



Response to Comments

Rule: OAC 3745-1-05 (Antidegradation)
OAC 3745-1-07 (Water use designations and statewide criteria)

Agency Contact for this Package

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Ohio EPA made available for review and two proposed amended rules regarding water quality standards. This document identifies the comments and questions received during the associated comment period, which ended on September 10, 2009.

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 comments and questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

Rule 3745-1-07 Water use designations and statewide criteria.

Comment 1: The Association of Ohio Metropolitan Wastewater Agencies ("AOMWA") is a statewide non-profit organization that represents the interests of public wastewater agencies in Ohio. AOMWA member agencies include Butler County, Hamilton County, the Cincinnati Metropolitan Sewer District, the Northeast Ohio Regional Sewer District, and the cities of Akron, Canton, Columbus, Dayton, Euclid, Lancaster, Marysville, Portsmouth, Springfield, Toledo, and Warren. Collectively, AOMWA members provide wastewater collection and/or treatment for over four million Ohioans. AOMWA appreciates the opportunity to comment on Ohio EPA's proposed changes to Ohio's Water Quality Standards contained in Ohio Administrative Code 3745-1-05 and 3745-1-07.

AOMWA supports and incorporates by reference herein the comments on the proposed rule changes submitted separately by the City of Akron and the Northeast Ohio Regional Sewer District. Copies of these AOMWA

member agency comments are attached to the e-mail covering this letter. AOMWA requests that Ohio EPA give serious consideration to the important issues raised by these AOMWA member agencies prior to Ohio EPA's final action adopting the proposed rules. (Tatyana Arsh, P.E., Association of Ohio Metropolitan Wastewater Agencies)

Response 1: See comments and responses below.

Comment 2: The proposed definition of Bathing Waters recreation use at OAC3745-1-07(B)(4)(a) was revised to, evidently, more clearly base this designation on intensity of swimming use. This is reflected in the proposed replacement of "suitable for swimming" with "heavily used for swimming." Furthermore, consistent with the federal criteria for recreation use protection as expressed in the U.S. EPA's *Ambient Water Quality Criteria for Bacteria – 1986*, providing the highest level of protection to "designated beach areas" (where such recreation uses are overtly encouraged) continues to be reflected in the proposed Bathing Waters use application to "where a lifeguard or bathhouse facilities are present." NEORSD strongly supports the proposed rule in both respects.

We, however, recommend that the proposed definition's first sentence be revised as follows for clarity and to more closely parallel the definition's second sentence:

"Bathing waters" – these are waters located at designated beach areas and other waters that, during the recreation season, are heavily used for swimming.

Our recommended change clarifies that the proposed rule is more protective than a minimal adoption of the federal criteria in that a lifeguard or bathhouse facilities need not be present for the Bathing Waters use to apply. The federal criteria apply the most restrictive numeric water quality values to "designated beach areas" and do not explicitly require such applicability to other areas where swimming use is heavy. We nonetheless believe, and evidently agree with the Ohio EPA, that waters identified as having the heaviest swimming use should be afforded the highest level of protection, regardless of the presence of a lifeguard or bathhouse facilities. We therefore support an approach more protective than a minimal adoption of the federal criteria in this regard. (Julius Ciaccia, Northeast Ohio Regional Sewer District)

Response 2: The suggested change was not made. The first sentence of each of the recreation use paragraphs provides a general description of the use. The specifics regarding where the use applies are provided in the remaining text of the paragraphs.

Comment 3: To maintain the proposal's appropriate focus on intensity of recreation use throughout the Bathing Waters definition, we further recommend that the proposed definition be revised in the following additional and important respects. First, we urge that, in the definition's second sentence, the term "waterbodies" be replaced with the word "waters" in both places that it now occurs. This change is important because, in some (particularly larger) waterbodies, designated beach areas may be confined to only a relatively small portion of the waterbody while, elsewhere within the waterbody, heavy swimming use may not be occurring and/or *should not be encouraged* due to physical safety, inaccessibility, or other factors. Our recommended change in this regard would provide site-specific flexibility to limit the scope of Bathing Waters use designation to areas where the highest level of protection is warranted by the intensity of use, without necessarily applying this designation to the entire waterbody.

Finally, also consistent with the focus on intensity of recreation use, we strongly urge that the reference to "local areas" in the currently effective rule's Bathing Waters definition be restored to the proposed rule so that the definition's second sentence would read as follows:

The bathing water use applies to all waters in areas where a lifeguard or bathhouse facilities are present, and to local areas meeting this definition in any additional waters designated bathing waters in rules 3745-1-08 to 3745-1-32 of the Administrative Code.

Again, intensity of recreation use, whether actual or intended, is the appropriate focus for the recreation use designation, and the changes we recommend above should allow resources to be focused on providing the highest level of protection to where the swimming use is heaviest. (Julius Ciaccia, Northeast Ohio Regional Sewer District)

Response 3: First and foremost, the bathing water use applies to all locations where a lifeguard or bathhouse facilities are present. Therefore, the first part of the second sentence was changed as requested to read:

The bathing water use applies to all waters in areas where a lifeguard or bathhouse facilities are present ..."

The requested changes to the second part of the sentence were not made. Specifically identifying water bodies or portions of water bodies in rules 3745-1-08 to 3745-1-32 allows a broader delineation of where the bathing water use applies. For example, rule 3745-1-31 specifically designates all of Lake Erie as bathing waters and rule 3745-1-32 specifically designates all of the Ohio River as bathing waters.

Comment 4: By way of background, on April 17, 2009, the City sent correspondence to Ohio EPA which provided the City's comments to Ohio EPA's proposed water quality standards rule amendments that were public noticed on March 3, 2009. In the City's April 17, 2009 correspondence to Ohio EPA, the City expressed its concern with the effect that the amendments would have on the City and on other similarly situated parties.

The City appreciates that Ohio EPA has revised Table 7-13, as provided in the Draft Rule Revisions. However, the City remains concerned that the Draft Rule Revisions to Table 7-13 do not fully address the City's concerns.

The current version of Table 7-13 requires that the geometric mean for E. coli content is established based upon not less than five samples obtained over a thirty day period. However, this provision is not set forth in the Draft Rule Revisions. For the reasons set forth in the City's April 17, 2009 comment letter, the City submits that Table 7-13 include a requirement for a minimum of five samples over a thirty day period, for both the seasonal geometric mean and the single sample maximum.

The City respectfully requests that Ohio EPA amend the Draft Rule Revisions in the manner set forth above prior to proceeding with the formal rulemaking process. (Terrence S. Finn, on behalf of the City of Akron)

Response 4: The requested change was not made. U.S. EPA requires there be an applicable water quality criterion in all situations, even when there are less than 5 samples. See "Water Quality Standards for Coastal Recreation Waters: Using Single Sample Maximum Values in State Water Quality Standards, EPA-823-F-06-013, August 2006," available on the Internet at <http://www.epa.gov/waterscience/criteria/humanhealth/microbial/>.

Statistically speaking, the more sample results used to calculate a geometric mean, the more confidence one can have that the geometric mean calculated represents the actual geometric mean concentration. However, a geometric mean can be calculated with as few as two samples.

Comment 5: What is the basis for removing fecal coliform as an indicator of water pollution, especially on recreational beaches? Our volunteers routinely collect fecal coliform water quality data at Lake Erie beaches and would like to provide this data to Ohio for use in water quality decisions. (Lyman Welch, Alliance for the Great Lakes)

Response 5: The proposed Ohio criteria are based on current U.S. EPA guidance. They are a refinement to the E. coli criteria currently in rule 3745-1-07, allowing less restrictive criteria for waters that are rarely used for recreation. U.S. EPA has concluded that the relationship between swimmer illnesses and E. coli bacteria levels is better than that for fecal coliform bacteria levels.

Comment 6: On August 13, 2009 we sent comments on Ohio's Proposed 303(d) Beneficial Use Impairment Methodologies for 2010. In those comments we asked that Ohio to set clear standards to determine whether water bodies are impaired by phosphorus and nutrients and to go beyond the presence of untreated sewage and E. coli bacteria as pollution indicators by evaluating damages to recreational uses caused by algae-infested waters and shores. These concerns should be reflected in the changes you are making to the water quality standards. (Lyman Welch, Alliance for the Great Lakes)

Response 6: We agree that there is a need for water quality criteria for nutrients and have been working on developing criteria for several years. The criteria are not at a point, however, where they could be adopted as part of this rulemaking. Water quality criteria for inland lakes are included in draft water quality standards rule 3745-1-43 (see table 43-12) currently out for interested party review. The draft rule is on the Internet at http://epa.ohio.gov/dsw/rules/draft_wqs_aug08.aspx. In addition, Ohio EPA has spent several years collecting information on Ohio's streams and rivers needed to develop nutrient water quality criteria for those water bodies. We expect to make available draft nutrient criteria for small and medium streams and rivers (those with drainage areas less than 500 square miles) in 2010. Additional field work is needed before developing nutrient criteria for large rivers.

Until numeric criteria are adopted in the rules, we will continue to rely on the narrative criterion in water quality standards rule 3745-1-04 that prohibits nutrients entering the waters as a result of human activity in concentrations that create nuisance growths of aquatic weeds and algae.

Comment 7: Section 101(a)(2) of the Clean Water Act (CWA) requires states to adopt uses that provide for, among other things, "recreation in and on the water" wherever attainable. Consistent with the federal regulations at 40 CFR 131.100), under Ohio's system of designated recreation uses, to designate a surface water as "secondary contact," it must be demonstrated that primary contact recreation, which includes swimming and other types of recreation involving immersion, is not attainable. We do not consider lack of access to be sufficient to demonstrate that primary contact recreation is not an attainable use.

We understand that waters are designated "secondary contact" in Ohio only after a field survey documents insufficient depth to support immersion, however, the new definition appears to make access the sole basis for designating a water as "secondary contact." We recommend revising the proposed rule to clarify that access is not the sole factor considered in

designating a water "secondary contact". An example of how the rule might be revised to accomplish this is:

(c) "Secondary contact" - these are waters that result in minimal exposure potential to water borne pathogens because the waters are: rarely used for water based recreation such as, but not limited to, wading; situated in remote, sparsely populated areas; have restricted access points; and have insufficient depth to provide full body immersion, thereby greatly limiting the potential for water based recreation activities. Waters designated secondary contact recreation are identified in rules 3745-1-08 to 3745-1-30 of the Administrative Code. (Linda Holst, U.S. EPA Region 5)

Response 7: The requested change was made.

End of Response to Comments