



Response to Comments

Rule: OAC 3745-1-06 (Water Quality Standards)
OAC 3745-2-02, -04, -05, -06, -07, -08, -09, -10, -12 (Implementation of WQS)
OAC 3745-33-01, -02, -03, -04, -05, -07, -08, -09 (Ohio NPDES Permits)

Agency Contact for this Package

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Ohio EPA made available for review and comment eighteen proposed amended rules regarding water quality standards, implementation of water quality standards, and National Pollutant Discharge Elimination System (NPDES) permits. This document identifies the comments and questions received during the associated comment period, which ended on January 6, 2011.

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 comments and questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

General

Comment 1: As a general comment, a number of these regulations refer to www.gpoaccess.gov for Federal regulations. However, according to that site, it will be officially retired in mid-2011. Ohio EPA may want to update these references to the new website. (Northeast Ohio Regional Sewer District)

Response 1: A reference to www.gpoaccess.gov is included in OAC 3745-2-02 and OAC 3745-33-01. As recommended, these rules will be changed to reference to the new website: www.gpo.gov/fdsys/.

Rule 3745-2-08(C)(17)

Comment 2: OUG previously submitted comments opposing draft rule language proposed by the agency that would have precluded conditions within mixing zones from being injurious to human health for a multitude of reasons, including, but not limited to, the fact that the provision was vague and ambiguous. While OUG appreciates the fact that the agency has made an effort to make the provision more concrete, it remains overly vague and ambiguous. Furthermore, as OUG previously commented, if Ohio EPA believes that such a provision is truly necessary to protect human health it could and should make efforts to utilize the procedures outlined in OAC 3745-1-34 to develop human health numeric or narrative criteria that it believes are necessary to prevent temporary injurious conditions from developing instead of pursuing the issue through this rulemaking. (Ohio Utility Group)

Response 2: The proposed rule provision is common sense based and necessary to protect human health and the environment. Before implementing this provision through the NPDES permitting program, Ohio EPA will work with a discharger to develop specific permit conditions or limitations through the NPDES permit development process.

Rule 3745-2-08(M)(3)

Comment 3: Ohio EPA has included a provision that “the thermal mixing zone shall not cause an increase in pathogens, or harmful, toxic, invasive or noxious aquatic organisms.” OUG continues to believe that this provision is unnecessary and reiterates its prior comments herein. As it stands, the provision fails to recognize that the presence and abundance of invasive species is dependent on many factors, many of which are not related to elevated temperature and/or may not be caused by elevated temperatures in a thermal mixing zone. Moreover, in some cases, elevated temperatures within a mixing zone may actually cause a reduction in the biomass of invasive aquatic organisms. For this reason, and those outlined in our prior comments, the revisions that Ohio EPA has proposed are not appropriate. OUG requests that Ohio EPA remove this provision before finalizing the rules or revise the language of this provision to address OUG’s concerns. (Ohio Utility Group)

Response 3: Ohio EPA will revise this language to make the prohibition effective only when Ohio EPA projects a designated use impairment due to

contributions of the thermal discharge. This will allow mixing zones when organism increases are insignificant or not related to the discharge.

Rule 3745-2-08(M)(4)

Comment 4: In this section of the proposed rules, Ohio EPA has proposed to add a provision requiring that requests for new and expanded thermal mixing zones must also evaluate other discharge alternatives. While OUG does not oppose this general concept, Ohio EPA should revise the proposed rule language before it finalizes the rule to make it clear that the phrase “expanded discharge,” in this context, is intended to address a situation in which a facility requests an expansion of its previously permitted capacity. Such a revision is necessary as a result of the fact that some existing facilities that currently have thermal mixing zones may currently be off-line or running at minimal capacity, but still need the flexibility to utilize their existing mixing zone up to its current capacity without having to prepare the alternatives analysis. (Ohio Utility Group)

Response 4: The proposed rule language requires the evaluation of alternatives “as required by rule 3745-1-05” (Antidegradation). Revisions to the Antidegradation rule adopted on December 29, 2010 clarify a net increase from an existing source that is the result of allowing a previously authorized or documented production or treatment capacity to be achieved is exempt from the rule requirements, which includes the alternatives analysis. Therefore, revisions to the proposed rule are not needed.

Rule 3745-33-03(A)

Comment 5: Please include the following language: “and other information required by Ohio EPA shall” in the paragraph of OAC 3745-33-03(A), after “these forms...”. This is intended at a minimum to clarify Ohio EPA’s authority to implement 40 CFR125.72(b) and (c). (U.S. EPA Region 5)

Response 5: The term “forms” will be replaced with “applications” to clarify that information not specifically identified on the forms may need to be submitted as part of an application.

Rule 3745-33-04(A)(2)

Comment 6: Currently, O.A.C. 3745-33-04(A)(2) requires the Director to deny an NPDES application based on any one of several findings. Ohio EPA's Proposed Rules add a provision requiring denial where "the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states." O.A.C. 3745-33-04(A)(2)(d).

Effectively, this proposed regulatory change incorporates the water quality standards of surrounding states into Ohio's own water quality standards and NPDES program. This inclusion contradicts the purposes of Ohio's own water quality standards, which have been established based on data and review specific to Ohio's waterways and aquatic life. The inclusion of water quality standards of other states, which may be based on non-scientific, political rationale, conflicts with Ohio law and the federal Clean Water Act. Similarly, the water quality standards put in place by Pennsylvania, Kentucky, Indiana, West Virginia and Michigan were derived by those states using state-specific and waterway specific data. By introducing the water quality standards of other states into Ohio's water quality requirements, Ohio EPA abdicates its authority and subjects POTWs like Warren, and industrial users like Patriot, to meeting standards which are not related to Ohio specific waterways or environmental data and for which the Ohio operators have no control. In addition, the new rule discriminates against those POTWs and companies located near state borders, in favor of those located more centrally. With this rule change, entities obtaining an NPDES near the state border may be subject to laws of neighboring states which are more stringent than both Ohio law and federal law for no rational reason.

Warren and Patriot ask that Ohio EPA reconsider the inclusion of this new criteria forcing the director to deny an application of other state's water quality requirements are not met. (Patriot Water Treatment, LLC and City of Warren)

Response 6: The proposed provision regarding compliance with applicable water quality requirements of all affected states is being included at the request of U.S. EPA Region 5 to make the State's existing authority under 40 C.F.R. Part 122.4(d) explicit. This is not a new requirement and Ohio EPA will continue to implement this provision consistent with current practices.

Comment 7: We received your e-mail of today's date concerning the proposed Ohio EPA rules change. Our department has been in discussions with your firm to establish three pre-treatment plants located in our sewer district. Mahoning County is immediately adjacent to Pennsylvania State line. The three treatment plants that would treat your discharge all ultimately discharge in to the Mahoning River that flows in to Pennsylvania. Your proposed plants would bring approximately 100 new jobs to Mahoning County and would bring as much as \$1,000,000.00 per year revenue to our Department. The Mahoning County Sanitary Sewer Department is very strongly opposed to the proposed Ohio EPA rules change! Please add our comment to your submittal to the EPA. Thank you for the heads up about this very important issue. If we can be of any further help please do not hesitate to contact me. (Mahoning County Sanitary Engineer)

Response 7: See the response to comment 6 above.

Comment 8: Overall, the Ohio EPA's draft NPDES Rules could result in additional regulatory requirements and expense for municipalities without meaningful benefit to the environment. The City of Steubenville is located directly across the Ohio River from Weirton, West Virginia and it would not be beneficial to the City to be help at a higher standard based on both the Ohio NPDES Rules and any NPDES rules imposed by the State of West Virginia; particularly given the current NPDES issues the City of Weirton, West Virginia faces due to overwhelming NPDES violations. Please find media accounts of the severity of the situation that would face the City of Steubenville, should be held to the same standards as the City of Weirton, West Virginia all due to the ineffectiveness of Weirton to respond to past NPDES issues. These accounts are attached as Exhibits A, B and C.

Also, if the draft NPDES Rules are adopted the economic impact to any future plans for the City would be detrimental. The City would likely lose \$300,000 in treatment income from a potential industry that has entered into contract negotiations with the City. This estimate is only for treatment of water and does not include the income tax revenue, nor does it include the revenue from related businesses that will result from this new industry which have been conservatively estimated at \$800,000. The loss of this revenue of \$1.1 million would have a severe impact on the City's budget as we have been struggling with the closing of our main industry Severstal Steel, and an unemployment rate of 13.2%; which is the seventh

highest in the State of Ohio. These funds will be utilized to expand our current environmental programs as well as continue to bring the City into compliance with all NPDES and EPA requirements.

The City's new management is diligently working on recreating a solid relationship with the Ohio EPA, and I implore you to take in to consideration the economic impact of these draft NPDES Rules will have on a city that is already facing a severe economic crisis. (City of Steubenville)

Response 8: See the response to comment 6 above.

Comment 9: As written, paragraph 3745-33-04(A)(2)(d) could preclude issuance of Ohio NPDES permits in the Lake Erie basin if another state with discharges to the lake were to promulgate criteria resulting in discharge limits that are below the actual conditions found in the lake (as could possibly be done for nutrients or pharmaceuticals and personal care products). Therefore, NEORSR suggests that it be phrased as follows:

“The director determines that the discharge or source would cause a violation of applicable water quality requirements in any affected state.” (Northeast Ohio Regional Sewer District)

Response 9: See the response to comment 6 above.

Rule 3745-33-04(D)

Comment 10: OUG reiterates its prior comments and its request that Ohio EPA remove the provision that allows “interested persons” to request modifications of permits held by other parties when they believe that it is necessary. In the event that Ohio EPA remains unwilling to remove this provision from the proposed rules before it finalizes them, Ohio EPA should revise the language of the rule so that it requires interested persons and other third parties that request a modification of a permit for facilities – that they do not own or operate – to support their request with Level 3 credible data when the submittal of new information is the basis for the requested modification (in a manner consistent with Ohio EPA’s credible data rules). Such a provision would protect permit holders and Ohio EPA from having to deal with requests that are not supported by high quality data and discourage irresponsible third-parties and “interested persons” from requesting such modifications until such

time as they have committed resources on the development and collection of reliable data. (Ohio Utility Group)

Response 10: Allowance for a modification request by an interested party is required of state NPDES programs by 40 C.F.R. 124.5. We have reduced the scope of these requests to those allowed in the federal rule. The requirement for data to be Level 3 would narrow the scope of federal requirements, providing a basis for U.S. EPA Region 5 objection.

Rule 3745-33-05(C)

Comment 11: The NEORSD is seeking further clarification regarding the expression of permit limits for continuous discharges, found at OAC 3745-33-05(C). Specifically, OAC 3745-33-5(C)(1)(a)(vii) requires NPDES permit for continuous discharges to express pathogen limitations as average weekly and average monthly limits unless more restrictive limits for other periods are needed to meet water quality standards or other regulatory requirements. It is unclear how Ohio's newly adopted recreational use criteria are to be translated into weekly and monthly NPDES permit limits when the criteria themselves are expressed as a seasonal geometric mean and a single sample maximum criteria that is not to be exceeded in more than 10 percent of the samples in a thirty-day period. It is difficult to determine the impacts of this issue without understanding how these rules will be applied in upcoming NPDES permits. We reserve the right to further evaluate this issue once this clarification is given. (Northeast Ohio Regional Sewer District)

Response 11: The establishment of permit limitations is meant to be conducted during the permit issuance/renewal process and not in rule. We intend to continue our practice of applying the geometric mean bacteria criteria as monthly average permit limits and applying the maximum bacteria criteria as weekly average permit limits. Please see the following document for more information on the expression of pathogen limits in NPDES permits:
http://epa.ohio.gov/dsw/permits/technical_assistance.aspx#ecoli.

Comment 12: As written, 3745-33-05(C)(2) is misleading as 40 CFR 122 does not contain a definition for non-continuous discharges. To provide clarity, NEORSD suggests that 3745-33-05(C)(2) be expressed as:

“Expression of permit limits for non-continuous discharges.
Discharges that are not continuous, as continuous is defined

in 40 C.F.R. 122.2, shall be particularly described and limited, considering the following factors, as appropriate.”
(Northeast Ohio Regional Sewer District)

Response 12: The suggested change will be made.

Rule 3745-33-07(B)(11)

Comment 13: Ohio EPA adds O.A.C. 3745-33-07(B)(11) which requires that permits contain both chronic and acute toxicity testing requirements when the ratio of the downstream or mixing zone dilution is 20:1 or greater. This requirement is not in concert with federal law, specifically, 40 C.F.R. 122.21(j)(5). 40 C.F.R. 122.21(j)(5)(v)(A)-(C), sets the triggering threshold for acute toxicity testing at an effluent greater than 1000:1. Additionally, US EPA states that if effluent is diluted between 100:1 and 1000:1, the permittee can choose between acute or chronic toxicity. Patriot and Warren request that Ohio EPA revise this section to match federal regulation. (Patriot Water Treatment, LLC and City of Warren)

Response 13: The proposed rule language would require only acute toxicity testing if the ratio of downstream or mixing zone dilution is 20:1 or greater and only chronic toxicity testing if the ratio is less than 20:1. This is less restrictive than the federal counterpart to the rule provision, which is only a suggestion, not a requirement.

End of Response to Comments