



## New legislation allows for challenges to Ohio EPA TMDLs

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The Ohio legislature has recently clarified uncertainty surrounding how the Ohio Environmental Protection Agency (Ohio EPA) will establish and maintain total maximum daily loads (TMDLs) for Ohio watersheds. On March 24, 2015, the Ohio Supreme Court issued its decision in *Fairfield Cty. Bd. of Commrs. v. Nally*, 143 Ohio St.3d 93, 2015-Ohio-991, holding that Ohio EPA must follow the rulemaking procedures set forth in Ohio Revised Code Chapter 119 before submitting a TMDL to the U.S. EPA for approval. This ruling sent waves throughout Ohio's water and wastewater community. Because none of the TMDLs previously set by Ohio EPA had been adopted as rules under ORC Chapter 119, the Ohio Supreme Court's ruling arguably invalidated all of the TMDLs for Ohio's watersheds established prior to the *Fairfield* decision. In addition, Ohio EPA was prevented from setting new TMDLs until a process had been established that met the requirements of ORC Chapter 119.

In response to the *Fairfield* decision, the Ohio legislature drafted House Bill 49 of the 132<sup>nd</sup> General Assembly, which became law when signed by Governor Kasich on June 30, 2017. The changes contained in H.B. 49 are codified in the new ORC Sections 6111.561–6111.564, which govern Ohio's treatment of previously-set TMDLs as well as Ohio EPA's establishment of new TMDLs moving forward. Most importantly, the new legislation sets forth avenues for "potentially affected dischargers" to challenge TMDLs, both those previously set and those to be established in the future.

Regarding preexisting TMDLs, H.B. 49 reinstates all TMDLs established by Ohio EPA and approved by the U.S. EPA prior to March 24, 2015. However, affected dischargers now have an avenue to challenge a previously-established TMDL. Holders of a National Pollutant Discharge Elimination System (NPDES) permit containing effluent limits, pretreatment limits, or other terms and conditions based on an existing TMDL can challenge the TMDL to the Environmental Review Appeals Commission (ERAC), but such

a challenge can *only* be made during the appeal of the NPDES permit. This requires holders of an NPDES permit to wait until the permit is up for renewal before they can challenge an associated TMDL. In addition, when a publicly owned treatment works appeals a TMDL-based NPDES permit, ERAC is statutorily required to join as parties to the appeal all significant industrial users listed in the NPDES permit holder's annual pretreatment program reports that are known to discharge a significant amount of a pollutant limited by the TMDL into the publicly owned treatment works. This process thereby ensures that all relevant parties can be involved in the TMDL appeal process, if they so choose.

For the establishment of TMDLs moving forward, Ohio EPA is required to release documents for public review and comment during the TMDL development process. These documents include: (1) the project assessment study plan; (2) the biological and water quality study report; (3) the TMDL loading analysis plan; and (4) the preliminary TMDL modeling results. Ohio EPA must allow at least 30 days for input and public comment on each of these documents. In addition, before releasing a final TMDL, Ohio EPA must prepare and provide public notice of an official draft TMDL, with an accompanying time period for comment of at least 60 days. If the director of Ohio EPA determines that there is "significant public interest" in the TMDL, he is required to provide an opportunity for a public hearing.

Ohio EPA is currently working on establishing procedures for providing notice of the required documents to stakeholders and for determining if significant public interest in a TMDL exists and has been charged with establishing criteria for both by December 31, 2018. So far, Ohio EPA appears to be providing public notice of TMDL documents through bulletins posted on its [website](#) and accepting comments via email, to [epatmdl@epa.ohio.gov](mailto:epatmdl@epa.ohio.gov), or in writing to Ohio EPA, Division of Surface Water, P.O. Box 1049, Columbus, Ohio 43216-1049. Stakeholders can request to be provided with notice via an electronic mailing list, which can be subscribed to [here](#).

Questions about the new TMDL process should be directed to Melinda Harris, [melinda.harris@epa.ohio.gov](mailto:melinda.harris@epa.ohio.gov) or (614) 728-1357. Interested stakeholders should keep an eye out for Ohio EPA's procedures for providing notice of TMDL processes, which will likely be established later this year.

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