



## Division Name

### Response to Comments

**Rule:** Ohio Administrative Code (OAC) Chapter 3745-15, "General Provisions on Air Pollution Control"

#### Agency Contact for this Package

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Ohio EPA held a 30-day comment period ending November 7, 2014 on the above mentioned rules and the associated business impact analysis document. This document summarizes the comments and questions received during the comment period.

Ohio EPA reviewed and considered all comments received during the public comment period. 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.

#### General/Overall Concerns

**Comment 1:** Upon review of the proposed rule changes, we respectfully submit that they are of such an inconsequential stylistic nature that they do not warrant a change in the familiar status quo, and certainly do not warrant the administrative costs and potential disagreements attendant to revisions of fully-approved SIP provisions. We therefore think "no change" is the more appropriate, common sense outcome of the five-year review of Chapter 15.  
**(Robert L. Brubaker and Eric B. Gallon, Porter Wright Morris & Arthur LLP)**

**Response 1:** Ohio EPA is required by Ohio Revised Code (ORC) 119.032, every 5 years, to review each of the rules promulgated by the agency. OAC Chapter 3745-15 is currently undergoing its 5-year review.

While Ohio EPA concedes that some of the changes being made to the rules in this chapter are minor in nature, the 5-year review is considered the appropriate time to make these types of minor updates.

3745-15-01, "Definitions"

**Comment 2:** 3745-15-01 (B): The proposed omission of paragraph (B) in rule 3745-15-01 is detrimental and unnecessary to the rule of the law. Paragraph (B) defines terms such as language, "Agency", "OEPA", "EPA" and/or "board" that define entities and departments that administer the rule and/or the law.

3745-15-01(S): The proposed addition of paragraph (S) is unnecessary and irrelevant to the rule. Refer to paragraph (B) as currently stated in rule 3745-15-01 for a correct and relevant wording of the EPA, OEPA, agency, and board respectfully.

Solutions:

3745-15-01 (B): Do not omit paragraph (B).  
**(Scott Bushbaum, Sierra Club, Miami Group)**

**Response 2:** The stand-alone terms "Agency" and "Board" as defined in OAC 3745-15-01(B) are no longer used to describe the Ohio EPA in Ohio's air pollution control rules. Ohio EPA is, therefore, removing the terms for clarity. Because the definition was arranged alphabetically by the word "agency", it is being moved alphabetically to paragraph (S) because the definition now starts with "O."

**Comment 3:** 3745-15-01 (N): The proposed omission of paragraph (N), where the language, "Effective date of these rules" should remain and refer to new effective dates. This language is important and relevant to the law and code of law.

Solutions:

3745-15-01 (N): Do not omit paragraph (N). I suggest simply changing the language to reflect new dates and the Clean Air Act, wherever applicable in the rule and throughout rule 3745.

**(Scott Bushbaum, Sierra Club, Miami Group)**

**Response 3:** The term "Effective date of these rules" is no longer used in Ohio EPA's air pollution control rules, except in instances where the term means the effective date of a newly promulgated rule where the date is unknown during the writing of the rule language. Ohio EPA, Division of Air Pollution Control has systematically gone over our rules during previous 5-year reviews and replaced this term with the actual, intended date or removed the term where it is irrelevant. This definition, which sets a specific date for this term, is no longer necessary and has been identified as potentially confusing for the regulated public. As such, Ohio EPA is removing this definition.

**Comment 4:** 3745-15-01 (O): The proposed change of the word, "source(s)" to word, "source" is unnecessary and quantifies the rule language incorrectly.

Solutions:

3745-15-01(O): Do not remove or change the word "source(s)". The context of the language as is currently stated in rule 3745-15-01 is correct and relevant language.

**(Scott Bushbaum, Sierra Club, Miami Group)**

**Response 4:** The Ohio Legislative Services Commission (LSC), in their "Rule Drafting Manual" (Fourth Edition, May, 2006) indicates in Section 5.8.4, P.46, that in terms of number..."The singular includes the plural and the plural includes the singular. It is generally preferable to write in the singular, unless the plural is more appropriate to the context."

The use of the parenthetical (s) is counter to LSC rule writing procedure and, therefore, Ohio EPA is converting these terms to the singular to avoid confusion and to bring Ohio EPA rule language in-line with state rule formatting convention.

**Comment 5:** Solutions:

3745-15-01 (BB): I suggest reviewing the changes in paragraph (BB). The proposed changes in language, "incorporated" to "referenced", and "regulation" to "rule" are questionable as to the relevance and importance of the proposed changes with regard to how the language is currently stated. The context of the proposed language needs not interfere with other language throughout rule 3745-21 or rule of law throughout rule 3745.

**(Scott Bushbaum, Sierra Club, Miami Group)**

**Response 5:** Ohio EPA is required by Section 121.72 of the Ohio Revised Code (ORC) to provide potentially affected parties with information regarding items that have been incorporated by reference within our rules. To fulfill these requirements, Ohio EPA has included information on the availability (how to obtain copies) and the date, edition, or version of the item referenced. This paragraph fulfills this requirement for the entire chapter and is consistent with procedures used by Ohio EPA and other agencies.

3745-15-05, "'De Minimis" air contaminant source exemption"

**Comment 6:** 3745-15-05 (F): The language proposed in rule 3745-15-05, paragraph (F) is unnecessary. No punctuation, ie: a period, appears at the end of the sentence where the word "director" ends the proposed sentence as well.

Solution:

3745-15-05 (F): Do not change paragraph (F). The context and wording of rule 3745-15-05, paragraph (F) is currently correct and relevant to the rule and the code of law.

**(Scott Bushbaum, Sierra Club, Miami Group)**

**Response 6:** The change made to this paragraph was for the removal of the gender specific pronoun to meet LSC rule formatting guidelines. The lack of a period after the word "director" is a function of Ohio's Rule Authoring Software. The period is actually preserved after the struck language.

**Comment 7:** One proposed set of changes - to the definition of a de minimis source in OAC 3745-15-05 - is more than stylistic, and is clearly unlawful. Ohio EPA proposes to modify "ten" and "twenty five" to the numerical decimal expressions "10.0" and "25.0." The problem is that the proposed changes would amend the statutory exemption for de minimis sources in section 3704.011 of the Ohio Revised Code. Ohio EPA is, of course, a creature of statute, and is not authorized to amend or enlarge its statutory jurisdiction. The General Assembly chose not to base the de minimis exemption on decimal fractions beyond a single whole number integer. In the hypothetical circumstance of an air contaminant source with potential PM emissions of 10.4 pounds per day, that

amount would not be more than ten pounds when rounded to the nearest whole number integer. The legislation does not authorize Ohio EPA to consider fractions to the right of the decimal point in applying the ten pounds per day and twenty five tons per year de minimis criteria **(Robert L. Brubaker and Eric B. Gallon, Porter Wright Morris & Arthur LLP)**

**Response 7:** Ohio EPA considers a de-minimus source to be a source that emitted 10.0 and 25.0 pounds of contaminants per day or less and the draft amendment was made to clarify this interpretation. The commenter does point out, however, that the language in the rule appears to be directly taken from Ohio Revised Code (ORC) 3704.011 which includes whole number integers (ten instead of 10.0) and Ohio EPA agrees with this observation. In the interest of having the language in this rule match the language in the Revised Code, Ohio EPA will revert the draft changes back to the original whole number integers.

3745-15-06, "Malfunction of equipment; scheduled maintenance; reporting"

**Comment 8:** 3745-15-06 (A) (3): The proposed changes in punctuation and the omission of language, "and" in rule number 3745-15-06, paragraph (A), number (3) is unnecessarily removing quantifying and important enforcement of the rule and the code of law.

Solution:

3745-15-06 (A) (3): Do not change any punctuation or language in rule 3745-15-06. The context and enforcement of the rule and rule of law is better exemplified by the current language and punctuation. **(Scott Bushbaum, Sierra Club, Miami Group)**

**Response 8:** The use of the word "and" in this instance is unnecessary. Paragraph (A)(3) indicates that the report "...shall include the following:". This implies that all of the listed items must be included, therefore, "and" is not necessary and has been deleted along with the format change.

This change also brings this rule, stylistically, in-line with Ohio EPA and LSC rule formatting guidelines.

**Comment 9:** The proposed stylistic changes to the malfunction rule, OAC 3745-15-06, are of particular concern. The rule has been in place for decades without problems of style the Agency proposes to fix. More importantly, U.S. EPA policies with respect to malfunctions are in a state of flux at the present time.

Ohio EPA should not expose this rule to the SIP revision approval process before U.S. EPA's actions and policies with respect to currently-approved SIP malfunction provisions, like Ohio's, are more clear and settled.  
**(Robert L. Brubaker and Eric B. Gallon, Porter Wright Morris & Arthur LLP)**

**Response 9:** As noted in Response 1, the 5-year review is the time to make minor, stylistic changes such as the ones in the draft rule. The minor rule changes are being made to bring the rule in-line with state and agency rule formatting conventions. This change does not alter the content, nor intent of the rule. Ohio EPA will evaluate the context of the changes to the final rules of this chapter and determine the need, on a rule-by-rule basis, for requesting incorporation of the changes into Ohio's SIP. Ohio EPA will take your comment into consideration when deciding whether to submit the changes in this particular rule, the malfunction rule, to USEPA as a SIP revision.

3745-15-07, "Air pollution nuisances prohibited"

**Comment 10:** Solution: 3745-15-07 (A)(B): I suggest analyzing the criteria for exempting certain air pollution nuisances from the proposed language changes in rule 3745-15-07. If it is determined that these air pollution nuisances are not endangering the health, safety, property or welfare of the public, then do not change the language of the rule. I suggest then that when the rule is up for Early Stakeholder Outreach and JCARR review in five years, then suggest/propose changes in the language of rule 3745-15-07, paragraphs (A) and (B) respectfully.  
**(Scott Bushbaum, Sierra Club, Miami Group)**

**Response 10:** OAC Chapter 3745-15 is currently undergoing its 5-year review. The rule was sent out for a 30-day early stakeholder comment period ending November 5, 2013. No comments or suggestions were received on this rule at that time. Ohio EPA then went ahead and made changes intended to clarify the rule without changing the intent of the rule.

**Comment 11:** The proposed stylistic changes to the nuisance rule, OAC 3745-15-07, do not change its meaning, and do not warrant the administrative costs of minor stylistic revision. The problem with the nuisance rule is not its punctuation, but rather the misperception of its status as federal rather than State-only law. The nuisance rule was clearly never designed or intended to be an integral part of the Ohio SIP NAAQS attainment strategy, nor was it ever publicly noticed or technically supported as such. The nuisance rule became particularly controversial subsequent to the introduction of the Title V permit program in the mid- 1990s, because it does not fit the definition of a Title V "applicable requirement." It is not required by the Clean Air Act and does not "implement relevant requirements of the Clean Air Act." See OAC 3745-77- 01(H)(1). It is therefore not a Title V "applicable requirement," but rather a State-only requirement. Nevertheless, Ohio EPA has placed the nuisance rule on the federally-enforceable side of Title V permits, which has led to a number of ERAC appeals (still pending) challenging the mischaracterization of the Ohio nuisance rule as a Title V "applicable requirement." Region 5 has appropriately approved the removal of the similar nuisance rule from Michigan's SIP, and the same should happen for Ohio. Region 5 approved Michigan's request to remove Rule 901, the Michigan nuisance rule, from Michigan's SIP because U.S. EPA correctly concluded that "the rule does not have a reasonable connection to the national ambient air quality standards (NAAQS) and related air quality goals of the Clean Air Act." See 63 Fed. Reg. 27492 (May 19, 1998). Ohio should likewise remove the nuisance rule from its SIP as soon as possible. **(Robert L. Brubaker and Eric B. Gallon, Porter Wright Morris & Arthur LLP)**

**Response 11:** Thank you for your comment. This comment is outside the purview of this rulemaking, however Ohio EPA will take this comment into consideration when determining if Ohio will request U.S. EPA to reconsider Ohio's nuisance rule as a SIP provision.

**Comment 12:** If any revision is to be proposed to the Ohio nuisance rule, it should be to add an explicit exemption for any source/pollutant combination subject to, and in substantial compliance with, an Ohio EPA or U.S. EPA rule, order, or permit requirement specifying allowable emissions, control requirements, or work practices for that source/pollutant combination. Emissions that environmental protection agencies have specifically addressed with technically exacting emission limits or control requirements should not be exposed to inconsistent overlapping public nuisance liability (that is inherently more subjective and nebulous)..  
**(Robert L. Brubaker and Eric B. Gallon, Porter Wright Morris & Arthur LLP)**

**Response 12:** Ohio EPA is now not proposing any changes to the nuisance rule. It is important to point out, however, that if the emissions from a source of any substance are found to be a public nuisance, then the source must be subject to the nuisance rule even if it is complying with its permitted limits so that the nuisance can be abated.

3745-15-08, "Circumvention"

**Comment 13:** 3745-15-08: The proposed changes in rule number 3745-15-08 are relevant to the enforcement and to the intent of the rule and the code of law.  
**(Scott Bushbaum, Sierra Club, Miami Group)**

**Response 13:** Ohio EPA thanks you for your comment.

**End of Response to Comments**