

Tenth District Court of Appeals court decision represents victory for municipalities of regulation of nutrient pollution

October 4, 2013

This article comes from our Fall 2013 Water & Wastewater Newsletter

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Background

The Ohio Environmental Protection Agency (Ohio EPA) currently faces a difficult regulatory challenge in addressing the issues presented by nutrient pollution in Ohio waterways. Nutrient pollution occurs when too much nitrogen or phosphorus enter aquatic environments, such as lakes, streams, rivers and other water bodies. Although these nutrients are chemicals that plants and animals typically require to grow, when a disproportionate amount of such nutrients are introduced into the environment, water can become polluted, causing problems such as harmful algal blooms, nuisance growths of aquatic vegetation, and poor swimming and fishing conditions.

The Ohio EPA continues to work diligently to create an equitable and effective nutrient reduction plan, targeting both point and non-point sources of nutrient pollution. However, in its efforts to regulate point sources of such nutrients, it has sought to implement these measures through limits placed in National Pollutant Discharge Elimination System (NPDES) permits. Such limits have led at least one county, in the case of *Fairfield Cty. Bd. of Commrs. v. Koncelik*, 2013-Ohio-2106, to challenge the Ohio EPA's authority to implement such water quality effluent limitations under ORC 6111.03.

ORC 6111.03 sets forth the authority of the Director of the Ohio EPA to regulate Ohio's water bodies. ORC 6111.03(J)(1) allows for the Director to regulate the discharge of wastes into the waters of the state through the issuance of NPDES permits in compliance with the Federal Water Pollution Control Act. At issue in *Fairfield County* was ORC 6111.03(J)(3), which provides:

To achieve and maintain applicable standards of quality for the waters of the state ... 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 ORC 6111.03(J)(3) (emphasis added).

Fairfield County Board of Commissioners Appeals Nutrient Limits in NPDES Permits

In 2005, Fairfield County applied for a renewal of its NPDES permit for its Tussing Road wastewater treatment plant, located on Blacklick Creek in Pickerington, Ohio. The previous permit for this plant called for monitoring of total phosphorus (TP) and did not address the removal of total dissolved solids (TDS) prior to discharge. However, following Fairfield County's request for the renewal of the Tussing Road permit, the Ohio EPA issued public notice of a change to the permit, calling for a TP limit of .5 mg/l and a TDS limit of 1,646 mg/l concentration and 18,692 mg/l monthly loading. After Fairfield County issued comments requesting such limits be removed due to burdensome costs and technological infeasibility, the Ohio EPA Director issued the final permit retaining such limits.

Following the final implementation of the above limits, Fairfield County filed a notice of appeal with the Environmental Review Appeals Commission (ERAC). The County sought, among other assignments of error, a determination that the director acted unreasonably and unlawfully under ORC 6111.03(J)(3), because the director, in placing the TP and TDS limits in the permit, did not give consideration to, or base his decision on, the technical feasibility or economic reasonableness of removing either TP or TDS from the wastewater treated at the plant.

ERAC first held that there was a valid factual foundation for imposing both the TP and TDS limits on the Tussing Road plant. The TP limit was based upon the total maximum daily load (TMDL) assessment, approved by the U.S. EPA for the Big Walnut Creek Basin. Therefore, ERAC found that the director had a valid factual foundation for the TP limit because it was based entirely on an already assessed TMDL. Likewise, ERAC held that there was a valid factual foundation for imposition of the TDS limit. While Blacklick Creek was in attainment, ERAC found the director established a TDS limit that was "consistent with attainment of the water's designated uses," and was therefore lawful under OAC 3745-1-07(A)(6)(a).

Despite finding a factual foundation for the imposition of both limits, ERAC held that the regulations were unlawful and unreasonable because the director failed to analyze the technical feasibility and economic reasonableness of the limits prior to issuance of the permit. Fairfield County and the Ohio EPA director appealed ERAC's holding to the Tenth District Court of Appeals in Franklin County.

Tenth District Court of Appeals of Franklin County Affirms: Regulation of Water Quality Effluent Limitations by Director Requires Technical Feasibility and Economic Reasonableness Analysis

The Tenth District Court of Appeals affirmed ERAC's holdings, including that the Ohio EPA Director must analyze the technical feasibility and economic reasonableness of nutrient limits placed in NPDES permits under ORC 6111.03(J)(3) prior to issuance of such discharge limits.

Under the first assignment of error, Fairfield County argued that ERAC erred in finding that there was a valid factual foundation for the phosphorus limits imposed in the permit because the limit was, for several reasons, arbitrarily established. The director, however, argued that the phosphorus limit was consistent with the Big Walnut Creek TMDL report, which was a publicly noticed and federally approved plan to reduce nutrient enrichment via reduction of phosphorus discharge to the Big Walnut Creek Watershed. Thus, because the limits were based upon the approved TMDL report, the Court of Appeals affirmed ERAC's finding that there was a valid factual foundation for the phosphorus limit and the first assignment of error was overruled.

Under the second assignment of error, Fairfield County argued that ERAC erred in finding that there was a valid factual foundation for the TDS limits in the renewed permit. Fairfield County argued that the TDS limit was likewise unrelated to attainment of water quality standards due to the fact that, even without the limit, Blacklick Creek was in attainment. The director countered by arguing that the TDS limit was supported by reliable, probative and substantial evidence that met the established statewide water quality standards for TDS. Again, the Court of Appeals affirmed ERAC's finding that the Ohio EPA had a valid factual foundation upon which to base the TDS limit and the second assignment of error was overruled.

Under the third assignment of error, the director asserted that ERAC erred in concluding that the director is responsible for analyzing technical feasibility and economic reasonableness prior to implementation of water quality-based effluent limits under

ORC 6111.03(J)(3). The director argued that, under the delegated authority of the Clean Water Act (CWA), he did not have the authority to consider economic reasonableness and technical feasibility in making effluent limit determinations and that, even if such analysis was consistent with the CWA, the statute provides an exemption where it would be contrary to the CWA. He argued that here, such analysis was contrary to the purposes of the CWA due to the existence of the limitations set forth in the TMDL. However, the director further contended that, in the event the Court of Appeals found such analysis was required, the appropriate remedy would be to remand the permit back to the director to conduct such analysis, rather than to have ERAC make a determination on the issue.

On appeal, the director admitted that he did not engage in such technical or economic analysis prior to implementing the TP and TDS limits in the NPDES permit for the Tussing Road plant. Furthermore, he was unaware that the price of implementing a phosphorus treatment facility would cost more than \$5 million. Finally, he was not aware that it was not technically feasible to treat TDS as required under the permit at the Tussing Road plant nor was he aware that no other plant in Ohio engaged in the removal of TDS.

Fairfield County argued on appeal that the economic reasonableness and technical feasibility analysis was expressly required by the plain language of ORC 6111.03(J)(3) such that, in setting water quality effluent 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. ...” The county further argued that such analysis is consistent with the CWA and that the TMDL report does not override ORC 6111.03 or other state laws or regulations by becoming an automatic standard with which the director must comply. Further, Fairfield County argued that ERAC’s approach of remanding the permit back to the director to engage in a technical feasibility and economic reasonableness analysis was incorrect and that the director should not receive “two bites at the apple.” Rather, Fairfield County argued that it is ERAC’s duty to make a determination based on the evidence presented to it by the county, which demonstrates that the limits are not technically feasible or economically reasonable.

The Tenth District Court of Appeals affirmed ERAC’s holding that a technical feasibility and economic reasonableness analysis must be conducted by the director of the Ohio EPA prior to issuance of water quality related effluent limits in NPDES permits. The court noted that the director failed to point to a provision of the CWA, which prohibits a cost-benefit analysis involving water quality standards, and otherwise failed to prove how such analysis would be inconsistent with the CWA. Further, the court stated that the fact that such analysis is not explicitly required by federal law does not make it inconsistent thereto. Also, the court has previously required consideration of technical feasibility and economic reasonableness in an Ohio case involving the Clean Air Act and an Ohio statute containing substantially similar language to that of ORC 6111.03(J)(3), *Sandusky Dock Corp. v. Jones*, 106 Ohio St.3d 274, 2005-Ohio-4982. Finally, the plain language of ORC 6111.03(J)(3) clearly provides for such analysis in implementing water quality based effluent limits.

Additionally, the Court of Appeals found that the TMDL-derived phosphorus limit for the Tussing Road plant was not mandatory, so long as adjustments to it were made so as to be consistent with the TMDL. The TMDL thus did not confine the director to simply implement the exact limit set forth in the report. Instead, the director may allocate limits across various point sources so as to comply with the TMDL. However, in so doing, the director must consider and base his determination on the technical feasibility and economic reasonableness of such limits pursuant ORC 6111.03(J)(3).

Finally, the court held that, in this case, the issuance of TP and TDS effluent limits were unreasonable and unlawful and should be remanded to the director of the Ohio EPA so that the implementation of any such limits may be based upon a technical feasibility and economic reasonableness analysis. Further, it stated that the director has broad discretion in determining *how* he will comply with the requirements set forth in ORC 6111.03(J)(3).

Future Significance of Fairfield Cty. Bd. of Commrs. v. Koncelik

The *Fairfield Cty. Bd. of Commrs. v. Koncelik* decision represents a significant victory for municipalities and other members of the wastewater industry in the uphill battle over regulation of nutrient pollution. It issues a warning to the director that, in its actions to protect the waters of the state, it must consider the practical effect such regulation poses to the technical and economic

interests of private and public industry. While the Ohio EPA will continue to search for equitable and effective solutions to the issues presented by nutrient loading, it must now do so with an eye toward the interests of the public and businesses that it affects.

Special thanks to summer associate Rachel Lusk for her assistance in preparing this summary.

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