



John G. Newsome, P.E.,
President, AOMWA
1250 Fairwood Avenue
Columbus, OH 43215
(614) 645-8276

November 30, 2021

VIA EMAIL ONLY

Ohio EPA - Division of Surface Water
epatmdl@epa.ohio.gov
P.O. Box 1049
Columbus, OH 43215

Re: Comments on Ohio EPA's Preliminary Draft TMDL Report for the Black River Watershed

Dear TMDL Coordinating Team:

The Association of Ohio Metropolitan Wastewater Agencies ("AOMWA") appreciates the opportunity to comment on Ohio EPA's Preliminary Draft TMDL Report for the Black River Watershed. AOMWA is a not-for-profit trade association that represents the interests of public wastewater agencies across the state of Ohio, serving more than 4 million Ohioans and successfully treating more than 320 billion gallons of wastewater each year. AOMWA's members include Avon Lake, which is located in the Black River watershed, as well as many other Ohio publicly-owned treatment works¹ ("POTWs") that would be affected by virtue of the precedent set by the Black River TMDL.

AOMWA looks forward to participating in the TMDL process, and understands based on Ohio EPA's comments that if the Agency moves forward with this TMDL, then it will make the report available for another 60-day comment period and will provide additional opportunities for stakeholder meetings. As a result, these comments are meant to be merely preliminary in nature. AOMWA reserves the right to provide comments on additional issues in future stages of the development of the TMDL.

- 1. The Black River TMDL Must be Developed Consistent with R.C. 6111.562.** As the Fact Sheet associated with the TMDL acknowledges, "[t]his preliminary Black River Watershed TMDL report is the first TMDL report made available to stakeholders since Ohio EPA's statute and rules were revised in 2017 and 2019, respectively." Given the precedential nature of this TMDL, AOMWA is interested in ensuring that the TMDL is developed appropriately and in accordance with the new law. Under the new statutory framework, R.C. 6111.562 adds requirements for additional notices and opportunities for

¹ Other AOMWA members include cities of Akron, Bowling Green, Canton, Columbus, Dayton, Euclid, Fairfield, Hamilton, Lancaster, Lima, Marysville, Middletown, Newark, Portsmouth, Solon, Springfield, Wadsworth, Warren, and Butler County, Greene County, Hamilton County, Summit County, the Metropolitan Sewer District of Greater Cincinnati and the Northeast Ohio Regional Sewer District.

commenting that must be provided “during the development of a TMDL after March 24, 2015.”² In 2015, the Ohio Supreme Court held that Ohio EPA’s TMDL development process at that time was unlawful, because stakeholders were not afforded an opportunity to comment on TMDLs as required by R.C. Chapter 119. *Fairfield Cty. Bd. of Commrs. v. Nally*, 143 Ohio St.3d, 2015-Ohio-991. Following that decision, the Ohio General Assembly enacted legislation that protects opportunities for meaningful public engagement. This legislation is now codified as R.C. 6111.562.

Under R.C. 6111.562, Ohio EPA **shall** provide notice and an opportunity for public input during at least the following steps of TMDL development: (1) the project assessment study plan, including portions of the plan that seek to determine the causes and sources of impairments or threats; (2) the biological and water quality study report or its equivalent; (3) the loading analysis plan, including the proposed modeling approach and the water quality restoration targets, goals, or criteria; and (4) the preliminary modeling results. Unfortunately, it does not appear from the preliminary draft of the Black River TMDL that Ohio EPA has provided an opportunity for comment at each of these steps, including with respect to (1) the October 2016 Biological and Water Quality Study of the Black River Basin, based on data collected in 2012; (2) a loading analysis plan; or (3) preliminary modeling results. Without an opportunity to comment on the loading analysis plan in particular, affected stakeholders were unable to provide comments regarding the water quality restoration targets for the watershed. Accordingly, stakeholders were not provided an opportunity to comment on this key element driving the recommended pollutant loading reductions, as discussed in greater detail below.

2. **The Agency Should Not Rely Upon Outdated Data, and Should Revisit its Assessment of Conditions with Newer Data.** As noted in the Preliminary Draft Report, Ohio EPA is relying on biological and water quality monitoring data gathered in 1999 and 2012. See Preliminary Draft Report at 113-114. The representativeness of this data is concerning, as the data is nearly 10 years old. In addition, as the Agency has acknowledged, recent developments are expected to have an impact on water quality, including Avon Lake’s completion of a sewer separation project in 2019 that eliminated eighteen CSOs. See Preliminary Draft Report at 36. AOMWA requests that the Agency develop any TMDL and/or watershed management plan based on updated and representative data. Given the potentially significant costs associated with the recommended point source reductions, it would be appropriate to verify that the waste load allocations are indeed justified based on current water quality conditions, and to start over with the required steps set forth in R.C. 6111.562(A)(1)(a)-(d).
3. **Revisiting the Biological and Water Quality Monitoring Data is Especially Appropriate Given the TMDL’s Data Gaps.** In general, successful use of loading duration curves requires a sufficient number of samples across a range of flow conditions. However, the Preliminary Draft Report acknowledges that Ohio EPA had one sample within certain flow zones, and in some instances had no samples collected within other flow zones. See Preliminary Draft Report at 87, 97. As a result, the sampling data available is not merely outdated, but would also benefit from developing a more robust dataset.
4. **The Waste Load Allocations for Combined Sewer Overflows for *E.coli* Should be Revisited.** The Preliminary Draft Report also contains some concerning and unrealistic

² Similarly, additional requirements are set forth in OAC Chapter 3745-2.

waste load allocations. In particular, Ohio EPA has calculated waste load allocations associated with CSOs using 126 count *E.coli* / 100 mL as the concentration of bacteria for these discharges. If a waste load allocation is calculated for CSOs, it would be more appropriate to use the expected *E.coli* concentration in remaining overflows based on the control technology identified in the entity's LTCP rather than the instream *E.coli* target. If the Agency does intend to proceed with the TMDL, AOMWA looks forward to collaborating and considering alternative waste load allocations for CSOs, preferably with the benefit of updated biological and water quality data as discussed above. Any such allocation should also reflect that individual dischargers that have implemented their CSO Long-Term Control Plans have already achieved the necessary load reduction efforts to meet the target.

5. **Ohio's Role in Developing the TMDL.** AOMWA believes that Ohio, as the delegated permitting authority under the Clean Water Act, should retain primary oversight over the development of the Black River TMDL. The Preliminary Draft Report acknowledges that certain modeling work was provided by Tetra Tech under contract with US EPA. However, US EPA's involvement is not based on (1) a finding by US EPA that Ohio EPA failed to act timely and appropriately, as a delegated CWA NPDES authority, to develop an amended Black River TMDL in accordance with Ohio's approved CWA Section 303(d) list of impaired waterbodies, or (2) a decision by Region 5 to exercise its oversight authority under the CWA to develop the TMDL due to Ohio EPA's untimeliness. AOMWA requests confirmation that Ohio will retain the primary authority for this TMDL development at each key step of the process.
6. **The Preliminary Draft Report Contains an Unsuitably Conservative Allocation for Future Growth.** Ohio EPA includes a 4 percent allocation for future growth, yet Ohio EPA acknowledges that municipalities in the watershed are experiencing an average **decline** of 0.1 percent. This conservative approach—combined with a 10 percent margin of safety for E.coli waste load allocations—is inconsistent with the Agency's stated intention of incorporating an adaptive management approach. Instead of using an iterative/adaptive management approach, the Agency's reliance on these conservative assumptions would impose costly controls without evaluating whether interim measures lead to water quality improvements.
7. **The Draft Report Improperly Uses the 1999 Associations Report for "Target" Water Quality Standards.** The Preliminary Draft Report states that "TMDL [nutrient] targets are selected on the basis of evaluating reference stream data published in a technical report [published by Ohio EPA in 1999] titled Association between Nutrients, Habitat, and the Aquatic Biota in Ohio Rivers and Streams." See Preliminary Draft Report at 7. However, in the *Fairfield County* decision noted above, the Ohio Supreme Court held that the target values for phosphorus from the same Associations Report constitute "standards of water quality" for "waters of the state of Ohio" within the meaning of R.C. 6111.041, and that "Ohio EPA could not lawfully impose a [numeric] phosphorus allocation for [wastewater treatment plants] in the watershed until that standard was first promulgated as a rule under R.C. Chapter 119." *Fairfield Cnty. Bd. of Comm'rs* at ¶¶ 38-39 (referencing decision which held that Ohio EPA "cannot regulate through 'guidelines' that are in reality rules requiring formal promulgation").

With respect to the Black River TMDL, Ohio EPA continues to rely on the 1999 Association Document to set a *de facto* water quality standard without first providing an opportunity for comment on the standard. When the Agency merely provides an opportunity for comment

during the final steps of the TMDL's development, as is the case here, stakeholders are not afforded a meaningful opportunity for engagement; the Agency has already moved forward with developing the TMDL based on water quality targets. As a result, stakeholders are "denied access" to "the early, informed, and meaningful opportunity to challenge the legality of the standards," in a manner that is not permitted under Ohio law. *Fairfield Cnty.* at ¶ 47. The Preliminary Modeling Report does not indicate why this opportunity was not provided.

8. **TSS Targets Should be Supported with Additional Explanation.** Stakeholders should be provided with an opportunity to discuss the Total Suspended Solids ("TSS") targets in the TMDL. In particular, the stakeholders should be provided information as to how the 75th percentile is (or is not) linked to the underlying biological criteria.

AOMWA appreciates Ohio EPA's consideration of these comments and willingness to extend the comment deadline. We look forward to participating in the development of this TMDL. Should you have any questions, please contact Rees Alexander at rees.alexander@squirepb.com or (614) 365-2798. Thank you again for your attention to and consideration of these comments.

Sincerely,



John G. Newsome, P.E.
President, AOMWA

cc: (via email)
Rees Alexander, Esq., Squire Patton Boggs (US) LLP
Katherine Wenner, Esq., Squire Patton Boggs (US) LLP
Adrienne Nemura, Geosyntec
Beth Toot-Levy, Geosyntec