

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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*Ice Miller, LLP, Stephen P. Samuels, Joseph M. Reidy and Nicole Woods, for appellant.*

*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.

{¶ 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 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*

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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 unrebutted 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 un rebutted 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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