

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio EPA

Regulation/Package Title: OAC Chapter 3745-102, General Conformity

Rule Number(s): OAC Rules 3745-102-01 to 3745-102-06

Date: January 28, 2014

Rule Type:

- | | |
|----------------------------------|---|
| <input type="checkbox"/> New | <input checked="" type="checkbox"/> 5-Year Review |
| <input type="checkbox"/> Amended | <input checked="" type="checkbox"/> Rescinded |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.

Ohio Administrative Code Chapter 3745-102 contains Ohio's General Conformity regulations. General Conformity is established under Section 176(c) of the Clean Air Act

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CSIOhio@governor.ohio.gov

(CAA) and prohibits Federal entities from taking actions in a nonattainment or maintenance area which do not conform to Ohio’s State implementation plan (SIP) for the attainment and maintenance of the national ambient air quality standards (NAAQS). Therefore, the purpose of conformity is to ensure Federal activities do not interfere with the SIP; ensure actions do not cause or contribute to new violations of the NAAQS; and ensure attainment and maintenance of the NAAQS.

In summary, Conformity regulations prohibit Federal agencies from spending monies on projects which will violate the Clean Air Act. General conformity does not address roadway (transportation) projects. Transportation projects are covered under a separate chapter of the OAC.

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

These rules are authorized under Ohio Revised Code 3704.03(E) and amplify Ohio Revised Code 3704.03(A) and 3704.03(E). The rules in this rulemaking are as follows:

Rule Number	Authorizing Statute	Proposed Action
3745-102-01	3704.03(E)	Rescind
3745-102-02	3704.03(E)	Rescind
3745-102-03	3704.03(E)	Rescind
3745-102-04	3704.03(E)	Rescind
3745-102-05	3704.03(E)	Rescind
3745-102-06	3704.03(E)	Rescind

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.

These rules implement the federal conformity regulations in Section 176 of the Clean Air Act (CAA). These rules are part of Ohio’s State Implementation Plan (SIP) for the attainment and maintenance of the National Ambient Air Quality Standards (NAAQS) as required under Section 110 of the Clean Air Act.

As part of the Clean Air Act (CAA) amendments of 1990, the federal government established requirements in section 176, paragraph (c)(4)(C) of the CAA stating that a state must submit a plan that includes criteria and procedures for assessing general conformity as part of their SIP as required under Section 110 of the CAA. The language

in the CAA was codified by USEPA in 40 CFR 51.851 and 40 CFR Part 93, Subpart B. Paragraph (a) of 40 CFR 51.851 also required states to submit a General Conformity SIP. Ohio promulgated and submitted rules in chapter 3745-102 of the Ohio Administrative Code (OAC) for inclusion into our SIP to fulfill these requirements. The rules were accepted into Ohio's SIP in May, 1996 (61 FR 9646).

In August 2005, Congress passed the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) which eliminated the requirement for States to adopt and submit General Conformity SIPs. SAFETEA-LU removed the language in Section 176(c)(4)(C) of the CAA, eliminating the requirements for states to maintain a General Conformity SIP.

In April, 2010, USEPA promulgated changes to 40 CFR 51.851 to address the SAFETEA-LU changes. The language in paragraph (a) of the section was changed from "must" to "may", thereby eliminating the need for states to maintain a General Conformity SIP.

Upon review to fulfill the requirements of ORC 119.032, Ohio EPA determined that our rules were essentially identical to the federal rules in 40 CFR Part 93, Subpart B. Additionally, in the 17 years in which these rules have been in existence, there have not been any projects in the state of Ohio large enough to trigger the requirements in the rules. For these reasons, Ohio EPA determined that maintaining these rules provided no added benefit to the citizens of Ohio. Ohio EPA is, therefore, intending to rescind the rules in OAC Chapter 3745-102 and will default to the federal requirements in 40 CFR Part 93, Subpart B if necessary.

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

These rules do not exceed federal requirements.

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)?

The public purpose is to prevent federal agencies from expending monies on projects which would worsen ambient air quality and impact the air quality experienced by the general public.

The rules provide requirements by which agencies, both state and federal, interact to identify project impacts and mitigate the impacts prior to initiating the projects. These

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rules do not directly affect the general public or private businesses through any sort of regulation.

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

Ohio EPA measures the success of these rules by the number of public projects that are completed without impact to the air quality of the state of Ohio. In the history of these rules, there have been no projects in the state of Ohio large enough to trigger the requirements of these rules.

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 established a 30-day early stakeholder comment period and requested comments from potentially affected parties. The comment period ended as of April 27, 2012. Ohio EPA Division of Air Pollution Control (DAPC) sent notice of our request for comments electronically to the 636 members of Ohio EPA's electronic Interested Parties list for DAPC rulemaking. DAPC also posted the notice on our website and placed the notice in the Director's Weekly Review publication.

No comments were received as a result of Ohio EPA's request for Early Stakeholder input.

On August 7, 2012, Ohio EPA submitted a BIA form regarding the proposal of these rules as "no change" rules to the public for a 14-day comment period. Ohio EPA received a single set of comments recommending that Ohio EPA make changes to the state rules to mirror the federal regulations. Upon consideration of the comments, Ohio EPA agreed and committed to reexamine the rules and make changes as necessary.

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

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a single set of comments recommending that Ohio EPA make changes to the state rules to mirror the federal regulations. Upon consideration of the comments, Ohio EPA agreed and committed to reexamine the rules and make changes as necessary.

Upon reexamination of the rules and a reexamination of the federal laws, Ohio EPA determined that maintaining these rules was no longer necessary and did not provide any added benefit to the citizens of Ohio. Therefore, Ohio EPA has determined that the most beneficial course of action is to rescind the state rules and default to the federal rules as necessary.

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?

These rules implement the requirements of Section 176 of the Clean Air Act. The rules in this chapter were originally promulgated in 1995. These rules are administrative in nature and do not contain outcomes based on science or scientific data. These rules deal with how agencies (both state and federal) are to interact to identify projects and how they are to agree on mitigation efforts, if necessary. The rules in this chapter do not set any standards or require attainment of any emission limits.

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?

These rules implement the requirements of Section 176 of the Clean Air Act. Ohio's rules mirror the federal requirements in 40 CFR 51.851 and 40 CFR Part 93, Subpart B. Because of this duplication and because it is no longer a federal mandate for the state of Ohio to maintain our own rules to retain primacy over this program, Ohio EPA has decided to rescind the state rules and default to the federal laws as necessary.

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.*

The rules in this chapter are performance based regulations. The rules discuss interactions between agencies, but do not dictate how those interactions are to take place or the outcome of the interactions. The rules' only requirements are that, once a project has been identified to be in violation of the Clean Air Act, federal agencies are prohibited from expending monies on these projects unless mitigation actions are agreed upon and implemented.

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

Ohio EPA reviewed our own regulations and performed a search of regulations from other agencies to determine if duplication was being made. To our knowledge, Ohio EPA is not duplicating another existing Ohio regulation.

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.

These rules have been in effect since 1995 and, since then, Ohio EPA has developed extremely effective working relationships with the cooperating agencies including the Ohio Department of Transportation, U.S. EPA and the Federal Transportation and Highway Administrations regarding general conformity. All agencies are very cooperative in these areas and Ohio EPA has never had to enforce any measures of these rules. The rules do, however, contain measures for conflict resolution among agencies up to, and including, naming the Governor as arbitrator in the case of state agency deadlock. Because these rules were essentially identical to the federal laws that will replace them, Ohio EPA does not see any issues in implementing these requirements in the future.

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

There is a cost of compliance with the rules in this chapter. The cost of compliance is minimal compared to the overall cost of a project. Typical costs for collecting the information necessary to comply with this chapter is between a few thousand dollars

and approximately \$50,000. The cost of a project for which the rules in this chapter would be applicable is typically greater than \$10 million and frequently in the range of \$100 million to \$250 million or greater.

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

They were promulgated in 1995 so that Ohio could implement Section 176 of the Clean Air Act and maintain primacy over our State Implementation Plan. Recent changes to the federal regulations allow Ohio to rescind our state rules which essentially parrot the federal requirements. As the federal laws no longer require state to maintain a general conformity SIP, Ohio EPA determined it would be more beneficial to the citizens of Ohio to rescind the state rules, which were essentially a duplication of the federal laws.

Regulatory Flexibility

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

The rules in this chapter do not affect small business. These rules apply to federally funded projects which release greater than 100 tons of pollutants during their execution. These projects are typically performed at airports or large military institutions which would not be considered small businesses.

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?

Violations of this rule would be treated as paperwork violations and would be addressed under the scope of ORC 119.14.

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

As noted in item #16 above, these rules would almost certainly never be applied to an affected facility which could be considered a small business, however, the following resources are available:

- Ohio EPA's Office of Compliance Assistance and Pollution Prevention (OCAPP) is a non-regulatory program that provides information and resources to help small

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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://www.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.
- US. 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 800-368-5883.
- Ohio EPA's Division of Air Pollution Control (DAPC) maintains a State Implementation Plan (SIP) Development section through which SIP related rulemaking is performed. DAPC rule writer Paul Braun, the primary contact for the General Conformity Rules in OAC Chapter 3745-102, is available to answer questions. He can be reached by calling 614-644-3734 or by e-mail at paul.braun@epa.ohio.gov.