



Response to Comments on Draft Rules

Rules: OAC 3745-33-04 Permit actions.
OAC 3745-36-03 Individual indirect discharge permits.

Agency Contact for this Package

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On September 27, 2012, Ohio EPA made available for review and comment two permits program rules. This document identifies the comments and questions received during the associated comment period, which ended on October 29, 2012.

Ohio EPA reviewed and considered all comments received during the public comment periods. 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 comments and questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

Comment 1: 3745-33-04(C)(2): The omission of paragraph C is detrimental to the rule. It gives the director less authority with regards to enforcing the limitations and conditions of the permit. (Scott Bushbaum)

3745-36-03(G)(1) and (2): The proposed change in rule number 3745-36-03 letter G subset 1 where the words "Except as provided in paragraph (G)(2) of this rule individual" and omission of paragraph (G)(2) is detrimental to the rule. My suggestion is not to omit the wording of rule 3745-36-03 letter (G)(1) or paragraph (2) in effort to provide the Director with the necessary enforcement capability to uphold the rule and the meaning of the law. (Scott Bushbaum)

Response 1: The omission of paragraph (C) in OAC 3745-33-04 and paragraph (G)(2) in OAC 3745-36-03 does not affect the authority of the director to enforce a permit. The rule allows the director a greater flexibility in the methods for bringing a permittee into compliance – including more stringent conditions in the permit, starting enforcement actions, or denying the application for a renewal.

Comment 2: The Utilities support removing rule language requiring the director to deny permit renewal. However, this change does not address the issues raised in early stakeholder outreach. Specifically, what right to a hearing does a permittee have should the director deny renewal? Should the director deny renewal will a permittee be in immediate noncompliance? (Ohio Utility Group)

Response 2: While we believe existing provisions address the stated concern, we have reiterated requirements in the rule to the effect that a permittee has adjudication rights if the director were to propose to deny a renewal permit. We have added language clarifying that permit conditions and coverage remain in effect until the Director issues a final action.

Comment 3: Under the current rule, the Agency has interpreted that the Director could not renew a permit if there was a finding that the permittee did not comply with the terms and conditions of the existing permit. Thus, even in circumstances where the Director found substantial compliance, the language indicated that the Director was required to deny the renewal. The Utilities ask Ohio EPA to confirm that this is the Agency's interpretation of the rules. (Ohio Utility Group)

Response 3: This is not a complete understanding of the rule. The current rule does not require the Director to deny an application; he must simply not renew the permit. Other options available to the Director are to begin an enforcement action, or to work with the permittee to bring them into compliance. In these cases the current permit conditions continue according to OAC 3745-33-03(B). The changes to ORC Section 6111.03(J)(7) via SB 294 give the director greater flexibility to renew a permit despite noncompliance and this rule change is being made in order to be consistent with the changes to the statute.

Comment 4: The new ORC 6111.03(J) state that “the director....may deny the renewal if the director determines that the permit holder has not complied with the terms and conditions of the existing permit.” It is the Utilities understanding that this revision and any subsequent revision to the rules clarifies that the Director has flexibility to look at the compliance history of a permittee and, based on that history, make a determination to renew or deny the renewal of the permit. Without further information about how the Director will make

this determination, the Utilities cannot provide meaningful comments at this time.

For example, consider a scenario where a permittee was in substantial non-compliance during the first year of the issuance of its NPDES permit and Ohio EPA took enforcement actions to remedy the non-compliance. Subsequent to that non-compliance, the permittee was in compliance for the remainder of the duration of the permit. Does the Director have the discretion to penalize the permittee a second time by denying the renewal of the permit for the first year of non-compliance? To safeguard against this type of action, the Utilities recommend that the rules include the following language:

3745-33-04(C)

“(4)The director will not deny the renewal of a permit where an enforcement action has been instituted and the permittee is in compliance with or is making satisfactory progress toward the terms of the compliance order or consent decree.” (Ohio Utility Group)

Response 4: The suggested language proposed by this comment is a good articulation of the historical permitting practices under the former rule language, meaning that the Agency would renew permits once an enforcement action was completed and the permit holder was on a path to compliance. While we certainly envision renewing permits under similar facts under the new rule, the new rule language goes further and would give the Director the discretion to renew a permit even where a permit holder is not in compliance with its permit. However, we would rather keep the language consistent with the level of discretion afforded by the General Assembly. Further, if Ohio EPA were to propose to deny a permit for any reason, the permit holder would be offered an adjudication hearing under ORC Section 119. This due process requirement is currently in place and is not affected by this rulemaking.

Comment 5: In addition, the Utilities are concerned with the uncertainty that would occur should the Director deny the renewal of the permit. It is not clear how this rule change works with the continuance of an expired permit under OAC 3745-33-03(B). The Utilities are concerned that if the Director makes a finding of non-compliance in connection with the review of a permit application, the expired permit would not remain in force. In instances where the Director should deny the renewal of a permit, is the denial considered a final agency action and, thus, appealable to the Environmental Review Appeals Commission? If yes, does the existing permit remain in force until the appeal is resolved? If this is Ohio EPA’s interpretation of the rules, the Utilities recommend the following revision:

3745-33-03 Permit Applications

“(B)(2)If a permit application is submitted at least one hundred eighty days prior to the expiration date of the existing permit, and the director denies renewal of the permit, the conditions of the expired permit shall continue in force until the conclusion of any appeal of the denial of the renewal of the permit as allowed under ORC 3745-53-10.” (Ohio Utility Group)

Response 5: We have included language that recognizes that permit conditions continue until the Director issues a final action. This covers the period related to any adjudication hearings on a proposed denial.

Comment 6: Ohio EPA should also include provisions similar to OAC 3745-33-03 and OAC 3745-33-10 to the rules for individual Indirect Discharge Permits. (Ohio Utility Group)

Response 6: We have included the language from OAC 3745-33-03 in the rules for Indirect Discharge Permits. Much of the language from OAC 3745-33-10 is already included in these rules in OAC 3745-36-03(L). We recognize the applicability of the statutory requirements currently listed in OAC 3745-33-10. These apply to all related rules, including OAC Chapter 3745-36, without being listed in the rule.

End of Response to Comments