

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: NPDES/ Indirect Discharge Rule Package

Rule Number(s): 3745-33-04 and 3745-36-03

Date: 09/14/12

Rule Type:

New

Amended

5-Year Review

Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

This draft rulemaking consists of two rules in two separate chapters of the Ohio Administrative Code (OAC). The permit program rules contain administrative requirements

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for issuing, renewing, modifying and transferring permits. In regards to permit renewals, the rules implied that the Director could not renew a permit for a facility that was not in compliance with the terms and conditions of the effective permit. This rule language was based on Ohio Revised Code (ORC) 6111.03(J)(7).

On June 5, 2012, the Governor signed into law Senate Bill 294, the Agency's Omnibus Bill. Included in this bill was a revision to ORC 6111.03(J)(7), which would provide the Director with the discretion to renew the permittee's permit or deny the renewal. Since the statute has been revised, the Agency can now move forward with a rulemaking to update rule language. The Division of Surface Water is considering deleting the rule language that is now inconsistent with the statute.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

Rule#	Statutory Authority - ORC
3745-33-04	6111.03
3745-36-03	6111.03(Q), 6111.042

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program? If yes, please briefly explain the source and substance of the federal requirement.

Overall, both rules contain federal requirements necessary to implement the NPDES and Indirect Discharge permit programs. Ohio EPA has been delegated the authority from U.S. EPA to implement these programs created in the Federal Water Pollution Control Act ("Clean Water Act"). The provision in each rule subject to revision (OAC 3745-33-04(C)(2) and OAC 3745-36-03(G)(2)), however is not based on federal regulation; it is based on Ohio Revised Code 6111.03(J)(7). The removal of the rule language regarding permit renewals will align Ohio's rules with federal requirements.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

There is no federal counterpart language for this particular requirement in these two rules. The existing rule provisions subject to revision amplified state statute ORC 6111.03(J)(7). The existing rule language is to be deleted.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

These two rules include procedural requirements for the implementation of Clean Water Act programs designed to regulate the discharge of pollutants into surface waters. Ohio EPA has been delegated to implement the NPDES and Indirect Discharge permitting programs from U.S. EPA. Ohio EPA would not be able to effectively implement these permit programs without the procedures for issuing, denying, renewing and terminating the permits.

The purpose for the rule amendments is to potentially improve water quality by eliminating the delay of more protective permit requirements, which may be included in a renewed permit.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

Ohio EPA measures the success in these two permit programs through biological and water quality sampling and determines whether or not a stream is attaining its designated use. The status or health of Ohio's streams is reported every two years in the Integrated Water Quality Monitoring and Assessment Report, which is available on Ohio EPA's website at: <http://epa.ohio.gov/dsw/tmdl/OhioIntegratedReport.aspx>. The number of Ohio streams meeting water quality goals has dramatically increased since the inception of these two permit programs.

For these two specific rules and the draft revisions, which will allow the director to renew NPDES and Indirect Discharger permits to permittees in noncompliance with their current permit, Ohio EPA will measure success by water quality status of the receiving stream during our biological and chemical stream surveys. The results of the downstream sampling should show maintenance and/or improvement in water quality.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

Ohio EPA sent electronic notice to DSW's rulemaking interested party list and posted the Early Stakeholder Outreach fact sheet on DSW's website on July 17, 2012. The comment period deadline was July 31, 2012.

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8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

DSW received comments from the Ohio Utility Group. The comments requested additional clarification of the statute in the rules. At this time, the Agency is not intending to include language in the rules.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

Not applicable. The rules contain procedural requirements for the Agency to follow in implementing the NPDES and Indirect Discharger permitting programs and are not based on scientific data.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

In regards to the overall rules, Ohio EPA is required by state statute and delegation agreements with U.S. EPA to implement, at a minimum, these permit programs in accordance with federal regulations. Ohio EPA is also required to administer its programs in accordance with state statute. These draft rule revisions will eliminate the inconsistency between current rule language and revised statute provisions.

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

Not applicable. As mentioned above, Ohio EPA has been delegated authority from U.S. EPA to implement the NPDES and Indirect Discharge programs in accordance with, at a minimum, federal requirement. The federal rules do not allow performance-based regulation.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

Ohio EPA is the delegated state agency for the NPDES and Indirect Discharge programs. Only a review of existing Ohio EPA rules was necessary and no duplication was found.

13. Please describe the Agency’s plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The rules will be implemented at the time Ohio EPA renews a permit. During the permit renewal process, compliance with the rule will be evaluated and a decision made as to whether the permit renewal can proceed. Ohio EPA does not anticipate any impact on enforcement cases as long as criteria in the rules are evaluated.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

The rules are part of the NPDES and Indirect Discharger permitting programs. Anyone subject to these permit programs could be impacted by the draft rule revisions. This includes cities, villages, counties, townships, industries that discharge wastewater directly into surface waters, industries that discharge pretreated wastewater into sanitary sewers, and various privately owned wastewater treatment facilities that discharge into surface waters.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

As mentioned above, these two rules are part of larger permitting programs. The cost associated with the NPDES and Indirect Discharger permit programs varies widely based on factors such as volume of wastewater treated, complexity of treatment system, stringency of effluent limitations, effluent monitoring requirements, etc. However, each facility subject to these permit programs will incur costs for permit application and permit renewal every five years, costs of wastewater treatment plant construction and operation, effluent monitoring and reporting costs, time for paperwork completion (required record keeping, monthly reports), and potentially fines for noncompliance with the permit.

In regards to the draft revisions to the two rules, the permittee may be subject to cost of wastewater treatment plant upgrade, more frequent effluent monitoring, etc. sooner than if a permit renewal was delayed until any enforcement for noncompliance with the existing permit is resolved.

c. Quantify the expected adverse impact from the regulation.

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a

“representative business.” Please include the source for your information/estimated impact.

The cost associated with the draft rule changes will vary depending on the permit renewal updates. It should be noted that any upgrades or increase monitoring, etc. required by a renewed permit would have to be implemented eventually by a permittee. The draft rule changes may speed up the time in which the new/modified requirements will take place by allowing a permit to be renewed for a facility in noncompliance with an existing permit. Currently, a facility in noncompliance can delay any costs associated with updated permit requirements in a permit renewal until their enforcement action is settled. In some instances, a renewed permit may actually contain less stringent requirements that may result in cost savings for a facility. Examples of requirements that typically change in a permit renewal include pollutant parameter monitoring frequency, effluent limit values and pollutant laboratory analysis methods.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

In regards to the NPDES and Indirect Discharge programs, Congress made the determination that the intent (fishable, swimmable waters) justifies the adverse impact to the regulated business community when they passed the Federal Water Pollution Control Act (Clean Water Act).

In regards to the draft rule revisions, the Ohio Legislature made the determination that the regulatory intent justified the adverse impact when Senate Bill 294 passed. Ohio EPA determined that continued impacts to water quality from a facility should not be allowed to occur while permit noncompliance issues are being resolved. Some facilities have used the provisions in these two rules to their advantage, delaying construction of treatment facilities for years, meanwhile having an impact on the surface water quality. The draft revisions to these rules do not necessarily change the cost that would be incurred; the revisions will require the costs to be paid by the facility sooner.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No. The corresponding federal regulations and Ohio Revised Code sections for these two rules do not provide for exemptions or alternative means of compliance for any permittees.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

The failure to get a permit or to submit a timely renewal application under these rules is not considered a paperwork violation and would not fall under the scope of ORC 119.14. However, the Agency uses enforcement discretion and first-time violations of reporting requirements are typically waived.

18. What resources are available to assist small businesses with compliance of the regulation?

Ohio EPA's **Office of Compliance Assistance and Pollution Prevention (OCAPP)** is a non-regulatory program that provides information and resources to help small businesses comply with environmental regulations. OCAPP also helps customers identify and implement pollution prevention measures that can save money, increase business performance and benefit the environment. Services of the office include a toll-free hotline, on-site compliance and pollution prevention assessments, workshops/training, plain-English publications library and assistance in completing permit application forms. Additional information is available at: <http://epa.ohio.gov/ocapp>.

Ohio EPA also has a permit assistance web page (http://www.epa.ohio.gov/dir/permit_assistance.aspx) that contains links to several items to help businesses navigate the permit process, including the Permit Wizard, Answer Place, Ohio EPA's Guide to Environmental Permitting, and eBusiness Center.

Ohio EPA maintains the Compliance Assistance Hotline 800-329-7518, weekdays from 8:00 a.m. to 5:00 p.m.

U.S. EPA Small Business Gateway also has information on environmental regulations for small businesses available at: <http://www.epa.gov/smallbusiness/> and a Small Business Ombudsman Hotline 800-368-5888.