Ohio Supreme Court holds that Ohio EPA's TMDLs and Phosphorus Target Values must go through rulemaking

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On March 24, 2015, the Ohio Supreme Court announced its decision in *Fairfield Cty. Bd. of Com'rs. v. Nally*, an opinion that will significantly impact hundreds of wastewater dischargers across Ohio and is likely to set precedent on a national scale.

The case originated in 2006, when Fairfield County appealed the phosphorus limit in its renewal NPDES permit, asserting that the TMDL-based limit was substantively and procedurally flawed. The lower tribunals deferred to Ohio EPA, but the Ohio Supreme Court resoundingly rejected the Agency's arguments that TMDLs and its 1999 Phosphorus Report were only "guidance."

Agreeing with the County, the Supreme Court held that TMDLs establish new uniform, binding water quality standards, and must be formally adopted as rules under Ohio's Administrative Procedure Act (APA). The Court also declared that the in-stream phosphorus target value (of 0.11 mg/l) that the Agency has been using as the basis for permit phosphorus limits for fifteen years was, in reality, a water quality standard that cannot be imposed without first undergoing rulemaking. Because this is only the second supreme court decision to directly rule that TMDLs are rules and therefore required to be formally promulgated as such, the *Fairfield County* decision is certain to influence how other state environmental agencies and their permittees handle TMDLs in the future.

In reaching its decision, the Court agreed with the County that (1) U.S. EPA's approval of an Ohio EPA-developed TMDL does not insulate it from the APA, (2) APA procedures are required even though a permittee has the right to appeal a permit that contains TMDL-based limits, and (3) Ohio EPA may not utilize guidance documents as mandates unless and until they also are subjected to rulemaking. The Court rejected Ohio EPA's argument that TMDLs that impose phosphorus limits are merely "interpretations" of Ohio EPA's existing narrative nuisance water quality standard.

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The *Fairfield County* decision will require that Ohio EPA revise its process for pending and future TMDLs and the NPDES permits that are based on them. The Court's decision does not address previously-adopted TMDLs, existing permits with TMDL-based limits, and existing phosphorus permit limits derived from the 1999 guidance. Although a minority of the Court asserts that the majority's decision invalidates all existing TMDLs, leaving the enforceability of many permits in question, that determination will be left to a later case.

For more information, please contact Stephen Samuels or Stephen Haughey, who principally handled the Fairfield County appeal, or any other attorney in Frost Brown Todd's Environmental Practice Group.

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