


Division of Air Pollution Control

**Response to Comments
Proposed Rule Language Comment Period**

Rule: OAC Chapter 3745-109, "Clean Air Interstate Rules (CAIR)"

Agency Contact for this Package

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Ohio EPA provided a 30 day comment period which ended on October 8, 2013 and a public hearing held October 8, 2013 in Columbus, Ohio. This document summarizes the comments and questions received during the associated comment period and hearing.

Ohio EPA reviewed and considered all comments received during the public comment period and hearing. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health.

In an effort to help you review this document, the questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

Specific Comments

OAC Rule 3745-109-17 "CAIR NO_x ozone season allowance allocations"

Comment 1:

Concerning set asides for Energy Efficiency/Renewable Energy (EE/RE) and Innovative Technology (IT) programs: "the Utilities object to the inclusion of these set aside programs because they are duplicative and unnecessary. On July 31, 2008, the General Assembly passed Senate Bill 221, which mandates that the electric utilities provide 25% of the electricity supply from alternative energy resources by 2025. Ohio R.C. §4928.64(B). Thus, the Utilities are required under the bill to implement alternative energy projects- projects that are the same as those encouraged by Ohio EPA in establishing these set aside programs. Thus, the set aside programs are no longer necessary and merely add transactional costs to an expensive compliance program."

(Cheri A. Budzynski, Shumaker Loop and Kendrick, LLP)

Response 1:

Ohio EPA plans to continue the set aside programs for EE/RE and IT projects in the CAIR NOx ozone season allowance allocations portion of the rules as it is currently incorporated. The cost to the utilities and Ohio EPA are justified compared to the benefits of encouraging the development of programs that reduce the burning of fossil fuels and NOx emissions. These set asides are an additional benefit beyond Senate Bill 221. Additionally, a majority of states incorporate these type of set asides in their CAIR programs.

Comment 2:

“the Utilities object to these set aside programs because the rules do not contain clear criteria for applying and receiving allowances.”

(Cheri A. Budzynski, Shumaker Loop and Kendrick, LLP)

Response 2:

Ohio EPA believes that the rule, as written, allows flexibility for the Director to determine if a project is eligible for these set asides. This evaluation process was always intended to be done on a case-by-case basis.

Comment 3:

“the Utilities object to Ohio Adm. Code 3745-109-17(C)(8) that allows the Director to change the volume of allowances in the EE/RE and IT programs without additional rulemaking. There is no statutory basis that authorizes the Director’s action under this rule.”

(Cheri A. Budzynski, Shumaker Loop and Kendrick, LLP)

Response 3:

The comment is similar to comments regarding the Director’s authority to change the volume of allowances made during the review of the draft rules and several years ago for the NOx Budget Trading Program. Ohio EPA’s response is the same for comments received during those periods, and are reiterated here.

Firstly, these set asides are currently a relatively small percentage of the state’s total allowance budget, and Ohio EPA believes that the Director should have the flexibility to adjust the set aside based on future demand for these projects without having to change allocations already committed to existing units during a control period.

Secondly, the authorization for the Director not to re-allocate under-utilized set-aside allowances to EGUs and non-EGUs has been part of the CAIR program in OAC Chapter 3745-109 since it was initially adopted in 2007, and was previously a part of the NOx Budget Program, OAC 3745-14, adopted in 2002. OAC rule 3745-109-01(E)(3)(e) specifically states:

A CAIR NOx or NOx ozone season allowance is a limited authorization to emit one ton of NOx in accordance with the CAIR NOx annual or ozone season trading program. No provision of the CAIR NOx annual or ozone season trading program, the CAIR permit application, the CAIR permit, or an exemption under paragraph (D) of this rule and no provision of law shall be construed to limit the authority of the United States or the state of Ohio to terminate or limit such authorization.

This version of the rule was approved as part of Ohio's partial SIP on February 1, 2008 and full SIP approval was issued on September 25, 2009. Thus the rule has federal sanction as a legitimate exercise of the Director's authority under ORC 3704.03 to implement the federal Clean Air Act and achieve the NAAQS.

It is also important to note that the same rule makes it clear that there is no property right attached to the allowances. OAC rule 3745-109-01(E)(3)(f) states that "A CAIR NOx, SO2, or NOx ozone season allowance does not constitute a property right".

There is thus considerable statutory basis authorizing the Director's actions under this rule concerning the changing of allowance volume.

Comment 4:

"the Utilities asked Ohio EPA to identify the number of allowances it has set aside for the EE/RE and IT programs for each year since the adoption of these rules. Further, the Utilities asked Ohio EPA to identify any sources that have applied for allowances under the EE/RE and IT programs. The Utilities note that the agency responses to these questions are telling that these programs are unnecessary. Since the inception of the program in 2009, only 44 allowances have been awarded with no allowances being awarded from 2011-2013."

(Cheri A. Budzynski, Shumaker Loop and Kendrick, LLP)

Response 4:

Ohio EPA has set aside 457 allowances for EE/RE programs and 456 allowances for IT programs (913 in total) each year since 2009. The distribution of these allowances annually has been as follows:

2009: 20 EE/RE allowances awarded, 893 returned to existing units
2010: 24 EE/RE allowances awarded, 889 returned to existing units
2011: 0 allowances requested, 913 returned to existing units
2012: 0 allowances requested, 913 returned to existing units
2013: 0 allowances requested, 913 to be returned to existing units

The allowances were awarded to Bryan Municipal Hydroelectric Plant (3 in 2009 and 3 in 2010) and Kent State University (17 in 2009 and 21 in 2010).

Ohio EPA does not view the under-utilization of these allowances by the regulated community to be sufficient cause to eliminate the programs. Ohio EPA plans to continue the set aside programs for EE/RE and IT projects in the CAIR NOx ozone season allowance allocations portion of the rules as it is currently incorporated. The cost to the utilities and Ohio EPA are justified compared to the benefits of encouraging the development of programs that reduce the burning of fossil fuels and NOx emissions. These set asides are an additional benefit beyond Senate Bill 221. Additionally, a majority of states incorporate these type of set asides in their CAIR programs.

Comment 5:

The Utilities object to Ohio EPA not setting deadlines for the return of unused new unit set aside allowances.

(Cheri A. Budzynski, Shumaker Loop and Kendrick, LLP)

Response 5:

Ohio EPA does not agree that a deadline date for this allocation is needed or necessary. Ohio CAIR rules, containing the same allocation language/procedures for new units in the program as found in the final federal model rule, state that on or after May 1 of each control period for annual CAIR NOx and on or after February 1 of each control period for CAIR NOx ozone season allowances, the Director will allocate allowances as determined by the rules to these new units and then allocate any unused allowances to existing units also on or after May 1 or February 1 of the appropriate control period (OAC 3745-109-04(C)(4) and 3745-109-17(C)(4)). The rules do not give a specific "cut-off" date for the distribution of unused allowances if available. Due to variations in workload and submittals of the necessary information, it would be impractical to set an exact date for the distribution of these unused allowances. The rules are already specific as to the dates when the director will begin the process and allocate allowances from the set aside to the new units, and the distribution of un-used allowances should follow as expeditiously as possible towards the completion of that process as outlined in the rules.

Comment 6:

The Utilities object to the EE/RE and IT programs being maintained in addition to Senate Bill 221.

(Cheri A. Budzynski, Shumaker Loop and Kendrick, LLP)

Response 6:

Ohio EPA maintains that these set asides are an additional benefit beyond those of Senate Bill 221.

End of Response to Comments