



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

Eric Nygaard
Division of Surface Water
(614) 644-2024
eric.nygaard@epa.ohio.gov

On January 22, 2013, 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 February 26, 2013.

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: Thank you for the Interested Party Review notification for proposed changes to the OAC 3745-36-03 and the opportunity to comment on the change proposals. The Metropolitan Sewer District of Greater Cincinnati (District) supports the agency's efforts to review and improve the OAC to reflect the current environmental and business situation.

The District encourages the Agency to remove the substantial compliance requirements for renewing Indirect Discharge Permits for Industrial Users. Removal of this wording gives the District the ability to permit a company as necessary to address environmental or other local concerns.

Additionally, the expense related to renewal, nonrenewal and termination of Indirect Discharge Permits is one of the many tools used by the District to

help noncompliant Industrial Users come into compliance. (Christopher Hall, Metropolitan Sewer District of Greater Cincinnati)

Response 1: No response needed. The Agency thanks the District for the comments of support.

Comment 2: The Utilities submitted comments during the Early Stakeholder Outreach and during Interested Party Review. The Utilities had essentially three concerns with the rules, which are addressed below:

First, the Utilities were concerned that the changes to the rules would give the Director more discretion to deny a renewal of a permit. In response to Interested Party Comments, Ohio EPA stated that “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 ... The changes to ORC Section 6111.03(J)(7) ... 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.” Response to comments, p. 2 (emphasis added). Ohio EPA’s response to the Utilities’ comments appears to address the Utilities’ concern. Thus, the Utilities have no further comments on this issue.

Second, the Utilities were concerned regarding a permittee’s right to appeal a denial of a permit renewal. The revised language in the rules indicates that a denial of a renewal is a final action by the Director. This clarifies that a denial of a permit is appealable as a final action. The Utilities are satisfied with this response and have no further concerns.

Finally, the Utilities were concerned that if a permit renewal was denied and the denial appealed, the proposed rule did not provide clear guidance as to whether the facility would be able to continue to operate under the old permit until exhaustion of administrative and judicial appeals. Ohio EPA has included revised language to Ohio Adm. Code 3745-33-04(C)(2) and 3745-36-03(G)(2) that indicates that if the Director proposes to deny a renewal, the existing permit remains in effect until the Director issues a final action. This language does provide clarification about what happens when the Director “proposes” to deny a renewal of a permit. However, it does not address the Utilities’ concerns regarding the ability to continue operating during the pendency of an appeal of a decision to deny the permit. Further, the rules suggest that a permittee can only operate under the existing permit for 15 days after the Director’s action to deny the permit is final (pursuant to Ohio Revised Code §119.06).

The Utilities believe that requiring the facility to cease operations during the pendency of an appeal could be disastrous for the permittee, its

shareholders, and its customers. Given the number of years that sometimes passes prior to obtaining a final approved permit, this could be the equivalent of a death sentence for some facilities. It also potentially treads on due process rights because the mere threat of denial could cause a permittee to give up its legal rights due to the severity and punitive nature of a shut-down of operations while an appeal is pending. This is especially a concern when the evidence indicates that the Director's denial of a renewal was unlawful and unreasonable. Thus, the Utilities again suggest the following language:

3745-33-03 Permit applications.

(B)(1) ... If a permit renewal application is submitted at least one hundred eighty days prior to the expiration date of the existing permit, and the director does not issue a new permit before the expiration date, the conditions of the expired permit shall continue in force until the director acts on the permit application.

(2) If a permit renewal 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 3745-33-10.

Ohio EPA should also include provisions similar to Ohio Adm. Code 3745-33-03 and 3745-33-10 to the rules for Individual Indirect Discharge Permits. (Cheri Budzynski, Ohio Utility Group)

Response 2: No response needed in regards to the first two concerns. The third concern raised by the Utilities relating to the continuation of a permit until the conclusion of any appeal is acknowledged by the Agency; however the suggested revisions will not be implemented. The Environmental Review Appeals Commission already has the capability for addressing the Utilities' concerns by issuing a stay under Ohio Revised Code section 3745.04 and Ohio Administrative Code 3746-5-13.

End of Response to Comments