



Stormwater Litigation & Legal Hot Topics

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MARK YOUR CALENDARS!!

Upcoming Ohio Stormwater Association Events:

- June 14th at 1pm – Regulatory Committee meeting
- Post Construction Maintenance – Regional Trainings
 - July 19th - Central Ohio July 26th - Northwest Ohio August 2nd - Southwest Ohio
- September 13th – State-wide webinar – Nutrients/TMDLs
- October 30th - 2017 WATERSHED WORKSHOP, The Ohio State University
- December 6th – State-wide Stormwater Webinar – OEPA Updates



SPECIAL THANKS to the 2018 OSWA ORGANIZATIONAL PARTNERS!



Please consider becoming an organizational partner and supporting the
Ohio Stormwater Association!

Contact LentzB@stormwaterdistrict.org if interested.

OSWA's REGULATORY COMMITTEE

Bob Lentz, Butler Stormwater District

David Reutter, Franklin Soil and Water Conservation District

Harry Stark, City of Aurora

John Aldrich, CDM Smith

Jennifer Fish, Franklin Soil and Water Conservation District

John Lyons, Strand Associates

Justin Cekaj, City of Aurora

Kathy Wade-Dorman, Village of Indian Hill

Kellie Hebert, ARCADIS

Kelly Kuhbander, Strand Associates

Mark McCabe, Gresham, Smith & Partners

Mark Rufener, K.E. McCartney & Associates

Michael Liptak, EnviroScience, Inc.

Patekka Pope Bannister, City of Toledo

Regina Collins, City of Toledo

Samantha Brown, Contech Engineered Solutions

Heather Elmer, Chagrin River Watershed Partners

Christina Znidarsic, Chagrin River Watershed Partners

Hans Gucker, ODOT

Alaina Morman, Allen Soil and Water Conservation District

Brian Grimm, Emerald Environmental

Heather Haynes-Long, RES

Steve Buchberger, University of Cincinnati

Jonathan Prier, ODOT

Teri Wise, City of Baltimore

Jennifer Vatter, JMA Consultants

Mathew Repasky, City of Columbus

Dana Hinaman, Contech Engineered Solutions

Eric Pottenger, Butler County Engineer's Office

Joe Gearing, City of Lima

Becky Humphreys, ODOT

Ben Howard

Joe Reitz, City of Avon Lake

Benjamin Schroeder, Wessler Engineering

Thomas Jedlinsky, CDM Smith

GET INVOLVED!!!

**The Ohio Stormwater Association is seeking volunteers
to serve on various committees!**

**Contact any board member to express interest.
Or email Andrea at asalimbene@mdlip.net
for more information.**

Hawai'i Wildlife Fund v. County Of Maui

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HAWAII WILDLIFE FUND, a Hawaii
non-profit corporation; SIERRA CLUB
- MAUI GROUP, a non-profit
corporation; SURFRIDER
FOUNDATION, a non-profit
corporation; WEST MAUI
PRESERVATION ASSOCIATION, a
Hawaii non-profit corporation,
Plaintiffs-Appellees,

v.

COUNTY OF MAUI,
Defendant-Appellant.

No. 15-17447

D.C. No.
1:12-cv-00198-
SOM-BMK

OPINION

Appeal from the United States District Court
for the District of Hawaii
Susan O. Mollway, Senior District Judge, Presiding

Argued and Submitted October 12, 2017
University of Hawaii Manoa

Filed February 1, 2018

Before: Mary M. Schroeder, Dorothy W. Nelson,
and M. Margaret McKeown, Circuit Judges.

Opinion by Judge D.W. Nelson

- 9th Circuit Court of Appeals
- February 1, 2018

FACTS

- County has 4 wells at Lahaina Wastewater Reclamation Facility
- County concedes that effluent from all 4 wells reaches ocean and has known since facility inception
- Tracer Dye Study showed 64% of treated wastewater injected into Wells 3 and 4 discharges to ocean

COUNTY'S DEFENSE

- Wells are a PS, but PS itself must convey pollutants into navigable water to be a PS discharge into WOTUS and require permit
- How pollutants travel from the original PS to navigable waters matters

DISTRICT COURT'S DECISION

Held County liable for discharging effluent to WOTUS without a permit

1. County indirectly discharged a pollutant into the ocean through a groundwater conduit
2. The groundwater is a PS
3. The groundwater is a navigable water

9th CIRCUIT AFFIRMS

- CWA doesn't require that PS itself convey pollutants directly into navigable water.
- If pollutants are fairly traceable from PS to a navigable water such that discharge was functional equivalent of discharge into navigable water and pollutant levels were more than de minimis, then you need NPDES

WHAT DOES THIS MEAN?

- Basic terms of 40 year old law is still up for interpretation
- WOTUS dispute over what is navigable water persists
- Blurring lines between PS and NPS pollution
- Decision could create opportunity for federal jurisdiction
- ORC 6111 broadly defines WOTS to include wells and accumulations of water underground ... except those private waters that do not combine or effect a junction with natural surface or ground waters.

WATERS OF THE U.S.

August 28, 2015
Obama WOTUS
rule in effect

October 9, 2015
6th Circuit issues
nationwide stay of
Obama WOTUS
rule (before it
determined
whether it had
jurisdiction)

January 22, 2018
US Supreme Court
unanimously
struck down
nationwide stay
finding 6th Circuit
didn't have
jurisdiction

February 6, 2018
Pruitt publishes rule in
Federal Register to
amend Obama
WOTUS rule to
postpone effective date
to February 2, 2020

Kentucky Waterways Alliance v. Kentucky Utilities Co.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

KENTUCKY WATERWAYS ALLIANCE, et al.,)	
Plaintiffs,)	Civil Action No. 5: 17-292-DCR
V.)	
KENTUCKY UTILITIES CO.,)	MEMORANDUM OPINION AND ORDER
Defendant.)	

*** **

This is a citizen enforcement action brought by Plaintiffs Kentucky Waterways Alliance and Sierra Club against Defendant Kentucky Utilities Co. ("KU"). [Record No. 1] The plaintiffs allege that KU's handling, storage, treatment, transportation, and disposal of coal combustion residuals at the E.W. Brown Generating Station presents an imminent and substantial endangerment to human health and the environment in violation of the Resource Conservation and Recovery Act ("RCRA"), and has led to the unpermitted discharge of pollutants into navigable waters in violation of the Clean Water Act ("CWA"). [Id.] KU has moved to dismiss the Complaint on the grounds that the plaintiffs do not have standing to bring an RCRA claim, that the RCRA claim is barred by the abstention doctrine of *Burford v. Sun Oil*, 319 U.S. 315 (1943). The defendant also contends that the plaintiff's CWA claim fails as a matter of law. [Record No. 16] For the reasons that follow, the motion to dismiss will be granted.

- US District Court for the Eastern District of Kentucky
- December, 2017

FACTS

- Coal fired power plant generates residuals of fly ash and bottom ash
- To dispose, transported by water through a sluice system to unlined settlement/treatment ponds where bottom ash settles. Then permitted discharge to Herrington Lake.
- KU proposes to cap main pond, install waste landfill on top, use new drying and landfill disposal process going forward

THE ARGUMENT

- Plaintiff citizens opposed plan arguing settling ponds were contaminating groundwater through fractured, permeable karst
- Claimed contaminated groundwater was discharged via a network of springs into Herrington Lake without permit
- KU argued pollutants are not conveyed directly and, if pollutants enter navigable waters after migrating through groundwater, the pollution is NPS and does not require NPDES permit

DISTRICT COURT'S DECISION

Whether discharges to groundwater that is hydrologically connected to navigable water constitutes the “addition of any pollutant to navigable waters from any PS” under CWA

Court considers 3 options:

1. GW could be a navigable water. **NO**
2. GW could be a PS to navigable water. **NO**
3. GW could be a NPS that falls within CWA. **NO**

WHAT DOES THIS MEAN?

- Debate remains within 6th Circuit
- Being appealed
- EPA/KDEP may have other options to address issue

Environmental Law and Policy Center v. USEPA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Environmental Law and Policy Center, *et al.*, Case No. 3:17CV01514

Plaintiffs,

v.

Order

United States Environmental Protection Agency, *et al.*

Defendants.

The Water Department of the City of Toledo, Ohio, provides water to about 500,000 persons living in that City and elsewhere in Northwest Ohio. For three days in August 2014, those people were without water. (A.R. 2085).¹ Shortly after the City gave notice that its water was not fit to drink (or use for any other household purpose) bottled water in grocery and convenience stores, gas stations, and other outlets was quickly sold out.

Toledo's water was contaminated by microcystin—a toxin produced by Harmful Algae Blooms (HABs) growing near the City's water intake point and elsewhere in the Western Basin of Lake Erie.

Microcystin is dangerous. It "causes diarrhea, vomiting and liver-functioning problems, and readily kills dogs and other small animals that drink contaminated water."² And one need not ingest the toxin to experience ill-effects; the Ohio Environmental Agency (Ohio EPA) reports

¹ Citations designated "A.R." refer to the administrative record.

² Michael Wines, *Behind Toledo's Water Crisis, a Long-Troubled Lake Erie*, The New York Times (Aug. 4, 2014), <https://www.nytimes.com/2014/08/05/us/lifting-ban-toledo-says-its-water-is-safe-to-drink-again.html> (last visited March 16, 2018).

- US District Court for the Northern District of Ohio
- April, 2018

FACTS

- CWA Section 303d requires OEPA to submit a biennial Report to EPA identifying waters within the state's borders that fail to meet Ohio WQS
- EPA can approve the Report only if OEPA “assembles and evaluates all existing and readily available water quality related data and information” concerning these impaired waters
- ELPC sued EPA under APA to compel EPA to approve or disapprove OEPA's 303d list

BUT WAIT...THERE'S MORE

- 2 days after Plaintiffs filed their complaint, EPA issued formal approval which “deferred to the State’s judgment not to assess the open waters of the Western Basin of Lake Erie for the 2016 list.”
- Did EPA violate the CWA for approving OEPA’s 303d list?

BUT WAIT...THERE'S EVEN MORE

- January 15, 2018 – a federal holiday and the day before the MSJ deadline, EPA notified plaintiffs' counsel that it had reevaluated OEPA's submission and deemed it incomplete and was withdrawing approval decision.
- EPA asked OEPA to resubmit so it could reconsider.

DISTRICT COURT'S ORDER

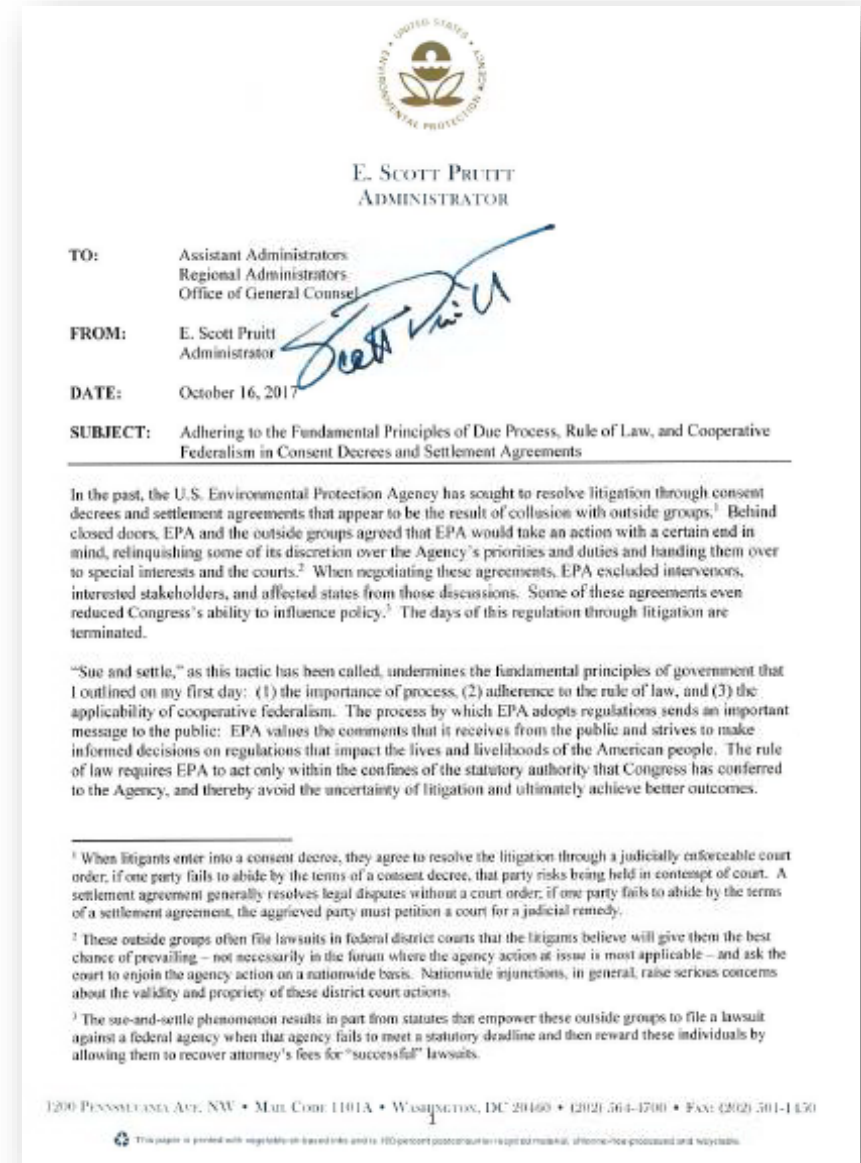
- Court found OEPA refused to initially “assemble and evaluate all existing and readily available water quality-related data and information”
- Instead EPA approved Ohio’s impaired waters list and its 2016 Report and “deferred to the State’s judgment not to assess the open waters of the Western Basin of Lake Erie.”
- Neither of these are acceptable
- Court says 303d list submission remains pending before EPA, so court keeps jurisdiction, remands and gives EPA 30 days to render decision.

WHAT DOES THIS MEAN?

- 2016 listing will be submitted and reevaluated pursuant to judicial schedule
- End of March, 2018 OEPA added western Lake Erie basin to 303d list

COOPERATIVE FEDERALISM

- EPA to work collaboratively with states and local governments rather than dictating one-size fits all mandates from DC
- Creates continued opportunities for Integrated Planning
- In terms of consent decrees and settlements, no “sue and settle”



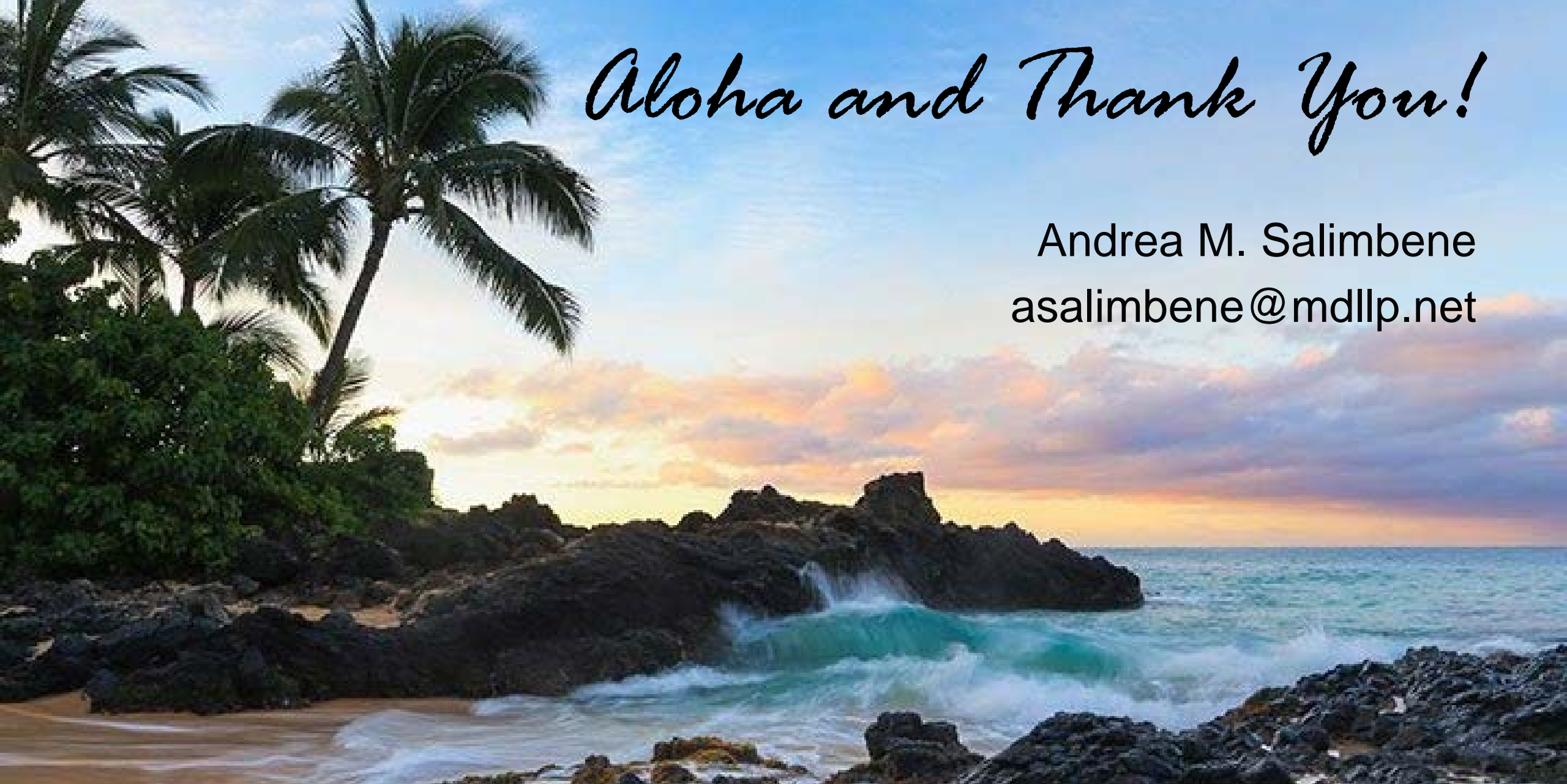
Common Sense Environmental Legislative Initiatives

Ohio EPA's legislative reform initiatives are a common-sense approach to provide balance between streamlining burdensome rules while still addressing environmental issues in ways that will continue to protect Ohio's environment.

Instituting a Statewide Phosphorus Permit Limit for Wastewater Treatment Plants — Ohio EPA proposes to institute a statewide phosphorus permit limit for wastewater treatment plants to address threats to public water systems, recreation on inland lakes, and other downstream problems associated with excess nutrients. Small increases in phosphorus can significantly increase algae growth, which has a drastic negative impact on water quality. Algae growth affects public health, limits recreational use of inland waters, reduces property values, impacts businesses, and has increased costs to rate payers for drinking water. Currently, the major publicly owned treatment works in the Ohio Lake Erie Basin have a total phosphorus limit of 1 mg/L. Michigan, Wisconsin, Indiana, and Minnesota have also placed a limit on phosphorus at 1mg/L or lower.

Watersheds in Distress — The modification of the "watershed in distress" designation creates a practical tool for the State and its partners to use to target specific challenges within watersheds in Ohio. The bill expands the definition of "agricultural pollution" to include fertilizer and directs the Ohio Department of Agriculture (ODA) to establish rules for "watersheds in distress" that are caused by fertilizer. Those rules will also include requirements for the creation of nutrient management plans that address fertilizer use in those watersheds. The bill also establishes a process for Ohio EPA to share information with ODA regarding unsanitary water conditions so that proper investigatory action may occur if it is found to be necessary by ODA.

Ohio EPA Director's Authority to Require Cleanup of Water Pollution Violations — Ohio Revised Code empowers the Ohio EPA Director to prohibit or abate discharges of pollutants to waters of the state. However, a court ruling has limited the Director's authority to compel a cleanup of pollutants that have already been discharged into the water. In other words, the Director can prevent pollution from being discharged into the water but is without authority to compel a cleanup of contamination that has already reached the water.



Aloha and Thank You!

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