


Division of Air Pollution Control

**Response to Comments
Draft Rule Language Comment Period**

Rule: OAC Chapter 3745-77

Agency Contact for this Package

Division Contact: (Michael Ahern, DAPC, 614-644-3631, mike.ahern@epa.state.oh.us)

Ohio EPA provided a 30 day comment period which ended on April 7, 2008. This document summarizes the comments and questions received at the public hearing and/or 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.

Two sets of comments were received. Comments were submitted by:

- 1. The law firm of Porter Wright, Morris & Arthur on behalf of The Ohio Chamber of Commerce, The Ohio Manufacturers' Association, and The Ohio Chemistry Technology (PWMA) ; and,**
- 2. U.S. Environmental Protection Agency, Region V staff (USEPA).**

General/Overall Concerns

Comment 1: Commenters recommend that Ohio EPA reconsider whether to amend the title V rules at all. None of the proposed changes appears to be mandated by changes in USEPA's rules pertaining to Title V permits, and therefore none is needed for Ohio EPA to retain authority to implement the Title V permitting program. The current rules are fully approved by USEPA, 40 CFR Part 70, Appendix A. Further revisions will have to be submitted to USEPA for approval, and it will be unclear to Ohio EPA and Title V permittees during the period in which USEPA is reviewing the changes whether they will ultimately be approved. That inserts legal uncertainty into the program. **(PWMA)**

Response 1: Specific rule amendments are required by changes to federal rule and in response to the April 10, 2002 federal notice of deficiency. The proposed changes clarify and amplify the underlying statute in a manner that is consistent with the requirements of the five-year rule review. The rule amendment synopsis identifies which rules are being amended in response to federal requirements.

Rule 3745-77-01(X) "Definitions"

Comment 2: (X). The internal paragraph references should be changed from (W) to (X), **(PWMA)**

Response 2: The reference has been corrected.

Rule 3745-77-01(JJ)(1) "Definitions"

Comment 3: The reference to paragraph (U) should be to (V). **(PWMA)**

Response 3: The reference has been corrected.

Rule 3745-77-01(JJ)(2) "Definitions"

Comment 4: The Commenters support excluding trivial emission activities listed in Engineering Guide 62 from Title V permits, but recommend against referencing the guide in the rule. Doing so converts the referenced portion of the guide into a legally binding rule, rather than a non-binding explanation of how the agency interprets and implements the rule. Doing so also requires readers of the rule to locate and review the referenced portion of the guide in order to fully understand the rule. The better practice is to place the language in the referenced portion of the guide into the rule itself, thus making the rule easier to understand, and exposing the language to public comment and public hearing that are required by ORC Section 119.03. **(PWMA)**

Response 4: Referencing engineering guides is not contrary to ORC section 119.03. Referencing the engineering guide does not convert it to a legally binding rule. The list of trivial air contaminant emission activities in Engineering Guide 62 will be legally binding as a list, but the list is a discrete list found in one and only one version of Engineering Guide 62, as

referenced in OAC rule 3745-77-01(SS)(2)(r). The list as referenced in this rule, is being referenced in an ORC 119.03 rule-making procedure and cannot be changed outside of a rulemaking procedure.

Rule 3745-77-01(LL) "Definitions"

Comment 5: Commenters see no reason to define "statement of basis". The phrase is not defined in the federal rule definition sections, 40 CFR 70.2 and 71.2. And, as noted above, there is uncertainty whether USEPA will approve this definition. Moreover, this definition of "statement of basis" is inadequate. Because Title V permits may not impose new substantive requirements, ORC Section 3704.036(K), all permit terms must be derived from language appearing in statutes, rules or relevant terms in previously-issued permits. The proposed definition does not seem to be confined to such bases. Thus, a better definition is, "Statement of basis means a citation to a specific portion of a statute, rule, or relevant term of a previously issued permit that imposes the applicable requirement contained in the permit condition."
(PWMA)

Response 5: Ohio EPA has defined this term to clarify the Director's intent with respect to documenting the legal and factual basis for applicable requirements in Title V permits. 40 CFR Part 70.6(c) requires permitting authorities to provide to U.S. EPA and any other interested individuals an enumeration of the legal and factual basis for applicable requirements in Title V permits. In reviewing documentation from other States, and correspondence from U.S. EPA to Ohio and other States, it is clear that implementation of this provision of the federal Title V program requires more than a strict recitation of the underlying federal and/or State regulation; the "factual basis" is clearly not written into statute and is largely dependent on the operation being permitted. Defining the term "statement of basis" provides clarity and certainty for those looking to Ohio EPA documentation underlying the facts and reasons for applicable requirements in a given Title V permit. Addition of this definition adds no additional liability to Title V applicants or permittees. The terms of the definition may be more general than the commenter desires, but, being general, the terms do not expand the scope of a Title V permit or ORC 3704.036(K).

Rule 3745-77-01(SS) "Definitions"

Comment 6: There are several problems with this lengthy paragraph. As noted above, incorporating engineering guides into a rule converts a nonbinding guidance document into a legally-binding rule. If the agency wishes to make engineering guide language part of a rule, it should insert that language into the text of the rule. Also, specific federal statutes and rules can be referenced where appropriate without wholesale incorporation by reference of the Clean Air Act and implementing rule chapters in the CFR. Where incorporation by reference is used, care should be taken to indicate which portions of the referenced statute or rule are being incorporated, and for what purpose the incorporation is occurring. Wholesale and blanket incorporation by reference of entire statutes or rule sections is inefficient and confusing. Moreover, the Ohio statutes on providing information on where incorporated documents are available for review make plain that federal statutes and rules are exempt from that requirement. ORC Section 121.75 states that "Sections 121.71 to 121.74 of the Revised Code do not apply with regard to the incorporation by reference into a rule of any of the following so long as the incorporation by reference consists of a citation that will be intelligible to the persons who reasonably can be expected to be affected by the rule ... (A) A section of the United States Code; ... (D) A regulation in the federal register or Code of Federal Regulations ..." Thus, language on where those provisions are available can be deleted. **(PWMA)**

Response 6: Ohio EPA is required by Section 121.72 of the Ohio Revised Code (ORC) to provide potentially affected parties with information regarding items that have been incorporated by reference within our rules. Specifically, Ohio EPA is required to... explain in the rule how persons who reasonably can be expected to be affected by the rule can obtain copies of the text or other material that has been incorporated by reference If the text or other material incorporated by reference was, is, or reasonably can be expected to be subject to change, the agency, as part of the explanation, shall identify, and specify the date of, the particular edition or other version of the text or other material that is incorporated by reference.

Rather than providing this information after every reference to an incorporated rule, which would substantially lengthen

the chapter, Ohio EPA has condensed the information into a single location, convenient for potentially affected parties to access.

Paragraph (SS)(1) of OAC rule 3745-77-01 provides the required information on the availability of the materials, including outlets where the material may be obtained. Paragraph (SS)(2) of OAC rule 3745-77-01 provides the required information on the particular date, edition, or other version that is being incorporated.

Rule 3745-77-02(G) "Prohibition and Applicability"

Comment 7: The references to paragraph (U) should be changed to (V).
(PWMA)

Response 7: The reference has been corrected.

Rule 3745-77-05(B) "Application Completeness Determination"

Comment 8: This paragraph consists mostly of language taken verbatim from ORC Section 3704.036 (D). This draft proposes to delete a small portion of the statutory language (regarding stays on appeal of completeness determinations), but leaves the rest of the language unaffected. There is no explanation in the synopsis for this selective deletion. Of course, deleting statutory language from the rule has no effect on the statute which contains the language, and thus nothing is accomplished by the deletion. Therefore, all of the statutory language should remain. **(PWMA)**

Response 8: Ohio EPA agrees that the propose change has no bearing on the underlying statutory rights and requirements. Indeed, the deletion was intended to avoid selective reference to only one statutory appeal provision (stays) and not others that are stated in ORC sections 3745.04 and 3704.036.

Rule 3745-77-07 "Permit Content"

Comment 9: The draft amendment to this subparagraph poses an important issue under the malfunction rule, OAC Rule 3745-15-06. The draft amendment states that emissions resulting from a malfunction that exceed allowable visible emissions under OAC Rule 3745-17-07 are "not a violation", and therefore need not be reported in deviation reports. This language implies that exceedances from other emission limitations that result from malfunctions are enforceable violations. This is a misreading of the malfunction rule.

Under OAC Rule 3745-15-06(C), the Director "shall take appropriate [enforcement] action" regarding excess emissions resulting from malfunctions if he determines that five conditions have not been satisfied. But, if the conditions have been satisfied, such as timely reporting of the malfunctions and proper operation and maintenance of the control equipment, the Director will not take action. Thus, emissions resulting from malfunctions that exceed other emission limitations, although they must be reported in Title V deviation reports, are not enforceable violations if the malfunction rule has been complied with. To avoid this misimpression, the phrase "is not a violation and" should be deleted, so that the rule reads, "An exceedance of the visible emission limitations ... that is caused by a malfunction does not need to be reported." **(PWMA)**

Response 9: The Ohio EPA does not agree with the commenters interpretation of OAC rule 3745-15-06(C). That paragraph only prescribes that the Director "shall" take action when the five conditions are not satisfied. It does not do the converse – prohibit action by the Director when the five conditions are satisfied. Regardless, this portion of the rule only states what is not a violation and what does not have to be reported as a deviation, not what does.

Comment 10: For 3745-77-07 Paragraph (A) (3) (c) (iii): Why don't visible emission exceedances need to be promptly reported? And if they don't need to, when would the exceedances be reported? **(USEPA)**

Response 10: The VEs cited are those that are specifically exempted pursuant to OAC Chapter 3745-17 if all of the provisions of the applicable rule are followed. OAC rule 3745-17-07(A)(3)(c) is a SIP approved rule. If the applicable emission limitation does not apply, there is no deviation, and therefore, there is no prompt reporting requirement.

Rule 3745-77-08 "Permit issuance, modifications, revisions, revocations, reopenings, and termination"

Comment 11: For OAC rule 3745-77-08 Paragraph (H): What are the administrative procedures for terminating a Title V permit under this new proposed rule? Would the terminating action go through public comment? In the case of a partial termination, we believe a public comment may be necessary as a partial termination would be similar to a permit modification. **(USEPA)**

Response 11: We have added the termination provision because it was missing in our original rules, but was provided for in Part 70. We are not aware of any public comment provisions in Part 70 (or Part 71) associated with termination or partial termination. The action would be appealable, but would not necessarily be subject to prior public comment (i.e., a “draft” or “proposed” termination). The commenter expresses concern about public comment on partial terminations. The rule does not allow termination of say, the monitoring requirements only; the termination occurs for all requirements associated with an emissions unit or activity. Therefore, while the monitoring requirements would be terminated, so too would the authorization to operate the emissions unit. The removal of a monitoring requirement, in the case that the permittee would want to continue operating the emissions unit, would be accomplished through a significant permit modification.

End of Response to Comments