

Publications

Client Alert: Ohio Supreme Court Decides Ohio EPA TMDLs Must be Promulgated As Rules

Related Services

Environmental

CLIENT ALERT | 3.26.2015

On March 24, 2015, the Ohio Supreme Court decided the *Fairfield County v. Nally* (former Ohio EPA Director) case. This was a challenge brought by Fairfield County to a Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) permit limit, which was based on a total maximum daily load (TMDL) report prepared by Ohio EPA to limit phosphorus discharges from the county's wastewater treatment plant. The Court agreed with the lower appellate court in finding the NPDES permit limit was invalid. The Court ruled that a TMDL established by Ohio EPA under the CWA is subject to the rulemaking requirements under Ohio Rev. Code Chapter 119, which provides among other things, procedures for public notice and comment. The Court also ruled that the TMDL must be properly promulgated by Ohio EPA before it is submitted to US EPA for approval, and before Ohio EPA may implement TMDL requirements such as "target values" or similar pollutant reduction goals, into an NPDES permit.

This is a significant development in the process of establishing a TMDL. A TMDL is essentially a lengthy document establishing a "pollution diet" for a receiving water or watershed by allocating pollution load reductions to all point sources (wasteload allocation) and nonpoint sources (load allocation) to the water for the pollutant of concern (with consideration for natural background sources and an appropriate load margin of safety factor). Under the CWA, a TMDL is required after the state identifies the water as needing more controls because NPDES permit limits are not stringent enough to implement the applicable water quality standard. These waters are classified as "impaired" and are then ranked based on the severity of pollution and use of the water. The TMDL is developed for the impaired water to determine the amount of a pollutant that may be discharged without causing the receiving water to violate the applicable water quality standard. The TMDL is submitted to USEPA for approval and once approved the state is required by an USEPA rule to include limits in an NPDES permit consistent with the assumptions and requirements set forth in the TMDL (generally referred to as target values).

The Court determined that the TMDL prescribes legal standards and creates new legal obligations that apply to all current and future dischargers in the watershed which makes up a large segment of the public. All stakeholders in the watershed will now have an opportunity to express their views on the wisdom of the TMDL proposals and target values, and contest the legality of the assumptions and requirements. Ohio EPA's argument that the TMDL was merely a "tool" for implementing the agency's already existing legal obligations was rejected. This argument ignores the significant consequences of a TMDL that establishes mandatory load reductions, which were primarily thrust upon point source dischargers because the CWA authority over nonpoint source and agricultural runoff discharges is limited. Furthermore, the Court commented that when USEPA establishes its own TMDLs it must follow notice and comment rulemaking procedures, so the TMDL is truly "rule-like" in nature, and other states, like Idaho and South Carolina require a TMDL to be promulgated as a rule before they can be used as a basis for NPDES permit limits.

This opinion has broad significance and benefits NPDES permit dischargers by providing the opportunity to review, comment on and challenge a TMDL for their receiving water before the TMDL requirements are imposed in an NPDES permit. TMDLs in Ohio will now be required to proceed through the formal rulemaking process of Ohio Rev. Code Chapter 119, including submission of the proposed TMDL to the Ohio Joint Committee on Agency Rule Review (JCARR)

The decision calls into question the legality for existing TMDL-based limits which were imposed in NPDES permits without going through the rulemaking procedure. Dischargers are advised to review their NPDES permits for any TMDL-based limits, and determine whether the TMDL-based limit is acceptable. For more information about this decision and a permit review, please contact Ted Boggs in our Columbus office at taboggs@vorys.com or 614.464.8319.