAC 235929 entered into the Journal of the Commission this 12<sup>th</sup> day of May, 2011.

  
\_\_\_\_\_  
Julie A. Slane, Executive Secretary

Dated this 12<sup>th</sup> day of  
May, 2011, at Columbus, Ohio.