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Recent Ohio Supreme Court case could impact enforceability of discharge limits in Wisconsin wastewater permits

On March 24, 2015 the Ohio Supreme Court reached a decision that could have broad implications for phosphorus, total suspended solids and other water-quality-related discharge limits placed in wastewater permits under the total maximum daily load (TMDL) procedure. In *Fairfield County Board of Commissioners v. Nally*, Slip Opinion No. 2015-Ohio-991 (Ohio Supreme Court, March 24, 2015), the Ohio Supreme Court invalidated a phosphorus limit contained in a municipal wastewater-treatment permit based upon a TMDL allocation. The basis for this Supreme Court's invalidation was that the Ohio Environmental Protection Agency (Ohio EPA) failed to follow notice and opportunity for comment under the state rulemaking requirements prior to adopting a final TMDL allocation for dischargers on an impaired waterway in Ohio. Although the Ohio Supreme Court case is not controlling under Wisconsin law, the analysis could have significant impact on TMDL development and waste load allocations expressed as discharge limits in Wisconsin pollution discharge elimination system (WPDES) permits.

An overview of the TMDL process under the Clean Water Act

The Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1251 et seq., establishes the process for imposing water-quality-related discharge limits in a WPDES permit. It is important to understand this process in order to appreciate the significance of the Ohio case for WPDES permit holders.

The Clean Water Act protects water quality in water basins by requiring state agencies to use two methods for protection from point source discharges: (1) technology-based effluent limitations on "point sources" (33 U.S.C. § 1311), and (2) water-quality standards which classify a body of water by its designated use and set criteria for protecting that use (33 U.S. C. § 1313). A latter method is known as water-quality-related protections.

The Clean Water Act requires each state to identify those waters within its boundaries for which the technology effluent limits are not stringent enough to protect water-quality standards applicable for those waters (33 U.S.C. 1313(d)(1)(A)). The state is required to make rankings for those water bodies that fail to provide adequate protection for water quality and must develop a TMDL allocation for those impaired and listed water basins. (33 U.S.C. 1313(d)(1)(C)). The TMDL process required under the Clean Water Act sets the maximum amount of the pollutant that may be discharged

without causing the receiving body a water to violate water-quality standards (33 U.S.C. 1313(d)(1)(C)).

The state is required to submit each TMDL to the United States Environmental Protection Agency (U.S. EPA) for its approval, and the EPA must make a decision regarding approval within 30 days of submission of the TMDL (33 U.S.C. 1313(d)(2)). Once the TMDL is approved by the U.S. EPA, the state must include limits that are “consistent with the assumptions and requirements” set forth in the TMDL (40 C.F.R. 122.44(d)(1)(vii)(B)).

The definition of total maximum daily load is contained in 40 C.F.R. 130.2(i) as follows:

The total maximum daily load (TMDL). The TMDL process for the waterbody calculates the maximum amount of pollutants that any particular waterbody can receive and allocates that amount to each pollutant source including sources that have individual permits for discharge.

Wisconsin has listed 856 waterbodies as failing to meet water-quality standards within the meaning of the Clean Water Act. The Wisconsin Department of Natural Resources is in the process of preparing TMDL reports for some of these waterbodies and, after finalization, use those allocations to impose limitations on individual point sources identified in the TMDL allocation report.

It is important to note that DNR has established TMDLs for some but not all of the impaired water bodies. For permit holders whose permit is

renewed before a TMDL process has been concluded, that permit holder will have a water-quality-related effluent limit subject to a compliance schedule later to be replaced by a TMDL limit once it is established. Other permit holders will have a TMDL limit since they are located on waterbodies where that process has already been completed.

The Wisconsin Department of Natural Resources has established numerical water-quality criteria for phosphorus and has published that criterion for waterbodies under its rulemaking authority. However, to date, the Wisconsin Department of Natural Resources has not adopted or used the rulemaking process for finalizing TMDL reports for any of the impaired waterbodies analyzed to date.

The rulemaking process

As a general proposition, Wisconsin law requires the adoption of any standard which is contained in an individual license to be promulgated in accordance with general rulemaking process procedures. In particular Wis. Stats. § 227.10(2)(m) provides as follows:

No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter, except as provided in § 186.118(2)(c) and (3)(b) 3. The governor, by executive order, may prescribe guidelines to ensure that rules are

promulgated in compliance with this subchapter.

The definition of “rule” is contained in Wis. Stats. § 227.01(13) and provides as follows:

“Rule” means a regulation, standard, statement of policy, or general order of general application which has the effect of law and which is issued by an agency to implement, interpret, or make specific legislation enforced or administered by the agency or to govern the organization or procedure of the agency.

There is a long list of exceptions to this definition of “rule” that is contained in Wis. Stats. § 227.01(13); but none of these exceptions appear to be relevant to the establishment of a TMDL limit which is later imposed in a point source discharge permit.

In addition, it is important to note that U.S. EPA must proceed through federal rulemaking in the event it establishes its own TMDLs under the Clean Water Act. See, 33 U.S.C. 1313(d)(2).

Wisconsin law has a number of provisions which require the Wisconsin Department of Natural Resources to administer its water-quality protections in a manner consistent with the Federal Clean Water Act as it applies to water-quality standards. See Wis. Stats. § 283.11(2).

Overview of the Ohio Supreme Court decision

The Ohio EPA imposed a new condition limiting the discharge of phosphorus in Fairfield County’s

National Pollutant Discharge Elimination System (NPDES) permit. Fairfield County owns and operates a wastewater treatment plant which discharges into a creek that is on the list of water impaired waterbodies. In imposing the new limit, Ohio EPA relied on a TMDL report which imposed specific allocations of phosphorus to point and nonpoint sources in the impaired watershed, including the Fairfield County wastewater treatment facility.

The County filed a notice of appeal with the Environmental Review Appeal process under Ohio law and challenged the imposition on the TMDL limit in its new permit on the grounds that Ohio EPA failed to adopt the TMDL report in accordance with the rulemaking process requirements under state law.

The Ohio Supreme Court ruled that Ohio EPA should have adopted the TMDL allocation in its report in accordance with rulemaking procedures under Ohio law. In particular, the Ohio Supreme Court decided that the TMDL is a “rule” based upon an Ohio definition of “rule” which is remarkably similar to the Wisconsin definition of “rule.” Under Ohio law, “rule” is defined as:

Any rule, regulation, or standard, having a general and uniform operation, adopted, promulgated, and enforced by any agency under the authority of the laws governing such agency, and includes any appendix to a rule.

In supporting its interpretation, the Ohio Supreme Court relied on other state Supreme Court decisions that have addressed this issue and have also ruled that TMDLs must be promulgated as rules before they are used as a basis for discharge limitations in wastewater

permits. See *Asarco, Inc. v. Idaho*, 138 Idaho 719, 69 P.3d 139 (2003) and *Commissioners of Public Works v. South Carolina Department of Health & Environmental Control*, 372 S.C. 351, 641 S.E.2d 763 (2007).

In the Fairfield County decision, the Ohio Supreme Court stated as follows:

In the TMDL for Big Walnut Creek, Ohio EPA developed binding standards to apply to the entire watershed, and the discharging sources are expected to abide by those standards. But those that will be affected have not been provided with the full panoply of rights afforded by R.C. Chapter 119. [The rulemaking procedures under Ohio law.] Without the benefit of the procedure prescribed by that chapter, affected persons are denied access to the process that the general assembly intended them to have, i.e., the early, informed, and meaningful opportunity to challenge the legality of the standards established in the TMDL and the underlying assumptions, data, logic, and policy choices that Ohio EPA made in developing those standards.

The Ohio Supreme Court vacated the TMDL for phosphorus contained in the Fairfield County wastewater treatment permit and remanded the matter to the Ohio EPA for compliance with rulemaking procedures.

Possible implications of the Ohio case for Wisconsin

While the Ohio Supreme Court case is based upon Ohio law describing rulemaking procedures, many of those procedures are remarkably similar to the Wisconsin legislative

standards for requiring agency action to follow rulemaking procedures. The Wisconsin courts could reach that same result using the Ohio Supreme Court analysis. This analysis would support a finding that all TMDL limits (including phosphorus and total suspended solids) applicable to permit holders located in impaired waterbodies of Wisconsin should be established in accordance with rulemaking procedures under Wis. Stats. Chap. 227 before the TMDL report is submitted to U.S. EPA for approval under the Clean Water Act.

If EPA were to modify the TMDL Report that previously went through the rulemaking process under Wisconsin, there is a strong argument that that modification must go through additional rulemaking in accordance with Wisconsin law before the EPA proposed modifications are implemented.

The implications of the Ohio State Supreme Court case include the following for holders of WPDES permits in Wisconsin that potentially would be subject to TMDL limits. The permit holder should consider challenging a limit imposed as a result of the TMDL process when that TMDL process was not adopted by rulemaking. The legal options to challenge a discharge limit in a permit may include filing a declaratory judgment action in state court under Wis. Stat. § 227.40 after the TMDL report is finalized by the Wisconsin Department of Natural Resources if that report did not go through rulemaking procedures.

Another possible opportunity would be to challenge the failure of the Wisconsin Department of Natural Resources to adopt a TMDL limit through rulemaking in a request for

a hearing under Wis. Stat. § 283.63 when the permit holder receives the TMDL related limit in its new permit.

The TMDL process for water and impaired waterbodies and the adoption of phosphorus, total suspended solids and other water-quality-related limitations is an extraordinarily complex process. In any event, the Ohio Supreme Court decision provides a very important analysis that should be considered by permit holders when the TMDL process is undertaken for the impacted waterbody where the permit holder is located.

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