



## Response to Comments

**Rule:** OAC 3745-1-06 (Water Quality Standards)  
OAC 3745-2-02, -04, -05, -06, -07, -08, -09, -10, -12 (Implementation of WQS)  
OAC 3745-3-07 (Pretreatment)  
OAC 3745-33-01, -02, -03, -04, -05, -07, -08, -09 (Ohio NPDES Permits)

### Agency Contact for this Package

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Ohio EPA made available for review and comment nineteen draft amended rules regarding water quality standards, implementation of water quality standards, pretreatment, and National Pollutant Discharge Elimination System (NPDES) permits. This document identifies the comments and questions received during the associated comment period, which ended on April 26, 2010.

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 3745-2-02/Rule 3745-33-01 Definitions.

**Comment 1:** We are concerned with Ohio EPA's proposal to remove the definition of nonpoint source from both of these rules. We understand that the current rules' definition was not acceptable to USEPA, indicating that the current definition appears to improperly include direct wet and dry deposition. It is not clear why USEPA has requested this change.

In environmental literature, "direct wet and dry deposition" is discussed as a form of atmospheric deposition. USEPA has previously identified atmospheric deposition as a nonpoint source. For example, in "National Management Measures to Control

Nonpoint Source Pollution from Urban Areas”, USEPA-Office of Water (EPA-841-B-05-004, November 2005). USEPA stated:

There are several nonpoint sources of nutrients in urban areas, mainly fertilizers in runoff from lawns, pet wastes, failing septic systems, and atmospheric deposition from industry and automobile emissions.

In order to provide clarity and guidance to the regulated community, and to maintain consistency with federal law, OEPA should not delete the definition of nonpoint source, or at most amend that definition to delete only the words “wet and dry deposition”. (Northeast Ohio Regional Sewer District (NEORDS), Columbus Utilities Department, Association of Ohio Metropolitan Wastewater Agencies (AOMWA))

**Response 1:** As a result of further discussion with U.S. EPA over the definition of “nonpoint source”, a definition will remain in OAC Chapters 3745-2 and 3745-33, but will be revised to ““Nonpoint source” means any source of pollutants other than those defined or designated as point sources.”

U.S. EPA’s concern with the current definitions of nonpoint source is the potential for conflict with the implementation of the federal regulations for concentrated animal feeding operations, revised in 2008. The examples of nonpoint source provided in the definition in OAC rule 3745-2-02 could be considered point sources if occurring at a concentrated animal feeding operation. The definitions were revised to cover instances where animal feeding operations are designated as concentrated animal feeding operations (and therefore a point source) by the Director.

**Comment 2:** OUG questions why Ohio EPA removed the definition of “nonpoint source” and seeks clarification from Ohio EPA regarding the rationale for this deletion. It appears that Ohio EPA may be attempting to broaden the scope of the definition of “point source” by eliminating the nonpoint source definition, but Ohio EPA has not offered a rational justification for this revision. The OUG requests that Ohio EPA provide it with additional information concerning Ohio EPA’s justification for this revision. (Ohio Utility Group)

**Response 2:** Please see the response to comment 1 above. It should be noted that the definition of “point source” remains unchanged, therefore regulation of point sources will not be impacted by these rule changes.

### Comments on Rule 3745-2-08

**Comment 3:** OAC 3745-2-08(C)(17) - Ohio EPA has revised the rules on the mixing zone demonstration and sizing requirements to include a provision in Ohio Adm. Code 3745-2-08(C)(17), which prohibits conditions within a mixing zone from becoming “injurious to human health, in the event of a temporary exposure.” OUG opposes the addition of this provision as unnecessary and problematic, as the language is vague and ambiguous. This revision appears to be the result of an isolated comment from the Ohio River Valley Water Sanitation Commission which was expressed as a “belief” with no empirical data provided to support the request. See Prior Response to Comments, Comment 6.

The language Ohio EPA has proposed is ambiguous and unquantifiable. If Ohio EPA is concerned with protecting human health in mixing zones, Ohio EPA should implement benchmarks or other scientifically-based criteria instead of relying on a vague descriptive criterion as it does in this draft rule. Specifically, the agency should proceed with establishing a numeric threshold or criterion consistent with the existing Water Quality Standard regulations. For example, Ohio Adm. Code 3745-1-34 provides guidance on how human health criteria are to be developed for the Ohio River drainage basin:

Any methodologies and procedures acceptable under 40 C.F.R. 131 may be used when developing or revising human health water quality criteria or implementing narrative criteria contained in rule 3745-1-04 of the Administrative Code for water bodies located in the Ohio River drainage basin.

The proposed language appears to give Ohio EPA unfettered discretion in determining what constitutes an “injury” from “temporary” exposure to “conditions” within a mixing zone. OUG is concerned that the agency may make relatively meaningless comparisons of exposure surrogates (for example, water temperature measured at a condenser outlet prior to mixing with a receiving stream) to **potential** human health effect endpoints (for example, scalding thresholds for bathing water, or standards written for long term human exposure in hot tubs and spas). Therefore, before Ohio EPA moves forward, the OUG requests that Ohio EPA provide a scientific basis for including this provision in the rules and provide us guidance explaining how Ohio EPA intends to

implement this provision. Otherwise, Ohio EPA should leave the rule as is or consider other alternatives. (Ohio Utility Group)

**Response 3:** The proposed rule language has been revised to clarify the Agency's intent to protect human health from acute exposures that may occur from recreation within a discharger's mixing zone.

**Comment 4:** OAC 3745-2-08(M)(1)(b) – Ohio EPA has included a directive in the rules and prohibits a thermal mixing zone from issuing if it will cause an increase in pathogens, or harmful, toxic, invasive or noxious aquatic organisms. OUG opposes this provision as unnecessary. Under the CWA §316(a) variance provision, a facility proposing a waiver from any thermal criteria must demonstrate that a variance will not interfere with the maintenance of the function, structure, and energy flow of the receiving stream such that a balanced indigenous population or balanced indigenous community is maintained, and this is the only standard that should be applied. Furthermore, OUG notes that most utilities that operate once-through cooling generating units deliberately inject biocide chemicals into the condenser pipe systems to control the growth of heat-tolerant microbes and other "biofilm." Thus, the presence of thermophilic microbes in condenser pipes is a relatively "normal" condition. In addition, Ohio EPA should recognize that the presence and abundance of invasive species is dependent on many factors, many of which are not related to elevated temperatures. For this reason, OUG does not think the addition to this provision is appropriate and recommends that Ohio EPA remove this provision from the rules. (Ohio Utility Group)

**Response 4:** This provision was added to protect sensitive waters from mixing zones that would cause harm to waters in ways that are not regulated by numeric criteria. It is related to removing the mixing zone prohibition on lakes and biologically high quality waters. As a result, we have moved this provision to paragraph -08(M)(3). Also, please see the response to comment 5 below.

We understand that 316(a) demonstrations should include an assessment of these factors; however, 316(a) demonstrations on these high quality waters are rare. We believe that moving the rule requirement addresses these issues.

**Comment 5:** OAC 3745-2-08(M)(3) – While OUG appreciates and largely agrees with Ohio EPA's response to our prior comments on this provision, the agency's response failed to provide any explanation of the reason for the proposed revision in the first place. Nor did the

response address the agency's future intentions regarding this provision as requested in OUG's previous comments. OUG believes that this provision is unnecessary. Currently, unless a permittee has a CWA §316(a) variance, the water quality standards do not allow for any man-made increase in temperature for the use designations. In addition, all new sources must meet the temperature criteria at end-of-pipe. For these reasons, OUG recommends that Ohio EPA remove this provision in its entirety instead of revising the language to specifically address CWA §316(a). (Ohio Utility Group)

**Response 5:** This requirement is related to the prohibition on mixing zones being removed for these waters. This rule is meant to ensure protection of these sensitive waters if thermal mixing zones are allowed (they are currently not). The overall changes are intended to allow mixing zones for discharges with an incidental thermal component (POTWs, for example) or those that have a *de minimis* thermal load with respect to the receiving water. We believe that extra protection for these waters is warranted to prevent impacts from new or expanded thermal discharges.

The rule would not affect any existing 316(a) demonstrations. The demonstration would be taken into account whenever the Agency does a use designation rule that would upgrade an aquatic life use.

#### Comments on Rule 3745-2-12

**Comment 6:** OAC 3745-2-12(B) – This Section states that “A TMDL shall be determined as the sum of all significant existing or projected loads of a pollutant to the TMDL assessment area from point sources, nonpoint sources, and background sources. The sum of the loads shall not be greater than the loading capacity of the receiving water for the pollutant minus the sum of a specified margin of safety and any capacity reserved for future growth.”

“Significant” should be eliminated, as TMDL's are developed for all sources.

As the draft regulations state in Section (J), Margin of Safety (MOS) can be explicit (a number) or implicit (conservative assumptions). There is no “sum” when implicit MOS is used. (U.S. EPA Region 5)

**Response 6:** We have made these changes in the proposed rule.

### Comments on Rule 3745-3-07

**Comment 7:** The changes to confidentiality requirements in the pretreatment rule may be in conflict with ORC 149.43, and may prevent indirect dischargers from providing accurate information to POTWs that run pretreatment programs. The draft rule should only incorporate the confidentiality limits that are required by 40 CFR 122.7(b) and (c). These include the name and address of the permit applicant, permit applications, permits, effluent data and any information required by NPDES application forms. (NEORSD, Columbus Utilities, AOMWA)

**Response 7:** The draft changes to rule OAC 3745-3-07 require additional review; therefore, we have decided to remove this rule from this rulemaking and will consider revisions as part of the next five-year rule review.

### Comments on Rule 3745-33-02

**Comment 8:** Ohio Adm. Code 3745-33-02(B) contains an incomplete citation to federal NPDES rules: “At a minimum, this chapter shall be administered consistent with the act and regulations adopted or subsequently amended by the administrator including **40 C.F.R.**” In addition, the fact sheet indicates that the “[r]evisions ... include clarifying language that Ohio NPDES rules shall be consistent with federal regulations.” However, this provision, as worded, goes beyond language indicating that Ohio rules must be consistent with federal regulations by including the phrase “at a minimum.” If Ohio EPA believes that its rules must be compared to federal rules, this provision should say nothing more than that the rules should be interpreted in a manner consistent with the federal rules and should not indicate that the rules can or should be more stringent than federal requirements. (Ohio Utility Group)

**Response 8:** Ohio EPA proposed to add that sentence to ensure that dischargers from confined animal feeding operations (CAFOs) would not interpret Ohio rules as less stringent than U.S. EPA rules.

The sentence has been reworded to read “this chapter shall be administered in a manner no less stringent than the act and regulations adopted or subsequently amended by the administrator including 40 C.F.R. 122 to 125, 129 to 133, 136, 400 to 471, 501 and 503.” This more clearly addresses the concern and completes the citation.

Comments on Rule 3745-33-03

**Comment 9:** Ohio Adm. Code 3745-33-03(A) contains an incomplete citation to federal NPDES rules; “As a minimum, these forms shall contain any NPDES application information required by regulations adopted by the administrator, including **40 C.F.R.**” (Ohio Utility Group)

**Response 9:** The citation has been corrected as follows “including 40 C.F.R. 122 to 125, 129 to 133, 136, 400 to 471, 501 and 503.”

**Comment 10:** Ohio EPA proposes to amend the provisions of OAC 3745-33-03 by adding new confidential business information provisions. Ohio EPA proposes language which would allow the disclosure of any CBI “without such person’s consent” in three instances: (1) where CBI is provided to “officers, employees or authorized representatives of the state, or a federal agency;” (2) “in any judicial proceeding;” and (3) “in any hearing conducted by Ohio EPA.” OCTC is concerned about the potential impact of this language, and believes that the language is overbroad. While a court or, in some cases, an administrative judge or hearing examiner, may lift the protections afforded by designating material as CBI, this should occur only after: (1) notice to the party who submitted the CBI; and (2) an opportunity is afforded to the party who submitted the CBI to challenge the disclosure of the CBI after an in camera inspection of the CBI by the judge or administrative officer. Ohio EPA’s proposal does not clearly set forth the procedures which would be followed before making a disclosure of CBI. This simply may be an oversight on Ohio EPA’s part. However, if Ohio EPA intends to adopt a rule of disclosure which allows EPA unilaterally to waive the CBI protections unilaterally, and without an opportunity on the part of the party submitting the CBI to challenge this decision, OCTC would oppose this proposed rule change. CBI designations are extremely important to OCTC’s members, since many chemical products may have proprietary formulations, process information or production details which are of value to competitors. Moreover, some CBI from OCTC members may invoke homeland security concerns if disclosed to the public. We therefore urge Ohio EPA to reword and clarify this proposed rule change to articulate more precisely the circumstances and procedures under which CBI would be disclosed. (Ohio Chemistry Technology Council)

**Response 10:** Please see the revised rule language, which should clarify notice requirements.

Comments on Rule 3745-33-04

**Comment 11:** The language at (A)(1)(b) needs to be clarified. We understand that this language is meant to satisfy requirements of state-administered NPDES permit programs, however we believe that this provision can not be used to circumvent the administrative continuance authority provided in ORC 119.06. This law allows for an NPDES permittee to continue discharging under an expired permit as long as the permittee has filed an application for renewal within the time and in the manner provided by statute. If the director requests supplemental information of a permittee during the renewal process that in its opinion renders the application incomplete, the permittee may not be able to complete the application process within the time and in the manner provided. (NEORS, AOMWA)

**Response 11:** The proposed rule clarifies this distinction. OAC Rule 3745-33-03(B), which is unchanged in this rule package, provides authorization for a permittee to continue operating under an expired NPDES permit as long as a timely permit renewal application has been submitted to Ohio EPA and the Director has not acted on the renewal application.

OAC Rule 3745-33-04(A)(1) addresses the criteria for issuing an NPDES permit. One criterion must be submission of a complete permit application; additional information requested by the director beyond the application form requirements may be needed to issue the permit, but do not affect the completeness of the application form; the revised rule language clarifies this point.

**Comment 12:** OAC 3745-33-04(A)(1)(b) – OUG believes that this new provision adds uncertainty to the permit application process by giving Ohio EPA too much discretion in determining when an application is complete. It is OUG's experience that utilities and other permit applicants can work with Ohio EPA during the permitting process and provide supplemental information to the agency when it is truly necessary. Therefore, OUG recommends that Ohio EPA remove this provision and continue its current practices rather than promulgating a rule that gives the Director vast discretion to slow the permitting process by requesting – without limits – supplemental information during the permitting process while considering the application incomplete. (Ohio Utility Group)

**Response 12:** OAC Rule 3745-33-04(A)(1) addresses the criteria for issuing an NPDES permit. The language has been clarified to distinguish

between application form completeness and additional information. Also see Response 11 above.

**Comment 13:** Ohio EPA proposes the following language change to OAC 3745-33-04(A)(1)(b):

“An application is complete when the director receives an application form and any other supplemental information that the Director requests.”

This proposed rule change makes it virtually impossible to determine when an applicant has submitted a complete application to the Director. The proposed rule change, therefore, is not a “rule,” but rather provides no rule or “bright line” for judging when an application is complete. An application should be complete when an applicant has completed all information required by an application form. If additional information is requested by the Director, the applicant should be required to submit such additional information in a timely fashion, but the Director’s request for additional information should not effectively deprive an application of its “complete” status absent a failure on the part of the applicant to fully and correctly complete the application form, and any attachments thereto which are required by the application form. OCTC recommends that this sentence be deleted from the proposed rule changes. (Ohio Chemistry Technology Council)

**Response 13:** See Responses 11 and 12 above.

**Comment 14:** We believe that the draft language in OAC 3745-33-04(A)(2)(f) should be deleted in its entirety. This language would essentially prevent the construction of any new source discharging into an impaired water until a TMDL is not just developed but implemented, which will hinder economic development in Ohio. This level of stringency is not warranted under the Clean Water Act. (NEORS)

**Response 14:** U.S. EPA is not requiring that Ohio adopt this rule at this time, therefore the language has been removed from the proposed rule. Note that Ohio EPA must implement the federal impaired waters rule under the general authority in ORC 6111.03(J).

**Comment 15:** For the following reasons, OAC 3745-33-04(C)(3) should not be deleted but rather amended to incorporate the relevant provisions of the governing federal rules. OEPA should incorporate 40 CFR 122.29(d), along with the definitions contained in 40 CFR 122.2 and 122.29 to make it consistent with the federal rule. This will ensure

that Ohio EPA will interpret the rule in a way that is no more stringent than the federal rule. (NEORSD, Columbus Utilities, AOMWA)

**Response 15:** We have included a reference to 40 C.F.R. 122.29(d) in the proposed rule.

**Comment 16:** OAC 3745-33-04(D) should be further amended to limit the permissible grounds for modification of an NPDES permit at the request of an interested person to those grounds set out in 40 CFR 124.5(a). The federal rule limits these requests to the grounds for modification specified in 40 CFR 122.62. The OEPA rule should contain the limitations from the federal rule. (Columbus Utilities)

**Response 16:** We have made this change in the proposed rule.

**Comment 17:** OAC 3745-33-04(D) – The previous version of this provision only allowed permittee to apply for modifications of their own NPDES permits. However, the draft provision allows “any interested person” to request a modification of an NPDES permit. OUG has concerns with this additional language. OUG believes that any modification of an NPDES permit should be a function of discussion between the permittee and Ohio EPA. Other interested persons, including the general public have ample opportunity to affect the terms of another persons permit by submitting comments on the draft permit and if necessary, appealing final permits at ERAC. Allowing any interested person to request modifications to permits held by other persons or entities has the potential to create additional and unnecessary work for Ohio EPA. Moreover, such a provision will dramatically and negatively impact a permittee’s ability to rely upon their current permits going forward with confidence. This provision should be removed from the rules before they are finalized. (Ohio Utility Group)

**Response 17:** Allowance for a modification request by an interested party is required of state NPDES programs by 40 CFR 124.5. We have reduced the scope of these requests to those allowed in the federal rule (see Response 16 above). Any proposed modification is subject to comment by the public, including the permittee. Permittees also retain their rights to adjudication hearings before the Director.

**Comment 18:** Ohio EPA proposes to add the following language to OAC 3745-33-04(D):

“Permits may be modified **at the request of any interested party**, or upon the director’s initiative.” (Emphasis added)

This proposed language change would allow anyone, irrespective of whether such a person is even aggrieved or injured by the terms and conditions of an Ohio NPDES permit, to re-open the NPDES application process and seek changes to an Ohio NPDES permit. Allowing such a right effectively renders meaningless the finality of an NPDES permit after it has been issued by the Director as a final action, and is not appealed. What is the point of having an appellate process to challenge the terms and conditions of an NPDES permit when any person can simply seek to modify the terms of the NPDES permit at any time during the life of the permit? This proposed language is inappropriate, and should be deleted from Ohio EPA’s proposal. (Ohio Chemistry Technology Council)

**Response 18:** See response 17.

Comments on Rule 3745-33-05

**Comment 19:** OEPA is excluding the flexibility provided by USEPA guidance without providing a rationale for doing so. While the change in fish tissue standards would implement USEPA’s latest recommendation, USEPA’s “Draft Guidance for Implementing the January 2001 Methyl Mercury Water Quality Criteria” (August 2006) permits a discharger the ability to look at fish species based upon local consumption and take a weighted average to evaluate whether a mercury limitation is exceeded. This flexibility should be incorporated into the draft rule as well. (NEORSD)

**Response 19:** We have included the option of using a weighted average of various fish species based on local consumption in determining compliance with a mercury limitation in the proposed rule.

**Comment 20:** Ohio EPA proposes to amend the language of OAC 3745-33-05 by adding the following language to a new subsection (E):

The Director may establish limitations for any discharge **based on a level of performance that a proposed treatment system is designed to achieve**, as documented in the approved permit to install under Chapter 3745-2 of the Administrative Code. These limitations are limited to those pollutants that the proposed treatment system is designed to remove. (Emphasis added)

There are two problems with this proposed language: First, Chapter 6111. of the Revised Code gives the Director the ability to adopt effluent limitations based upon national categorical treatment standards, water quality based effluent limitations or, in certain situations where national categorical treatment standards are “inapplicable,” a “case-by-case” effluent limit based upon the following considerations:

...the appropriate technology for the category or class of point sources of which the applicant is a member, based on all available information, including the administrator’s draft of proposed development documents or guidance; the total cost of achieving the limitations in relation to the effluent reduction benefits to be achieved; the age of the equipment and facilities involved; the process employed; the engineering aspects of the application of various types of control techniques and process changes; nonwater quality environmental impact, including energy requirements, and other factors that would have been appropriate for the Administrator to consider pursuant to Section 304 of the Federal Water Pollution Control Act.

See Section 6111.042(A), Ohio Rev. Code.

Director is also obligated to consider any unique factors reading the considerations set forth in division of (A) of the Revised Code as to the applicant for the permit. See Section 6111.042(B), Ohio Rev. Code. The language of Chapter 6111. Of the Revised Code, including but limited to Section 6111.042 of the Revised Code, does not confer authority upon the Director to establish an across-the-board rule that allows the establishment of effluent limitations based solely upon “the level of performance that a proposed treatment system “is designed to achieve.”

Second, an applicant normally selects and designs a wastewater treatment system in order to achieve effluent limits which are required of the system. In doing so, an applicant will engineer the treatment system to provide a “margin of safety” so that applicable effluent limits can be reliably and continuously met. Setting an effluent limit at the design level of performance effectively eliminates that margin of safety. Because NPDES permits typically require compliance with effluent limitations 100% of the time, it is good engineering practice to design a facility with an appropriate margin of safety below the applicable effluent level for that facility, in order to achieve 100% compliance with applicable effluent limitations. Also, in some cases, the design level of performance

may be the arithmetic average performance of the system. Unless it is clear that the effluent limitation is also being set as an average value, and not a maximum (or absolute) limit, the permit will not accurately reflect the basis for establishing the design level of performance. It is not the case, as Ohio EPA's response to comments submitted in response to the first draft indicates, that "treatment technology limits should match the treatment technologies installed to ensure that systems are operated as well as they can be." This kind of comment reflects a basic misunderstanding of how design levels of performance are set. OCTC would strongly urge that this provision be deleted from the proposed rules. (Ohio Chemistry Technology Council)

**Response 20:** This rule language does not add new requirements or set limits more restrictive than a treatment system can achieve. Ohio EPA acknowledges the applicability of ORC 6111.042 in setting any treatment technology-based limits. However, this statute requires consideration of treatment technology for "a class of pollutant sources". If the factors to be considered under this section of the ORC indicate that a treatment technology standard is broadly applicable to a class of pollutant sources, the director may establish such a standard. ORC 6111.042 includes consideration of unique factors and this rule provision will be implemented accordingly.

The rule does not indicate that margins of safety in treatment design would be eliminated. Treatment standards are set on statistical performance of well-operated treatment systems; they do not necessarily set limits based on 100% compliance. For example, U.S. EPA, when setting effluent guideline limitations, considers effluent variability and sets limits based on average performance and a statistical projection of compliance levels at the 95<sup>th</sup> or 99<sup>th</sup> percentile, as appropriate. This process accounts for consistent achievability of the limits and good design and operation. Ohio EPA uses similar processes when setting treatment limitations.

#### Comments on Rule 3745-33-07

**Comment 21:** Ohio Adm. Code 3745-33-07(C)(2)(f) requires the practical quantification level for polychlorinated biphenyl compounds ("PCBs") to be equivalent to the minimum limits for each PCB congener listed in draft USEPA Method 1668B. At this time, OUG does not believe that Ohio EPA should incorporate any aspect of Method 1668B into its rules. Studies have demonstrated that the results derived by different laboratories are highly variable, differing

by as much as an order of magnitude. While some variability is inevitable, the variability seen in these studies, combined with the part per quadrillion concentrations that Method 1668 is intended to measure, makes it difficult, if not impossible, to distinguish actual PCB concentrations from background noise. Because of the uncertainty associated with this method, OUG strongly recommends that Ohio EPA remove this provision at this time. (Ohio Utility Group)

**Response 21:** Since the Method 1668B has been included in a proposed rulemaking by U.S. EPA, the draft requirement has been removed from this rule package. In accordance with OAC 3745-33-07(C)(2), this method will be required to be used upon finalization of U.S. EPA's rule.

**End of Response to Comments**