Ohio EPA held an interested party comment period from August 18, 2017 to September 18, 2017 regarding nine NPDES rules. This document summarizes the comments and questions received during the associated 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.

3745-33-01:

Comment 1: (DD: “Pollutant”) OEPA proposed revision to OAC Rule 3745-33-01, redefining “pollutant” to exclude

“water, as, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well is used either to facilitate production or for disposal purpose as approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources

unreasonably subjects Ohioans to potential adverse public health impacts and environmental degradation as a result of oil and gas exploration and development activities around the State. Instead leaving the determination of potential impact
to be decided on a case-by-case bases. As oil and gas operations around the state continues to increase, it is necessary to ensure Ohioans water supplies and environmental resources are adequately protected. Accordingly, the above referenced definition should be included within the definition of pollution. (Ohio Environmental Council, OEC)

Response 1: Ohio EPA has retracted the draft changes to the definition of “pollutant”. The existing definition of “pollutant” will not be amended.

Comment 2: (DD “Pollutant”) Ohio Adm. Code 3745-33-01(DD) Pollutant: The definition of pollutant includes “biological materials.” There is a concern that dead fish impinged on travelling screens and subsequently rinsed back into the receiving stream could be regarded as a pollutant. For consistency, it is recommended that Ohio EPA revise this definition to reflect the definition in Ohio Adm. Code 3745-1-02(B)(73) and R.C. 6111.01(A). This would eliminate this concern that dead fish would be considered a pollutant. In the alternative, Ohio EPA could revise the definition to exempt this type of biological material. (Ohio Utilities Group, OUG)

Response 2: Ohio EPA has retracted the draft changes to the definition of “pollutant”. The existing definition of “pollutant” will not be amended.

Comment 3: (GG: “Process wastewater”) The proposed definition would capture as regulated process wastewater any water that during manufacturing or processing comes in contact with, or results from, production or use of raw materials, products, by-products, or waste products, but would expressly exclude noncontact cooling water (NCCW) and sanitary wastewater. The phrase "or results from" is not contained in other states’ definition of the term "process wastewater." It substantially broadens the scope of the term "process wastewater" and makes it less clear. But for a proposed exclusion, the phrase "or results from" would include NCCW, which has never before been considered to be a process wastewater. It also arguably captures condensate, boiler blowdown, and even production well water within its scope, when these waters are not process wastewaters. The phrase "or results from" should be deleted if OEPa intends to move forward with promulgating a definition of the term "process wastewater," and the term should only include waters that come in contact with raw materials, products, by-products, or waste products. (American Energy Corp.)

Response 3: The definition that Ohio EPA is proposing for process wastewater is consistent with the definition in the federal NPDES rules [40 CFR 122.2], which includes the phrase “or results from”. Three of the other EPA Region Five states include a definition for “process wastewater” in their administrative rules, and all three of those states include the “or results from” phrase as well. Ohio EPA has revised the definition to add the word “direct” and to remove “except noncontact cooling water and sanitary wastewater”.

The definition now reads: “Process wastewater” means any water that during manufacturing or processing comes into direct contact with, or results from, the production or use of any raw material, intermediate product, finished product,
byproduct or waste product. This is consistent with the definition in the federal NPDES rules.

Ohio EPA already considers condensate and boiler blowdown to be process wastewaters under the existing definition. In a few cases, non-contact cooling water is considered a process wastewater (the Steam Electric Power Effluent Limitations Guidelines, for example).

Comment 4: (KK “Reasonable potential”) The proposed, revised definition adds clarity to the process OEPA currently uses to determine "reasonable potential" for actual or threatened violations of numeric water quality standards (WQS), but adds little or no clarity to the process the Agency uses for making the same determination for actual or threatened violations of OEPA’s narrative WQS. The statement that "the Director will use appropriate environmental indicators and modeling procedures" provides no guidance for permit holders, and subjects them to potentially arbitrary decisions about limits to address actual or threatened violation of narrative WQS relating to, for example, nuisance or toxic conditions, codified under OAC 3745-1-04.

OEPA has ample sampling and modeling tools, and other sources of information, at its disposal to be able to provide greater specificity of the indicators and procedures that will be used to make these determinations. For example, the Agency measures phosphorus, chlorophyll, and diurnal DO swing to determine whether nutrient-driven nuisance conditions exist in a waterbody. The Agency also measures algal toxins as an indicator of potentially toxic conditions, and conducts biological and whole effluent toxicity tests of aquatic species in waterbodies. In addition, OEPA has access to algal bloom advisories posted by the Department of Health, and measures bacteria levels to determine whether unsanitary conditions are present. These are just a few of the existing tools OEPA uses as indicators of potential violations of narrative WQS. The Agency also uses several established modeling programs to predict potential violations of narrative WQS. Examples where additional clarity is provided in other rules or guidance include OAC 3745-1-04(F) & (G) and WQS Guidance #3, which provide a detailed procedure defining when an unsanitary condition exists to support a finding of a public health nuisance, and in OEPA’s WQS Guidance #4, which provides detailed protocol defining when nutrients are causing a nuisance condition in a waterbody. There is no reason why OEPA cannot define the term "reasonable potential" with greater clarity and specificity in the context of applying narrative WQS. American Energy Corporation request that the Agency add additional guidance to the revised definition of "reasonable potential," so that permit holders will have understandable, objective criteria that OEPA will use to apply the narrative WQS in their permits. (American Energy Corp.)

Response 4: The purpose of this paragraph is to clarify that Ohio EPA has the authority to assess reasonable potential to contribute to exceedances of narrative water quality criteria, as required by 40 CFR 122.44(d).
To provide greater specificity in defining reasonable potential, Ohio EPA clarifies that reasonable potential for narrative criteria must be assessed using direct linkages between the criterion and environmental indicators related to the criterion. However, the wide range of stressors that may result in narrative criteria violations is not conducive to a detailed definition in a general rule. Often the reasonable potential needs to be based on site-specific factors. As such, the narrative reasonable potential assessment needs to be general.

There is a separate ongoing effort to address reasonable potential for nutrients. Ohio EPA has formed an external Nutrient Technical Advisory Group (TAG) to advise and consult with the Agency in the development of nutrient rules. The TAG has submitted final recommendations to Ohio EPA. Ohio EPA has been reviewing TAG recommendations and met with four members of the TAG to discuss an implementation strategy in early September. Rules to address nutrient reasonable potential will be promulgated under OAC Chapter 3745-1. This draft change in OAC Rule 3745-33-01 is part of a concerted effort to revise OAC Chapter 3745-33 to allow for the implementation of these rules.

To address the concerns detailed in this comment, Ohio EPA has revised the paragraph to:

“For determinations of reasonable potential to cause or contribute to exceedances of the narrative criteria in OAC Rule 3745-1-04, the director will use available environmental indicators (chemical, physical, biological) relative to the specific criterion being evaluated and modeling appropriate to the indicator designed to relate the source being evaluated to the indicator of the specific narrative criterion.”

Comment 5: (KK: “Reasonable potential”) The proposed, revised definition adds clarity to the process OEPA currently uses to determine “reasonable potential” for actual or threatened violations of numeric water quality standards (WQS), but adds little or no clarity to the process the Agency uses for making the same determination for actual or threatened violations of OEPA’s narrative WQS. The statement that “the Director will use appropriate environmental indicators and modeling procedures” provides no guidance for permitholders, and subjects them to potentially arbitrary decisions about limits to address actual or threatened violations of narrative WQS relating to, for example, nuisance or toxic conditions, codified under OAC 3745-1-04.

OEPA has many sampling and modeling tools, and other sources of information, at its disposal to be able to provide greater specificity of the indicators and procedures that will be used to make these determinations. For example, the Agency measures phosphorus, chlorophyll, and diurnal DO swing to determine whether nutrient-driven nuisance conditions exist in a waterbody. The Agency also measures algal toxins as an indicator of potentially toxic conditions, and conducts biological and whole effluent toxicity tests of aquatic species in waterbodies. In addition, OEPA has access to algal bloom advisories posted by the Department of Health, and measures bacteria levels to determine whether unsanitary conditions
are present. These are just a few of the existing tools OEPA uses as indicators of potential violations of narrative WQS. The Agency also uses several established modeling programs to predict potential violations of narrative WQS. Examples where additional clarity is provided in other rules or guidance include OAC 3745-1-04(F) & (G) and WQS Guidance #3, which collectively provide a detailed procedure defining when an unsanitary condition exists to support a finding of a public health nuisance, and OEPA's WQS Guidance #4, which provides detailed protocol defining when nutrients are causing a nuisance condition in a waterbody.

There is no reason why OEPA cannot define the term "reasonable potential" with greater clarity and specificity in the context of applying narrative WQS, just as it does in the context of applying numeric WQS. The firm's clients request that the Agency add additional guidance to the revised definition of "reasonable potential," so that permitholders will have understandable, objective criteria that OEPA will use to apply the narrative WQS in their permits. (County Sanitary Engineers Association of Ohio (CSEAO), and the cities of Dayton, Canton, Wooster and Lima)

Response 5: Please see Response 4.

3745-33-03:

Comment 6: (C)(2) Ohio EPA is formalizing a treatment additive policy by incorporating the policy into the rules. Ohio EPA has also created and provided for public comment a treatment additive application and treatment additive reporting form. Those forms are included in the attached packet. The Utilities recommend, under Ohio Adm. Code 3745-33-03(C)(2), that Ohio EPA replace "chemicals or substances" with "treatment additives proposed" in Ohio Adm. Code 3745-33-03(C)(1). Ohio EPA did not replace the same language in Ohio Adm. Code 3745-33-03(C)(2). (OUG)

Response 6: The Agency has made this change in the proposed rule.

Comment 7: (D) The proposed rule states that NPDES applications will be rejected as incomplete if any of the required sampling data is missing, or if any of the required sampling data was collected with analytical procedures with method detection limits (MDLs) deemed not "sufficiently sensitive." The term "sufficiently sensitive" would be defined as: (1) an approved analytical method with a MDL at or below the applicable WQS for the pollutant being measured, (2) any approved analytical method with a MDL above the applicable WQS for the pollutant being measured where the analytical method detects the pollutant in the discharge, or (3) the approved analytical method with the most sensitive MDL. If there is no currently approved analytical method, the applicant would have to provide a description of the method.

The proposed rule creates a significant potential for delay in the processing of new or renewal NPDES permit applications. Requiring that the applicant determine the applicable WQS for the pollutant being measured can be very difficult. Because WQSs differ for different use designations, the applicant must know the use
designation to begin to assess the applicable WQSs that apply to the discharge, before the applicant can take steps to ensure that the outside lab doing the analysis selects a sufficiently sensitive analytical method. Many WQSs also differ based on the hardness of the receiving stream (metals) and temperature and pH of the stream (ammonia). WQSs also differ for inside and outside mixing zone averages and maximums. The process of determining the applicable WQS in order to select a sufficiently sensitive analytical method is way too complicated for all but the most sophisticated permit holders, and presents too many opportunities for mistakes by an applicant that will result in rejection of the application as incomplete.

Is this proposed rule driven by a significant number of applications that OEPA is receiving with nondetect sampling at method detection levels above applicable WQSs, caused by applicants or their labs choosing less sensitive analytical methods? Or is this a proposed rule in search of a problem that rarely exists? If it is the latter, the Agency should deal with the limited number of problem applications using a case-by-case rejection of the application and request for supplemental sampling, not through a scattergun rule that will likely create more problems than it corrects. If it is the former, the proposed rule is still unworkable for the reasons explained above. It is also unworkable because even the most sensitive analytical test methods have detection limits that can vary substantially due to matrix interferences in the sample. If matrix interferences drive a sample detection limit above the applicable WQS, will the Agency seek to reject the application as incomplete when the analytical test method meets the proposed definition of "sufficiently sensitive" but for the matrix interferences?

If OEPA is seeing a rash of problematic NPDES permit applications, the better solution is to develop for comment new permit guidance in which the Agency sets forth the approved analytical methods that can be used for applicable WQSs for NPDES permit applications. The Agency is in a much better position than applicants to determine what methods need to be used for different WQS to provide the needed sensitivity. Such guidance can be amended quickly when new or revised methods are approved, and can be incorporated by reference in OAC Chapter 3745-33 as required for use by NPDES permit applicants. (American Energy Corp.)

Response 7: ORC Chapter 6111 and the rules adopted thereunder are to be administered consistently with federal law. Ohio EPA included this clause in Ohio rules due to ongoing issues with insufficiently sensitive data being submitted on both applications and Discharge Monitoring Reports (DMRs). The Agency wants to emphasize this program requirement to improve data submittals.

The problem of insufficiently sensitive data exists in both applications and DMRs. Due to this, there has been an increase of method sensitivity clauses in NPDES permits. In some cases, this increases monitoring requirements beyond what they would have been if sufficiently sensitive data had been submitted. With the upcoming increase in application testing for major POTWs, this issue may increase.
The Agency agrees that guidance on this would be useful. Ohio EPA will prepare guidance on this issue similar to the recently-issued guidance on applications for coal mining discharges.

Ohio EPA disputes that dischargers are incapable of determining sufficiently sensitive methods. Ohio water quality criteria are available on-line; much of the Agency’s stream data is also on-line through interactive map applications. The district NPDES staff are also available as a resource for permittees.

These requirements should speed up permit renewals because applications will be sent back for revision less often. Ohio EPA appreciates the concern about analytical interferences, but believes, based on DMR and Ohio EPA data, that these are rare occurrences that the Agency would account for in reviewing applications (especially if the applicant notes the issue). Many U.S. EPA-approved test methods have procedures for removing interferences.

Comment 8: (D) The proposed rule states that NPDES applications will be rejected as incomplete if any of the required sampling data is missing, or if any of the required sampling data was collected with analytical procedures with method detection limits (MDLs) deemed not "sufficiently sensitive." The term "sufficiently sensitive" would be defined as: (1) an approved analytical method with a MDL at or below the applicable WQS for the pollutant being measured, (2) any approved analytical method with a MDL above the applicable WQS where the analytical method detects the pollutant in the discharge, or (3) the approved analytical method with the most sensitive MDL. If there is no currently approved analytical method, the applicant would have to provide a description of the method.

The proposed rule creates a significant potential for delay in the processing of new or renewal NPDES permit applications. Requiring that the applicant determine the applicable WQS for the pollutant being measured can be very difficult. Because WQSs differ for different use designations, the applicant must know the use designation to begin to assess the applicable WQSs that apply to each pollutant in the discharge, before the applicant can take steps to ensure that an outside lab doing the analysis selects a sufficiently sensitive analytical method. Many WQSs also differ based on the hardness of the receiving stream (metals) and temperature and pH of the stream (ammonia). WQSs also differ for inside and outside mixing zone averages and maximums. The process of determining the applicable WQS in order to select a sufficiently sensitive analytical method is too complicated for all but the most sophisticated permit holders, and presents too many opportunities for mistakes by an applicant that would result in rejection of the application as incomplete.

Is this proposed rule driven by a significant number of applications that OEPA is receiving with nondetect sampling at MDLs above applicable WQSs, caused by applicants or their labs choosing less sensitive analytical methods? Or is this a proposed rule in search of a problem that rarely exists? If it is the latter, the Agency should deal with the limited number of problem applications using a case-by-case rejection of the application and request for supplemental sampling, not through a
scattergun rule that will create more problems than it corrects. If it is the former, the proposed rule is still unworkable for the reasons explained above. It is also unworkable because even the most sensitive analytical test methods have detection limits that can vary substantially due to matrix interferences in the sample. If matrix interferences drive a sample’s detection limit above the applicable WQS, will the Agency seek to reject the application as incomplete even though the analytical test method meets the proposed definition of "sufficiently sensitive" but for the matrix interferences?

If OEPA is seeing a rash of problematic NPDES permit applications, the better solution is to develop new permit guidance in which the Agency sets forth the approved analytical methods that can be used for applicable WQSs for NPDES permit applications. The Agency is in a much better position than applicants to determine what methods need to be used for different WQS to provide the needed sensitivity. Such guidance can be amended quickly when new or revised methods are approved, and can be incorporated by reference in OAC Chapter 3745-33 as required for use by NPDES permit applicants. (CSEAO and the cities of Dayton, Canton, Wooster and Lima)

Response 8: Please see Response 7.

Comment 9: (G) In the proposed codification of current informal procedures for approval of chemical additives is a requirement that the new OEPA form be submitted at least 45 days before using the proposed chemical additive. In many cases, it is not realistic to expect the form to be submitted that far in advance of proposed usage. In many situations, a problem with, for example, settling of solids, or buildup of algae in a lagoon, appears suddenly and requires quick action, such as the application of polymers or algicides, to avoid or minimize potential permit violations. Often these chemicals are already on OEPA’s approved list, and are well-known and well-established chemicals for these purposes. If an NPDES permit holder proposes to use a chemical additive that is on OEPA’s current approval list and demonstrates that the proposed application rate is within the Agency’s accepted range, there is no reason the application must be submitted at least 45 days before the proposed usage. In such circumstance, submitting the new OEPA form to the Agency, followed by its response verifying that the proposed chemical/application rate has previously been approved, should suffice, even if that process takes only a few hours to complete.

It is assumed that the proposed formal procedures for OEPA approval of the use of chemical additives, including submission of the proposed new form, are not meant to be applied retroactively to permitholders that have previously received approval from the Agency. Please confirm that this assumption is correct, or provide an explanation to support the proposed retroactive application of the new requirements to permitholders whose additives have previously received approval. (American Energy Corp.)

Response 9: Previously approved treatment additives.
Permittees with previously approved treatment additives do not need to resubmit on the new form due to these rule changes. OAC 3745-33-03(C)(2) has also been clarified that treatment additive applications are not required if a treatment additive has been approved via NPDES permit issuance.

However, additives must be reviewed whenever criteria calculation procedures change. These do not change frequently, and are not likely to change for the foreseeable future because they are based on interstate agreements that cannot be altered by any one state. These procedures were last changed in 2002 in the Ohio River watershed and in 1997 for the Lake Erie watershed.

If criteria calculation procedures do change, Ohio EPA would likely re-review additives during permit renewals depending on the implementation schedule of the multi-state agreement(s). Ohio EPA may request permittees submit additional information with the renewal application if the procedures change.

**Timeframe to submit applications**
The requirements to submit the application at least 45 days before usage has been removed. Instead, a comment has been added to the rule that Ohio EPA recommends submittal 45 days prior to use. While the timeframe has changed, Ohio EPA has retained a requirement to obtain permission before discharging these additives. This is consistent with the Discharge Changes requirements of NPDES permits and 40 CFR 122.41.

**Additive exemptions**
There is currently no pre-approved list of treatment additives, only exemptions from MSDS submittal requirements. However, Ohio EPA has added the following list of common additives that are exempt from requiring approval:

- Acids and bases used only to alter the pH of the discharge (when the applicable outfall already contains a pH limit) including
  - caustic soda (sodium hydroxide)
  - magnesium hydroxide
  - ferric chloride
  - aluminum sulfate (also known as alum)
  - lime
  - sulfuric acid
- Sodium carbonate
- Polyaluminum chloride
- Chlorination chemicals (when the applicable outfall already contains a chlorine limit):
  - Chlorine
  - Sodium hypochlorite
  - Calcium hypochlorite
- Dechlorination chemicals:
  - Sodium thiosulfate
  - Sodium sulfite
  - Sulfur dioxide
Domestic Treatment Works
Treatment additives used at a treatment works which receives domestic sewage are proposed to be exempt from the additive approval process. In addition to the chemicals which are exempted above, treatment works also typically use polymers or other additives to dewater sludge.

Unlike many other industrial applications of treatment additives, the filtrate from the sludge dewatering is typically routed towards the headworks or aeration tank and receives additional treatment. At the same time, all municipalities with pretreatment programs or design flows of greater than 1 million gallons per day are required to sample for whole effluent toxicity to determine acute and chronic effects which are not captured with chemical sampling.

Maintaining the current requirements for treatment additives at treatment works of domestic sewage will continue to be protective of the environment. Treatment works are still required to submit SDS with applications and provide notification of any changes with the discharge as required by rule and the permit.

Comment 10: (G) In the proposed codification of current informal procedures for approval of chemical additives is a requirement that the new OEPA form be submitted at least 45 days before using the proposed chemical additive. In many cases, it is not realistic to expect the form to be submitted that far in advance of the proposed usage. In many situations, a problem with, for example, settling of solids, or buildup of algae in a lagoon, appears suddenly and requires quick action, such as the application of polymers or algicides, to avoid or minimize potential permit violations. Often these chemicals are already on OEPA's approved list, and are well-known and well-established chemicals for these purposes. If an NPDES permit holder proposes to use a chemical additive that is on OEPA's current approval list and demonstrates that the proposed application rate is within the Agency's accepted range, there is no reason the application must be submitted at least 45 days before the proposed usage. In such circumstance, submitting the new OEPA form to the Agency, followed by its response verifying that the proposed chemical/application rate has previously been approved, should suffice, even if that process takes only a few hours to complete. It is assumed that the proposed formal procedures for OEPA's approval of the use of chemical additives, including submission of the proposed new form, are not meant to be applied retroactively to permitholders that have previously received approval from the Agency. Please confirm that this assumption is correct, or provide an explanation to support the proposed retroactive application of the new requirements to permitholders whose additives have previously received approval. (CSEAO and the cities of Dayton, Canton, Wooster and Lima)

Response 10: Please see Response 9.
3745-33-04:

Comment 11: (A) RC 6111.03(J)(2)(b) prohibits OEPA from issuing NPDES permits that conflict with an areawide wastewater treatment management plan adopted under Section 208 of the CWA. This language comes directly out of Section 208 of the CWA. The proposed rule would replace the italicized statutory term with the OEPA's approval of an areawide plan as the prerequisite that triggers the Agency's prohibition. OEPA cannot through rulemaking alter the statutory language in RC 6111.03(J)(2)(b) and Section 208 of the CWA. Once a delegated, authorized areawide management agency has adopted or amended its 208 plan, OEPA cannot issue a permit that conflicts with the plan regardless how long the Agency takes to approve the existing or amended plan. The proposed revision would allow the Agency to issue a permit that conflicts with an amended plan, just because the permit does not conflict with the previous OEPA-approved plan, but the Agency has not yet approved the amended plan.

OEPA has a history of taking a long period of time to review and approve amended areawide Section 208 plans. For example, the Agency's website (http://www.epa.ohio.gov/dsw/mgmtplans/208index.aspx# 157704651-recentactivities) indicates that a proposed approval of several areawide plans from around the State is still pending despite a notice and comment period issued in October 2015. The Agency also has a practice of holding up the process of approving amended plans until a large group of amended plans is assembled and then made the subject of one consolidated notice and comment. There is nothing wrong per se with this practice, but it leads to substantial delays in the Agency's approval process, and increased risk of permits being issued that are in conflict with the areawide agency's current plan. The Agency needs to leave the current language of the rule as it is written, which is consistent with the statute. (American Energy Corp.)

Response 11: The CWA Section 208(e) states “No permit under section 402 of this Act shall be issued for any point source which is in conflict with a plan approved pursuant to subsection (b) of this section.” (Emphasis added.)

This change makes the rule consistent with federal law.

We are accomplishing the intent of the statute by using the term approved. That is, no NPDES permit can be issued which conflicts with an areawide waste treatment management plan that has been approved by the Administrator.

Comment 12: (A) RC 6111.03(J)(2)(b) prohibits OEPA from issuing NPDES permits that conflict with an areawide wastewater treatment management plan adopted under Section 208 of the CWA. This language comes directly out of Section 208 of the CWA. The proposed rule would replace the italicized term with the OEPA's approval of an areawide plan as the prerequisite that triggers the Agency's prohibition. OEPA cannot through rulemaking alter the statutory language in RC 6111.03(J)(2)(b) and Section 208 of the CWA. Once a delegated, authorized areawide management
agency has adopted or amended its Section 208 plan, OEPA cannot issue a permit that conflicts with the plan regardless how long the Agency takes to approve the existing or amended plan. The proposed revision would allow the Agency to issue permits that conflict with an amended plan, just because the permit does not conflict with the previous OEPA-approved plan, but the Agency has not yet approved the amended plan.

OEPA has a history of taking a long time to review and approve amended areawide Section 208 plans. For example, the Agency's website (http://www.epa.ohio.gov/dsw/mgmtplans/208index.aspx#157704651-recent-activities) indicates that a proposed approval of several areawide plans from across the State is still pending following a notice and comment issued in October 2015. The Agency also has a practice of holding up the process of approving amended plans until multiple amended plans are assembled and then made the subject of one consolidated notice and comment. There is nothing wrong per se with this practice, but it leads to substantial delays in the Agency's approval process, and the increased risk of permits being issued that are in conflict with the areawide agency's current plan. The Agency needs to leave the current language of the rule as it is written, which is consistent with the state and federal statutes. (CSEAO and the cities of Dayton, Canton, Wooster and Lima)

Response 12: Please see Response 11.

Comment 13: (D) Treating the addition to NPDES permits of monitoring and/or effluent limits for approved chemical additives as a minor permit modification that does not require notice and comment makes sense, but it should not be limited to the situation where the approval of the chemical additive is through the issuance of Director's F&Os. If the permit modification justifies treatment as a minor modification, it does not matter whether the approval of the chemical additive came via a letter from the OEPA's staff or through formal F&Os issued by the Director. The proposed requirement of F&Os should be deleted from the proposed rule. (American Energy Corp.)

Response 13: It is Ohio EPA's intent to continue approving cooling water additives primarily through Director’s Findings & Orders or PTI approvals, although permittees may submit additives with NPDES renewal application for approval.

To allow for approval via NPDES permit actions, OAC 3745-33-03(C)(2) has been modified to:

“If these treatment additives proposed chemicals or substances have not been approved in a permit to install issued under Chapter 3745-42 of the Administrative Code, or director's final findings and orders, or NPDES permit issuance, the applicant shall...”

Regarding minor modification approvals, the Agency believes that these additives cannot be added by minor modification because adding new chemicals to the discharge does not meet the requirements of federal rule [40 CFR 122.63], and
must be done as an action of the Director which is legally-reviewable. The minor modification procedure for adding limits and monitoring is included in the rule to address a specific situation – where the additive contains an ingredient for which a water quality criterion exists. In the past, U.S. EPA has insisted that these types of additives (chlorine used as a cooling water biocide most commonly) must be incorporated into the permit, and has successfully cited companies for getting Findings & Orders only.

Comment 14: (D) Treating as a minor permit modification the addition to NPDES permits of monitoring and/or effluent limits for approved chemical additives makes sense, but it should not be limited to the situation where the approval of the chemical additive is through the issuance of Director’s F&Os. If the permit modification justifies treatment as a minor modification, it does not matter whether the approval of the chemical additive came via a letter from the OEPAs staff or through formal F&Os issued by the Director. The proposed requirement for F&Os should be deleted from the proposed rule. (CSEA, the cities of Dayton, Canton, Wooster and Lima)

Response 14: Please see Response 13.

Comment 15: (D)(3) The following items are added to the list of minor permit modifications that can be made without public participation:

(k) monitoring requirements and effluent limits for certain treatment additives, and
(l) newly discovered storm water outfalls.

The analogous federal rule 40 C.F.R. § 122.63 does not provide for minor modifications in these two situations. EPA requests that OAC 3745-33-04(D)(3)(k) & (l) are consistent with 40 C.F.R. § 122.63 or remove these new provisions from the rule. (U.S. EPA Region V)

Response 15: With respect to minor mods, USEPA intended to allow states the flexibility to have their own minor modification conditions, as long as federal due process requirements from 40 CFR 124 were met. This language is found in the preamble of the Consolidated Permit Regulations, May 19, 1980:

“Several commenters suggested that the list of minor modifications should be examples, rather than exclusive. EPA rejects the notion that the permit modifications which can be processed without any notice to the public should be open-ended. EPA continues to believe that scrutiny by the interested public should be available in most instances, not only to lessen the possibility of objectionable changes being made without public notice, but to preserve public confidence in the permit system. Several other commenters suggested that more flexibility should be available to States in the scope of permit actions which can be processed as minor modifications. The final minor modification provisions are not applicable to States...as with any part 122 requirement, a State is free to have such provisions as part of its program. However, the essential due process requirements of Part 124 ...are still applicable in these final regulations. This means that a State may provide for modifications to permits without notice in any situation where to do so would be “more stringent” than the applicable requirements of Part 124. For most of the
items in 122.17 [now 122.63], a State program could provide for more flexible minor modification provisions (if consistent with due process) because eliminating notice and comment provisions would result in greater State control."

Ohio’s minor modification conditions contain several provisions that are not specifically listed in 40 CFR 122.63. Ohio believes that these conditions are all consistent with due process, and are within the spirit of the federal rule (including changing monitoring months, and adding storm water pollution prevention language). The two new provisions (additives and existing storm water outfalls) would be consistent with the spirit of the federal rule, as well. The additives provision allows OEPA to add monitoring requirements and limits to a permit that have already been approved via a Permit-to-Install or Director’s Final Findings and Orders. The addition of monitoring and/or limits provides Ohio greater control over the additive use and discharge, and both of these mechanisms provide appeal rights.

Adding newly-discovered storm water outfalls at existing facilities would also enhance the Director’s control, and provide a more efficient mechanism for getting these discharges authorized and regulated by the permit.

Ohio EPA administers a general permit for industrial storm water activities which is similar to the U.S. EPA Multi-Sector General Permit (MSGP). The permit requires, among other things:

1. Discharges be controlled as necessary to meet applicable water quality standards; and
2. Prevents New Dischargers or New Sources tributary to Tier 3 from being eligible for coverage.

If both criteria are met, a New Discharger or New Source can submit a Notice-of-Intent (NOI) to obtain coverage under the general permit.

Allowing the director to utilize minor permit modifications on individual NPDES for new storm water outfalls is equivalent to requiring a separate NOI for water quality purposes. In other words, the proposed rule is as stringent as U.S. EPA and other Ohio EPA programs. The benefit of the proposed rule is that it allows storm water permitting to be done under a single permit.

OAC 3745-33-04(D)(3)(l) is proposed to be modified as follows:

(I) Incorporate newly discovered storm water outfalls at an existing facility provided the following:
   (i) The discharge must be controlled as necessary to meet applicable water quality standards.
   (ii) For new discharges or new sources as defined by OAC Rule 3745-01-02 and 3745-01-05, the discharge cannot be to outstanding state waters, outstanding national resource waters, or superior high quality waters other than lake Erie, as
defined by and identified in OAC Rule 3745-1-05, or direct tributaries to these waters within one miles of these waters.

Comment 16: (D)(3)(k) Ohio EPA has included monitoring and limits on treatment additive approval as a minor modification. Under Ohio Adm. Code 3745-33-04(D)(3)(k), there is a requirement that the Agency could require monitoring requirements or effluent limits for "pollutants in treatment additives when treatment additives are approved under director's final findings and orders." In previous years, AEP used dilution calculations to show that the hypothetical treatment additive concentration at the discharge is less than the toxicity-based Tier II criterion. The analytical detection of the treatment additive itself could be difficult as many of these are complex polymers. The Utilities recommend that Ohio EPA explore this issue further before finalizing the rules. (OUG)

Response 16: It is the Agency’s intent to continue reviewing these chemicals using dilution calculations, and approving them using Director’s F&Os, PTIs, or NPDES actions. Please see Response 13.

Ohio EPA has revised the language to add that requiring monitoring or effluent limits by minor modification for pollutants in treatment additives is limited to pH, total residual oxidants, total residual chlorine and phosphorus.

Comment 17: (F) EPA recommends that the proposed language be clarified to read: “No permit shall be issued that will run for a period of more than five years; however, the permit can be unless administratively continued under paragraph (C) of this rule.” This change would ensure that the rules more clearly state that permits are issued for no more than five years. (U.S. EPA Region V)

Response 17: This change has been made.

3745-33-06:

Comment 18: (C) The current rule imposes a 1 mg/L phosphorus limit on POTWs and semi-public dischargers with a design flow of 0.2 mgd or larger discharging to a publicly-owned lake or reservoir, and to other WWTPs with a design flow of 0.2 mgd or larger discharging significant phosphorus loadings to a tributary to a publicly-owned lake or reservoir. The proposed revised rule would replace "semi-public dischargers" with any WWTP of 0.2 mgd design or larger treating sanitary wastewater for discharge to a publicly-owned lake or reservoir, and would delete the word "significant" for any WWTP that discharges to a tributary to a publicly-owned lake or reservoir.

Expanding the authority to include private WWTPs discharging treated sanitary wastewater to a publicly-owned lake or reservoir makes sense, but the expanding the authority to impose phosphorus limits on insignificant dischargers of phosphorus to a tributary leading to a publicly-owned lake or reservoir is not supported, particularly if the discharger is located several miles upstream in the
tributary. There are many situations where the discharge of phosphorus is so small, or the discharger is located so far upstream on the tributary, that there is no measurable contribution of phosphorus loadings to the downstream publicly-owned lake or reservoir. OEPA should either leave the language as is, or add some mileage proximity or other qualifiers for dischargers to tributaries to a publicly-owned lake or reservoir. (CSEAO and the cities of Dayton, Canton, Wooster and Lima)

Response 18: The word “significant” will be re-instated. To further clarify OAC rule 3745-33-06(C)(2), the following changes are proposed:

“POTW and semi-public Discharges to **publicly owned lakes or reservoirs state**... This limit also applies to discharges of this magnitude with a design flow of 0.2 million gallons per day or more...”.

3745-33-07:

Comment 19: Monitoring requirements, are exceptions as provided for in proposed rule 3745-33-07 should ensure that pollutants are monitored, or exempted from monitoring requirements, based on known or potential for adverse impacts on human health, in addition to other factors provided for in applicable statutes and rules including: frequency of occurrence; variability of the levels of pollutants; known and potential impact on water quality and water biology. Although, every waterbody is not used as a drinking water supply; the interconnectivity of Ohio’s waterways and bodies warrants monitoring, or exemption from such requirements, only in light of its potential to cause adverse impacts on human health. Accordingly, an exemption from monitoring requirements should take into consideration a pollutants’ potential for adverse impact on human health and if the impacted waterbody serves as a source for drinking water. (OEC)

Response 19: Ohio EPA’s modeling and reasonable potential process includes an evaluation of all uses (human health, aquatic life, etc.). The procedures in OAC Chapter 3745-2 also require the Agency to look at downstream segments when doing wasteload allocations, reasonable potential and Total Maximum Daily Loads.

Comment 20: (A) The proposed rule would require Group 4 classification of pollutants - which requires effluent monitoring and a pollutant tracking mechanism in NPDES permits - where the effluent database is too small to support a projected effluent quality (PEQ) determination that is representative of the discharger’s effluent. This would be an arbitrarily stringent classification that does not take into account a number of relevant factors, including, for example, the variability of the database, how much above the detection limit are the data, the toxicity of the pollutant, the likelihood that the pollutant will consistently be present in the effluent, and the size of the receiving stream. Depending on these and other factors, the pollutant may properly be classified as a Group 2 or 3 parameter, with optional monitoring and no pollutant tracking mechanism. Just because a database is too small to support a PEQ determination does not mean that the stringent Group 4 classification is merited across the board. The Agency should incorporate factors
such as these into the determination of an appropriate classification for small databases. (American Energy Corp.)

**Response 20:** The rule change clarifies that Group 5 pollutants also meet the definition of Group 4 pollutants so that when the Director uses his discretion not to include limits normally required for Group 5 pollutants, the monitoring for Group 4 pollutants is still applicable. In exercising this discretion, the Director considers the factors listed above, particularly the likelihood that the pollutant would be present in the discharge, and whether the measured pollutant concentration exceeds the wasteload allocation.

The PEQ process incorporates estimates of variability; the toxicity of the pollutant is considered in setting the WQS and wasteload allocation for that pollutant. Monitoring is needed to determine if that pollutant has reasonable potential or not. If monitoring were not required, a discharger could avoid the required reasonable potential evaluation, and exceedances of WQS could occur permit cycle after permit cycle just because insufficient data was collected over and over. The purpose of Group 4 monitoring requirements is to collect sufficient data to determine whether there is reasonable potential (Group 5 classification), or whether requirements for one of the less stringent groupings applies.

**Comment 21:** (A) The proposed rule would require Group 4 classification of pollutants - which requires effluent monitoring and a pollutant tracking mechanism in NPDES permits - where the effluent database is too small to support a projected effluent quality (PEQ) determination that is representative of the discharger's effluent. This would be an arbitrarily stringent classification that does not take into account a number of relevant factors, including, for example, the variability of the database, how much above the detection limit are the data, the toxicity of the pollutant, the likelihood that the pollutant will consistently be present in the effluent, and the size of the receiving stream. Depending on these and other factors, the pollutant may properly be classified as a Group 2 or 3 parameter, with optional monitoring and no pollutant tracking mechanism. Just because a database is too small to support a PEQ determination does not mean that the stringent Group 4 classification is merited across the board. The Agency should incorporate factors such as these into the determination of an appropriate classification for small databases. (CSEAO and the cities of Dayton, Canton, Wooster and Lima)

**Response 21:** Please see Response 18.

**Comment 22:** (A)(10) There is a typo — change "data is" to "data are". (OUG)

**Response 22:** Ohio EPA will make this typographic change.

**Comment 23:** (A)(11) The Utilities recommend the following revision: "The permittee demonstrates to the director's satisfaction that the concentration of methylmercury in the edible portion of consumed species or weighted average of various species based upon local consumption exposed to the discharge does not exceed 0.3 mg/hg" should be revised to read "The permittee demonstrates to the
director's satisfaction that the geometric mean concentration of methylmercury in
the edible portion of a consumed species or the weighted average of various
species based upon local consumption exposed to the discharge does not exceed
0.3 mg/kg." (OUG)

Response 23: The Ohio EPA has made a modified version of this change in the proposed rule
that reads: “The permittee demonstrates to the director’s satisfaction that the
gEometric mean concentration of methylmercury in the edible portion of a
consumed species or the weighted average of the geometric means of various
species based upon local consumption exposed to the discharge does not exceed 0.3
mg/kg.”

Comment 24: Removal of Variance Language to Ohio Adm. Code 3745-1: The Utilities do not
oppose this proposed change. However, Ohio EPA has yet to propose draft rules on
the Water Quality Standards Therefore, there is a concern that the NPDES permit
rules could be finalized and promulgated before the Water Quality Standards are
finalized, thereby leaving a gap where there are no rules regarding variances. The
Utilities ask Ohio EPA to ensure that if this revision is to occur the two rulemakings
should be finalized at the same time. (OUG)

Response 24: Ohio EPA has moved the text of the variance rule into the WQS rules at OAC 3745-
1-38. This language in Chapter 1 is fully effective, therefore the variance language
can be removed from OAC Chapter 3745-33.

Comment 25: (A)(11) When whole effluent toxicity (WET) testing is required by U.S. EPA’s rules
for the Lake Erie Basin or warranted under OEPA’s weight-of-evidence Table 1 in
OAC 3745-33-07 for the Ohio River basin, the proposed rule would require a
minimum testing frequency of four times per permit cycle with at least one fish
and macroinvertebrate species, whereas the current rule does not specify a
minimum frequency or number of test species. There is no reason why a discharge
with no or low toxicity, but for which WET is nevertheless required by U.S. EPA’s
NPDES rules or warranted under OEPA’s weight-of-evidence Table 1, should be
subject to a minimum number of WET tests in the permit cycle and a minimum
number of test species. WET testing is expensive and, despite improvements in
consistency in test species and QA/QC procedures, still prone to anomalies that
cannot be explained.

As OEPA knows, U.S. EPA’s WET rule for the Lake Erie Basin treats reasonable
potential determinations for WET as if they were numeric WQSs determinations,
without any weight-of-evidence factors, and with stringent multipliers for PEQ
determinations for small databases. Establishing a minimum number of tests and
test species creates that many more opportunities for an anomaly that would
trigger increased testing and potential for TREs and numeric WET limits being
imposed in NPDES permits under the stringent federal rule. The regulatory
establishment of a minimum testing frequency and minimum number of test
species should be removed, leaving the Agency the discretion to determine
the number of tests and test species based on the consideration of factors specific to
the discharge. (CSEAO and the cities of Dayton, Canton, Wooster and Lima)
Response 25: The minimum toxicity test requirement implements the WET testing required by federal NPDES application rules for specified POTWs [40 CFR 122.21(j)(5)]. Ohio EPA chose to implement this application requirement as a minimum permit testing requirement, due to widespread issues with non-submittal of toxicity testing data with applications. The reasonable potential process does influence the frequency of testing required, and the number of organisms that need to be tested.

3745-33-09:

Comment 26: (B)(1)(d) Finally, transparency and public accountability for the OEPA in maintaining Ohio’s water quality is an imperative. In addition to allowing input during NPDES application for a permit, OEPA should make readily available to the public, on the OEPA website, all documents and reports as a result of this rulemaking. Proposed rule 3745-33-09(B)(1)(d) provides that the OEPA will receive an annual status report from permittees subject to pollutant minimization program rules. This report along with any others provided for in revisions to 3745-33 should be made available on the agency’s website to the public including, but not limited to, data and modeling that was relied on during each stage of developing the report(s). (OEC)

Response 26: All of the documents referenced by the commenter are readily available to the public upon request.

Comment 27: (C) In the proposed rule, permits that contain limits for total toxic organics may contain requirements to implement a management plan instead of effluent monitoring requirements (where total toxic organics are defined in State rule at OAC 3745-33-01(WW) as those pollutants regulated under the Federal treatment technology-based standards pursuant to 40 C.F.R. Parts 401 through 471). EPA requests the OEPA further explain how Ohio intends to implement OAC 3745-33-09(C), as it is currently unclear to us how and when this provision will be implemented. The explanation should include, but not be limited to, describing how the provisions are consistent with 40 C.F.R. § 122.48 and the permit application requirements in 40 C.F.R. § 122.21. (U.S. EPA Region V)

Response 27: Ohio does not fully understand EPA’s concerns with this provision. The proposed rule allows Ohio to implement the federal TTO provisions included in industrial point source categories such as the Metal Finishing Subcategory [see 40 CFR 433.12(a)]. Nothing in the proposed rule change would exempt facilities from submitting data required by their NPDES application.

- End of Response to Comments -