

OHIO SUPREME COURT INVALIDATES 1700 WATER QUALITY DETERMINATIONS

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The Ohio Supreme Court provided a major setback to Ohio EPA efforts to establish water quality-based discharge limits in its surface water discharge permits (i.e., NPDES permits), affecting (1) any manufacturer who discharges water directly into surface water or (2) any political subdivision with its own wastewater treatment plant. The Court determined in [Fairfield County v. Nally](#) that Total Maximum Daily Loads (TMDLs) must go through formal administrative rulemaking before they can be used to support discharge limits in NPDES permits.

Ohio EPA had argued the TMDLs were merely guidance. The Court rejected the Agency's argument and said that TMDLs establish new legal obligations and, therefore, must go through the formal rulemaking process contemplated by Ohio Revised Code Chapter 119.

WHAT IS A TMDL?

Section 303(d) of the Clean Water Act requires the identification of polluted rivers, streams, lakes, and other waterbodies. Once impaired waterbodies are identified, the Clean Water Act contemplates use of the TMDL process to determine the maximum amount of a pollutant that may be discharged without causing the receiving body of water to violate water-quality standards. See [33 U.S.C. 1313\(d\)\(1\)\(C\)](#).

A TMDL is a complex technical analysis of a waterbody. The analysis includes chemical and biological testing of the waterbody to determine whether it currently doesn't meet water-quality standards. If the waterbody doesn't meet water-quality standards, the TMDL process determines how much reduction must occur in various pollutants for the waterbody to be able to meet water-quality standards. If the waterbody meets water-quality standards, the TMDL determines how much additional pollution may be discharged to it before it will no longer meet those standards.

Once the TMDL process determines either the amount of pollutant loading reduction needed or available pollutant loading remaining, the Agency allocates the available pollutant loading among the NPDES permitted dischargers to the surface water body (i.e., wastewater treatment plants, utilities, manufacturers, etc.). The allocation takes the form of effluent discharge limits for dischargers through NPDES permits.

IMPACT OF SUPREME COURT DECISION ON OHIO EPA DISCHARGE PERMITS

As of May 9, 2013, Ohio EPA had listed approximately 86 watersheds for TMDL development, and approximately half had been completed and approved by U.S. EPA. While there are 86 watersheds, there may be multiple surface waters in each watershed. According to information provided by Ohio EPA, the Agency has issued approximately 1,761 TMDLs for watercourses throughout Ohio, including 132 TMDLs to determine phosphorus loading alone.

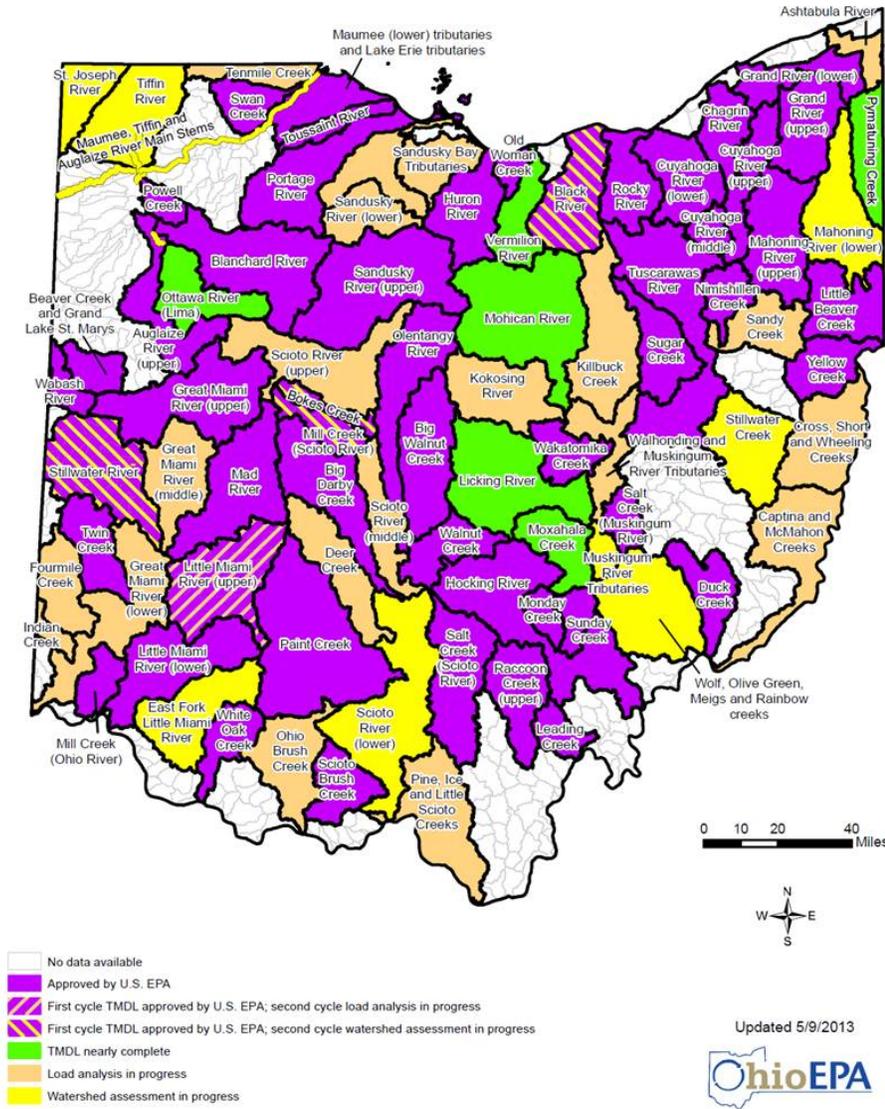
The map below is from [Ohio EPA's website and shows the current status of the TMDL process](#) for each watershed. The purple areas show those watersheds with TMDLs approved by U.S. EPA. The other colors show the progress toward obtaining U.S. EPA's approval of the TMDL.

After the Ohio Supreme Court decision, all of the purple areas will have to through the rulemaking process before those TMDLs can be used to support discharge limits in NPDES permits for those watersheds.

Furthermore, any NPDES permit that currently has a discharge limit based upon a TMDL approved by U.S. EPA is likely not enforceable. Given the large number of NPDES permits that have been issued in these areas, the Court decision represents a huge setback for the Agency.

Not only does the decision make it more difficult for the Agency to enforce discharge limits in existing NPDES permits, the Agency will also have to expend significant resources going back through the rulemaking process for potentially each the 1,761 TMDLs the Agency had previously considered completed.

Ohio Total Maximum Daily Load Program Progress



ADDITIONAL INFORMATION

For additional information, please contact:

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