

**BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

VILLAGE OF LOCKBOURNE,

Applicant.

**Case No. 11-MS-01-1
Hearing Officer Wilson**

REPORT AND RECOMMENDATION

Attached hereto is a copy of the Hearing Officer's Report and Recommendation in this matter. Pursuant to Ohio Revised Code Section 119.09 and Ohio Administrative Code Rule 3745-47-24, any party to this matter may file written objections to the Report and Recommendation. Such objections must be filed with the Director of Environmental Protection within ten (10) days of the receipt of the Report and Recommendation. Written objections should be filed with:

Ohio Environmental Protection Agency
Hearing Clerk - Legal Section
50 West Town Street, Suite 700
P. O. Box 1049
Columbus, Ohio 43216-1049

If objections are filed, an original plus two (2) copies are required.

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REPORT AND RECOMMENDATION

Applicant.

STATEMENT OF CASE

Pursuant to Ohio Administrative Code ("O.A.C.") 3745-39-03(A)(4), the Village of Lockbourne ("Lockbourne") is seeking a waiver from the general requirement that small municipal systems located partially or completely within an urbanized area obtain a Phase II Small Municipal Separate Storm Sewer System ("MS4") Permit. Lockbourne submitted its original request for a waiver on February 28, 2003. This case was initiated on January 24, 2011, when Lockbourne filed a request for an adjudication hearing. Lockbourne's request for adjudication was filed in response to the Director of the Ohio Environmental Protection Agency's January 5, 2011 proposed denial of Lockbourne's request for a waiver.

FACTS

On February 28, 2003, Lockbourne filed a waiver request with the Ohio Environmental Protection Agency (Ohio EPA) seeking a waiver from the general requirement that small municipal systems obtain an MS4 Permit.

On January 5, 2011, the Director of the Ohio EPA ("Director") issued a proposed denial of Lockbourne's February 28, 2003 waiver request. On January 24, 2011, Lockbourne requested an adjudication hearing regarding the Director's proposed denial.

On February 28, 2012, a hearing was held in this case. During the hearing, Ohio EPA's representative, Jason Fyffe, agreed that Lockbourne meets the waiver criteria in O.A.C. 3745-39-03(A)(4) and O.A.C. 3745-39-03(A)(4)(a) because Lockbourne has a population of less than one thousand, and because Lockbourne's storm water system is not contributing substantially to the pollutant loadings of a physically interconnected Ohio NPDES permitted MS4. (See the testimony of Jason Fyffe found at hearing transcript ("TR") Page 220, Line 12 through Page 221, Line 3. See also TR Page 223, Lines 14-24.)

While the parties agree that Lockbourne meets the waiver criteria found in O.A.C. 3745-39-03(A)(4) and O.A.C. 3745-39-03(A)(4)(a), the parties disagree about whether the waiver criteria found in O.A.C. 3745-39-03(A)(4)(b) is applicable to Lockbourne and whether Lockbourne meets the O.A.C. 3745-39-03(A)(4)(b) waiver criteria.

During the February 28, 2012 hearing, Lockbourne's expert witness, Brady Carlucci, testified that Lockbourne discharges storm water to a "detention area." (See the testimony of Brady Carlucci at TR Page 28, Lines 6-8.) The Ohio EPA refers to the area where Lockbourne discharges storm water as the Ohio Canal. (See the Supplement of the Record admitted into evidence with my May 24, 2012 Ruling on Staff's Motion to Supplement the Record. The Supplement of the Record consists of Attachments 1 through 10 attached to the "Staff's Motion to Supplement the Record" filed in this case on April 11, 2012.) While the parties use different names to describe the water body where Lockbourne discharges storm water, the parties agree as to the actual area of the discharge. (See the testimony of Jason Fyffe at TR Page 221, Line 20, through Page 222, Line 8.)

Whether the area where Lockbourne discharges storm water is called a "detention area" or is called the Ohio Canal, the evidence admitted in this case establishes that Lockbourne does not discharge storm water into any water body that has had pollutants "identified" as a cause of impairment to any such water body in the most recent final report submitted to the United States EPA by the Director to fulfill the requirements of section 303(d) of the act (33 U.S.C. section 1313(d)). (See the testimony of Harry Kallipolitis at TR Page 165, Line 9 through Page 167, Line 22 and the testimony of Jason Fyffe at TR Page 252, Line 7 through Page 253, Line 5. See also the waiver criteria language in O.A.C. 3745-39-03(A)(4)(b) to understand the importance of the fact that Lockbourne does not discharge storm water into any water body that has had pollutants "identified" as a cause of impairment to that particular water body.)

APPLICABLE LAW

O.A.C. 3745-39-03(A)(4) states:

(4) The director shall waive permit coverage if your small MS4 serves a population of less than one thousand within the urbanized area and you meet the following criteria:

(a) Your system is not contributing substantially to the pollutant loadings of a physically interconnected Ohio NPDES permitted MS4; and

"(b) If you discharge any pollutant that has been identified as a cause of impairment of any water body to which you discharge, storm water controls are

not needed based on wasteload allocations that are part of a United States EPA approved or established total maximum daily load that addresses the identified pollutant. As used in this rule, "identified" means in the most recent final report submitted to the United States EPA by the director to fulfill the requirements of section 303(d) of the act (33 U.S.C. section 1313(d))." (Underline emphasis added.)

ISSUE PRESENTED

Should the Director grant Lockbourne a waiver of the general requirement that small municipal systems obtain an MS4 Permit?

DISCUSSION

In order to determine whether the Director should grant Lockbourne a waiver, we must examine the waiver language of O.A.C. 3745-39-03(A)(4). (See the bottom of page 2 and the top of page 3 above.)

The parties have agreed that the Village of Lockbourne does serve a population of less than one thousand within an urbanized area. Thus, the parties have agreed that Lockbourne meets the waiver criteria found in O.A.C. 3745-39-03(A)(4). The parties have also agreed that Lockbourne's system is not contributing substantially to pollutant loadings of a physically interconnected Ohio NPDES permitted MS4. Thus, the parties have agreed that Lockbourne meets the waiver criteria found in O.A.C. 3745-39-03(A)(4)(a). While the parties have agreed that Lockbourne meets the waiver criteria found in O.A.C. 3745-39-03(A)(4) and O.A.C. 3745-39-03(A)(4)(a), the parties disagree about whether the waiver criteria found in O.A.C. 3745-39-03(A)(4)(b) is applicable to Lockbourne and whether Lockbourne meets the O.A.C. 3745-39-03(A)(4)(b) waiver criteria. Consequently, Lockbourne's entitlement to a waiver turns on whether Lockbourne meets any applicable criteria found in O.A.C. 3745-39-03(A)(4)(b).

In determining whether the criteria in O.A.C. 3745-39-03(A)(4)(b) is applicable to Lockbourne, it is critical to note that the first word in O.A.C. 3745-39-03(A)(4)(b) is the word "if", to note that the term "identified" is specifically defined in O.A.C. 3745-39-03(A)(4)(b), and to note that the phrase "water body" (not watershed) is used in O.A.C. 3745-39-03(A)(4)(b).

Because of the use of the word "if", the waiver criteria in O.A.C. 3745-39-03(A)(4)(b) would be applicable to Lockbourne only if Lockbourne discharges a pollutant that has been "identified" as a cause of impairment to the "water body" to which Lockbourne discharges. The term "identified" is defined in the second sentence of O.A.C. 3745-39-03(A)(4)(b) to mean identified in the most recent final report submitted to the United States EPA by the director to fulfill the requirements of section

303(d) of the Act (33 U.S.C. section 1313(d)). Even if we accept the Ohio EPA Staff's nomenclature and agree that Lockbourne discharges storm water into the Ohio Canal, the fact remains that no final report submitted to the United States EPA has specifically addressed the Ohio Canal (the water body to which Lockbourne discharges) and, thus, no final report submitted to the United States EPA has "identified" any pollutant causing impairment to the water body to which Lockbourne discharges. Because no pollutant has been "identified" as causing impairment to the Ohio Canal, Lockbourne cannot possibly be discharging any pollutant that has been "identified" as a cause of impairment to the Ohio Canal (the water body to which Lockbourne discharges.) Therefore, O.A.C. 3745-39-03(A)(4)(b) does not apply to Lockbourne.

Unless and until a final report fulfilling the requirements of section 303(d) of the Federal Water Pollution Control Act (Clean Water Act) is submitted to the United States EPA addressing the Ohio Canal and identifying one or more pollutants as a cause of impairment to the Ohio Canal, Lockbourne will not be and cannot be discharging any pollutant that has been identified as a cause of impairment of the water body to which Lockbourne discharges, i.e., the Ohio Canal. (See O.A.C. 3745-39-03(A)(4)(b).)

Contrary to the Staff's argument, the key question is not whether Lockbourne discharges any pollutant that has been identified as a cause of impairment to any "watershed" to which Lockbourne discharges. The key question is whether Lockbourne discharges a pollutant that has been "identified" as a cause of impairment of the water body to which Lockbourne discharges. It is critical that we keep in mind that O.A.C. 3745-39-03(A)(4)(b) uses the term water body and not the word watershed in the first sentence. "Waterbody" and "watershed" are not the same and are separately and distinctly defined by the United States EPA as used in the Clean Water Act. "Waterbody" is defined in pertinent part as: "A geographically defined portion of navigable waters, ... including segments of rivers, streams, lakes, wetlands, coastal waters and ocean waters." The Ohio Canal is a waterbody. On the other hand, "Watershed" is defined in pertinent part as an: "Area that drains or contributes water to a particular point, stream, river, lake, or ocean. ..." All of the waterbodies in the Big Walnut Creek watershed contribute water to the Big Walnut Creek and those waterbodies taken together help make up the Big Walnut Creek watershed. ... (I found the United States EPA definitions by doing a search of www.water.epa.gov/lawsregs/lawguidance/cwa/tmdl/overviewoftmdl.cfm on Google and clicking on the article "What is a TMDL?" and then clicking on "Glossary.") Because O.A.C. 3745-39-03(A)(4)(b) uses the term "water body" and not "watershed", O.A.C. 3745-39-03(A)(4)(b) would only be applicable to Lockbourne if Lockbourne discharged into a segment of a water body that has been addressed in a final report to the United States EPA. Again, the evidence in this case demonstrates that the water body to which Lockbourne discharges storm water (the Ohio Canal) has not been addressed in a final report submitted to the United States EPA. (See the testimony of Harry Kallipolitis found at hearing transcript (TR) Page 165, Line 9 through Page 167, Line 22 and the testimony of Jason Fyffe found at TR Page 252, Line 7 through Page 253, Line 5.) As stated above, because Lockbourne does not discharge storm water into a water

body that has been addressed in a final report submitted to the United States EPA, the discharge of that storm water cannot by definition constitute the discharge of any pollutant that has been "identified". O.A.C. 3745-39-03(A)(4)(b) is simply not applicable to the Village of Lockbourne's discharge and, therefore, Lockbourne does not have to prove that storm water controls are not needed in order for Lockbourne to establish entitlement to a waiver.

We cannot eviscerate the distinction between the terms waterbody and watershed and we cannot ignore the plain meaning of the term "water body" as that term is used in O.A.C. 3745-39-03(A)(4)(b). It does not mean watershed. To further emphasize this point, it may be helpful to look at the Clean Water Act and the United States EPA Total Maximum Daily Load (TMDL) regulations and consider that O.A.C. 3745-39-03(A)(4)(b) is modeled upon the Clean Water Act and United States EPA regulations that require that TMDLs be developed for each water body (not watershed) on the section 303(d) list. O.A.C. 3745-39-03(A)(4)(b) addresses discharges into impaired water bodies (not watersheds) on the 303(d) list that are the subject of a final report submitted to the United States EPA. I found a United States EPA website stating that United States EPA regulations refer to a TMDL as strictly a calculation or formula used to address one pollutant in one particular part of a water body. The United States EPA website states:

"By regulation, each pollutant causing a 'waterbody' to be impaired is referred to as a waterbody/pollutant combination, and a TMDL is developed for each waterbody/pollutant combination. For example, if one waterbody is impaired by three pollutants, three TMDLs will be developed for the waterbody. However, in many cases, [the practice has developed to use] the word TMDL ... to describe a document that addresses several waterbody/pollutants combinations (i.e., several TMDLs exist in one TMDL document.)" (Underline emphasis and bracketed material added for emphasis and clarification.)

The United States EPA website points out that more and more states are bundling TMDLs. Some states (like Ohio) are even "bundling TMDLs on a 'watershed' scale." However, even though states such as Ohio are bundling TMDLs, doing so cannot alter the clear meaning of the language of regulations such as O.A.C. 3745-39-03(A)(4)(b), which were written to address one water body and any pollutant that has been "identified" as a cause of impairment to that particular water body. If Ohio chooses to bundle TMDLs, even if it does so on a watershed scale, it cannot thereby alter the fact that O.A.C. 3745-39-03(A)(4)(b) still addresses only one water body, not an entire watershed. The plain language of O.A.C. 3745-39-03(A)(4)(b) cannot be altered and the term "water body" cannot be interpreted to mean "watershed", even if Ohio has decided to bundle TMDLs on a watershed scale. Bundling TMDLs may be a practical and even appropriate way to develop a watershed plan designed to meet water quality standards and restore individual impaired water bodies on the 303(d) list, but such a practice cannot alter the clear use of the term "water body" in O.A.C. 3745-39-03(A)(4)(b) and cannot alter the fact that O.A.C. 3745-39-03(A)(4)(b) is not applicable

to Lockbourne's discharge. I found the foregoing US EPA explanation by doing a search of www.water.epa.gov/lawsregs/lawguidance/cwa/tmdl/overviewoftmdl.cfm on Google and by clicking on "What is a TMDL?".

Ultimately, the goal of Ohio's TMDL process is full attainment of biological and chemical water quality standards and, subsequently, removal of water bodies from the 303(d) list. Currently, the Big Walnut Creek is on the 303(d) list. If the Village of Lockbourne discharged into the Big Walnut Creek, O.A.C. 3745-39-03(A)(4)(b) would be applicable to Lockbourne, and it would have to establish that storm water controls were not needed based on wasteload allocations. However, there has been no evidence that the Ohio Canal is on the 303(d) list or that the Ohio Canal has been addressed in a final report to the United States EPA fulfilling the requirements of section 303(d). In fact, the Ohio EPA witnesses testified that the area to which Lockbourne discharges (i.e., the Ohio Canal) has not been addressed in a final report to the United States EPA. (See the testimony of Harry Kallipolitis found at hearing transcript (TR) Page 165, Line 9 through Page 167, Line 22 and the testimony of Jason Fyffe found at TR Page 252, Line 7 through Page 253, Line 5.) Simply put, no pollutant has been "identified" as a cause of impairment to the Ohio Canal. Because Lockbourne does not discharge any pollutant that has been "identified" as a cause of impairment to the Ohio Canal (the water body to which Lockbourne discharges), O.A.C. 3745-39-03(A)(4)(b) is not applicable to Lockbourne and Lockbourne does not have to prove that storm water controls are not needed in order to establish its right to a waiver under O.A.C. 3745-39-03(A)(4)(b).

CONCLUSION

Because the parties have agreed that Lockbourne meets the waiver requirements of O.A.C. 3745-39-03(A)(4) and O.A.C. 3745-39-03(A)(4)(a), and because O.A.C. 3745-39-03(A)(4)(b) is not applicable to the Village of Lockbourne, the Director should grant Lockbourne's request for a waiver under O.A.C. 3745-39-03(A)(4).

The attached Findings of Fact, Conclusions of Law, and Recommendations are hereby submitted to the Director for his consideration.

Sam Wilson

W. SAMUEL WILSON, Esq.
Presiding Hearing Officer

7/20/12

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FINDINGS OF FACT

1. On February 28, 2003, Lockbourne filed a waiver request with the Ohio Environmental Protection Agency (Ohio EPA) seeking a waiver from the general requirement that small municipal systems attain an MS4 Permit.
2. On January 5, 2011, the Director of the Ohio EPA ("Director") issued a proposed denial of Lockbourne's February 28, 2003 waiver request.
3. On January 24, 2011, Lockbourne requested an adjudication hearing regarding the Director's proposed denial.
4. On February 28, 2012, a hearing was held in this case.
5. During the hearing, Ohio EPA's representative, Jason Fyffe, agreed that Lockbourne meets the waiver criteria in O.A.C. 3745-39-03(A)(4) and O.A.C. 3745-39-03(A)(4)(a) because Lockbourne has a population of less than one thousand, and because Lockbourne's storm water system is not contributing substantially to the pollutant loadings of a physically interconnected Ohio NPDES permitted MS4. (See the testimony of Jason Fyffe found at hearing transcript ("TR") Page 220, Line 12 through Page 221, Line 3. See also TR Page 223, Lines 14-24.)
6. While the parties agree that Lockbourne meets the waiver criteria found in O.A.C. 3745-39-03(A)(4) and O.A.C. 3745-39-03(A)(4)(a), the parties disagree about whether the waiver criteria found in O.A.C. 3745-39-03(A)(4)(b) is applicable to Lockbourne and whether Lockbourne meets the O.A.C. 3745-39-03(A)(4)(b) waiver criteria.
7. During the February 28, 2012 hearing, Lockbourne's expert witness, Brady Carlucci, testified that Lockbourne discharges storm water to a "detention area." (See the testimony of Brady Carlucci at TR Page 28, Lines 6-8.)

8. The Ohio EPA refers to the area where Lockbourne discharges storm water as the Ohio Canal. (See the Supplement of the Record admitted into evidence with my May 24, 2012 Ruling on Staff's Motion to Supplement the Record. The Supplement of the Record consists of Attachments 1 through 10 attached to the "Staff's Motion to Supplement the Record" filed in this case on April 11, 2012.)
9. While the parties use different names to describe the water body where Lockbourne discharges storm water, the parties agree as to the actual area of the discharge. (See the testimony of Jason Fyffe at TR Page 221, Line 20, through Page 222, Line 8.)
10. Whether the area where Lockbourne discharges storm water is called a "detention area" or is called the Ohio Canal, the evidence admitted in this case establishes that Lockbourne does not discharge storm water into any water body that has had pollutants "identified" as a cause of impairment to any such water body in the most recent final report submitted to the United States EPA by the Director to fulfill the requirements of section 303(d) of the act (33 U.S.C. section 1313(d)). (See the testimony of Harry Kallipolitis at TR Page 165, Line 9 through Page 167, Line 22 and the testimony of Jason Fyffe at TR Page 252, Line 7 through Page 253, Line 5.)

CONCLUSIONS OF LAW

1. Ohio Administrative Code (O.A.C.) 3745-39-03 governs the Ohio EPA's requirements for National Pollutant Discharge Elimination System (NPDES) Permits for small municipal separate storm sewer systems (MS4s).
2. Waivers from the general requirement that small municipal systems located partially or completely within an urbanized area obtain a Phase II MS4 Permit are governed by O.A.C. 3745-39-03(A)(4).
3. Because O.A.C. 3745-39-03(A)(4)(b) states that "[i]f you discharge any pollutant that has been identified as a cause of impairment of any water body to which you discharge," and because Lockbourne does not discharge any pollutant that has been identified as a cause of impairment of any water body to which Lockbourne discharges, O.A.C. 3745-39-03(A)(4)(b) does not apply to Lockbourne.
4. Because the parties have agreed that Lockbourne meets the waiver criteria of O.A.C. 3745-39-03(A)(4) and O.A.C. 3745-39-03(A)(4)(a) and because O.A.C. 3745-39-03(A)(4)(b) is not applicable to Lockbourne, Lockbourne's small MS4 meets all of the applicable waiver criteria in O.A.C. 3745-39-03(A)(4).

5. Because Lockbourne meets all of the applicable waiver criteria in O.A.C. 3745-39-03(A)(4), the Director must grant Lockbourne's request for a waiver from the general requirement that small municipal systems located partially or completely within an urbanized area obtain a Phase II MS4 Permit.

RECOMMENDATION

1. Because Lockbourne meets all of the applicable waiver criteria in O.A.C. 3745-39-03(A)(4), the Director should withdraw his January 5, 2011 proposed denial of Lockbourne's request for a waiver from the general requirement that small municipal systems obtain a Phase II Small MS4 Permit.
2. Pursuant to O.A.C. 3745-39-03(A)(4), the Director should grant Lockbourne's February 28, 2003 request for a waiver from the general requirement that small municipal systems obtain a Phase II Small MS4 Permit.

Sam Wilson

W. SAMUEL WILSON, Esq.
Presiding Hearing Officer

7/20/12

Date

VILLAGE OF LOCKBOURNE
Case No. 11-MS-01-1

SERVICE LIST

Rick Matsa, Esq.
Village of Lockbourne Solicitor
728 North High Street, Suite 1000
Columbus, OH. 43215
(614) 299-9111
for Village of Lockbourne

Ralph Coon, Mayor
Village of Lockbourne
85 Commerce Street
Lockbourne, OH. 43137
for Village of Lockbourne

Casey L. Chapman, Esq.
L. Scott Helkowski, Esq.
Christine L. Rideout, Esq.
Environmental Enforcement Section
Office of the Attorney General
30 East Broad Street - 25th Floor
Columbus, OH. 43215
(614) 466-2766
for the Ohio Environmental Protection Agency

W. Samuel Wilson, Esq.
Hearing Officer
Ohio Environmental Protection Agency
Lazarus Government Center
50 West Town Street, 6th Floor
P.O. Box 1049
Columbus, OH. 43216-1049
(614) 644-3037
Presiding Hearing Officer

Hearing Clerk
Ohio Environmental Protection Agency
P.O. Box 1049
Columbus, OH. 43216-1049
(614) 644-2129

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