

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: Storm Water Program

Rule Number(s): OAC 3745-39-04 Ohio EPA NPDES requirements for industries, and large and medium MS4s.

Date: March 26, 2012, updated January 30, 2013

Rule Type:

New

5-Year Review

Amended

Rescinded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.

Note: The Agency is updating this document for the second interested party review of the Storm Water Program rule OAC 3745-39-04.

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.

This rulemaking addresses the Ohio EPA Storm Water program administrative permitting requirements for industries, construction activities, and large and medium MS4s under the National Pollutant Discharge Elimination System (NPDES). Regulations for small MS4s are covered under the other rules in the Ohio Administrative Code (OAC) Chapter 3745-39. This rule describes NPDES permit application applicability, deadlines for submittal, and content requirements. The specific NPDES permit terms and conditions are not part of this rulemaking.

OAC 3745-39-04 five year review date is November 1, 2012. Only minor revisions are planned for this rule, including comments to clarify rule content and organization, removal of unnecessary expired dates, update of references and formatting revisions to comply with Ohio Legislative Service Commission's Rule Drafting Manual (2006).

In addition, the Agency is revising the rule to be consistent with the 2008 Ninth Circuit Court of Appeals' opinion in Natural Resources Defense Council v. United States Environmental Protection Agency, which vacated U.S. EPA's 2006 oil and gas construction storm water regulation that was included in this rule. The Agency has been implementing the rule in accordance with the court decision since 2008.

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

Ohio Revised Code 6111.03

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.

Yes, the rule implements federal requirements. The corresponding federal requirements can be found in 40 C.F.R. 122.26. Ohio EPA has been delegated the NPDES permitting program by the U.S. EPA in accordance with the Federal Clean Water Act. As a delegated state, federal law requires Ohio EPA to administer the NPDES permit program in accordance with

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minimum U.S. EPA regulations. Rule OAC 3745-39-04 was developed to incorporate federal requirements into the state code. The inclusion of this rule into the OAC provides convenient access to Ohio NPDES rules for our stakeholders.

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

No. OAC 3745-39-04 mirrors requirements found in 40 C.F.R 122.26.

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 Storm Water Program seeks to minimize the introduction of pollutants into storm water discharges that enter Ohio's surface waters in order to protect public health and water quality from harmful contaminants and changing stream flows. Storm water runoff from land modified by human activities can harm surface water resources by causing an exceedance of water quality standards by changing natural hydrologic patterns, accelerating stream flows, destroying aquatic habitat, elevating pollutant levels and threaten drinking water supplies. Runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients (phosphorous and nitrogen), heavy metals and other toxic pollutants, pathogens, oxygen-demanding substances (organic material) and floatables.

The highest concentrations of these contaminants often are contained in "first flush" discharges, which occur during the first major storm after an extended dry period. Individually and combined, these pollutants impair water quality, threaten designated beneficial uses and cause habitat alteration or destruction. Urban development creates new pollution sources as population density increases and brings with it proportionately higher levels of pollutants which may be washed into receiving waters by storm water.

The Water Quality Act of 1987 added storm water discharge regulation provisions under the Clean Water Act NPDES permit program. This was in response to research documenting water quality impairments from contaminated storm water. The storm water NPDES permit program requires entities to obtain permit coverage and implement best management practices to minimize or eliminate the discharge of pollutants into surface waters. Water quality has improved dramatically in Ohio since the 1970s due to implementation of point source controls under the NPDES permit program.

In regards to Ohio's storm water regulations, although they are based on the federal requirements, by adopting state rules, Ohio EPA has made the program requirements more clear and accessible to the regulated community.

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

Ohio EPA, Division of Surface Water measures the success of its programs through biological and chemical sampling and determines whether or not a water body is attaining its designated uses. The status or health of Ohio's streams, rivers and lakes is reported every two years in the Integrated Water Quality Monitoring and Assessment Report, which is available on Ohio EPA's website at:

<http://www.epa.ohio.gov/dsw/tmdl/OhioIntegratedReport.aspx>.

The success of the storm water program regulations will be based on whether or not Ohio EPA detects water quality impairments downstream of storm water sources (industries, large and medium MS4s and construction sites). For example, Ohio EPA observed storm water impacts in the Darby Creek watershed associated with development. As a result, a specific construction storm water general permit was created which includes provisions above and beyond the standard construction storm water general permit that were determined to be necessary to protect the watershed from additional development related impacts. Improvements in water quality in the Darby watershed will determine the success of the program's requirements.

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 sent electronic notice to DSW's rulemaking interested party list and posted the Early Stakeholder Outreach fact sheet on DSW's on website on January 23, 2012. The comment period deadline was February 17, 2012.

Ohio EPA sent electronic notice to DSW's rulemaking interested party list and posted the interested party review documents on DSW's website on September 14, 2012. The comment period deadline was October 15, 2012.

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

DSW did not receive input from stakeholders during the Early Stakeholder Outreach comment period.

DSW received comments from two individuals during the interested party review comment period. No revisions to the draft rule were necessary in response to the comments.

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?

The rule contains administrative requirements for the permit program and is not based on science. The federal requirements in 40 C.F.R. 122.26 were used to support this rulemaking.

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?

Ohio EPA reviewed the rule and determined that major revisions are not necessary at this time. U.S. EPA is currently reviewing its storm water program regulations, however final regulations are not likely to be released before this rule's five year review date. Ohio EPA will reassess this rule once U.S. EPA's regulations are final to determine if revisions are necessary to this rule.

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.*

Not applicable. The rule contains administrative requirements for the storm water NPDES permit program. Under the program, all dischargers that meet certain criteria are required to obtain coverage under a permit and implement the permit requirements regardless of the discharger's actual impact on the surface water. As a delegated state, Ohio EPA is required to implement the storm water NPDES permit program in accordance with federal regulations, therefore a performance-based regulation approach is not permissible in this case.

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

Ohio EPA is the delegated state agency for the storm water NPDES program. Only a review of existing Ohio EPA rules was necessary and no duplication was found.

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.

The Agency will continue to implement the rule through current practices, which include inspections and reporting requirements to ensure the rule requirements are applied consistently throughout the state.

Adverse 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.

a. The scope of the impacted business community will not change with this rulemaking. Industries required to obtain covered under a storm water NPDES permit are listed in the definition of “storm water associated with industrial activity” in paragraph (B)(15) of rule OAC 3745-39-04.

B. The nature of impact of this rule on regulated industries includes the requirement to prepare and submit an NPDES permit application to Ohio EPA for review and approval.

C. The fees associated with storm water NPDES consist of:

- Fees associated with permit applications are located in paragraph (S)(1) of the Ohio Revised Code Section 3745.11 and are summarized below.

Storm Water NPDES Sector	Fee
Industrial Storm Water	\$350.00
MS4s	\$200.00
Construction Storm Water	\$200.00 + \$20.00 per whole disturbed acre above 5 acres, with a max disturbed acreage fee of \$300.00

- MS4 annual discharge fees are located in paragraph (L)(6) of the Ohio Revised Code Section 3745.11. The fee is \$100 per square mile of MS4 permitted with a maximum fee of \$10,000.

Beyond the cost of the permit application and MS4 annual discharge fee, Ohio specific cost information is currently not available. U.S. EPA provided an economic impact summary in the preamble of the November 16, 1990 Federal Register notice of the storm water rulemaking. The costs focus primarily on the costs associated with developing and submitting the permit applications covered under the rule.

U.S. EPA estimated an annual cost of applying for NPDES permits for discharges from MS4s to be \$4.2 million. U.S. EPA estimated that an average permit application for a large municipality would cost \$76,681 and require 4,534 hours to prepare. The average application for a medium MS4 would cost \$49,249 and 2,912 hours to prepare. The annual respondent cost for NPDES permit applications, notices of intent, and notifications for facilities with discharges associated with industrial activity was estimated to be \$9.5 million and 271,248 hours. U.S. EPA estimated that the average cost of an individual industrial permit application would be \$1,007 and 28.6 hours. The average Group application would cost \$74.00 per facility and 2.1 hours. The average cost of the notification and notice of intent to be covered by a general permit was \$17.00 and 0.5 hours.

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

In regard to the National Pollutant Discharge Elimination System (NPDES) and storm water program as a whole, the U.S. Congress made the determination that the intent (fishable, swimmable waters) justifies the adverse impact to the regulated business community when they passed the initial and subsequent amendments to the Federal Water Pollution Control Act (also known as the Clean Water Act).

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In regard to the current rulemaking, the intent of the storm water program is to minimize the impacts of pollutants in storm water discharges on the receiving stream water quality. Revisions to the draft rule in this rulemaking will have no additional impact on the business community.

Regulatory Flexibility

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

The storm water NPDES permit requirements for industries are based on industrial sector classification (i.e., what the industry manufactures) and the size of the construction project. The regulations do include provisions for a conditional exclusion for “no exposure” of industrial activities and materials to storm water, which excludes facilities from permit application requirements. This exclusion applies to industrial facilities of any size.

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?

The failure to get a permit under this rule is not considered a paperwork violation and would not fall under the scope of ORC 119.14. However, the Agency uses enforcement discretion and first-time violations of reporting requirements is typically waived.

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

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 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>.

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- 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.
- U.S. 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 800-368-5888.
- Ohio EPA's Storm Water Program web page (<http://www.epa.ohio.gov/dsw/storm/index.aspx>) contains regulations, permits, permit guidance and compliance documents and outreach materials.
- U.S. EPA's Storm Water Program web page (http://cfpub.epa.gov/npdes/home.cfm?program_id=6) contains background information on the program and guidance documents, regulations, and compliance documents for the construction, industrial and municipal sectors.