10 a.m. (EST)
Via Zoom

Environment Committee

Sept. 29, 2020

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2020 Environment Committee Calendar
Meetings begin at 10 a.m.

2021 Schedule Coming Soon!

Our Meeting Sponsor:

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Environment Committee Agenda

September 29, 2020

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Counsel's Report	Frank Merrill, Bricker & Eckler LLP Christy Schirra, Bricker & Eckler LLP
Public Policy Report	Rob Brundrett, OMA Staff

Our Meeting Sponsors

Laurie A. Stevenson, Director

In Jan. 2019, Governor Mike DeWine appointed Laurie A. Stevenson as director of the Ohio Environmental Protection Agency. She most recently served as Deputy Director for Business Relations where she served as a primary contact for regulated entities to help coordinate permitting activities within the Agency, particularly for complex projects requiring multiple permits. She also served as chief of Ohio EPA's Division of Environmental and Financial Assistance. DEFA provides financial and technical assistance to businesses and communities to help achieve compliance with the environmental regulations.

A public servant of 29 years, she previously served as the industrial liaison in the Director's Office and managed Ohio EPA's Small Business Assistance Office (SBAO). She held previous positions in Ohio EPA's Division of Hazardous Waste Management, starting in the Southeast District Office as a hazardous waste field inspector.

Laurie earned a B.S. in Environmental Health from Bowling Green State University and an M.S. in Public Health from The Ohio State University.

September 10, 2020

Benesch COVID-19 Resource Center: Ohio Businesses Should be Aware that Environmental Agencies Have Terminated COVID-19 Enforcement Discretion Policies

Client Bulletins

Authors: **John A. Rego**, **Reed W. Sirak**

In late March 2020, as many states adopted responses to the coronavirus pandemic that either encouraged or mandated "work from home" practices, U.S. EPA and other environmental regulators developed temporary enforcement discretion policies to mitigate the impact of the pandemic on their own employees and on the employees of regulated companies and their contractors. Recognizing that travel to many sites and workplaces was either legally prohibited or simply imprudent in light of the risk of viral exposure, U.S. EPA published "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program" on March 26, 2020. States such as Ohio adopted their own enforcement discretion policies to address companies' compliance with state environmental requirements. Both U.S. EPA and Ohio EPA have now terminated their policies.

U.S. EPA's COVID-19 enforcement discretion policy did not include an expiration date when adopted. In late June 2020, U.S. EPA announced a presumptive termination date of August 31, 2020. When U.S. EPA took no action to extend the federal policy, it terminated as scheduled at the end of August 2020. However, U.S. EPA expressly reserved its inherent authority to exercise enforcement discretion on a case-by-case basis, "including noncompliance caused by the COVID-19 public health emergency, before or after the temporary policy is terminated."

Ohio EPA also decided to terminate its "regulatory flexibility" request system as of August 31, 2020, announcing on its website:

> With the lifting of Ohio's stay at home order and the reopening of businesses under Ohio's Responsible RestartOhio Plan, Ohio EPA discontinued considering any new COVID-19 regulatory flexibility requests effective Aug. 31, 2020. This deadline is also consistent with U.S. EPA's termination of federally related regulatory flexibility requests.

Although Ohio EPA's announcement did not include an explicit reference to its inherent enforcement discretion, it's safe to assume that Ohio EPA believes it possesses such authority, including in situations involving COVID-19.

Ohio businesses, many still actively reconfiguring their workplaces and payrolls in response to the pandemic's gut punch to the economy, would be wise to assume that environmental regulators will now be deeply skeptical of claims that any ongoing difficulties collecting wastewater samples, submitting timely reports, complying with cleanup schedules, or meeting other legal obligations are attributable to pandemic-related disruptions. Future enforcement relief will only be available, at most, on a case-by-case basis and will require a demonstration of highly compelling and unique circumstances.

For more information, please contact a member of Benesch's Environmental Law & Litigation Group.

John A. Rego at jrego@beneschlaw.com or 216.363.4542.

Reed W. Sirak at rsirak@beneschlaw.com or 216.363.6256

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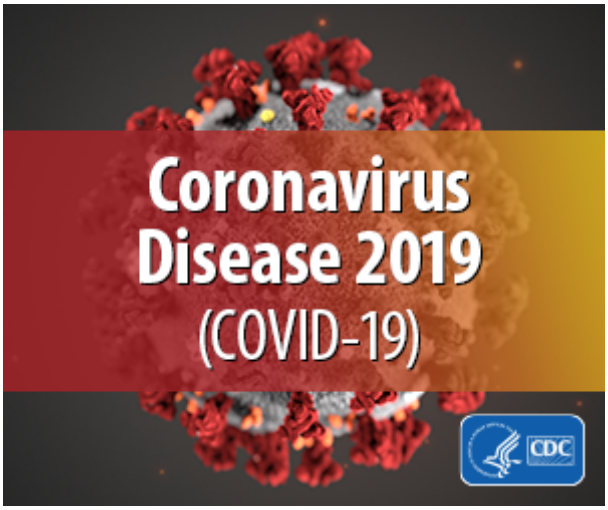
Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.



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Perspectives on Environmental, Safety & Health

SQUIRE PATTON BOGGS

US Supreme Court Adopts "Functional Equivalent" Standard for Discharges of Pollutants to Surface Water Through Groundwater

By Jonathan King on May 11, 2020
Posted in Clean Water Act, Environmental Litigation, Environmental Protection, Water Quality, Waters of the United States

Recently, in a 6-3 decision in *County of Maui v. Hawaii Wildlife Fund (Maui)*, the United States Supreme Court held that a discharge of pollution to groundwater may be regulated under the Clean Water Act (CWA). The Supreme Court's review arose from a case involving a wastewater treatment and reclamation facility in Hawaii that injects through disposal wells 4 million gallons per day of partially-treated waste water hundreds of feet deep into groundwater. The wells are located roughly half a mile from the Pacific Ocean, and dye tracer studies revealed the injected wastewater reached the ocean within 84 days. The facility had not obtained a National Pollution Discharge Elimination System (NPDES) permit under the CWA for its operation of the injection wells

The Court's Opinion in *Maui* does not provide CWA protection for groundwater itself. Surface waters, including territorial seas, navigable rivers, and lakes and their tributaries, and some wetlands remain the only waters generally subject to CWA jurisdiction. However, the Court recognized that where a point source discharges to groundwater that has a hydrologic connection to a jurisdictional surface water, the groundwater can serve as a conduit between an identifiable point source discharge and the surface water. Thus, the question presented to the Court was whether a NPDES permit is required "when pollutants originate from a point source but are conveyed in navigable waters through a nonpoint source," here "groundwater." The Court held that a point source discharge of pollutants that travels through groundwater

to surface water may require a NPDES permit "when there is the *functional equivalent of a direct discharge*" to a navigable surface water. In the same vein, it reasoned that "[w]hether pollutants that arrive at navigable waters after traveling through groundwater are 'from' a point source depends upon how similar to (or different from) the particular discharge is to a direct discharge."

In making its decision, the Court vacated and remanded a Ninth Circuit ruling that a NPDES permit is required when "pollutants are fairly traceable from the point source to a navigable water" because using a "fairly traceable" standard was too broad and could lead to permitting for discharges of pollutants that reach a surface water through groundwater, but only after traveling hundreds of miles over a century or more. In contrast, the Court also determined that US EPA's 2019 Interpretive Statement, which categorically excluded *any* discharges to groundwater from NPDES permitting, was too narrow. The Court favored a middle ground, multi-factor approach requiring lower courts to take into consideration the particular factual nuances of a discharge. In doing so, the Court freely admitted its approach does not "clearly explain how to deal with middle instances." However, it reasoned "there are too many potentially relevant factors applicable to factually different cases" for it to use more specific language than "functional equivalent" in its Opinion. Under this standard, many site-specific factors will have to be taken into account by the lower courts in determining in a particular case whether a discharge to groundwater was the "functional equivalent" of a direct discharge to surface water.

The Court noted, "[t]ime and distance will be the most important factors in most cases, but not necessarily every case." It also provided a non-exhaustive list of additional factors that could be considered, including, (1) the nature of the material through which the pollutant travels, (2) the extent to which the pollutant is diluted or chemically changed as it travels, (3) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point source, (4) the manner by or area in which the pollutant enters the navigable waters, and (5) the degree to which the pollution (at that point) has maintained its specific identity.

It is no surprise that the Court did not develop a bright line rule for this highly fact intensive issue. The *Maui* multi-factor approach will require a large number of lower court opinions before the application of the *Maui* "functionally equivalent" standard can be predicted with any certainty. This issue has the potential to affect a wide variety of sectors, and future attention should be paid to the lower court rulings as well as efforts by the States to regulate groundwater in the context of direct hydrologic connection with surface water.

H.B. 168 133rd General Assembly	Final Analysis Click here for H.B. 168's Fiscal Note

Version: As Passed by the General Assembly

Primary Sponsor: Rep. Arndt

Effective date: **September 15, 2020**

Helena Volzer, Attorney

UPDATED VERSION*

SUMMARY

BFPP immunity

- Establishes an affirmative defense that allows a bona fide prospective purchaser (BFPP) to claim immunity from liability for the costs associated with the state's performance of investigational and remedial activities to address a release or threatened release of a hazardous substance from the BFPP's facility.
- Specifies that a BFPP is a purchaser of a facility, where hazardous substances were disposed of before the purchaser acquired it, who can demonstrate specific factors relating to that facility.
- Specifies that the affirmative defense is available to a BFPP in any pending civil action as of the act's effective date or any new civil action initiated thereafter.
- Makes conforming changes to the law governing the Voluntary Action Program (VAP) consistent with the new affirmative defense.

Covenant not to sue

- Eliminates the law that automatically voids a covenant not to sue under the VAP when a property subject to institutional controls or activity and use limitations is not in compliance with those controls or limitations.
- Instead, authorizes (but does not require) the Director of Environmental Protection to issue an order voiding the covenant in that circumstance.
- Specifies that the order voiding the covenant not to sue is an appealable action.

* This version updates the effective date.

DETAILED ANALYSIS

BFPP immunity

Overview

Generally, when there is a release or threatened release of a hazardous substance at a facility, the state can investigate and conduct remedial activities to remedy the release or threatened release. The state then may recover those costs in a civil action against a responsible party.

The act specifies that a bona fide prospective purchaser (BFPP) of a facility (that was previously contaminated by a hazardous substance) who can demonstrate certain factors relating to that facility is immune from liability to the state in a civil action. This immunity is limited in scope to the costs incurred by the state for the state's performance of investigational and remedial activities to address the release or threatened release of a hazardous substance from the facility. The affirmative defense is available to a BFPP in any pending civil action as of the act's effective date (September 15, 2020) or any new civil action initiated thereafter (see **COMMENT**). This type of immunity was not previously available under Ohio law.[1]

Immunity for BFPPs is available at the federal level under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) but is somewhat broader than the immunity established by the act. The federal immunity extends to all response costs in a federal civil action, regardless of whether the party bringing the action is the federal government or a private citizen.[2]

BFPP immunity: federal

Under CERCLA, a BFPP is a person who acquires ownership of a facility (any property where a hazardous substance was disposed of) after January 11, 2002, and who establishes several factors relating to that facility. These factors include:

1. All disposal of hazardous substances at the facility occurred before the person acquired it;
2. The person made all appropriate inquiries into previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with federal law;
3. The person provides all legally required notices for the discovery or release of any hazardous substances at the facility;
4. The person exercises appropriate care with respect to any hazardous substances at the facility by taking reasonable steps to:

[1] R.C. 3746.122(B).

[2] *See, e.g., Saline River Props., LLC v. Johnson Controls, Inc.*, 823 F. Supp.2d 670 (2011) (in which a facility owner claiming BFPP immunity sued a previous facility owner).

- Stop any continuing release;
- Prevent any threatened future release; and
- Prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

5. The person provides full cooperation, assistance, and access to those authorized to conduct response actions or natural resource restorations;
6. The person is in compliance with any land use restrictions established or relied on in connection with the response action at the facility;
7. The person does not impede any institutional control employed at the facility in connection with the response action;
8. The person complies with any request for information or administrative subpoena; and
9. The person is not either of the following:
   - Potentially liable, or affiliated with any other person who is potentially liable, for response costs at the facility through any direct or indirect familial relationship, or, any contractual, corporate, or financial relationship (other than the relationship created for conveyance of title for the facility); or
   - The result of a reorganization of a business entity that was potentially liable for the facility.[3]

If a person can establish all of these factors in court by a preponderance of the evidence, the person is considered a BFPP and is immune from liability for response costs for a release or threatened release of hazardous substances based solely on the person's status as a facility owner or operator.[4] As mentioned above, response costs generally include any costs incurred to remedy a release or threatened release of a hazardous substance to ensure that the substance does not migrate and cause danger to public health, welfare, or the environment. To maintain BFPP immunity under CERCLA, the BFPP has an ongoing obligation not to impede the performance of a response action or natural resource restoration.[5]

BFPP immunity: the act

The act adopts the federal definition of BFPP and establishes an affirmative defense that allows a person to claim immunity from liability in a civil action **brought by the state** (but not by a private citizen). The person is not responsible for the cost of the state's investigational and remedial activities to address a release or threatened release of hazardous substances from the person's facility if all of the following apply:

[3] 42 U.S.C. § 9601(40).

[4] 42 U.S.C. § 9607(r).

[5] 42 U.S.C. § 9607(r).

1. The person demonstrates that the person is a BFPP of the facility;
2. The state's cause of action rests on the person's status as an owner or operator of the facility; and
3. The person does not impede a response action or a natural resource restoration at the facility.[6]

Because the act adopts the same definition of BFPP and facility as in CERCLA, the person must demonstrate all factors necessary to be considered a BFPP under that definition by a preponderance of the evidence.[7]

Consistent with the creation of the affirmative defense, the act makes conforming changes to the law governing the Voluntary Action Program (VAP).[8] The VAP allows a person to assume responsibility for cleaning a property contaminated by hazardous substances in exchange for a release from liability from the state.[9]

Covenant not to sue

Background

Under the VAP, the cleanup of a contaminated property must meet specific standards and requirements developed by the Ohio Environmental Protection Agency (OEPA). When those standards and requirements are met, the OEPA Director may issue a covenant not to sue. This covenant protects the property owner or operator and future owners from being legally responsible to the state for further investigation and cleanup. In order for the property to qualify for the covenant, OEPA may establish institutional controls or activity and use limitations that apply to the property.[10] For example, OEPA may limit the property to commercial uses only.

Voiding the covenant

Prior law *automatically* voided a covenant not to sue when an institutional control or activity and use limitation was violated, beginning on the date of the violation. Instead, the act authorizes (but does not require) the Director to issue an order voiding the covenant not to sue in that circumstance. It clarifies that the Director's order is a final action that may be appealed.[11]

[6] R.C. 3746.122(B).

[7] R.C. 3746.122(A). See also and 42 U.S.C. 9601.

[8] R.C. 3746.122(C) and R.C. 3746.02(A)(5).

[9] *See* R.C. Chapter 3746.

[10] *See* R.C. Chapter 3746.

[11] R.C. 3746.05(B).

COMMENT

The act specifies that it is the General Assembly's intent to extend the new affirmative defense to civil actions pending on the act's effective date that were initiated prior to that date. It also specifies that the General Assembly finds the BFPP immunity is remedial in nature.[12]

In general, the General Assembly is prohibited from establishing retroactive laws by both the Ohio Constitution and U.S. Constitution. However, retroactive laws are constitutional when necessary to remedy an omission, defect, or error in instruments or proceedings.[13] The Ohio Supreme Court has upheld retroactive laws as constitutional where the purpose of the law is remedial. In particular:

> Remedial laws are those that substitute a new or different remedy for the enforcement of an accrued right, as compared to the right itself, and generally come in the form of rules of practice, courses of procedure, or methods of review.[14]

Because a BFPP may assert the defense in a civil action initiated before the act's effective date, the act has a retroactive effect. It is for a court to determine whether that retroactive extension of the affirmative defense is constitutional as a remedial measure.

HISTORY

Action	Date
Introduced	03-26-19
Reported, H. Civil Justice	05-08-19
Passed House (90-0)	05-30-19
Reported, S. Agriculture & Natural Resources	12-04-19
Re-Reported, S. Agriculture & Natural Resources	05-06-20
Passed Senate (33-0)	05-06-20
House Concurred in Senate amendments (94-0)	05-13-20

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[12] R.C. 3746.122(D) and (E).

[13] Ohio Constitution, Article II, Section 28 and United States Constitution, Article I, Sections 9 and 10.

[14] *State ex rel. Kilbane v. Indus. Comm.*, 91 Ohio St.3d 258, 260 (2001).

S.B. 1 133rd General Assembly	Bill Analysis Click here for S.B. 1's Fiscal Note

Version: As Reported by House State and Local Government

Primary Sponsors: Sens. McColley and Roegner

Alyssa Bethel and Emily E. Wendel, Attorneys CORRECTED VERSION*

SUMMARY

Department of Health orders and rules

- Specifies that all orders issued by the Director of Health on or after April 29, 2020, cease to be effective 14 days after the bill takes effect, unless the Joint Committee on Agency Rule Review (JCARR) approves extensions of those orders by a specified vote.
- Prohibits any future order of the Director of Health from being effective for more than 14 days unless, at the Director's request, JCARR approves an extension by that same vote.
- Specifies that the Director may make public health rules to prevent the spread of disease only in accordance with the Administrative Procedure Act, and prohibits the Director from making emergency rules, rule amendments, or rescissions under the Act.
- Gives any Ohio citizen standing to seek a court order that the Director comply with the bill's requirements, and specifies that the citizen is not required to prove that irreparable harm will result if the court does not issue the order.

Reduction in regulatory restrictions

- Requires each state agency to reduce the regulatory restrictions contained in its rules by 30% by 2022, according to a schedule and criteria set forth in the bill.
- Prohibits an agency from adopting new regulatory restrictions that would increase the percentage of restrictions in the agency's rules.

* Corrects the discussion regarding the base inventory of regulatory restrictions.

- Beginning July 1, 2023, requires an agency that does not achieve a reduction in regulatory restrictions according to the required schedule to eliminate two restrictions before enacting a new rule containing a restriction.
- Allows JCARR to lessen an agency's required reduction in regulatory restrictions if the agency fails to meet a reduction goal and shows cause why the agency's required reduction should be lessened.
- Effective January 1, 2023, limits the total number of regulatory restrictions that may be in effect in Ohio.
- Lists the criteria an agency must use to determine whether a rule containing a regulatory restriction should be amended or rescinded.
- Requires an agency to produce a revised inventory and historical progress report before March 15, 2021, and annually thereafter until the agency has met its reduction goal.
- Allows an administrative department head to direct otherwise independent officials or state agencies organized under the department to reduce regulatory restrictions.
- Allows the Common Sense Initiative Office (CSIO) to review any rules containing regulatory restrictions that an agency is required to include in its inventory and to direct an agency to eliminate a regulatory restriction, and permits the agency to appeal that decision to JCARR.
- Directs JCARR to compile the agencies' inventories and reports into an annual comprehensive inventory and progress report that includes a description of JCARR's work over the past year in assisting agencies.
- Requires JCARR to consult with Legislative Information Systems (LIS) to create and maintain a system for agencies to enter regulatory restriction data and create, compile, and send inventories and reports.
- Requires JCARR to consult with LIS to establish, maintain, and improve the Cut Red Tape System, which must include a website and must allow members of the public to request information about regulatory restrictions and to communicate with JCARR about regulatory restrictions.

Continuing rule review process

- Changes the criteria that all agencies must use when conducting a five-year review of an existing rule to match the bill's criteria for elimination of regulatory restrictions.
- Requires JCARR to apply the same modified standards when reviewing an existing rule that an agency has decided not to change, and also allows JCARR to recommend that the General Assembly invalidate a rule if the agency has failed to justify the retention of a rule containing a regulatory restriction.

- Allows JCARR to recommend that the General Assembly invalidate a proposed rule on the basis that the agency has failed to justify the proposed adoption, amendment, or rescission of a rule containing a regulatory restriction.

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DETAILED ANALYSIS

Department of Health orders and rules

Current orders

The bill specifies that all orders issued by the Director of Health on or after April 29, 2020, cease to be effective 14 days after the bill takes effect, unless the Joint Committee on

Agency Rule Review (JCARR) approves extensions of those orders by a majority vote that includes at least three members of the House of Representatives and three members of the Senate.[1]

Since April 29, the Director has issued two orders in response to the COVID-19 pandemic: one that extends the closure of all K-12 schools in Ohio through June 30, 2020,[2] and one that modifies the previous stay at home order and allows some businesses to reopen.[3] Under the bill, those orders cease to be effective 14 days after the bill takes effect, unless JCARR approves extensions.

Future orders and rules

The bill prohibits any future order of the Director of Health from being effective for more than 14 days unless, at the Director's request, JCARR approves an extension by a majority vote that includes at least three members of the House of Representatives and three members of the Senate. JCARR must determine the period of the extension, if any.

For purposes of the bill, an order is considered to be effective for more than 14 days if the order includes an effective period that exceeds 14 days or if the substance of the order is contained in multiple subsequently issued orders whose combined effective period exceeds 14 days. (For example, the Director could not bypass the bill's restriction by issuing a series of orders with the same substance that each last only 14 days.)

The bill also specifies that the Director may make public health rules to prevent the spread of disease (as opposed to orders, governed by the provisions described above) only in accordance with the Administrative Procedure Act, which involves the JCARR rule review process. And, the Director may not make emergency rules, rule amendments, or rescissions under the Act, which generally allows agencies to change rules on an emergency basis without going through the typical rulemaking procedure.[4]

Enforcement

Under the bill, any Ohio citizen has standing to seek a court order that the Director of Health comply with the bill's requirements. The citizen is not required to prove that irreparable harm will result if the court does not issue the order.

In general, a person who asks a court for a preliminary injunction against a government agency (an order that the agency take an action or refrain from taking an action, issued before the court makes a final decision in the case) must show that the person has standing, meaning that the person is actually injured by the agency's actions. And, the person must show that

[1] Section 3 of the bill.

[2] "Second Amended Order the Closure of All K-12 Schools in the State of Ohio," issued April 29, 2020.

[3] "Director's Order that Reopens Businesses, with Exceptions, and Continues a Stay Healthy and Safe at Home Order," issued April 30, 2020.

[4] R.C. 101.35, 101.36, and 3701.13.

irreparable harm will result if the court does not grant the injunction. The bill allows an Ohio citizen to seek an injunction against the Director of Health without meeting those requirements.[5]

Reduction in regulatory restrictions

Reduction goals

Three-year reduction of 30%

The bill requires each state agency to reduce the number of regulatory restrictions in the agency's rules by 30% by amending or rescinding rules that contain regulatory restrictions according to criteria listed in the bill. The 30% reduction is based on the number of regulatory restrictions identified in a base inventory previously conducted by the agency under continuing law. The bill directs each agency to achieve a 10% reduction in regulatory restrictions before December 31, 2020; a 20% reduction before December 31, 2021; and the 30% reduction before December 31, 2022.

After an agency has achieved a reduction in regulatory restrictions, it cannot adopt additional regulatory restrictions that would cancel out the reduction. The agency also is encouraged to continue to reduce regulatory restrictions after the 30% reduction has been achieved.

If an agency does not achieve the required reduction in regulatory restrictions according to the bill's schedule, the bill prohibits the agency from adopting any new regulatory restriction unless it simultaneously removes two or more existing regulatory restrictions, beginning July 1, 2023. This prohibition remains in effect until the agency achieves the required reduction in regulatory restrictions. The agency also is barred from merging two existing regulatory restrictions into a single restriction in order to attempt to reduce the overall number of restrictions.[6]

Lessened required reduction

If an agency fails to meet a reduction goal listed above within 120 days of the deadline, the bill requires the Joint Committee on Agency Rule Review (JCARR) to give the agency an opportunity to appear to show cause why the agency's required reduction should be lessened. If JCARR determines that the agency has shown cause, JCARR must determine a lessened required reduction for that agency and must submit a written report to the Speaker of the House and the President of the Senate, indicating the lessened required reduction in regulatory restrictions for that agency and the reason JCARR determined that lessened reduction.[7]

[5] R.C. 101.36(C).

[6] R.C. 121.951. Current law contains a blanket prohibition through June 30, 2023, against state agencies adopting a new regulatory restriction unless the agency simultaneously removes two or more other existing regulatory restrictions. R.C. 121.95(F).

[7] R.C. 121.952.

Statewide cap on regulatory restrictions

Effective January 1, 2023, the total number of regulatory restrictions that may be effective at any one time in Ohio is capped at a number determined by JCARR. JCARR must determine that number by calculating, for each agency, the number of regulatory restrictions identified by the agency in its base inventory, minus the number of regulatory restrictions that represents the percentage reduction the agency is required to achieve not later than January 1, 2023 (30%, unless JCARR has lessened that percentage for the agency as described above), and then totaling the resulting numbers for all state agencies. An agency must contact JCARR before adopting a rule containing a regulatory restriction, and if JCARR determines that the state has reached the cap of regulatory restrictions, the agency may not adopt the restriction. No agency may adopt a regulatory restriction if that restriction would cause the state to exceed the cap on restrictions.[8]

Covered agencies

Under continuing law and the bill, "state agency" means an administrative department created under R.C. 121.02; an administrative department head appointed under R.C. 121.03, (essentially all cabinet-level departments); or a state agency organized under an administrative department or administrative department head. The term also includes the Department of Education, the State Lottery Commission, the Ohio Casino Control Commission, the State Racing Commission, and the Public Utilities Commission of Ohio.

Rules adopted by an otherwise independent official or entity organized under an agency are attributed to the parent agency. This means that a parent agency must include rules containing regulatory restrictions adopted by those otherwise independent officials or entities as part of its total number of regulatory restrictions. Each state agency is required to reduce its overall regulatory restrictions by 30%, but each otherwise independent official or entity organized under the agency is not required to achieve a 30% reduction so long as the parent agency overall achieves the goal.

Certain state boards that must continue to conduct five-year reviews of their rules, and are subject to JCARR review of their rules, are not included in the definition of "state agency," and therefore are not required to reduce their regulatory restrictions by 30% under the bill. However, as discussed below, the bill still adds to the factors those boards must consider during a rule's five-year review and when adopting a new rule (see "**Continuing rule review process**," below). It appears that the following entities would not be considered "state agencies" under current law regarding the base inventory or under the bill, but are subject to the continuing rule review process:[9]

- The Accountancy Board;
- The Architects Board and the Ohio Landscape Architects Board;

[8] R.C. 121.953.

[9] R.C. 121.95(A).

- The Ohio Athletic Commission;
- The Chemical Dependency Professionals Board;
- The Chiropractic Board;
- The Cosmetology and Barber Board;
- The Counselor, Social Worker, and Marriage and Family Therapist Board;
- The State Dental Board;
- The Board of Embalmers and Funeral Directors;
- The State Medical Board;
- The Motor Vehicle Repair Board;
- The Board of Nursing;
- The Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board;
- The State Board of Pharmacy;
- The State Board of Registration for Professional Engineers and Surveyors;
- The State Board of Psychology;
- The State Speech and Hearing Professionals Board;
- The State Vision Professionals Board;
- The State Veterinary Medical Licensing Board.

Covered regulatory restrictions

Under current law and for purposes of the bill, a "regulatory restriction" requires or prohibits an action. Rules that include the words "shall," "must," "require," "shall not," "may not," and "prohibit" are considered to contain regulatory restrictions.

However, the following types of rules or regulatory restrictions are not required to be included in a state agency's inventory of regulatory restrictions: [10]

- An internal management rule;
- An emergency rule;
- A rule that state or federal law requires the agency to adopt verbatim;
- A regulatory restriction contained in materials or documents incorporated by reference into a rule;
- Access rules for confidential personal information;

[10] R.C. 121.95(B) and (E).

- A rule concerning instant lottery games;
- Any other rule that is not subject to review by JCARR.

Criteria for elimination

The bill requires a state agency to review its base inventory of rules containing regulatory restrictions to determine whether each rule should be amended or rescinded because it does any of the following, or otherwise for the purpose of reducing regulatory restrictions:[11]

- Exceeds or conflicts with the purpose, scope, or intent of the statute under which the rule was adopted;
- Provides inadequate flexibility at the local level;
- Creates a compliance or oversight burden for the agency, or for any person or entity, that is greater than the burden that would be created if the agency accomplished the intended purpose of the restriction by other means;
- Is no longer useful or beneficial;
- Improperly incorporates a text or other material by reference, based on continuing-law standards;
- Duplicates, overlaps with, or conflicts with another state or federal law or rule. A rule duplicates, overlaps with, or conflicts with another law or rule if it imposes a duty or liability on a person or entity that the other law or rule also imposes on that person or entity, in whole or in part, or imposes a duty or liability that may require a person or entity to violate the other law or rule in whole or in part. If the rule duplicates, overlaps with, or conflicts with a rule adopted by another state agency, the bill requires the two agencies to determine which agency must amend or rescind its rule and to develop and execute a plan to work together to achieve the required oversight.
- Has an adverse impact on businesses, as determined under the continuing-law factors the Common Sense Initiative Office must apply when reviewing rules;
- Has an adverse impact on any other person or entity;
- Contains words or phrases whose meanings, in contemporary usage, are understood as being derogatory or offensive;
- Requires liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure;
- Imposes a more severe duty or liability than restrictions in neighboring states in order to accomplish the same goal.

[11] R.C. 106.03(A) and 121.951(A).

Agency implementation

Inventory of regulatory restrictions

Each agency to which the bill applies was required under continuing law, before December 31, 2019, to review its existing rules, prepare a base inventory of regulatory restrictions (see "**Covered regulatory restrictions**," above), and determine the number of those restrictions. In the base inventory, the agency was required to provide all of the following information concerning each regulatory restriction:

- A description of the regulatory restriction;
- The rule in which the restriction appears;
- The statute under which the restriction was adopted;
- Whether state or federal law expressly and specifically requires the agency to adopt the regulatory restriction or the agency adopted it under the agency's general authority;
- Whether removing the restriction would require a change to state or federal law, provided that removing a regulatory restriction adopted under a law granting the agency general authority is presumed not to require a change to state or federal law;
- Any other information JCARR considers necessary.

After completing the inventory, the agency was required to post it on its website and send a copy to JCARR, which was required to review the inventory and send it to the Speaker of the House and the President of the Senate.[12]

Progress report and revised inventory

Under the bill, not later than March 15, 2021, each agency must prepare an updated inventory and historical report of its progress in achieving its regulatory reduction goal according to the bill's schedule. In the report, the agency must explain how it applied the criteria described above under "**Criteria for elimination**" and must calculate its percentage reduction in regulatory restrictions by subtracting the current number of restrictions from the number of restrictions identified in the original inventory and dividing that result by the number of restrictions in the original inventory.

For example, if an agency identified ten restrictions in its original inventory and since then has added two new restrictions and eliminated four restrictions, the agency would have eight current restrictions. Ten original restrictions minus eight current restrictions equals a reduction of two restrictions. Two restrictions divided by ten original restrictions equals 0.2, or 20%. Therefore, the agency has achieved a 20% net reduction in restrictions.

The agency must produce a new revised inventory and historical report by March 15 of each year until the agency has achieved the required reduction in regulatory restrictions. The

[12] R.C. 121.95(B), (C), and (D). See also R.C. 101.68, not in the bill.

agency must send its completed reports electronically to JCARR, which must review them and send them to the Speaker of the House and the President of the Senate.[13]

Administrative department head authority

The bill authorizes the head of an administrative department created under R.C. 121.02 or an administrative department head appointed under R.C. 121.03 to direct otherwise independent officials or state agencies organized under the department to reduce regulatory restrictions in accordance with the bill.[14]

Common Sense Initiative Office

The bill also allows the Common Sense Initiative Office (CSIO) to review any rules containing regulatory restrictions that a state agency is required to include in its inventory of regulatory restrictions, either in the course of evaluating draft rules and business impact analyses under continuing law or at any other time.

If CSIO determines, based on the bill's criteria for eliminating regulatory restrictions, that an agency should eliminate a regulatory restriction, the bill requires CSIO to notify the agency that it is required to eliminate that regulatory restriction, and the agency must eliminate it. If the agency objects to the elimination of the regulatory restriction, the bill allows the agency to appeal CSIO's decision to JCARR. If JCARR also determines, based on the criteria for elimination, that the agency should eliminate the regulatory restriction, the agency must eliminate it.[15]

Joint Committee on Agency Rule Review administration

Assistance to agencies and annual report

The bill directs JCARR to advise and assist agencies in preparing their inventories of regulatory restrictions and in achieving the bill's reduction goals. Beginning in 2020, by June 15 of each year, JCARR must aggregate all the agencies' inventories and historical progress reports into an annual report that shows the agencies' overall progress in reducing regulatory restrictions. The annual report also must describe JCARR's work over the previous year and provide any appropriate recommendations for changes to statutes that contribute to the adoption of regulatory restrictions. JCARR must post the annual report on its website, send it to the Speaker of the House and the President of the Senate, and provide it to the members of JCARR.[16]

Database

The bill requires JCARR to consult with Legislative Information Systems (LIS) to create and maintain a system for state agencies to use to enter regulatory restriction data, create

[13] R.C. 121.951(B).

[14] R.C. 121.031.

[15] R.C. 107.57.

[16] R.C. 101.354.

required inventories, and send copies of inventories, reports, and other documents that will assist JCARR in aggregating reports under the bill.[17]

Cut Red Tape System

Under the bill, JCARR also must consult with LIS to establish, maintain, and improve the Cut Red Tape System, which must include a website and must allow members of the public to request information about regulatory restrictions and to communicate with JCARR about regulatory restrictions.[18]

Continuing rule review process

Five-year review of existing rules

Agency review

Under continuing law, a state agency must review each of its existing rules every five years to determine whether to amend or rescind them, based on listed criteria. The bill changes those criteria to match the criteria for elimination of regulatory restrictions (see "**Criteria for elimination**," above), both for rules that are subject to the bill's requirement to eliminate regulatory restrictions and for all other rules that are subject to the five-year review, including rules adopted by agencies that are not covered by the bill's requirements concerning regulatory restrictions (see the independent boards listed above under "**Covered agencies**"). The bill alters the criteria by doing all of the following:

- Removing a requirement to consider whether a rule needs amendment or rescission to eliminate unnecessary paperwork;
- Adding requirements that the agency consider whether the rule should be amended or rescinded because it does any of the following, or otherwise for the purpose of reducing regulatory restrictions:
  - Creates a compliance or oversight burden for the agency, or for any person or entity, that is greater than the burden that would be created if the agency accomplished the intended purpose of the restriction by other means;
  - Is no longer useful or beneficial;
  - Duplicates, overlaps with, or conflicts with a state or federal law. The bill specifies that a rule duplicates, overlaps with, or conflicts with another law or rule if it imposes a duty or liability on a person or entity that the other law or rule also imposes on that person or entity, in whole or in part, or imposes a duty or liability that may require a person or entity to violate the other law or rule in whole or in part. If the rule duplicates, overlaps with, or conflicts with a rule adopted by another state agency, the bill requires the two agencies to determine which agency must

[17] R.C. 101.355(A).

[18] R.C. 101.355(B).

amend or rescind its rule and to develop and execute a plan to work together to achieve the required oversight.

- Has an adverse impact on any person or entity;
- Imposes a more severe duty or liability than restrictions in neighboring states in order to accomplish the same goal.

Under continuing law, an agency must evaluate whether a rule should be amended or rescinded because it does any of the following:

- Exceeds or conflicts with the purpose, scope, or intent of the statute under which the rule was adopted;
- Provides inadequate flexibility at the local level;
- Improperly incorporates a text or other material by reference;
- Duplicates, overlaps with, or conflicts with other rules;
- Has an adverse impact on businesses, as determined by CSIO;
- Contains words or phrases whose meanings, in contemporary usage, are understood as being derogatory or offensive;
- Requires liability insurance, a bond, or any other financial responsibility instrument as a condition of licensure.

Because the bill makes the five-year review criteria match the criteria for eliminating regulatory restrictions, an agency that reviews all of its regulatory restrictions over the course of three years under the bill will already have completed the required five-year review for those rules. [19]

JCARR review

If the state agency conducts a five-year rule review and determines that the rule should not be changed, continuing law requires JCARR to review that decision and allows JCARR to recommend that the General Assembly invalidate the rule if JCARR disagrees with the agency's assessment of the rule. Under the bill, JCARR must apply the same modified standards discussed above when reviewing an existing rule, and the bill also allows JCARR to recommend invalidation if the agency has failed to justify the retention of a rule containing a regulatory restriction.[20]

Review of proposed rules

Under continuing law, when a state agency adopts a new rule, it also must file the proposed rule with JCARR for review, and JCARR may recommend that the General Assembly

[19] R.C. 106.03.

[20] R.C. 106.031.

adopt a concurrent resolution to invalidate the rule if JCARR makes certain findings. The bill expands the permitted reasons for JCARR to recommend the invalidation of a proposed rule to include the basis that the agency has failed to justify the proposed adoption, amendment, or rescission of a rule containing a regulatory restriction.[21]

HISTORY

Action	Date
Introduced	02-12-19
Reported, S. Gov't Oversight & Reform	05-08-19
Passed Senate (24-8)	05-08-19
Reported, H. State & Local Gov't	05-06-20

S0001-RH-CORRECTED-133/ks

[21] R.C. 106.021.

COUNSEL'S REPORT

Frank L. Merrill & Christine Rideout Schirra, Bricker & Eckler LLP
Counsel to the OMA
September 29, 2020

A. Ohio EPA Activities of Note

1. Ohio's General Permit for Ephemeral Streams

Ohio EPA issued a new general permit, titled Ohio General Permit for Filling Category 1 and Category 2 Isolated Wetlands and Ephemeral Streams, on June 25, 2020. The General Permit covers "the filling of, and the discharge of dredged material into, Category 1 and Category 2 isolated wetlands, of up to a total of one-half acre or less" and "the filling of, and the discharge of dredged material into ephemeral streams determined to not be waters of the United States and not subject to Section 404 or 401 of the Clean Water Act."

The General Permit requires submittal of a Pre-Activity Notification ("PAN") for impacts to ephemeral streams over 300 linear feet. It also requires submittal of a delineation and determination from the U.S. Army Corps of Engineers that the streams are not federally regulated. Impacts under 300 linear feet may be permitted without notification to Ohio EPA or completion of stream mitigation. For those impacts requiring submittal of a PAN, impacts that are temporary in nature require stream restoration and permanent impacts require stream mitigation. All filling activities must take place within 2 years.

The stated purpose of the General Permit is to fill gaps in the regulatory landscape following U.S. EPA's issuance of the Navigable Waters Protection Rule, which went into effect on June 22, 2020. On July 21, 2020, the Ohio Oil & Gas Association appealed the General Permit to the Ohio Environmental Review Appeals Commission (Case No. 20-7063), and on July 24, 2020, the Ohio Coal Association similarly appealed the General Permit (Case No. 20-7064). These appeals remain pending.

2. PFAS Regulation in Ohio

In February of this year, Ohio EPA began PFAS testing of nearly 1,500 public water systems in Ohio for six PFAS chemicals: PFOA, PFOS, GenX, PFBS, PFHxS and PFNA. The testing is in response to Governor Mike DeWine's statewide action plan, issued on December 2, 2019, to analyze PFAS in Ohio's drinking water. Ohio EPA temporarily suspended testing in March 2020 due to the COVID-19 pandemic, but has since resumed testing efforts. In a news release dated July 17, 2020, Ohio EPA announced that its testing has produced results for more

than 300 public water systems thus far. According to Ohio EPA, the testing revealed no PFAS detections in 286 facilities, and 17 detections that were below the action level. Ohio EPA also announced on June 17, 2020 that its analysis of the Village of Bridgeport's water revealed levels of PFNA at 21.8 parts per trillion (ppt), which is above the Ohio EPA action level of 21 ppt. Ohio EPA is currently working with the Village of Bridgeport to develop a long-term solution. Ohio EPA expects to complete sampling of Ohio's 1,500 public water systems by the end of 2020.

In an August 27, 2020 letter to the Department of Defense (DOD) Secretary Mark Esper, Governor DeWine requested DOD cooperation in addressing per- and polyfluoroalkyl substances (PFAS) threatening the drinking water supply in the Dayton area. More specifically, Governor DeWine requested that the DOD enter into a cooperative agreement with Ohio EPA and the City of Dayton in order to protect the Great Miami Buried Valley Aquifer from PFAS contamination at the Wright Patterson Air Force Base operated by the DOD. The Great Miami Buried Valley Aquifer supplies drinking water to more than 2.3 million people in Southwest Ohio, including more than 400,000 people in the Dayton area, and is designated by U.S. EPA under the Safe Drinking Water Act as a sole-source aquifer, meaning there is no other viable source of water for the area. According to Governor DeWine, the City of Dayton's wellfield is directly adjacent to and down-gradient from Wright Patterson Air Force Base operations, and Wright Patterson's monitoring wells have detected plumes of PFAS compounds migrating toward the City of Dayton wellfield. Under the National Defense Authorization Act for Fiscal Year 2020, state governors can request that the Secretary of Defense direct DOD installations to enter into cooperative agreements to address PFAS issues.

3. Proposed Amendment to Ohio's SIP

On August 10, 2020, Ohio EPA issued for public comment a draft letter for submittal to U.S. EPA, in which it requested that R.C. 3704.03(F)(2)(b)(iv) be incorporated into Ohio's State Implementation Plan (SIP). R.C. 3704.03(F)(2)(b)(iv) pertains to air pollution control installation permits, which are effective for a period of 18 months (and typically allow for one extension). The language within R.C. 3704.03(F)(2)(b)(iv) specifically provides that the 18-month time-period during which installation permits are to remain in effect is tolled in the event that the permit is appealed to the Environmental Review Appeals Commission.

In its draft letter, Ohio EPA notes that the majority of the provisions within R.C. 3734.03(F)(2)(b) are also found within Ohio Administrative Code (OAC) Rule 3745-31-07, which was approved into Ohio's SIP in 2015. However, Ohio EPA notes that it recently realized that R.C. 3734.03 (F)(2)(b)(iv) is not contained within OAC 3745-31-07, and therefore not currently a part of Ohio's SIP. The OMA has filed comments in support of Ohio EPA's draft letter.

4. Ohio EPA's Proposed Credible Data Program Wave 2 Rules

Ohio EPA has issued a public notice for proposed changes to Ohio Administrative Code Chapter 3745-4, the Credible Data Program. The credible data program is a surface water monitoring program designed to encourage and oversee the collection, analysis and use of data collected by volunteer individuals and organizations, which may then be considered by Ohio EPA in implementing its surface water programs. The most notable proposed change is Ohio EPA's

proposed addition of "state universities" to the definition of "state environmental agency" found within OAC 3745-4-02.

This is notable because data submitted by "state environmental agencies" shall be deemed credible by rule pursuant to OAC 3745-4-01, without the submitter first having to go through the process of becoming a qualified data collector. The other state environmental agencies listed within the definition of "state environmental agencies" include Ohio EPA, Ohio Department of Natural Resources, Ohio Department of Health Bureau of Environmental Health, Ohio Department of Agriculture Livestock Environmental Permitting Program, the Bureau of Underground Storage Tank Regulations, and Ohio Department of Transportation Office of Environmental Services.

Ohio EPA is accepting comments on the proposed rulemaking through October 8, 2020.

5. Ohio EPA Early Stakeholder Outreach on Variances from Water Quality Standards for Point Sources

Ohio EPA submitted an early stakeholder outreach notification in July 2020 pertaining to Ohio Administrative Code 3745-1-38, Variances from Water Quality Standards for Point Sources. The rule details requirements for variance eligibility, time frames, application procedures, approval process, and requirements for coverage under the mercury variance. Several of the proposed changes incorporate requirements reflective of those in the revised federal water quality standards. Additional anticipated changes by Ohio EPA include proposed changes to the mercury variance conditions, and an addition of an ammonia variance for lagoon systems.

The OMA submitted comments to Ohio EPA on August 28, 2020 in response to this early stakeholder outreach notification, requesting to be included in any meetings or future discussions on amendments to this rule and noting its belief that greater flexibility is needed with the mercury variance portion of the rule in particular.

B. U.S. EPA Activities of Note

1. Navigable Waters Protection Rule

On June 22, 2020, U.S. EPA's Navigable Waters Protection Rule went into effect. The Navigable Waters Protection Rule, a replacement for the Obama Administration's Clean Water Rule, seeks to define what constitutes "waters of the United States," the term within the Clean Water Act that controls permitting and regulatory requirements for waterbodies that fall within that definition.

The Navigable Waters Protection Rule lists four categories of waters that would be subject to federal jurisdiction: (1) territorial seas and waters used in interstate or foreign commerce; (2) certain tributaries; (3) lakes and ponds; and (4) wetlands that abut any of the other three types of waters. The Rule further details 12 categories of exclusions, or features, which are not "waters of the United States." Among these are features that only contain water in direct response to rainfall (e.g., ephemeral features) and isolated wetlands (i.e., wetlands that do not abut, are separated by

more than a natural berm from, are not inundated by flooding in a typical year from and do not have a direct hydrologic surface connection in a typical year to a jurisdictional non-wetland water).

Since the Navigable Waters Protection Rule went into effect, legal challenges have been filed in numerous federal district courts. On June 19, 2020, the District Court for the District of Colorado stayed the effective date of the Rule, applying within the State of Colorado. The Rule is currently being implemented in all other states and jurisdictions, aside from Colorado.

2. Army Corps Announces Proposal to Reissue and Modify Nationwide Permits

On August 3, 2020, the U.S. Army Corps of Engineers (Corps) announced a proposal to renew and revise its 52 nationwide permits and issue five new nationwide permits. Nationwide permits, which are general permits that authorize work in wetlands and other regulated waters, offer an abbreviated permitting process for those activities similar in nature that are deemed to cause minimal adverse environmental impacts to aquatic resources, separately or on a cumulative basis. The Corps' proposal notes that it follows President Trump's Executive Order 13783, Promoting Energy Independence and Economic Growth, which was issued on March 28, 2017, and instructed federal agencies to review existing regulations that potentially burden the development or use of domestically produced energy resources.

The Corps identified nine nationwide permits to be revised and five new permits to be issued, and is proposing to reissue its remaining nationwide permits so all nationwide permits remain on the same five-year approval cycle. (The nationwide permits currently in effect were issued in 2017 and are not set to expire until March 28, 2022.) The five new nationwide permits to be issued pertain to: electric utility line and telecommunications activities; utility line activities for water and other substances; water reclamation and reuse facilities; seaweed mariculture activities; and finfish mariculture activities. The current proposal also involves splitting the current Nationwide Permit 12 into three parts: oil and natural gas pipelines; electric utility lines and telecommunication lines; and utility lines conveying water, sewage and other substances.

On September 15, 2020, the Corps published its notice of proposed rulemaking in the Federal Register (85 FR 57298) for the reissuance and modification of the nationwide permits. The Corps is requesting that interested parties submit comments on or before November 16, 2020. After review of public comments, the Corps can prepare the final nationwide permits to replace those currently in effect.

3. Department of Justice Issues Clean Water Act Enforcement Policy

On July 27, 2020, the U.S. Department of Justice (DOJ) issued a memorandum memorializing and expanding upon the DOJ's existing, informal policy giving states primacy in enforcement of Clean Water Act civil cases. The memorandum sets forth the Environment & Natural Resources Division's policy of disfavoring federal enforcement of civil Clean Water Act violations in instances where a state has already instituted a state proceeding for penalties under an analogous State law arising from the same operative facts. The memorandum specifically requires pre-approval requests and express authorization to be received in order to pursue a subsequent enforcement action where the State already sought a penalty.

4. Proposed Amendment to Ohio's SIP

On March 23, 2020, U.S. EPA proposed to remove the air pollution nuisance rule from the Ohio State Implementation Plan (SIP), as U.S. EPA determined that the rule was not relied upon by Ohio to demonstrate attainment or maintenance of any National Ambient Air Quality Standards (NAAQS). On May 22, 2020, the OMA filed comments in support of U.S. EPA's proposed action. U.S. EPA has not yet acted upon its proposal.

The removal of the air pollution nuisance rule from Ohio's SIP will allow Ohio EPA to discontinue its current practice of including a nuisance provision as a standard term and condition within each air permit that it issues. In practice, the inclusion of the nuisance provision within these air permits allows for the filing of a citizen suit alleging that a facility is in violation of the nuisance provision, even if Ohio EPA says the facility does not operate as a nuisance.

C. Judicial

1. Nationwide Permit 12 Litigation

On April 15, 2020, the U.S. District Court for the District of Montana issued an order with potentially broad-sweeping implications for energy-related projects across the country. The case centered on the permitting of the Keystone XL Pipeline, and the issuance of Nationwide Permit 12 (NWP 12) in particular. NWP 12 is a commonly used general permit that authorizes activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in U.S. waters. In resolving the plaintiffs' claim that the U.S. Army Corps of Engineers' (Army Corps) 2017 reissuance of NWP 12 violated the Endangered Species Act (ESA), the court found that the Corps failed to comply with the ESA when issuing NWP 12 by failing to conduct a programmatic ESA Section 7 consultation. The court vacated NWP 12 and remanded it back to the Corps for proper completion of a programmatic consultation pursuant to ESA Section 7. In response to the decision, on April 17, 2020, Army Corps Headquarters instructed Corps Districts across the country not to verify any pending pre-construction notices for compliance with NWP 12 until further direction from headquarters.

On May 11, 2020, in response to a motion to stay the effectiveness of its April 15 order, the district court denied the motion for partial stay but amended the remedy set forth in its prior April 15 order. More specifically, in its May 11 order, the court amended its prior order such that NWP 12 is vacated as it relates to the construction of new oil and gas pipelines, but NWP12 is still to remain in place for non-pipeline construction activities and routine maintenance, inspection and repair activities on existing NWP12 permitted projects.

The Army Corps appealed the district court orders to the Ninth Circuit Court of Appeals. After the Ninth Circuit denied the Army Corps' emergency motion for a partial stay of the orders pending appeal, the Army Corps applied for a stay of the district court orders to the U.S. Supreme Court. In a one-paragraph order authored by Justice Elena Kagan, the U.S. Supreme Court stayed the district court order, except as it applies to the Keystone XL pipeline. The stay is to remain in

place pending disposition of the appeal currently pending before the Ninth Circuit Court of Appeals and any such future writ of certiorari that may be sought and granted by the U.S. Supreme Court. The appeal still remains pending with the Ninth Circuit Court of Appeals and is currently at the briefing stage.

TO: **OMA Environment Committee**
FROM: **Rob Brundrett**
RE: **Environment Public Policy Report**
DATE: **September 29, 2020**

Overview

The COVID-19 pandemic and the Larry Householder bribery scandal slammed the brakes on any robust legislative agenda through the spring and summer months. The General Assembly has been returning intermittently through the summer to take care of lingering issues. However no new or major environmental legislation or policy is expected in the coming months.

With the reduction of tax revenue there was concern that H2Ohio would lose funding. All first year funding was fully distributed, but there is a question mark for the second year funding. In the meantime, a wide variety of projects tied to H2Ohio continue as planned.

PFAS water testing was delayed due to COVID-19. The agency was attempting to test the vast majority of Ohio's public water systems. Testing was restarted in July and expected to continue through the end of 2020.

The OMA continues to be heavily engaged at the agency level regarding rules and regulations that impact Ohio's manufacturers.

OHIO EPA COVID-19 INFORMATION

Ohio EPA Requests Electronic Filings of Plans, Permit Applications

Ohio EPA has announced that because its district offices and central office are temporarily closed, businesses are encouraged to submit plans, permit applications, and other required documents electronically when there are existing avenues to do so, such as eBiz. Plans under 25 MB can be emailed. For large plans over 25 MB, entities should work with the reviewer/division to upload via LiquidFiles. Directions for submitting docs via LiquidFiles are available on YouTube (https://www.youtube.com/watch?v=BkeiTm5e9zE&feature=youtu.be).

Ohio EPA staff has been told they will be working from home until January 4, 2021.

How to Contact Ohio EPA Staff During the COVID-19 Crisis

Due to COVID-19 concerns, Ohio EPA is currently operating with many staff members working remotely. The agency wants businesses to know that if you are working with staff on a current project — and you know the name of the employee you are working with — you can email them using this format: firstname.lastname@epa.ohio.gov. Or call the employee directly.

The agency's website has contact information for every district, division, and office. Businesses can contact Ohio EPA's main phone line at (614) 644-3020. To report a spill or environmental emergency, contact the spill hotline (800) 282-9378 or (614) 224-0946.

Ohio EPA COVID-19 Guidance

Earlier this year, the U.S. EPA and other environmental regulators developed temporary enforcement discretion policies to mitigate the impact of the pandemic on their own employees, as well as on the employees of regulated companies and their contractors. States, including Ohio, also adopted their own enforcement discretion policies.

Both U.S. EPA and Ohio EPA have terminated these enforcement discretion policies.

In the early stages of the pandemic, Ohio EPA allowed for more regulator leniency. Ohio EPA's COVID-19 webpage now states:

With the lifting of Ohio's stay at home order and the reopening of businesses under Ohio's Responsible RestartOhio Plan, **Ohio EPA discontinued considering any new COVID-19 regulatory flexibility requests effective Aug. 31, 2020**. This deadline is also consistent with U.S. EPA's termination of federally related regulatory flexibility requests.

General Assembly News and Legislation

Senate Bill 2 – Statewide Watershed Planning

The bill's goal is to create a comprehensive statewide watershed planning structure to be implemented by local soil and water conversation districts to encourage efficient crop growth, soil conservation and water protection methods. The bill specifically states that it is the General Assembly's intent to collaborate with organizations representing agriculture, conservation, the environment, and higher education to establish a certification program for farmers that utilize practices designed to minimize impacts to water quality.

The Senate sees the bill as a complemental piece of legislation to the work done in the budget on creating and funding H2Ohio. The House of Representatives has held five hearings on the Senate bill.

House Bill 7 – H2Ohio Trust Fund

The bill creates the H2Ohio Trust Fund for the protection and preservation, and restoration of the water quality of Ohio's lakes and rivers. It requires the Ohio Water Development Authority to act as trustee of the fund and grants them full powers to invest money. It also creates the H2Ohio Advisory Council to establish priorities for use of the fund for water quality initiatives.

The House initially removed most of the funding for H2Ohio from the state budget. However, the startup funding was reinserted during House and Senate discussions along with other H2Ohio framework provisions. The House passed the bill and it has received one hearing in the Senate last fall.

Senate Bill 50 – Increase Solid Waste Disposal Fee

Senator Eklund has reintroduced Senate Bill 50. The bill would increase one of the state fees levied on the transfer or disposal of solid waste in Ohio. The proceeds of this increase will be deposited into the Soil and Water Conservation District Assistance Fund. Last General Assembly the OMA worked with allies to oppose the fee increase. Recently the Soil and Water Conservation Districts have been the point agency on any new water programs to battle nutrient runoff. The bill has had two hearings. The budget bill provided increased state funding to the soil and water conversation districts.

Senate Bill 222 – Container Use Restriction

The Senate version of House Bill 242 also authorizes the use of an auxiliary container for any purpose; it also prohibits the imposition of a tax or fee on those containers and applies existing anti-littering laws to those containers. The OMA provided proponent testimony on the bill in Senate committee.

House Bill 242 – Container Use Restriction
The Ohio House of Representatives last week voted 58-35 to accept the Senate's changes to House Bill 242 — often referred to as the "plastic bags bill" in the news media. HB 242 prevents local governments from putting fees or bans on the use of auxiliary containers, such as plastic bags or other types of containers often used in retail and the food and beverage industry. Ohio is a manufacturing leader for these types of containers.

The major change to HB 242 made by the Senate was the inclusion of a 12-month sunset on the pre-emption provision. Several local governments in Ohio had previously banned certain types of containers, although some had already repealed their ban due to COVID-19. Bill supporters, including the OMA who testified multiple times in support of the bill, say HB 242 provides uniform business regulations across the state.

The OMA supported the bill and will work to increase the length of the pre-emption in future legislation. Gov. Mike DeWine is expected to sign the bill.

House Bill 328 – PFAS Firefighting Foam
The bill prevents testing and training with firefighting foam with PFAS added. The bill which is supported by the industry has received two hearings in the House.

House Bill 491 – Plastic Pollution Awareness Day
The bill designates the fifteenth day of February as "Plastic Pollution Awareness Day." The bill has not had any hearings.

House Bill 497 – PFAS Drinking Standard
The bill would require the Director of Environmental Protection to adopt rules establishing maximum allowable contaminant levels in drinking water and water quality standards for certain contaminants (PFAS). The has not had any hearings and was referred to the House Health committee.

House Bill 522 – Waste Disposal Conservancy Districts
The bill authorizes conservancy districts to provide for the collection and disposal of solid waste. The bill has not had any hearings to date.

House Bill 675 – Clean Ohio Program
The bill makes revisions to the Clean Ohio Program and makes an appropriation. There have been no hearings.

Regulations
OMA Files Federal Comments on Ohio Air Pollution Nuisance SIP
This summer the OMA led a coalition of business groups by filing comments to the U.S. EPA's correction of the inclusion of Ohio's air pollution nuisance rule. The comments agree with U.S. EPA's proposal to remove the nuisance rule from the Ohio SIP. Ohio's public nuisance provision is a general rule prohibiting public nuisances and has not connection with the purposes for which SIPs are developed and approved. Manufacturers often find themselves in the crosshairs of lawsuits based on the SIP provision even though they are in total compliance with the permit limits. The coalition recently filed supporting comments. Early indications from U.S. EPA seem positive.

OMA Submits Comments on Water Quality Standards for Point Sources
On August 28, OMA submitted comments to Ohio EPA regarding the agency's Early Stakeholder Outreach (ESO) – OAC Chapter 3745-1-38 – Variances from Water Quality Standards for Point Sources.

OMA highlighted the wide ranging impact of the rule and stressed in particular that greater flexibility is needed with respect to the mercury variance portion of the rule.

OMA Submits Comments on Ambient Water Quality Criteria
The OMA submitted comments regarding the U.S. EPA's Draft Ambient Water Quality Criteria Recommendations for Lakes and Reservoirs of the Conterminous United States. The OMA outlined serious concerns regarding the proposed use of the draft recommendations, as well as some of the assumptions underlying the recommendations.

The OMA stated that the draft recommendations, if pursued, "should not be issued as Clean Water Act Section 304(a) criteria, but rather as guidance for the limited purpose of evaluating whether nutrients may be a cause of a confirmed use impairment in a lake or reservoir, and only after the models are revised to address their overly conservative assumptions."

Ohio Submits Ozone Documents to U.S. EPA
Last month, Ohio EPA submitted to U.S. EPA the emissions inventory and emission statement program to satisfy attainment demonstration requirements under the 2015 ozone National Ambient Air Quality Standard (NAAQS).

Cleveland, Cincinnati in Non-Attainment for Ozone Standard
Earlier this month, Ohio EPA hosted calls to notify stakeholders in the Cincinnati and Cleveland areas that both regions will not be in attainment under the federal ozone standard of 2015. Both regions are required to be in compliance with the standard by Aug. 3, 2021.

Because both regions are reporting higher ozone numbers, they will be considered as being in "moderate non-attainment." This status change will trigger additional compliance requirements under the federal Clean Air Act, including emissions offsets.

The OMA will continue to work with members and Ohio EPA on Ohio's responses to these new challenges. Ohio EPA says they are working with other states to examine non-point source solutions — not just point sources, which tend to punish manufacturers.

Good News for Manufacturers: U.S. EPA Declines to Tighten Ozone Standards
Ohio manufacturers should note that the U.S. EPA last week did not propose stricter ozone standards despite pressure from environmental groups. The EPA's new proposal retains the 70-part-per-billion (ppb) standard for ozone, commonly referred to as smog, set under the Obama administration. Even under the current standard, the Cincinnati and Cleveland areas are both at high risk of being elevated to "moderate non-attainment" status, which would mean tighter controls on emitting industries.

"At a time when we are facing record-breaking unemployment, a lower ozone standard could slow our economic rebound and threaten manufacturing competitiveness," the National Association of Manufacturers wrote in a statement of support for the EPA's proposal.

OMA Comments on U.S. EPA Stormwater Permits

The OMA submitted comments on the U.S. EPA's National Pollutant Discharge Elimination System (NPDES) 2020 Issuance of the Multi-Sector General Permit (MSGP) for stormwater discharges associated with industrial activity. The EPA's draft was more than 1,000 pages. The OMA has followed the MSGP closely for years as it is a good indication of where Ohio EPA will fall on the issue.

Three states are urging the U.S. EPA to impose new mandates related to the monitoring and reduction of per- and polyfluoroalkyl substances (PFAS) from industrial stormwater discharges. Colorado, Massachusetts, and New Mexico recently submitted comments on the draft Multi-Sector General Permit (MSGP) that ask EPA to require permitted industrial facilities to monitor PFAS in their stormwater discharges and to develop practices intended to minimize the potential for PFAS to be introduced into stormwater.

Ohio EPA Issues General Permit for Impacts to Ephemeral Streams

Ohio EPA announced the availability of a general permit that will be available to applicants for projects that impact ephemeral streams, which flow only for a short time, usually after a large storm or snowmelt.

The general permit comes in response to U.S. EPA's recently finalized Navigable Waters Protection Rule. The new federal rule removes certain waters from federal jurisdiction under the federal Clean Water Act. States retain the authority to determine oversight of these non-jurisdictional waters.

The OMA submitted comments on Ohio EPA's proposed General Permit for Isolated Wetlands and Ephemeral Streams. The new general permit is a product of the recent federal rule addressing "waters of the United States" (WOTUS) under the Navigable Waters Protection Rule.

Ohio EPA Agency News

Lake Erie Commission Advisory Group Includes OMA Members

The Lake Erie Commission has voted to establish an advisory group to better vet technology-driven proposals that will help combat harmful algal blooms to protect Lake Erie and Ohio waterways. Among the OMA members that have been named to the H2Ohio Technology Assessment Program advisory council are Scotts Miracle-Gro Company and Owens Corning.

Ohio EPA Launches 'Ask an Expert'

Ohio EPA's Office of Compliance Assistance and Pollution Prevention (OCAPP) has created a new avenue for companies to receive free and confidential environmental assistance regarding regulatory concerns about air, waste, water, and other environmental requirements. This service is available Monday through Friday, from 10 a.m. to 12 p.m. — and from 1 p.m. to 3 p.m. https://ohioepa.custhelp.com/app/contactus

Ohio Changes Direction on PFAS Testing

Due to the COVID-19 pandemic, Ohio paused its statewide PFAS testing plan due to COVID-19. The state resumed testing last month.

Last year Gov. Mike DeWine directed state agencies to analyze the prevalence of per- and polyfluoroalkyl substances (PFAS) in Ohio's drinking water. This action followed a Sept. 18 letter from Gov. DeWine and 14 other governors to federal lawmakers, calling for more comprehensive federal legislation on PFAS standards.

In December an action plan was released to study all of Ohio's drinking water for PFAS chemicals. The plan contains education and other support for communities who's water tests positive for certain PFAS chemicals. The OMA worked with the agency to ensure that the plan would be fairly developed as concerned to Ohio's manufacturers.

The debate over PFAS has become controversial as plaintiffs' lawyers aggressively attempt to litigate against manufacturers.

Ohio EPA Compliance Assistance Conference Set for Sept. 21 – Oct. 8

Ohio EPA's Compliance Assistance Conference is going virtual this year. The annual event will be held Sept. 21 through Oct. 8. The free conference will provide daily interactive sessions focusing on compliance with air, waste, and water regulations — spaced over three consecutive weeks. The agency says registration and more information will be coming soon.

H.B. 242*
133rd General Assembly

Bill Analysis

Click here for H.B. 242's Fiscal Note

Version: As Reported by Senate Local Government, Public Safety, and Veterans Affairs

Primary Sponsors: Reps. Lang and Jones

Helena Volzer and Sam Benham, Attorneys

SUMMARY

- Prohibits, for twelve months, local governments from imposing a tax, fee, assessment, or other charge on auxiliary containers (for example, a plastic or paper bag), the sale, use, or consumption of auxiliary containers, or on the basis of receipts received from the sale of auxiliary containers.
- Specifies that a person may use an auxiliary container for purposes of commerce or otherwise, but sunsets this specification after twelve months.
- Clarifies that existing law prohibiting the improper deposit of litter applies to auxiliary containers under the state anti-littering law.

DETAILED ANALYSIS

Auxiliary containers

The bill enacts new law and modifies existing law governing "auxiliary containers." Under the bill, auxiliary containers are single-use or reusable packaging such as bags, cans, bottles, or other containers made of materials such as plastic, glass, metal, or cardboard that is designed for transporting food, beverages, or other merchandise from or at a restaurant, grocery store, or other retail establishment.[1] In particular, the bill does all of the following with respect to auxiliary containers:

* This analysis was prepared before the report of the Senate Local Government, Public Safety and Veterans Affairs Committee appeared in the Senate Journal. Note that the legislative history may be incomplete.

[1] R.C. 3767.32(D); Section 3(A) of the bill.

1. Temporarily prohibits a municipal corporation, charter county, or limited home rule township from imposing a tax, fee, assessment, or other charge on auxiliary containers, the sale, use, or consumption of such containers, or on the basis of receipts received from the sale of such containers (for a more detailed explanation of this provision, see "**Local fee and tax prohibitions**," below);[2]
2. Specifically authorizes a person to use an auxiliary container for purposes of commerce or otherwise. The bill specifies that nothing in this authorization may be construed to prohibit the authority of a county, municipal corporation, or solid waste management district from implementing a voluntary recycling program (see **COMMENT** 1);[3]
3. Sunsets the prohibition on local fees or taxes and the specification regarding the use of auxiliary containers twelve months from the bill's effective date;[4]
4. Clarifies that existing law prohibiting the improper deposit of litter applies to auxiliary containers under the state anti-littering law. Current law prohibits a person from improperly depositing litter on public property, private property not owned by the person, or in or on waters of the state. Violation of the prohibition is a third degree misdemeanor, and a sentencing court may require the violator to remove litter from property or from the waters of the state.[5]

Local fee and tax prohibitions

Municipal corporations

Municipal corporations are endowed by the Ohio Constitution with home rule powers, which authorize them to exercise powers beyond those provided in state law and, in certain respects, contrary to state law.[6] In particular, municipal corporations may impose taxes without explicit authorization to do so under state law.[7] However, the Ohio Constitution does allow the General Assembly to enact laws limiting the power of municipalities to levy taxes and assessments.[8] Indeed, continuing law prohibits municipalities from levying several types of taxes, including sales taxes and gross receipts taxes.

The bill further restricts municipal taxing power by prohibiting municipal corporations from imposing a tax on auxiliary containers themselves, on the sale, use, or consumption of such containers, or on the basis of receipts received from the sale of such containers. The bill

[2] R.C. 301.30, 504.04(B)(8), and 715.013(B).

[3] Section 3(B) of the bill.

[4] R.C. 301.30, 504.04(B)(8), and 715.013(B); Section 4 of the bill.

[5] R.C. 3736.32 and 3767.99, not in the bill.

[6] Ohio Constitution, Article XVIII, Section 3.

[7] *Gesler v. City of Worthington Income Tax Bd. of Appeals*, 138 Ohio St.3d 76; 2013-Ohio-4986; 3 N.E. 1177.

[8] Ohio Constitution, Article XIII, Sections 6 and 13.

also prohibits a municipal corporation from imposing a fee, assessment, or other charge on any of those bases (see **COMMENT** 2).[9]

Charter counties

In general, counties possess only those powers expressly delegated to them by state law, or those which are necessarily implied from those powers.[10] However, the Ohio Constitution allows counties, with voter approval, to adopt a charter, which may endow the county with the same home rule powers exercised by municipal corporations, including the power of taxation.[11] However, the charters of both of the counties in Ohio that have adopted charters, Cuyahoga and Summit, specifically disclaim the power to levy any tax other than the taxes permitted under state law for noncharter counties.[12]

As with municipal corporations, the bill prohibits a charter county from imposing a tax, fee, assessment, or other charge on auxiliary containers, on the sale, use, or consumption of such containers, or on the basis of receipts received from the sale of the containers (see **COMMENT**). But the bill specifies that charter counties may still impose their general sales and use taxes on such containers to the extent the sale of such containers is taxable or becomes taxable in the future under the state's sales and use tax law.[13]

Limited home rule townships

Similar to counties, townships are generally limited to acting in accordance with powers delegated to them under state law.[14] Continuing law authorizes certain townships with at least 3,500 residents to form a limited home rule government, which is allowed to exercise home rule powers, subject to certain exceptions. Among other exceptions is a prohibition against levying taxes not authorized under state law for all townships.[15] Accordingly, even limited home rule townships are prohibited from levying taxes not authorized by state law, but this does not

[9] R.C. 715.013(B).

[10] See *Geauga County Bd. of Commrs. v. Munn Rd. Sand & Gravel*, 67 Ohio St.3d 579, 621 N.E. 696 (1993); *State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84 (1935), syllabus, paragraph 1.

[11] Ohio Constitution, Article X, Section 3.

[12] Article I, Section 1.02, Charter of Cuyahoga County, available at: Article I, Section 1.02, Charter of Cuyahoga County, available at: http://council.cuyahogacounty.us/en-US/Charter-CuyahogaCounty.aspx, and Article I, Section 1.02, Charter of Summit County, available at: https://co.summitoh.net/index.php/executive/charter-government.

[13] R.C. 301.30. Current sales and use tax law appears to exempt a broad range of items, some of which might qualify as auxiliary containers, when purchased by retailers for their customers' use – see R.C. 5739.02(B)(15).

[14] *See State ex rel. Schramm v. Ayres*, 158 Ohio St. 30, 106 N.E.2d 630 (1952) and *Drees Co. v. Hamilton Twp.*, 132 Ohio St.3d 186, 2012-Ohio-2370, 970 N.E.2d 916.

[15] R.C. 504.04(A)(1).

necessarily imply that they lack power to impose fees or other charges for regulatory purposes that are not regarded as taxes.

The bill expressly prohibits home rule townships from imposing a fee, assessment, or other charge on auxiliary containers, on the sale, use, or consumption of the containers, or on the basis of receipts received from the sale of the containers.[16]

COMMENT

1. The bill authorizes any person to use an auxiliary container for "purposes of commerce or otherwise." It also applies the existing littering law to the improper disposal of such containers. It is unclear how a municipal ordinance (enacted by a municipal corporation under its municipal home rule authority)[17] that prohibits persons from using auxiliary containers would interact with this general authorization.[18]

2. The bill prohibits municipal corporations and charter counties from imposing a "fee, assessment, or other charge" on auxiliary containers, on the sale, use, or consumption of such containers, or on the basis of receipts received from the sale of such containers.[19] Although the Ohio Constitution and county charters appear to allow state law's limitation on each subdivision's respective taxing power, it is unclear whether the Ohio Constitution authorizes the General Assembly to limit "fees and other charges" that might be imposed by a municipal corporation or charter county for regulatory or other public welfare purposes.[20]

Because the bill restricts municipal and charter county authority to impose fees and charges, it may interfere with a municipal corporation's or charter county's home rule authority.

Indeed, courts have held that a statute enacted by the General Assembly that purports to limit that constitutional authority may be invalid as applied to these home rule subdivisions.[21] The same issue does not arise with limited home rule townships, as their home rule authority is granted by state law and not the Ohio Constitution.

[16] R.C. 504.04(B)(8).

[17] Ohio Constitution, Article XVIII, Section 3.

[18] *See Canton v. State*, 95 Ohio St.3d 149, 2002-Ohio-2005, 766 N.E.2d 963.

[19] R.C. 301.30 and 715.013(B).

[20] *See Drees*, *infra.* for discussion of legal distinction between taxes versus fees and other government exactions.

[21] *See Canton*.

HISTORY

Action	Date
Introduced	05-13-19
Reported, H. State & Local Gov't	06-27-19
Passed House (58-35)	12-11-19
Reported, S. Local Government, Public Safety, & Veterans Affairs	05-26-20

July 31, 2020

VIA ELECTRONIC AND REGULAR MAIL

U.S. Environmental Protection Agency
EPA Docket Center
Docket No. EPA-R05-OAR-2020-0055, FRL-10006-83-Region 5
Mail Code 28221T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Supplemental Comment on the United States Environmental Protection Agency's ("EPA's") "Air Plan Approval; Ohio; Technical Amendment", Docket ID No. EPA-R05-OAR-2020-0055, FRL-10006-83-Region 5

Dear Administrator Wheeler:

The Ohio Chamber of Commerce, the Ohio Chemistry Technology Council, The Ohio Manufacturers' Association, API Ohio, and the Ohio Oil and Gas Association (the "Commenters") previously submitted comments in support of the agency's March 23, 2020 proposal to use the Clean Air Act ("CAA") error correction provision[1] to remove the air pollution nuisance rule OAC 3745-15-07 ("Nuisance Rule") from the Ohio State Implementation Plan ("SIP").[2] The Commenters are submitting this supplemental comment to call EPA's attention to a relevant new development after the close of the public comment period. Specifically, on July 15, 2020, EPA published a final rule removing general nuisance provisions and other rules from California's SIP that, like the Ohio rule, were approved in error and were inconsistent with the CAA.[3]

[1] 42 U.S.C.A. § 7410(k)(6).
[2] *See* Ohio Chamber of Commerce, Ohio Chemistry Technology Council and the Ohio Manufacturers' Association, Comments on the United States Environmental Protection Agency's "Air Plan Approval; Ohio; Technical Amendment", Docket ID No. EPA-R05-OAR-2020-0055, FRL-10006-83-Region 5, pp. 3-5 (detailed discussion on how the CA, MI, GA and other states' nuisance rules that have been removed; the definition of "air contaminants" under both CA and OH are the same.)
[3] Air Plan Revisions; California; Technical Amendments, 85 Fed. Reg. 42728 (July 15, 2020) (final rule).

In its proposal, EPA explained that "[r]ules that prohibit emissions causing general nuisance or annoyance in the community, [] address local issues but have essentially no connection to the purposes for which SIPs are developed and approved, namely the implementation, maintenance, and enforcement of the national ambient air quality standards (NAAQS). *See* CAA section 110(a)(1)."[4] The California general nuisance provisions are nearly identical to the Ohio nuisance rule. In general, they prohibit any person from ". . . [discharging] from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance or annoyance to any considerable number of persons or to the public or which endanger the comfort, repose, health or safety of any such persons or the public or which cause or have a natural tendency to cause injury or damage to business or property."[5]

EPA's decision to remove the general nuisance provisions from the California SIP further supports EPA's proposal to issue a technical amendment to the Ohio SIP by removing the general nuisance provisions. Like California's general nuisance provision, the prohibition of emissions causing general nuisance or annoyance in the community addresses local issues that have no connection to the purposes for which SIPs are developed and approved, namely the "implementation, maintenance, and enforcement of the national ambient air quality standards (NAAQS). *See* CAA section 110(a)(1).[6]

Sincerely,

Robert (Rob) Brundrett
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[4] 85 Fed. Reg. 22384, 22385 (Apr. 22, 2020).
[5] 83 Fed. Reg. at 43576 n.1 (Aug. 27, 2018) *See also* Ohio Admin. Code 3745-15-07 ("The emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances or combinations of substances, in such manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.").
[6] 85 Fed. Reg. 22384, 22385 (Apr. 22, 2020).

August 28, 2020

VIA Electronic Mail (dsw_rulecomments@epa.ohio.gov)

Ohio EPA Division of Surface Water
P.O. Box 1049
Columbus, OH 43215-1019
dsw_rulecomments@epa.ohio.gov

Re: **Comments on Ohio EPA's *Early Stakeholder Outreach – OAC Chapter 3745-1-38 – Variances from Water Quality Standards for Point Sources***

Dear Sir/Madam:

Pursuant to Ohio EPA's July 2020 Public Notice, the Ohio Manufacturers' Association (OMA) is hereby providing Ohio EPA with written comments to Ohio EPA's Early Stakeholder Outreach notification pertaining to Ohio Administrative Code 3745-1-38, Variances from Water Quality Standards for Point Sources.

The OMA is dedicated to protecting and growing manufacturing in Ohio. The OMA represents over 1,400 manufacturers in every industry throughout Ohio. For more than 100 years, the OMA has supported reasonable, necessary and transparent environmental regulations that promote the health and well-being of Ohio's citizens. The OMA appreciates the opportunity to comment on these rules at this Early Stakeholder Outreach stage.

The OMA's members are routinely impacted by Ohio EPA's water quality standards for point sources, including the provisions within OAC Rule 3745-1-38. The OMA therefore respectfully requests to be included in any meetings or future discussions on amendments to this rule, and looks forward to reviewing any draft proposed changes that are developed. In particular, the OMA believes that greater flexibility is needed with the mercury variance portion of the rule, and looks forward to further reviewing and discussing updates Ohio EPA may make to the multiple discharger mercury variance conditions contained within Rule 3745-1-38.

The OMA would like to thank Ohio EPA for the opportunity to comment. We look forward to working with Ohio EPA as these comments are taken under consideration and at future stages of this rulemaking.

Sincerely,

Rob Brundrett
Director, Public Policy Services

cc: Julianne Kurdila, Committee Chair
Christine Rideout Schirra, Esq.

August 20, 2020

Submitted Via https://www.regulations.gov

Mr. Lester Yuan
Health and Ecological Criteria Division
Office of Water
U.S. EPA
1200 Pennsylvania Avenue
Washington, DC 20460

Re: Comments on the *Draft Ambient Water Quality Criteria Recommendations for Lakes and Reservoirs of the Conterminous United States*, Docket ID No. EPA-HQ-OW-2019-0675

Dear Sir or Madam,

On May 22, 2020, the United States Environmental Protection Agency (USEPA) announced the availability of the Draft Ambient Water Quality Criteria Recommendations for Lakes and Reservoirs of the Conterminous United States: Information Supporting the Development of Numeric Nutrient Criteria (Draft Recommendations) and opened a 60-day public comment period. (85 FR 31184) On July 21, 2020, USEPA announced an extension of this comment period through August 20, 2020. (85 FR 44071) The Ohio Manufacturers' Association (OMA) appreciates the opportunity to submit these comments regarding the Draft Recommendations.

The OMA represents more than 1,300 members throughout Ohio. For more than 100 years, the OMA has supported reasonable, necessary, and transparent regulation that promotes the health and well-being of Ohio's citizens and the environment. Manufacturers across the state are actively engaged in protecting and improving the health of Ohio's important water resources, including lakes and reservoirs throughout the state, while supporting a vibrant and healthy economy. As detailed in these comments, many OMA members have a vital interest in, and the potential to have their operations impacted by, the Draft Recommendations.

While the Draft Recommendations reflect significant work and progress since the 2000 and 2001 "reference method" recommendations, the OMA has serious concerns regarding both the proposed use of the Draft Recommendations as well as some of the assumptions underlying the Draft Recommendations. In particular, and as detailed in our comments below, the Draft Recommendations, if pursued, should not be issued as Clean Water Act (CWA) Section 304(a) criteria but rather as guidance for the limited purpose of evaluating whether nutrients may be a cause of a confirmed use impairment in a lake or reservoir, and only after the models are revised to address their overly-conservative assumptions.

1. Relationship of Nutrient Parameters to Actual Impairment.

As published, the Draft Recommendations present a statistical method for calculating numeric criteria for phosphorus (P) and nitrogen (N) in lakes and reservoirs at concentrations that are designed to protect the designated uses of the target waterbodies. This type of bright-line criteria development is typically seen with toxic chemicals, where the presence of such a chemical above the bright-line value is specifically and definitively known to interfere with a designated use. In those cases, an exceedance of the criteria means that the water body is, in fact, not attaining its uses and an impairment designation is necessary and appropriate under the CWA.

For nutrients, the required analysis is different. Nutrients are naturally occurring and support and nourish the ecosystem at a variety of concentrations. Additionally, the link between nutrient concentrations and the target uses (aquatic life, drinking water or recreational) is indirect and impacted by many confounding variables, making it difficult to identify a direct link between a bright-line nutrient value (P or N) and a designated use. Under the Clean Water Act, federal ambient water quality criteria and state water quality standards are established at a level necessary to protect designated uses, requiring a verifiable link between the criteria and the use. (40 C.F.R. § 131.2) Contrary to this CWA structure, the Draft Recommendations instead look to estimate potentially protective criteria for N and P using a statistical analyses that establishes the target values by relating N and P to chlorophyll-a (Chl *a*) concentrations, and by further relating Chl *a* up through a secondary correlation to microcystin or to zooplankton/phytoplankton ratios. Because the Draft Recommendations do not establish a process for identifying a direct link from the nutrient concentration to a use impairment, this formulaic approach may result in estimated P and N bright-line criteria that are exceeded in a target water body that, in reality, meets the actual designated use. In those cases, an attaining water body suddenly becomes artificially, or presumptively, "impaired", triggering a waterfall of new regulatory restrictions on nutrients notwithstanding the functional use of the water body. This result runs contrary to, and is not justified under, the Clean Water Act's reliance on designated uses as establishing the ultimate attainment goals for our Nation's waters.

Additionally, because the new Draft Recommendations, if adopted, would result in some water bodies moving to "impaired" designations even where uses are met, the Draft Recommendations would result in unreasonable and unnecessary CWA permit limits designed to meet the artificial criteria. The CWA allows the agency to issue limits in CWA permits where necessary to achieve water quality standards and restore a designated use, but that authority does not extend to situations where a water body meets its uses and such limits would do nothing to protect or restore such a use. (40 C.F.R. § 122.44(d)) Accordingly, under the Draft Recommendations, manufacturers and other dischargers face the threat of unnecessarily stringent permit limits for N and P.

However, after peer review in accordance with the Office of Management and Budget's Bulletin on Peer Review (70 Fed. Reg. 2664)[1] and public comment and response are complete and the overly-conservative assumptions within the proposal are revised, the Draft Recommendations may have a role to play in a subsequent causal evaluation if a water is confirmed as impaired and nutrients are a suspect cause. If a water body is impaired (for example, high microcystin concentrations impair recreational use), the causal assessment process will identify potential sources for the impairment. Where nutrients are suspect (again, in our example, due to harmful algal blooms), the Draft Recommendations could be used as a screening tool to evaluate whether site-specific N or P targets should be developed in the total maximum daily load (TMDL) or similar process. Actual N or P targets could then be calculated for that particular lake or reservoir and set at site-specific concentrations designed to attain the designated use without over-regulating nutrients.

2. Impact of Overly-Conservative Model Outputs on Attainment Designations.

Further to Comment 1 above, because the Draft Recommendations do not establish a direct link between an N or P criteria and a verified impairment and because they include multiple layers of conservative assumptions, the Recommendations risk placement of many new water bodies into the "impairment" category notwithstanding the fact that such waters actually achieve their designated use. This risk is exacerbated by the conservative nature of the proposed models, which fail to account for the many variables that may contribute to an impairment and which may mischaracterize acceptable nutrient concentrations as harmful. By way of specific example, consider a lake that exhibits healthy aquatic life, enjoys recreational use and meets drinking water needs. If this lake were to face new N and P criteria developed under the Draft Recommendations that are lower than the lake's concentrations, the lake, by definition, will be labelled as "impaired", and the lake will face a nutrient total maximum daily load (TMDL) and new restrictions on discharges to that lake. When this example is extrapolated across the thousands of lakes that might fall into this scenario, it becomes evident that the "presumptive impairment" outcomes would lead to millions of dollars in unnecessary and wasteful control technology and impose an extraordinary burden on the regulatory agencies who oversee TMDL programs.

The defining purpose of water quality criteria is to protect the designated uses of a waterbody. It is evident that application of the Draft Recommendations would alter this purpose and create the arbitrary and capricious outcome of implied impairment, completely contrary to the requirements of the CWA. For the reasons outlined in Comments 1 and 2, we urge USEPA to withdraw the Draft Recommendations and believe that any further action on the Draft Recommendations should be limited, at most, to guidance on the causal assessment process following a confirmed impairment determination.

[1] https://www.epa.gov/osa/office-management-and-budgets-final-information-quality-bulletin-peer-review

3. Role of Limiting Nutrient Concept in Assessing Causes of Impairment.

If USEPA proceeds with final publication of the Draft Recommendations, the Draft Recommendations should be revised to clarify that nutrient causes of impairment should be evaluated on a "limiting nutrient" approach. The Draft Recommendations as proposed indicate that "[d]raft national criteria models are provided for both TN and TP as the simultaneous control of both nutrients provides the most effective means of controlling the deleterious effects of nutrient pollution." (Draft at 2) This approach could result in an "independent applicability" assessment where one nutrient is regulated even where the other nutrient (also regulated) controls the target condition. This secondary regulation of the non-limiting nutrient would result in significant regulatory compliance costs for no measurable progress towards attainment of the designated use. Such an outcome runs contrary to the CWA and would impose unreasonable burdens on the regulated community.

* * *

As outlined in these comments, we request that USEPA withdraw the Draft Recommendations as potential water quality criteria. If USEPA does issue the Draft Recommendations, either as federal criteria guidance or as an impairment causation assessment tool, we request that USEPA revise the proposed models to reflect the technical concerns raised by the regulated community regarding the overly-conservative nature of the models.

We very much appreciate the opportunity to comment on the Draft Recommendations. Please contact me at (614) 629-6814 or rbrundrett@ohiomfg.com should you have any questions regarding the OMA's comments.

Sincerely,

Rob Brundrett
Director, Public Policy Services

cc: Julianne Kurdila, Chair, OMA Environment Committee
Frank Merrill, Esq., Bricker & Eckler LLP

State of Ohio Environmental Protection Agency
Division of Air Pollution Control

Ohio State Implementation Plan
2015 Ozone National Ambient Air Quality Standard
Emissions Inventory & Emissions Statement

Prepared by:
The Ohio Environmental Protection Agency
Division of Air Pollution Control

July 2020

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Appendices

1 Introduction

The 1990 Clean Air Act Amendments (CAAA) requires the United States Environmental Protection Agency (U.S. EPA) to set National Ambient Air Quality Standard (NAAQS) for pollutants considered harmful to public health and the environment. In 2015, the U.S. EPA established revisions to the primary and secondary National Ambient Air Quality Standards for ozone thereby replacing the 2008 ozone standards. The 2015 NAAQS for Ozone established a primary and secondary 8-hour ozone standard of 0.070 parts per million (ppm) (80 FR 65292).

Ground level ozone is not directly emitted into the air. It is formed as a product of chemical reactions between nitrogen oxides (NO_x) and volatile organic compounds (VOCs), referred to as ozone precursors, in the presence of sunlight. Industrial facilities, motor vehicle exhaust, gasoline vapors and chemical solvents are a few examples of emission sources contributing to these ozone precursors. Ozone is a harmful pollutant at ground level and is of particular concern during the summer months when sunlight and hot weather can form harmful ozone concentrations which can trigger a variety of chest, throat and lung related health problems.

The CAAA defines five ozone nonattainment area classifications based on severity for areas that exceed the NAAQS. The nonattainment area classifications are as follows (in order of increasing severity): marginal, moderate, serious, severe and extreme. The U.S. EPA “Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards” and “Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards” rules designated nonattainment and attainment/unclassifiable areas nationwide effective January 16, 2018 (82 FR 54232) and August 3, 2018 (83 FR 25776), respectively. On March 9, 2018, U.S. EPA published the “Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area Classifications Approach” rule which established the air quality thresholds for classification categories that are assigned to all areas designated nonattainment for the 2015 Ozone NAAQS according to the ‘‘percent-above-the-standard’’ methodology (83 FR 10376).

In Ohio, three nonattainment areas (NAAs) were designated for the 2015 NAAQS for Ozone including Cincinnati, Cleveland and Columbus. These nonattainment areas, comprised of multiple counties, were each classified as Marginal nonattainment based on an areas design value criteria. The Cincinnati nonattainment area is a multi-state nonattainment area which includes partial nonattainment areas in counties located outside of Ohio in Kentucky (83 FR 25776). The nonattainment areas are discussed in further detail in the following section.

Outside of the Marginal nonattainment designation areas, all other counties in the State of Ohio have been designated as attainment/unclassifiable (82 FR 54232 and 83 FR 25776). U.S. EPA has historically used the “attainment/unclassifiable” category for areas that either have air quality monitors that demonstrate attainment and for areas that do not have monitors and for which there is no reason to believe they are not in attainment or are contributing to nearby violations.

Attainment dates and State Implementation Plan (SIP) submission requirements are dependent upon area classification designations. Under section 182(a) of the CAAA, Marginal areas have up to 3 years from designation to attain the NAAQS and are not required to submit an attainment demonstration. When Congress amended the CAA in 1990, it anticipated that nonattainment areas with ozone concentrations close to the NAAQS would likely come into attainment within 3 years of designation without any additional local planning (78 FR 34184).

This SIP submittal is intended to satisfy the requirements for the designated Ohio Marginal nonattainment areas established in the "Implementation of the 2015 National Ambient Air Quality Standards for Ozone: Nonattainment Area State Implementation Plan Requirements" (83 FR 62998) rule (hereinafter the "Implementation Rule"), including the emissions inventory and emissions statement requirements. This SIP submittal satisfies these requirements for the Cleveland and Cincinnati marginal nonattainment areas. These requirements do not apply to the Columbus area, as it was redesignated to attainment effective August 31, 2019 (84 FR 43508).

The 2014 emission inventory has been selected as the appropriate inventory for SIP development. The 2014 base year ozone emissions inventory presented in this document is an inventory of the actual reported, estimated or calculated ozone season day and annual VOC and NO_x emissions for Ohio sources. Ohio EPA has prepared an inventory for each nonattainment area including the point, nonpoint, nonroad and onroad sectors.

2 Nonattainment Areas

The U.S. EPA “Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards” rule designated three nonattainment areas in Ohio (83 FR 25776). The Columbus nonattainment area was redesignated to attainment effective August 31, 2019 (84 FR 43508). The design value for an individual monitoring site is the three-year average of the annual fourth highest daily maximum eight-hour average ozone concentration. An area meets the standard if, and only if, every monitoring site in the area meets the NAAQS. The designated nonattainment areas in Ohio were each classified as Marginal nonattainment based on an area design value criteria above the NAAQS of 0.070 ppm. Each of the two remaining nonattainment areas is comprised of a subset of several counties. Figure 1 shows the location of the counties included in each designated nonattainment area discussed below.

2.1 Cincinnati

The Cincinnati nonattainment area is a multi-state nonattainment area which includes partial nonattainment areas in counties located outside of Ohio in Kentucky. The Cincinnati nonattainment area includes the following counties: Butler, Clermont, Hamilton and Warren Counties in Ohio; and portions of Boone, Kenton and Campbell Counties in Kentucky. The emissions inventory and emission statement information presented in this report is only representative of the nonattainment counties located in Ohio. The Ohio-Kentucky-Indiana Regional Council of Governments (OKI) is the designated metropolitan planning organization (MPO) for all of the Cincinnati ozone nonattainment area.

2.2 Cleveland

The Cleveland nonattainment area includes the following counties: Cuyahoga, Geauga, Lake, Lorain, Medina, Portage and Summit. The Northeast Ohio Areawide Coordinating Agency (NOACA) is the MPO that covers Cuyahoga, Geauga, Lake, Lorain and Medina. The Akron Metropolitan Area Tranportation Study (AMATS) is the MPO that covers Summit and Portage counties.

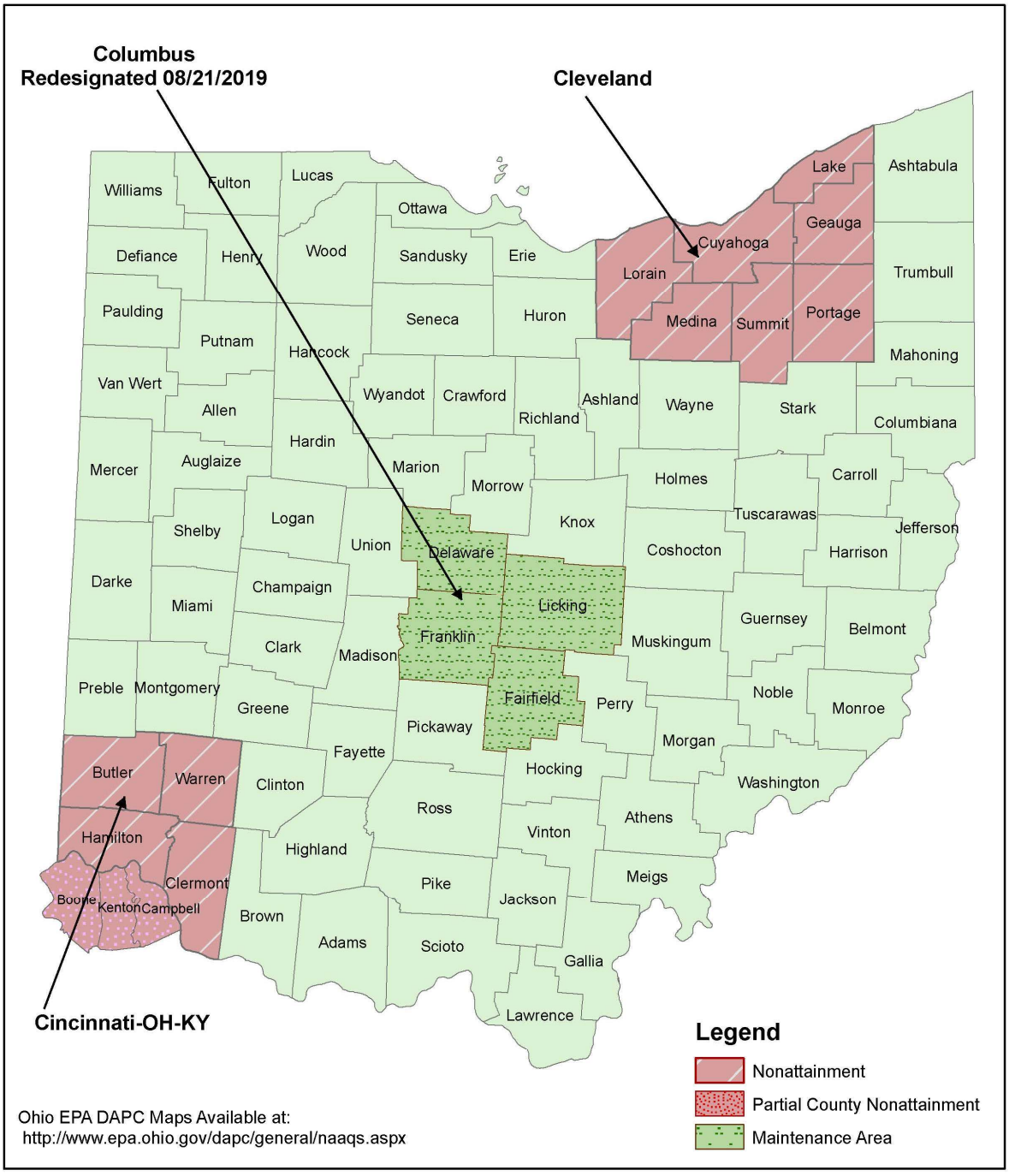


Figure 1. Ohio 2015 Ozone (0.070ppm) Nonattainment Areas

3 Emissions Inventory

This section presents a summary of the 2014 Base Year Emissions Inventory for Ohio. Marginal nonattainment areas are required to submit a base year emissions inventory for the nonattainment area within 2 years of nonattainment designation (CAA Section 182(a)(1)). In addition, CAA section 182(a)(3)(A) requires that states submit periodic emission inventories every 3 years after the initial base year inventory. Ohio commits to meeting the periodic emission inventory requirements.

The base year inventory must be "comprehensive, accurate, current inventory of actual emissions from sources of VOC and NOx emitted within the boundaries of the nonattainment area" (83 FR 63033). Ohio has selected 2014 for the base year inventory as it is one of the years used to designate the area as nonattainment and is the most current quality assured National Emissions Inventory (NEI) year available at the time development of this SIP submission began. The final Implementation Rule specifies the "the inventory year shall be selected consistent with the baseline for the [Reasonable Further Progress] RFP plan" (83 FR 63035). However, since both the Cleveland and Cincinnati areas were designated marginal nonattainment, RFP is not required at this time. Should one of Ohio's areas need to develop an RFP plan in the future, the inventory will be re-submitted, if required.

At the time the 2014 emission inventory was evaluated, permitted Ohio facilities classified as Title V were required to file annual emissions information in Ohio's Emission Inventory System (EIS). The EIS includes detailed emissions information as well as data about the egress points where pollutants are released into the air including NO_x and VOCs. Ohio EPA has the authority under Ohio Administrative Code (OAC) rule 3745-15-03 to request and receive this information from regulated entities. Ohio's EIS database which serves as the basis for the NEI.

A typical permitted facility may have multiple source types. For example, a refinery with numerous industrial processes would itself be a point source, the leaks from valves and the switch engine that moves tank cars on the railroad siding would be a nonroad mobile source. A typical permitted facility may also have more than one industrial classification. The refinery in the previous example is in one industrial category while the tank farm is in another. Quantities of emissions may be measured directly (at the stack); they may be calculated from engineering principles (e.g., mass balance); or they may be estimated (e.g., by assuming reasonable emission rates, times, etc.). Emissions can be expressed in terms of annual emissions, seasonal emissions or daily emissions. For the purpose of this submittal, the data presented has been quantified as both annual emissions (in tons per year or TPY) and ozone season day emissions (in tons per summer day or TSD).

Ohio EPA collected a comprehensive emissions inventory including point, nonpoint, nonroad and onroad sources for precursors of ozone (VOCs and NO_x) for base year 2014 from the NEI (2014 NEI v2). The point sources were divided into two categories, electric generating units (EGUs) and non-EGUs. Supporting documentation for the NEI is available on U.S. EPA's website at https://www.epa.gov/air-emissions-inventories/2014-national-emissions-inventory-nei-data. To develop a base year emissions inventory for the 2015 ozone NAAQS, Ohio EPA made only two modifications to the 2014 NEI inventory: 1) biogenic emissions were removed from the nonpoint sector (specifically, Source Classification Code (SCC) 2701200000 and 2701220000 were removed) and 2) the annual emissions reported in the NEI were converted to ozone season day emissions as described below. Marine, air and rail (MAR) emissions, which have been separated out as a distinct category in some previous SIPs, remain as accounted for in the NEI. For

example, emissions from aircraft are located in point, emissions from commercial marine vessels are in nonpoint, and emissions from locomotives are accounted for in both point and nonpoint sectors (see Table 2-1 in the NEI technical support documentation at https://www.epa.gov/sites/production/files/2018-07/documents/nei2014v2_tsd_05jul2018.pdf).

The emissions collected from the 2014 NEI v2 were presented in terms of annual emissions. Ozone season day emissions were derived by applying a conversion factor to the annual emissions. These conversion factors are shown in Table 1 below. The conversion factors were derived from U.S. EPA's 2014v2 Air Emissions Modeling Platform (2014fd), specifically the file "2014fd_nata_county_monthly_report_CAPs_PEC_POC.xlsx". This data is available athttps://www.epa.gov/air-emissions-modeling/2014-version-71-platform (select 2014v7.1 Data Files and Summaries, then 2014fd, then reports, then the specific file).

Separate conversion factors were determined for the EGU, non-EGU, nonpoint, nonroad and onroad sectors, by pollutant and nonattainment area (sum of each county in the area). Specifically, point source EGU emissions were determined using the "ptegu" sector[1]; non-EGU emissions were determined using the sum of the "ptnonipm" and "pt_oilgas" sectors[2]; and nonpoint, nonroad and onroad emissions were determined using the "nonpoint", "nonroad" and "onroad" sector groups, respectively. The conversion factors were derived as the ratio of the 2014 average July day emissions to 2014 annual emissions. Average July day emissions were determined by dividing the July emissions by 31, the number of days in July. The conversion factor ratios were then applied to annual emissions to determine ozone season day emissions.

Table 1. Conversion Factors for Annual to Ozone Season Day Emissions (TPY to TSD)*

AREA/POLLUTANT	EGU	NON-EGU	NONPOINT	NONROAD	ONROAD
Cincinnati NOx	0.003197	0.002721	0.001741	0.003246	0.002802
Cleveland NOx	0.002724	0.002747	0.001885	0.004279	0.002806
Cincinnati VOC	0.003347	0.002750	0.002655	0.004030	0.002667
Cleveland VOC	0.002528	0.002758	0.002643	0.005095	0.002412

* The conversion factors shown in the table have been rounded. The calculations resulting in the ozone season day emissions use unrounded values. Therefore, any differences in ozone season day emissions estimates found when applying the conversion factors in the table to annual emissions is due to rounding.

Annual and ozone season day emissions of NO_x and VOCs for each county and nonattainment area are shown in Tables 2-5.

[1] "ptegu" is the term used in the inventory to designate point source EGU emissions.
[2] "ptnonipm" and "pt_oilgas" are the terms used in the inventory to designation point source non-EGU emissions from facilities other than oil and gas, and from oil and gas, respectively.

Table 2. 2014 Annual NOx Emissions

	2014 ANNUAL NOx EMISSIONS (TPY)					
County/NAA	**EGU**	**NON-EGU**	**NONPOINT**	**NONROAD**	**ONROAD**	**TOTAL NOx**
Butler	122.35	3,981.47	1,309.76	1,317.23	4,423.77	11,154.58
Clermont	15,109.30	3.19	653.90	706.60	2,369.81	18,842.80
Hamilton	6,404.47	1,779.96	3,915.86	2,599.79	10,839.22	25,539.30
Warren	0.00	338.85	666.83	1,001.65	2,755.08	4,762.41
Cincinnati NAA	21,636.12	6,103.47	6,546.35	5,625.27	20,387.88	60,299.09
Cuyahoga	301.28	3,509.72	6,588.78	5,260.56	11,875.45	27,535.79
Geauga	0.00	8.90	399.38	439.58	887.94	1,735.80
Lake	2,005.10	667.35	2,068.60	1,462.81	2,318.91	8,522.77
Lorain	3,994.65	501.74	2,161.54	1,755.77	2,810.56	11,224.26
Medina	0.00	81.61	772.50	754.49	1,924.12	3,532.72
Portage	0.00	120.02	1,272.89	692.39	2,162.30	4,247.60
Summit	0.00	602.81	2,628.58	1,597.50	6,337.81	11,166.70
Cleveland NAA	6,301.03	5,492.15	15,892.27	11,963.10	28,317.09	67,965.64

Table 3. 2014 Annual VOC Emissions

	2014 ANNUAL VOC EMISSIONS (TPY)					
County/NAA	**EGU**	**NON-EGU**	**NONPOINT**	**NONROAD**	**ONROAD**	**TOTAL VOC**
Butler	6.71	1,078.39	5,032.48	845.03	2,705.51	9,668.12
Clermont	82.15	146.41	2,449.63	593.14	1,503.37	4,774.70
Hamilton	102.60	745.89	11,789.87	2,136.94	5,438.53	20,213.83
Warren	0.00	186.90	3,397.57	678.69	1,473.39	5,736.55
Cincinnati NAA	191.46	2,157.59	22,669.55	4,253.80	11,120.80	40,393.20
Cuyahoga	3.41	1,139.39	16,141.91	6,327.45	5,961.02	29,573.18
Geauga	0.00	31.33	1,617.09	914.85	554.26	3,117.53
Lake	15.64	294.73	3,750.15	2,075.79	1,218.56	7,354.87
Lorain	65.62	688.00	3,360.95	2,317.34	1,481.71	7,913.62
Medina	0.00	199.68	2,584.70	949.78	977.31	4,711.47
Portage	0.00	411.59	2,759.67	1,311.41	966.38	5,449.05
Summit	0.00	420.37	7,427.90	1,845.49	2,857.38	12,551.14
Cleveland NAA	84.67	3,185.09	37,642.37	15,742.11	14,016.62	70,670.86

Table 4. 2014 Ozone Season Day NOx Emissions

	2014 OZONE SEASON DAY NOx EMISSIONS (TSD)					
County/NAA	**EGU**	**NON-EGU**	**NONPOINT**	**NONROAD**	**ONROAD**	**TOTAL NOx**
Butler	0.39	10.83	2.28	4.28	12.40	30.18
Clermont	48.30	0.01	1.14	2.29	6.64	58.38
Hamilton	20.47	4.84	6.82	8.44	30.37	70.94
Warren	0.00	0.92	1.16	3.25	7.72	13.05
Cincinnati NAA	69.16	16.60	11.40	18.26	57.13	172.55
Cuyahoga	0.82	9.64	12.42	22.51	33.32	78.71
Geauga	0.00	0.02	0.75	1.88	2.49	5.14
Lake	5.46	1.83	3.90	6.26	6.51	23.96
Lorain	10.88	1.38	4.07	7.51	7.89	31.73
Medina	0.00	0.22	1.46	3.23	5.40	10.31
Portage	0.00	0.33	2.40	2.96	6.07	11.76
Summit	0.00	1.66	4.96	6.84	17.78	31.24
Cleveland NAA	17.16	15.08	29.96	51.19	79.46	192.85

Table 5. 2014 Ozone Season Day VOC Emissions

	2014 OZONE SEASON DAY VOC EMISSIONS (TSD)					
County/NAA	**EGU**	**NON-EGU**	**NONPOINT**	**NONROAD**	**ONROAD**	**TOTAL VOC**
Butler	0.02	2.97	13.36	3.41	7.22	26.98
Clermont	0.27	0.40	6.50	2.39	4.01	13.57
Hamilton	0.34	2.05	31.30	8.61	14.51	56.81
Warren	0.00	0.51	9.02	2.74	3.93	16.20
Cincinnati NAA	0.63	5.93	60.18	17.15	29.67	113.56
Cuyahoga	0.01	3.14	42.66	32.24	14.38	92.43
Geauga	0.00	0.09	4.27	4.66	1.34	10.36
Lake	0.04	0.81	9.91	10.58	2.94	24.28
Lorain	0.17	1.90	8.88	11.81	3.57	26.33
Medina	0.00	0.55	6.83	4.84	2.36	14.58
Portage	0.00	1.14	7.29	6.68	2.33	17.44
Summit	0.00	1.16	19.63	9.40	6.89	37.08
Cleveland NAA	0.22	8.79	99.47	80.21	33.81	222.50

3.1 Point Source Emissions

Emissions from point sources are defined as those whose emissions are usually fairly well characterized, are generally discharged through stacks and which are required to possess an Ohio EPA issued permit. The point source inventory was developed from Ohio EPA's online reporting database, STARS2, where facilities submit annual emissions reports. Ohio EPA requires annual emission reports for Title V and synthetic minor facilities. After review and approval by Ohio EPA staff, the facility emissions were then formatted, through a U.S. EPA provided Microsoft Access tool (the bridgetool), for annual submission to the EIS Gateway to fulfill required reporting for the annual EIS. Initially, the point source inventory was submitted to the EIS Gateway in draft form to begin the Quality Assurance (QA) process.

The EIS Gateway QA environment performed a variety of checks on the point source inventory, including facility site geographic coordinates, duplicate facilities, release point diameter and others. After the QA checks were performed, the EIS Gateway provided a feedback file with any errors that were encountered. These errors were dealt with on a case-by-case basis, depending on the error. Some errors required collaboration with U.S. EPA such as correcting duplicate facilities. Once all critical errors were corrected, the emissions were submitted to the EIS Gateway in final form.

The final point source inventory is divided into two categories: EGUs and non-EGUs. Based on the ozone season day emissions presented in Table 4 the EGU NO_x emissions were the largest emission sector in the Cincinnati NAA. Appendices A and B contain a detailed list of the EGU and non-EGU point sources included in the 2014 base year inventory by facility and unit ID, with their respective NO_x and VOC emissions.

3.2 Nonpoint Source Emissions

Nonpoint sources (also referred to as area sources) are usually spread over wide areas with no distinct discharge points or are comprised of a large number of small point sources that are difficult to describe separately and whose emissions are not well characterized (e.g., heating furnaces in individual homes, architectural surface coating, automobile refueling, dry cleaning, etc.).

For the development of the nonpoint inventory, a variety of state data was supplied to estimate emissions based on procedures and guidance supplied by U.S. EPA, as described further below. State specific data was only used when Ohio was able to provide data that was considered to more accurately describe activity or emissions in Ohio compared to U.S. EPA default data. Where Ohio was unable to provide state specific data, U.S. EPA default data was used. U.S. EPA default data for nonpoint sources was developed by U.S. EPA with the help of the Nonpoint Method Advisory (NOMAD) committee. NOMAD is a group of inventory developers from a variety of state and local agencies that collaborate on the development of methodologies to aid U.S. EPA in the development of default data for the NEI. In order to provide the most accurate and complete nonpoint inventory possible, Ohio implemented quality control and quality assurance measures throughout the development of this inventory. Additionally, Ohio followed inventory preparation procedures in guidance documents provided by U.S. EPA and NOMAD. The quality control and quality assurance of nonpoint data was primarily an ad-hoc process led by U.S. EPA. This process included comparing 2014 estimates to previous NEI cycles, gap-filling for missing pollutants, and evaluating outliers.

The Oil and Gas nonpoint category was estimated using well counts for conventional and unconventional wells, production data, and well site configuration data obtained from the Ohio Department of Natural Resources Division of Oil and Gas Resource Management. The data was processed through a Microsoft Access tool provided by U.S. EPA to estimate emissions. The tool was used only to estimate emissions from upstream activities since mid and downstream operations are accounted for in Ohio's point inventory. Since operating conditions were different for conventional and unconventional wells, the tool was run twice; once for conventional wells using U.S. EPA default data, and then run again with adjustments for well configuration in the tool for unconventional wells. The results were summed for submission to U.S. EPA.

For Industrial, Commercial, and Institutional (ICI) fuel combustion and Solvents, point source subtraction was used. This means either nonpoint activity data or emissions were adjusted to account for activity data or emissions that had already been reported in the point source inventory. This process was guided by the Point to Nonpoint Crosswalk which was provided by U.S. EPA. This crosswalk describes the similarities between point SCCs and nonpoint SCCs to help avoid double counting. Once the nonpoint activity data or emissions were identified, the data was imported into U.S. EPA tools for the specific sectors and a file was generated to be uploaded into the EIS Gateway's QA environment in draft form. The file was quality assured in U.S. EPA's QA environment and corrections were made to satisfy U.S. EPA's QA checks. Once all errors were corrected, final emissions were submitted in final form.

For remaining nonpoint categories other than Oil and Gas, ICI, and Solvents, U.S. EPA default activity data were used except in a few cases where Ohio compiled state specific activity data. In these cases, state specific data was collected from a variety of state organizations. Human cremation data such as deaths by county was obtained from the Ohio Department of Health. Publicly Owned Treatment Works data including annual discharge fees to estimate average flows and totals was provided by the Division of Surface Water in the Ohio EPA. The number of structural fires per county was collected from the Department of Commerce/State Fire Marshal. For vehicle fires, the number of vehicle fires by county was acquired from the Department of Commerce/Fire Prevention Bureau.

The state specific data was used in substitution of U.S. EPA default data and was populated into data tables to be imported into a copy of a U.S. EPA Microsoft Access tool (bridgetool). The bridgetool was used to submit a draft of the emissions to the EIS Gateway's QA environment where errors were identified. Once all errors were corrected, the emissions were submitted in final form.

Throughout the process of the nonpoint inventory development, Ohio took part in monthly NOMAD calls along with calls for NOMAD sub-committees. Through the regular conference calls, states were able to provide input throughout the development process of the 2014 NEI. Also, the calls provided information and guidance which helped develop a consistent and accurate inventory.

The nonpoint source VOC emissions were the largest sector contribution in both the Cincinnati and Cleveland NAAs. Appendix C contains a list of the nonpoint sources included in the 2014 base year inventory by SCC and county, with their respective NO_x and VOC emissions.

3.3 Mobile Source Emissions

Mobile sources are divided into two major categories – onroad and nonroad. Onroad mobile sources include cars, trucks, buses and motorcycles used for transportation of goods and passengers on roads and streets. Nonroad mobile sources include other modes of powered transportation such as aircraft, locomotives, ships and motor vehicles not associated with highway vehicles. This classification protocol has been utilized throughout this document.

3.3.1 Nonroad Mobile Emissions

During the development of the 2014 NEI the Motor Vehicle Emissions Simulator (MOVES-2014a) was run by U.S. EPA to generate nonroad emissions. Ohio EPA did not provide state specific data for the development of nonroad emissions. Since Ohio did not provide state specific data, data from default databases in MOVES was used to generate emissions. The ozone season day emissions presented in Tables 4 and 5 show nonroad emissions are the second largest contributing sector of NO_x and VOC emissions in the Cleveland NAA. Appendix D contains a list of the nonroad sources included in the 2014 base year inventory by SCC and county, with their respective NO_x and VOC emissions.

3.3.2 Onroad Mobile Emissions

For onroad mobile emissions, Ohio EPA provided state-specific data for U.S. EPA to use in the Motor Vehicle Emission Simulator (MOVES 2014a) runs. The state specific data was retrieved from the Ohio Department of Transportation, local MPOs, and the Ohio Bureau of Motor Vehicles.

The state data was sourced from a mix of local and state organizations. Some categories may have data sourced from several local agencies, primarily the Ohio Department of Transportation and the Bureau of Motor Vehicles, along with local MPOs. The data provided by the Ohio Department of Transportation accounted for Highway Performance Monitoring System Vehicle Type Year (HPMSVTypeYear) and Road Type Distribution. Alternate Vehicle and Fuel Technology (AVFT), Average Speed Distribution, and Month, Day and Hour Vehicle Miles Traveled (VMT) Fractions were also provided by the Ohio Department of Transportation along with MPOs. The Ohio Bureau of Motor Vehicles provided Source Type Age Distribution and Source Type Year for all counties and for source types 11(motorcycles), 21(passenger cars), 31(passenger trucks) and 32(light commercial trucks) only. For the remaining source types, U.S. EPA defaults were used.

For Inspections/Maintenance (I/M) Coverage, the data was derived from state-specific emissions testing data, including test methods, number of tests performed, number of vehicles requiring tests and waiver rates.

Zone Month Hour meteorological data was based on data from airports in Akron, Cincinnati, Cleveland, Columbus, Dayton, Toledo, Youngstown in Ohio; Fort Wayne in Indiana; Erie and Pittsburgh in Pennsylvania; and Huntington in West Virginia.

The U.S. EPA defaults, which are based on national averages that are built into MOVES, that were used were as follows: Audit Log, County, Fuel Usage Fraction, Hotelling Activity Distribution and Hotelling Hours, Import Starts Op Mode Distribution, On Road Retrofit, Starts, Starts Hour Fraction, Starts Month Adjust, Starts per Day, Starts Source Fraction, State, Zone, Zone Road Type, Emission Rate by Age. For Fuel Supply and Fuel Formulation all counties except for 027

(Clinton County), the fuel supply and fuel formulation tables were provided in U.S. EPA default starter databases. For Clinton County, the Fuel Formulation IDs were revised to reflect that Clinton County does not use low RVP fuel during the ozone season.

Internal QA checks were conducted including comparing VMT to previous years and removing blank meteorological data and replacing it with approximate data. Most of the QA for onroad mobile emissions was processed through tools built into MOVES. Additionally, just like the point and nonpoint inventories, QA was performed when the draft submittal package was submitted to the EIS Gateway.

Based on the ozone season day emissions presented in Table 4, onroad mobile emissions are the largest contributing sector of NO_x emissions in the Cleveland NAA, and the second largest contributing sector of both NO_x and VOC emissions in the Cincinnati NAA. Appendix E contains a list of the 2014 base year inventory onroad emissions by county and road type, with their respective NO_x and VOC emissions.

4 Source Emission Statement

Marginal areas are required to submit an emissions statement under Section 182(a)(3)(B) of the CAA (78 FR 34202). The emission statement must: ‘‘. . . require that the owner or operator of each stationary source of oxides of nitrogen or volatile organic compounds provide the state with a statement, in such form as the Administrator may prescribe (or an equivalent alternative developed by the state), for classes or categories of sources, showing the actual emissions of oxides of nitrogen and volatile organic compounds from that source. The first such statement shall be submitted within 3 years after the date of the enactment of the CAA Amendments of 1990. Subsequent statements shall be submitted at least every year thereafter. The statement shall contain a certification that the information contained in the statement is accurate to the best knowledge of the individual certifying the statement” (78 FR 34202). U.S. EPA requires that this SIP submittal of the emissions statement program be due 2 years after the effective date of designations (83 FR 63000).

In July 1992, U.S. EPA published a guidance memorandum on source emission statements titled, ‘Guidance on the Implementation of an Emission Statement Program.’ Further guidance was provided to clarify the source emission statement requirements were applicable to all areas designated nonattainment for the 1997 ozone NAAQS and classified as Marginal or higher under subpart 2, part D, title I of the CAAA. The Proposed Implementation Rule similarly applies the memorandum ‘‘Emission Statement Requirements Under 8-hour Ozone NAAQS Implementation,’’ dated March 14, 2006, to all areas designated nonattainment for the 2008 ozone NAAQS and classified as Marginal or higher under subpart 2 (78 FR 34202).

All of the Ohio 2015 Ozone NAAQS nonattainment areas have an emissions statement program in place due to historic nonattainment designations for an earlier ozone NAAQS. The Implementation Rule indicates that “a state may have an emissions statement regulation (per CAA section 182(a)(3)(B)) that has been previously approved by the EPA for a prior ozone NAAQS that covers all the state’s nonattainment areas and relevant classes and categories of sources for the 2015 ozone NAAQS, and that is likely to be sufficient for purposes of meeting the emissions statement requirement for the 2015 ozone NAAQS. Where an air agency determines that an existing regulation is adequate to meet applicable nonattainment area planning requirements of CAA section 182 (or OTR RACT requirements of CAA section 184) for a revised ozone NAAQS, that air agency’s SIP revision may provide a written statement certifying that determination in lieu of submitting new revised regulations” (83 FR 63002).

Ohio EPA has the authority under OAC Chapter 3745-24 to request NO_x and VOC Emission Statements, which applies to any facility located in a county that is out of attainment for the NAAQS for ozone and emits greater than or equal to 25 tons per year of VOC or NO_x during the reporting year. In general, facilities subject to this requirement must submit actual emissions data for NO_x and VOC. Appendix F contains a copy of OAC Chapter 3745-24 as approved into Ohio’s SIP.

Ohio’s current emission statement program was approved by U.S. EPA into Ohio’s SIP on September 27, 2007 (72 FR 54844).

5 Public Participation

Ohio published notification for the public comment period, including an opportunity to request a public hearing, concerning the draft emissions inventory and emissions statement in the widely distributed county publications on May 18, 2020.

The public comment period closed on June 22, 2020. No public hearing was held because no requests were received and no comments were received during the public comment period. Appendix G includes a copy of the public notice.

Cincinnati Ozone Update

September 15, 2020

Bob Hodanbosi
Chief, Division of Air Pollution Control

Jennifer Van Vlerah
Assistant Chief, Division of Air Pollution Control

Ohio Environmental Protection Agency

Meeting Logistics

- Please keep yourself muted unless you are talking to minimize background noise/distraction
- Opportunity for questions and discussion at end of presentation
- Slides will be emailed following today's meeting
- If you joined via a telephone line (and thus we cannot identify you for our attendance records), please email holly.kaloz@epa.ohio.gov with notice that you attended the meeting

Ohio Environmental Protection Agency

Background

- February 2020 meeting
  - 2015 ozone standard
    - 70 ppb based on a 3-year average of annual 4th high values (called "design value")
  - Cincinnati is currently designated marginal nonattainment
  - Required to meet standard by August 3, 2021 (called "attainment date")
    - 2020 is last ozone season before attainment date
      - Ozone season is March 1 to October 31
  - Cincinnati unlikely to meet standard or be eligible for 1-year extension
    - May get "bumped up" to moderate nonattainment

Ohio Environmental Protection Agency

Current Cincinnati Ozone Outlook

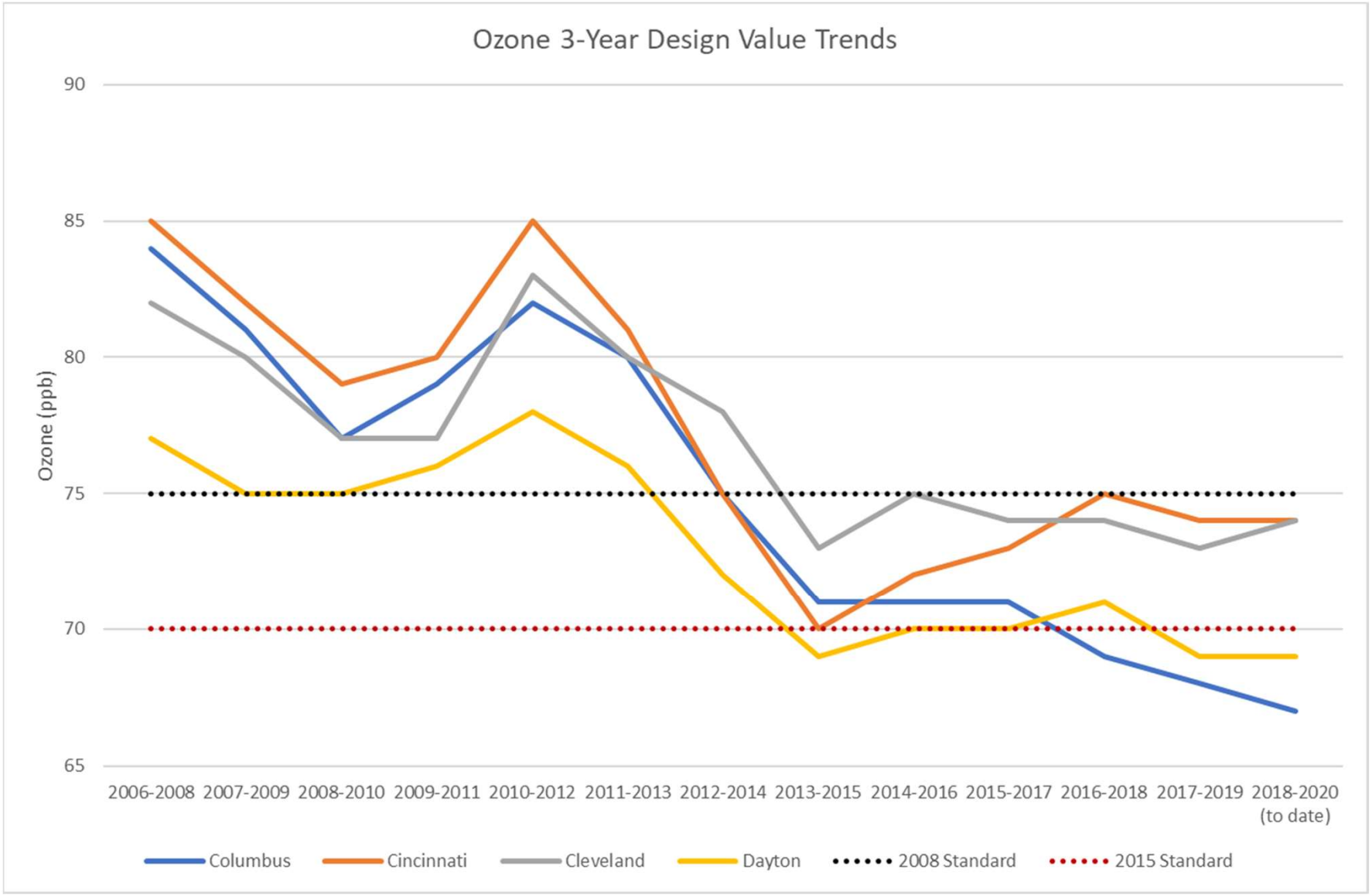
- **Cincinnati will not meet standard by end of 2020**
- Required to meet standard ("attain") by August 3, 2021
  - 2020 is last ozone season before attainment date
- 3 monitors (so far) do not meet standard based on current 2018-2020 design value
  - Middletown Airport (Butler County) – 71 ppb
  - Sycamore (Hamilton County) – 74 ppb
  - Lebanon (Warren County) – 72 ppb
- **Will not qualify for 1-year extension – even with reduced traffic due to pandemic**
  - All monitors in area need 2020 4th high meeting standard (70 ppb or below)
  - Lebanon monitor does not meet criteria

Ohio Environmental Protection Agency

Cincinnati Ozone Outlook

Site Name	Site Id	County	2014 4th High	2015 4th High	2016 4th High	2017 4th High	2018 4th High	2019 4th high	2020 4th high needed to violate 2015 standard	Current 2020 4th high	Current 2018-2020 Design Value
Middletown Airport	39-017-0018	Butler	69	70	73	70	76	67	70	70	71
Crawford Woods	39-017-0023	Butler				72	73	67	73	67	69
Miami University, Oxford	39-017-9991	Butler	69	68	71	69	70	65	78	64	66
Batavia	39-025-0022	Clermont	68	70	73	68	69	71	73	64	68
Sycamore	39-061-0006	Hamilton	71	72	75	72	80	72	61	70	74
Colerain	39-061-0010	Hamilton	73	70	73	68	75	67	71	70	70
Taft NCore	39-061-0040	Hamilton	69	71	73	71	72	71	70	68	70
Lebanon	39-165-0007	Warren	71	71	74	68	75	70	68	71	72

Ohio Environmental Protection Agency



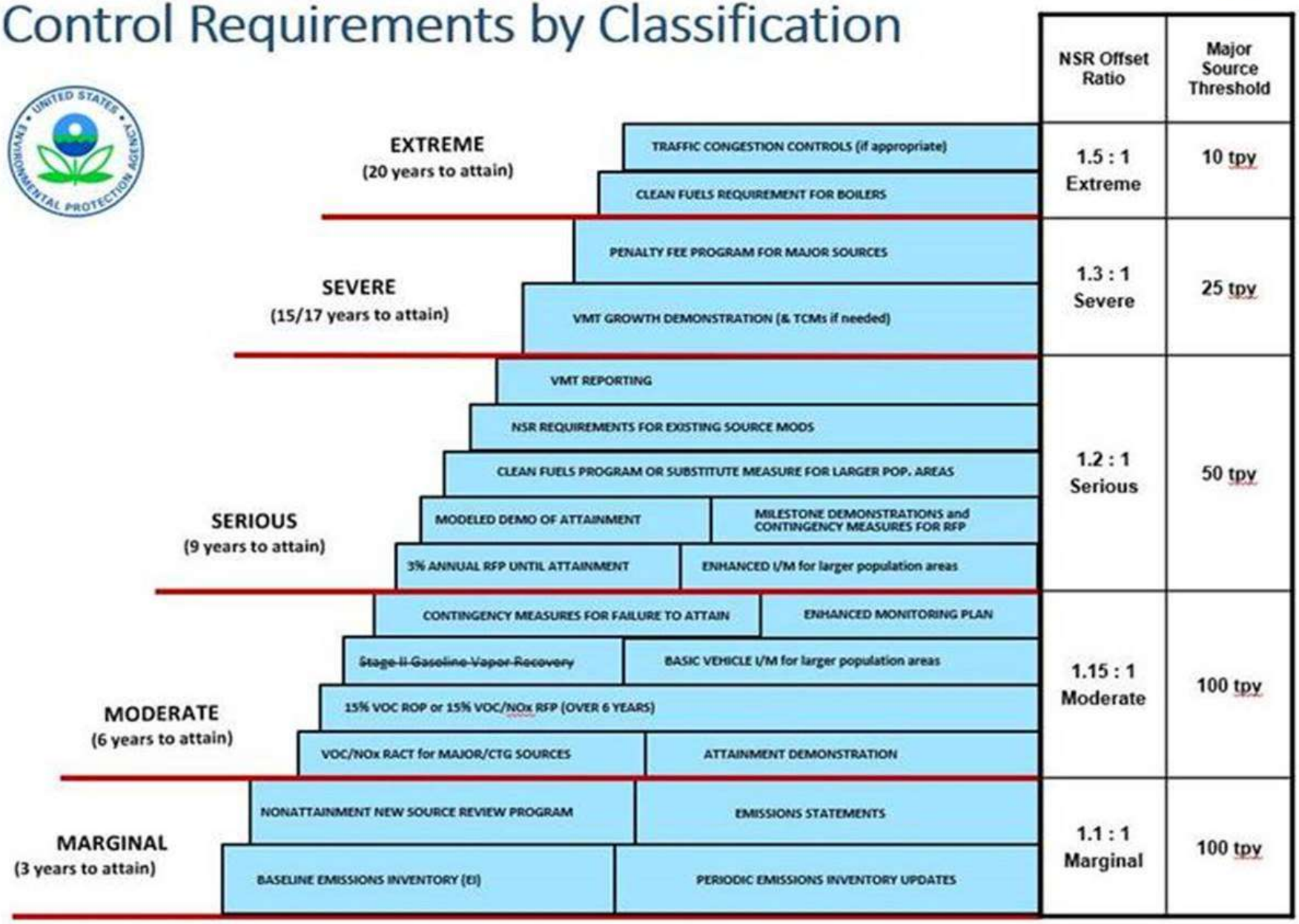
Ohio Environmental Protection Agency

“Bump-up” Anticipated Timeline

- 8/3/21: Attainment date (marginal)
- ~2/3/22: Bump-up to moderate
  - Required 6 months after attainment date (i.e. 2/3/22)
  - In recent actions for the 2008 standard (going from moderate to serious), U.S. EPA took ~ 1 year to finalize the bump-up
- ~2/3/23: Attainment demonstration due
  - Already past due at time of bump-up (original deadline 8/3/21)
  - U.S. EPA can adjust some deadlines as part of bump-up
    - In recent action extended some SIP deadlines to ~ 1 year after bump-up
- 8/3/24: New (moderate) attainment date (cannot be extended)
  - 2023 is last ozone season before new attainment date

Ohio Environmental Protection Agency

Overview of CAA Ozone Nonattainment Area Planning & Control Requirements by Classification



NOTE: Transportation and General Conformity apply in all ozone nonattainment areas.

Mandatory Requirements for Moderate Ozone Nonattainment Areas

"Bump-up" from marginal to moderate nonattainment triggers additional requirements under Clean Air Act (CAA):

- NOx Reasonably Available Control Technology (RACT)
  - Major stationary sources (> 100 tons per year (TPY) potential to emit (PTE))
  - Expand RACT in place in Cleveland area (OAC Chapter 3745-110) to Cincinnati area
    - Need to reassess to ensure previously established RACT is still appropriate
- VOC RACT
  - Control Technique Guidelines (CTGs)
    - Some older CTGs already in place (OAC Chapter 3745-21), but need to adopt several newer CTGs
  - Non-CTG VOC RACT
    - Major stationary sources (> 100 TPY PTE)
    - RACT for some sources already in place under older standards (OAC Chapter 3745-21), but need to reassess to ensure still appropriate, and add any sources not already covered

Ohio Environmental Protection Agency

Mandatory Requirements for Moderate Ozone Nonattainment Areas

"Bump-up" from marginal to moderate nonattainment triggers additional requirements under Clean Air Act (CAA):

- Emissions Inspection and Maintenance (I/M) Program (i.e. E-Check)
  - But not the E-Check you may remember!
    - On-board diagnostics only; no longer tail-pipe tests
  - Expand I/M in place in Cleveland (OAC Chapter 3745-26) to Cincinnati area
- Additional challenges permitting new and modified sources
  - NSR offset ratio 1.15:1
  - Baseline year reset

Ohio Environmental Protection Agency

Anticipated Rulemaking Timeline

- RACT revisions (OAC Chapters 3745-110 and 3745-21)
  - Anticipate implementation required by 3/1/23 (beginning of last ozone season before moderate attainment date)
  - ~1 year for rulemaking process
  - Try to provide at least 18 months implementation period
  - Anticipate start rulemaking process (Early Stakeholder Outreach) at the end of this ozone season (i.e. ~November 2020)
- I/M revisions (OAC Chapter 3745-26)
  - Anticipate implementation required by 2026 (4 years after bump-up)
    - U.S. EPA may establish alternate deadline as part of bump-up
  - Expand to include Cincinnati counties with future implementation date
    - Will include provision that will not be implemented if attain prior to implementation date

Ohio Environmental Protection Agency

Evaluating Possible Control Options

- In the past, primarily relied on federal control measures to meet standards
  - No new federal control measures are planned
  - Need to evaluate additional emissions reductions (beyond mandatory RACT and I/M) to meet standard and avoid another bump-up to Serious Nonattainment

Ohio Environmental Protection Agency

LADCO Projects

- Ongoing projects with Lake Michigan Air Directors Consortium (LADCO) – for information sharing among states
  - Ozone control options analysis
    - Regional, state, and nonattainment area analysis of potential control options, including potential emissions reductions and cost effectiveness
    - Expected ~fall/winter 2020
  - NOx/VOC sensitivity analysis
    - Photochemical modeling evaluating sensitivity of ozone to reductions in NOx and/or VOC emissions
    - Expected ~end of 2020
  - NOx RACT workgroup

Ohio Environmental Protection Agency

Summary

- Cincinnati will not meet standard by end of 2020, and is not eligible for 1-year extension
  - "Bump up" to moderate expected
- RACT evaluation and rulemaking likely to begin this winter
- Also looking at other sectors for potential controls, based on information from LADCO projects
- Attainment is primary goal

Ohio Environmental Protection Agency

Discussion/Questions

Cleveland Ozone Update

September 14, 2020

Bob Hodanbosi
Chief, Division of Air Pollution Control

Jennifer Van Vlerah
Assistant Chief, Division of Air Pollution Control

Ohio Environmental Protection Agency

Meeting Logistics

- Please keep yourself muted unless you are talking to minimize background noise/distraction
- Opportunity for questions and discussion at end of presentation
- Slides will be emailed following today's meeting
- If you joined via a telephone line (and thus we cannot identify you for our attendance records), please email holly.kaloz@epa.ohio.gov with notice that you attended the meeting

Ohio Environmental Protection Agency

Background

- February 2020 meeting
  - 2015 ozone standard
    - 70 ppb based on a 3-year average of annual 4th high values (called "design value")
  - Cleveland is currently designated marginal nonattainment
  - Required to meet standard by August 3, 2021 (called "attainment date")
    - 2020 is last ozone season before attainment date
      - Ozone season is March 1 to October 31
  - Cleveland unlikely to meet standard or be eligible for 1-year extension
    - May get "bumped up" to moderate nonattainment

Ohio Environmental Protection Agency

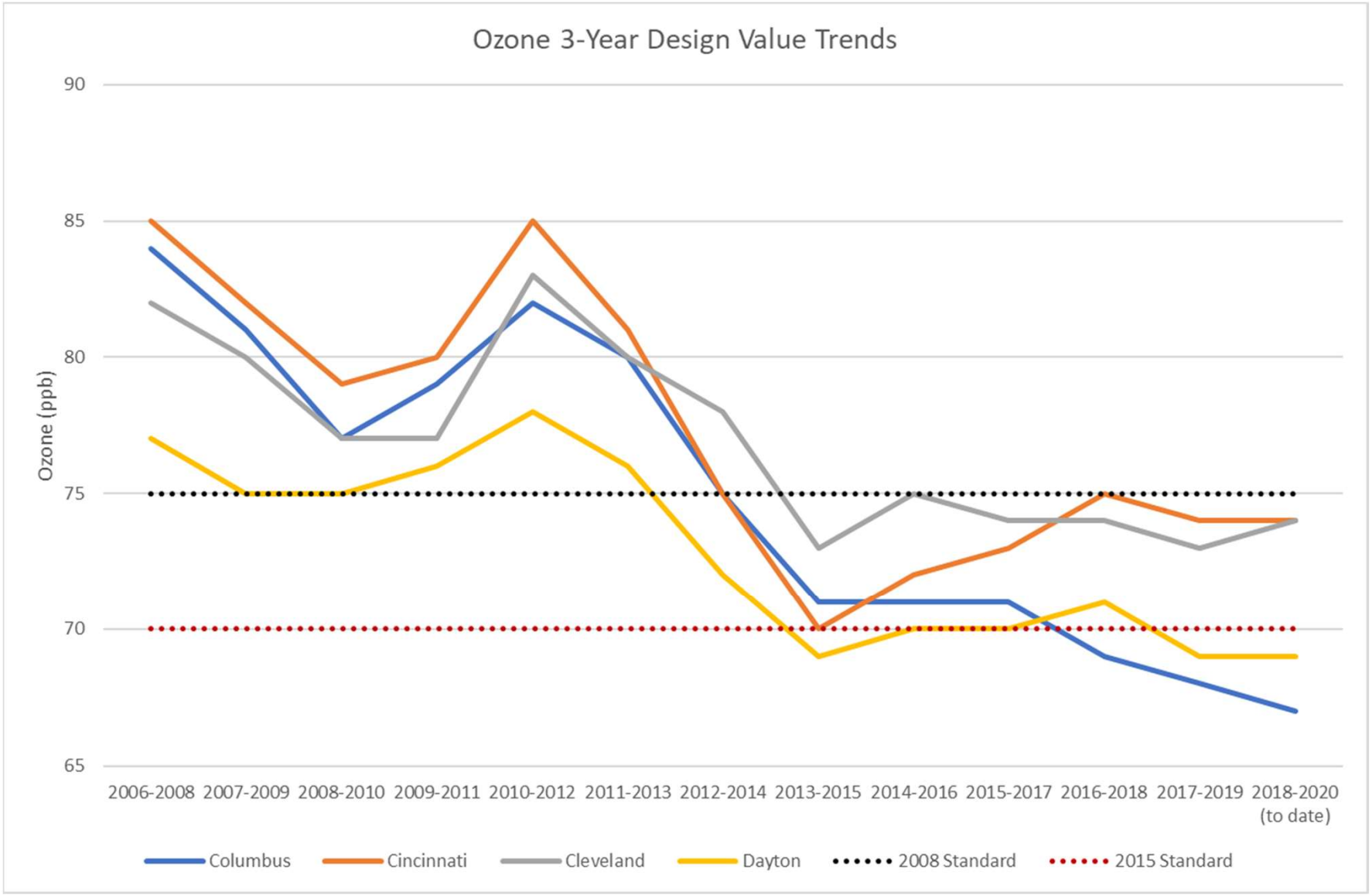
Current Cleveland Ozone Outlook

- **Cleveland will not meet standard by end of 2020**
- Required to meet standard ("attain") by August 3, 2021
  - 2020 is last ozone season before attainment date
- 3 monitors (so far) do not meet standard based on current 2018-2020 design value
  - District 6 (Cuyahoga County) – 71 ppb
  - Mayfield (Cuyahoga County) – 71 ppb
  - Eastlake (Lake County) – 74 ppb
- **Will not qualify for 1-year extension – even with reduced traffic due to pandemic**
  - All monitors in area need 2020 4th high meeting standard (70 ppb or below)
  - District 6 and Eastlake do not meet criteria

Ohio Environmental Protection Agency

Cleveland Ozone Outlook

Site Name	Site Id	County	2014 4th High	2015 4th High	2016 4th High	2017 4th High	2018 4th High	2019 4th high	2020 4th high needed to violate 2015 standard	Current 2020 4th high	Current 2018-2020 Design Value
District 6	39-035-0034	Cuyahoga	71	68	69	69	72	68	73	74	71
GT Craig NCore	39-035-0060	Cuyahoga	66	63	63	61	63	66	84	66	65
Berea BOE	39-035-0064	Cuyahoga	59	66	68	64	66	63	84	66	65
Mayfield	39-035-5002	Cuyahoga	61	72	70	68	75	70	68	68	71
Notre Dame	39-055-0004	Geauga	65	73	74	71	73	68	72	65	68
Eastlake	39-085-0003	Lake	75	74	74	73	76	71	66	75	74
Painesville	39-085-0007	Lake	62	70	69	72	69	69	75	68	68
Sheffield	39-093-0018	Lorain	67	62	68	65	69	58	86	59	62
Chippewa	39-103-0004	Medina	64	63	66	64	66	54	93	64	61
Lake Rockwell	39-133-1001	Portage	61	64	59	65	66	58	89	63	62
Patterson Park	39-153-0020	Summit	58	65	61	66	69	66	78	62	65



Ohio Environmental Protection Agency

“Bump-up” Anticipated Timeline

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- ~2/3/23: Attainment demonstration due
  - Already past due at time of bump-up (original deadline 8/3/21)
  - U.S. EPA can adjust some deadlines as part of bump-up
    - In recent action extended some SIP deadlines to ~ 1 year after bump-up
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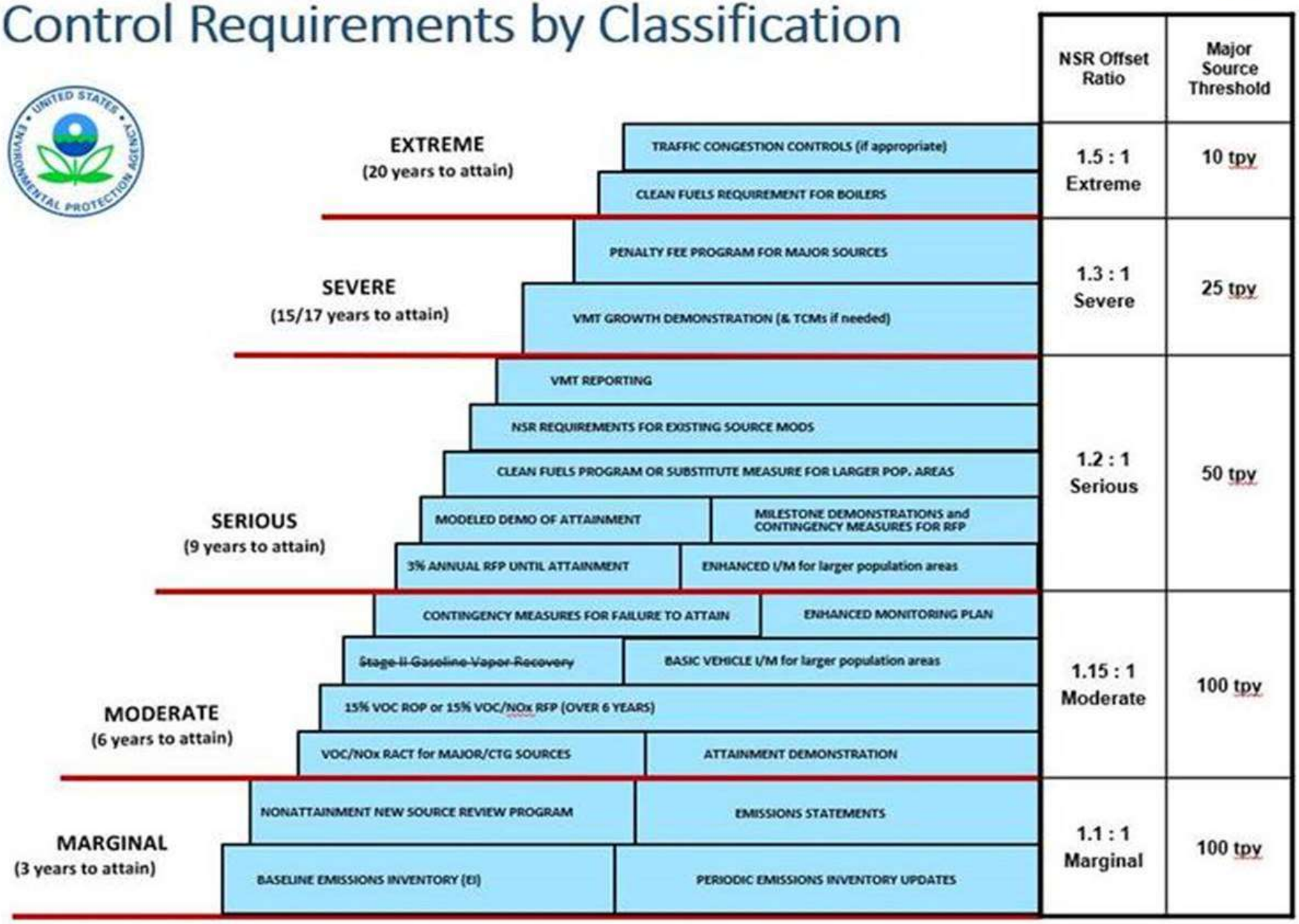
Ohio Environmental Protection Agency

Overview of CAA Ozone Nonattainment Area Planning & Control Requirements by Classification



NOTE: Transportation and General Conformity apply in all ozone nonattainment areas.

Mandatory Requirements for Moderate Ozone Nonattainment Areas

"Bump-up" from marginal to moderate nonattainment triggers additional requirements under Clean Air Act (CAA):

- Most already in place in Cleveland
  - NOx Reasonably Available Control Technology (RACT) - OAC Chapter 3745-110
    - Major stationary sources (> 100 tons per year (TPY) potential to emit (PTE))
    - Need to reassess to ensure previously established RACT is still appropriate
  - VOC RACT – OAC Chapter 3745-21
    - Control Technique Guidelines (CTGs)
      - Need to adopt 2016 Oil and Gas CTG
    - Non-CTG VOC RACT
      - Major stationary sources (> 100 TPY PTE)
      - Need to reassess to ensure previously established RACT is still appropriate
  - Emissions Inspection and Maintenance (I/M) Program (i.e. E-Check) - OAC Chapter 3745-26
- Additional challenges permitting new and modified sources
  - NSR offset ratio 1.15:1
  - Baseline year reset

Ohio Environmental Protection Agency

Anticipated Rulemaking Timeline

- RACT revisions (OAC Chapters 3745-110 and 3745-21)
  - Anticipate implementation required by 3/1/23 (beginning of last ozone season before moderate attainment date)
  - ~1 year for rulemaking process
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  - Anticipate start rulemaking process (Early Stakeholder Outreach) at the end of this ozone season (i.e. ~November 2020)

Ohio Environmental Protection Agency

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Ohio Environmental Protection Agency

LADCO Projects

- Ongoing projects with Lake Michigan Air Directors Consortium (LADCO) – for information sharing among states
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Ohio Environmental Protection Agency

Summary

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  - "Bump up" to moderate expected
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- Also looking at other sectors for potential controls, based on information from LADCO projects
- Attainment is primary goal

Ohio Environmental Protection Agency

Discussion/Questions

6/25/20
PUBLIC INTEREST CENTER, (614) 644-2160
MEDIA CONTACT: James Lee
CITIZEN CONTACT: Mary McCarron

Ohio EPA Issues General Permit for Impacts to Ephemeral Streams

Ohio EPA is announcing the availability of a general permit that will be available to applicants for projects that impact ephemeral streams.

The state agency developed the general permit as a mechanism for authorizing impacts to ephemeral streams from fill activities in response to U.S. EPA's recently finalized Navigable Waters Protection Rule. The new federal rule removes certain waters from federal jurisdiction under the Clean Water Act, including ephemeral streams and certain isolated wetlands. States retain the authority to determine oversight of these non-jurisdictional waters in ways that best protect their natural resources and local economies.

The general requirements that have historically been applicable to projects that impact ephemeral streams when these resources were under federal jurisdiction are included under the state permit, including pre-notification, site restoration and mitigation requirements for permanent impacts. The general permit does not include new or additional requirements for ephemeral streams. In addition, the draft general permit will serve as a streamlined and efficient permit mechanism for applicants.

It is estimated that there are more than 36,000 miles of ephemeral streams throughout Ohio. While they do not flow continuously, these streams are important to aquatic ecosystems because they help control run-off and erosion, reduce flooding potential and help filter pollutants. Channel-like features on the land surface created by water erosion that are not tributaries, such as agricultural ditches, roadside ditches and grass swale waterways would not meet the definition of ephemeral streams.

Ohio EPA has historically used state permitting authority to regulate impacts to isolated wetlands and will continue to maintain an isolated wetland permitting program.

The new general permit, along with responses to public comments Ohio EPA received during development of the permit, are available on Ohio EPA's website.
Issuance of final permit can be appealed to the Ohio Environmental Review Appeals Commission (ERAC). Appeals generally must be filed within 30 days of issuing a final action; therefore, anyone considering filing an appeal should contact ERAC at (614) 466-8950 for more information.

-30-

The Ohio Environmental Protection Agency was created in 1972 to consolidate efforts to protect and improve air quality, water quality and waste management in Ohio. Since then, air pollutants dropped by as much as 90 percent; large rivers meeting standards improved from 21 percent to 89 percent; and hundreds of polluting, open dumps were replaced with engineered landfills and an increased emphasis on waste reduction and recycling.

June 5, 2020

VIA epa.dswcomments@epa.ohio.gov

Ohio EPA
Division of Surface Water – Permits Processing Unit
P.O. Box 1049
Columbus, Ohio 43216-1049

Re: General Permit for Isolated Wetlands and Ephemeral Streams

Dear Sir/Madam:

Pursuant to Ohio EPA's public notice, dated May 18, 2020, the Ohio Manufacturers' Association (OMA) is hereby providing Ohio EPA with written comments on the proposed General Permit for Isolated Wetlands and Ephemeral Streams ("General Permit").

The OMA is dedicated to protecting and growing manufacturing in Ohio. The OMA represents over 1,300 manufacturers throughout Ohio. For more than 100 years, the OMA has supported reasonable, necessary, and transparent environmental regulations that promote the health and well-being of Ohio's citizens.

OMA's comments are as follows:

1. The proposed General Permit (Part II(B)(2)) requires that the Pre-Activity Notice (PAN), if required, must contain a "determination from the U.S. Army Corps of Engineers that the wetlands and ephemeral streams proposed to be covered by this General Permit are not Waters of the United States" (i.e., not jurisdictional). If Ohio EPA is assuming jurisdiction for impacts to ephemeral streams under O.R.C. Chapter 6111, why does the applicant have to first obtain concurrence from the Army Corps of Engineers that the streams are not subject to the jurisdiction of the Clean Water Act? This will complicate the process and add time to obtain regulatory approval for certain projects. The Agency should consider revising the order of this process and provide General Permit coverage first and then leave it up to the applicant to seek further concurrence from the Corps, if necessary or warranted, given the situation.

2. As a less-preferred alternative to Comment 1, Ohio EPA should provide for concurrent review and processing of a PAN while the Corps is processing the jurisdictional determination for the impacted waterbody, such that once the Corps issues its determination that the waterbody is not subject to its jurisdiction, the PAN has already been granted and the applicant can proceed immediately under the General Permit.

3. Please confirm that proposed impacts to ephemeral streams less than 300 feet do not require any notice or pre-approval to Ohio EPA, and that the permittee can just proceed under the General Permit to conduct the activity in question.

4. Is it Ohio EPA's position that an ephemeral stream has an "ordinary high water mark" as noted in Part IV, (K)(BMPs)(6) when heavy equipment is prohibited below the OHWM of "any surface water?" If the ephemeral stream is to be permanently filled or impacted, then any heavy equipment will more than likely be below any OHWM of the ephemeral stream.

5. Please confirm that impacts to roadside ditches connecting two ephemeral streams or jurisdictional waters are not subject to the General Permit and are unregulated by Ohio EPA.

6. Is it Ohio EPA's opinion that projects covered by a certification from the Federal Energy Regulatory Commission (FERC) must also obtain PAN approval and be subject to Ohio EPA's General Permit for impacts to ephemeral streams greater than 300 feet?

The OMA appreciates the opportunity to comment on the proposed General Permit. We look forward to the Agency's consideration of our comments in any final General Permit covering this area. If Ohio EPA has any questions regarding the foregoing, please do not hesitate to contact me (614-629-6814) or OMA's environmental counsel, Frank Merrill at Bricker & Eckler LLP (614-227-8871).

Regards,

Rob Brundrett
Director, Public Policy Services

cc: Frank L. Merrill, Esq.
Julianne Kurdila

June 1, 2020

VIA WWW.REGULATIONS.GOV

United States Environmental Protection Agency
Office of Water, Office of Wastewater Management (4203M)
1200 Pennsylvania Avenue, NW,
Washington, DC 20460

Re: Comments to the 2020 Issuance of the proposed USEPA NPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity: Docket ID EPA-HQ-OW-2019-0372

Dear Sir/Madam:

Pursuant to USEPA's Public Notice, issued on March 2, 2020 (85 Fed. Reg. 12288, Federal Register No. 2020-04254), The Ohio Manufacturers' Association (OMA) is hereby providing USEPA with written comments on USEPA's proposed NPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP).

The OMA is dedicated to protecting and growing manufacturing in Ohio. The OMA represents over 1,300 manufacturers throughout Ohio. For more than 100 years, the OMA has supported reasonable, necessary, and transparent environmental regulations that promote the health and well-being of Ohio's citizens.

Although Ohio is a delegated state for stormwater NPDES permitting, our membership of Ohio manufacturers are concerned about the guidance that this USEPA MSGP may provide to delegated states such as Ohio. We submit these comments in accordance with the June 1, 2020 extended comment deadline.

Of note, this proposed draft MSGP continues a recent trend towards a more top-down, command-and-control approach to stormwater regulation, with a highly prescriptive stormwater sampling/corrective action regime as its cornerstone. Prime examples of this trend in the draft MSGP include the Additional Implementation Measures (AIM), the Universal Benchmarks, and the new, voluminous Appendix Q of Stormwater Control Measures (SCMs). This is a most unfortunate trend that increases the regulatory burden on industry with no tie to a corresponding, quantifiable benefit to receiving waters. The new requirements in the proposed MSGP go well beyond what is required by the 2016 MSGP settlement and beyond what Congress intended in the Clean Water Act.

The following are additional detailed comments on the draft MSGP:

1. Request for Comment 2: Coal-Tar Sealcoat Prohibition

There appears to be some confusion that all sealcoat products are "coal-tar sealcoats", although this is not the case. In fact, USEPA has indicated in its MSGP fact sheet that there are viable alternatives that include "asphalt emulsion sealants and acrylic sealants". Therefore, we suggest that a sentence be added to Section 1.1.8 to indicate alternatives that can be used instead of coal-tar sealcoats, such as "Substitutes for coal-tar sealcoats are available, such as asphalt emulsion sealants and acrylic sealants."

Additionally, there may be regulated facilities who use coal-tar sealcoats in only limited areas of their facilities. If the agency keeps Section 1.1.8, it should include a de minimis exception based on the ratio of the area with coal-tar sealcoats to the overall drainage area of the permitted facility.

2. Request for Comment 4: 60-day Discharge Authorization Wait Period

We oppose this new 60-day wait period for discharge authorization. It is a needless expansion of the NOI processing times, and would allow USEPA to relax on permit processing efficiency by extending the permit backlog processing times with impunity. The regulated community needs efficient permit processing, which includes timely feedback on their permit applications, including application deficiencies.

There is an existing category in Table 1-2 of the MSGP for "[e]xisting facility without permit coverage" that specifies discharge authorization in "30 calendar days after EPA notifies you that it has received a complete NOI, unless EPA notifies you that your authorization has been denied or delayed." Therefore, USEPA already has the ability to deny or delay authorization for unpermitted sites with pending stormwater enforcement action without the need of the proposed new category. USEPA just needs to continue to improve their permit processing efficiency to make these denial or delay determinations in a timely manner under the current category, without the need for this proposed category.

3. Request for Comment 6: Public Posting of Permit Coverage

We oppose this new proposal for public posting of permit coverage. It is another capricious expansion of the existing MSGP "process" without any stormwater benefit. There are already USEPA and state EPA websites that list stormwater permittees. The enforcement risk for "non-compliance of process" is real, such as inadvertent non-posting, or not posting in the "right" location. This requirement would also add the burden of maintenance of the sign, often in natural bank environment that would disturb surrounding vegetation and create a visual obstruction to the natural water system. This proposal also raises precedential concerns on public postings of other non-stormwater operating permit programs.

4. Request for Comment 7: No Exposure Certification Acronym from "NOE" to "NEC"

We agree with this proposal to change the acronym for No Exposure Certification from "NOE" to "NEC" to more accurately represent what the acronym stands for.

5. Request for Comment 8: Enhanced Stormwater Controls for Major Storms

We oppose the proposed Section 2.1.1.8 for prescriptive enhanced flood controls, because the MSGP is an environmental permit, not a one-size-fits-all nationwide stormwater design manual. Flood controls have been, and continue to be, addressed in federal, state and local flood control laws, rules and ordinances as well as in local stormwater design codes and manuals.

We are also concern that these proposed requirements appear to be regulating stormwater flowrate and volume as a "stormwater pollutant", which is outside of the CWA's permitting authority and which has been rejected by the courts. If implemented, USEPA would become a flood management agency, sharing the responsibility and liability for failures of any flood controls implemented under this section.

6. Request for Comment 9: Alternatives to Benchmark Monitoring

There has been over 20 years of stormwater sampling, with the data submitted to USEPA and/or the state EPAs. This existing stormwater dataset should be sufficient for USEPA to make characterizations about industrial sites' stormwater discharges in order to provide some stormwater sampling relief. Unfortunately, it appears that USEPA is moving in the opposite direction, towards greater stormwater sampling to meet expanded, lowered benchmarks, coupled with more onerous, prescriptive corrective actions. This trend raises the enforcement liability for "non-compliance of process" on the regulated community, apart from any real stormwater quality benefit, and is characteristic of a top-down, command-and-control regulatory regime.

For these reasons, USEPA should develop alternatives to benchmark monitoring. In particular, the MSGP should provide improved off-ramps for facilities to rely on visual inspections, without analytical sampling, once they have developed record of meeting benchmarks. This is particularly true for the new Universal Benchmark monitoring requirements (see comment 7). Additionally, the benchmarks should align more closely with water quality standards, because in many cases the benchmarks are far more stringent than the applicable in-stream standard. Adjusting the benchmarks will relieve unnecessary burden by making the off-ramps more available and minimizing the risk of perpetual BMP escalation.

7. Request for Comments 10 & 13: Universal Benchmark Monitoring

We strongly oppose the introduction of stormwater benchmark requirements to **all permittees** with the addition of universal benchmarks. The intent of this new requirement has been addressed by the BMP approach in the MSGP, a successful cornerstone of stormwater management from a wide variety of sites.

Universal benchmark monitoring, at this point in time in the stormwater permitting program, would be more compliance "busy work" for no purpose other than to provide for more enforcement or citizen lawsuit opportunities for "non-compliance of process" in the implementation of these universal benchmark monitoring. Stormwater sampling is arduous, costly, and should be reserved for cases of known, significant stormwater pollutants (e.g., SARA Title III, Section 313 water priority chemicals), in order to mitigate real, actual pollution concerns.

Rather than mandating quarterly universal benchmark monitoring, USEPA should make this type of stormwater sampling an alternative to existing BMP approaches. Also, rather than mandating the three (3) parameters (i.e., pH, TSS, COD) for all permitted sites, each site should be able to determine which parameters should be monitored, if at all, if these parameters are significant stormwater pollutants from the site's industrial activities. Another suggestion, if USEPA persists with this universal benchmark monitoring, is to mandate only pH monitoring, which is a cost-effective field test, and leaving benchmark monitoring of other parameters as optional. Additionally, if the universal benchmark is included, the proposed language should be revised to clarify that annual averaging is allowed and to add efficient and permanent off-ramps for those facilities that meet the benchmarks in the first year. Quarterly sampling for the entire permit period (and for subsequent permits) is unreasonable and of no substantive value.

Finally, once this universal benchmark monitoring is inserted into the MSGP, there is real concern that what starts out as three (3) parameters (i.e., pH, TSS, COD) will expand to a host of other parameters in future MSGPs.

8. <u>Request for Comment 11: Inspection-only Option for "Low-Risk" Facilities</u>

We support an "inspection-only" option, but are concerned about the potential for additional, onerous requirements to utilize this option. For this option to work, it should not end up involving more resources on the regulated community than what is required for benchmark monitoring. We would recommend that the quarterly facility inspections (Part 3.1 of the draft MSGP) be the basis for this inspection-only option, perhaps at increased frequency (e.g., monthly).

Also, the "Qualified Personnel" defined in Appendix A of the draft MSGP should be the person(s) able to perform the inspections under this option, and the qualification requirements should not be made more restrictive (e.g., no specialized licensures). Many environmental laws allows facility personnel/authorized representatives to certify environmental results, and this precedent should apply to the inspection-only protocols under the MSGP, where facility personnel knowledgeable about the site conditions is qualified to certify under the MSGP.

Additionally, the "inspection-only" option should be available to facilities that have historically met benchmarks, with the inspection protocol providing the basis for continued compliance.

9. Request for Comment 19: Site-specific Benchmark Basis

We support this proposal for this "off-ramp" from the copper national benchmarks, on a site-specific basis, and suggest that this site-specific risk assessment "off-ramp" option be made available for all of the other benchmark parameters.

10. General Comments on Additional Implementation Measures (AIM)

We strongly oppose the introduction of the Additional Implementation Measures (AIM) to the MSGP. We note that this requirements has been added solely as a result of a 2016 USEPA "sue-and-settle" case, (now contrary to federal policy) in which the regulated community was not given adequate opportunity to provide input or to object. The AIM attempts to impose a definitive SCM requirement on all facilities, irrespective of relevance or benefit, and without any link at all to in-stream water quality. This proposal simply goes far beyond the reach of the CWA.

If USEPA intends to finalize the AIM provisions, over our objections, then the potential exists for many sites to be in "perpetual" "non-compliance of process". To mitigate this untenable situation, all of the proposed exceptions provided for each of the three (3) AIM tiers should be made available to every tier: (a) background or run-on, (b) "aberrant event", and (c) demonstration that the stormwater discharges do not result "…in any exceedance of water quality standards…" Additionally, if AIM is included, USEPA must update all benchmarks to link them to actual water quality standards, as a minimum benchmark, not urban run-off studies from the 1970s and early 1980s.

In addition, we propose a fourth AIM exception, which is a non-industrial pollutant source demonstration, where the benchmark chemical(s), such as Zinc, is not from the industrial activities of the site (e.g., not in raw materials), but from ubiquitous items (e.g., building envelope, fencing) found in every industrial, non-industrial and residential sites.

Regarding the AIM compliance schedules, subject to our objections to the unreasonable, rigid nature of the new Appendix Q requirements, we further object to the time frames for compliance with AIM triggers. If included in the final MSGP, these time frames must include more flexibility for facility management to review, develop and secure funding for the new SCMs, which in some cases will involve ordering new equipment, modifying site layout, constructing new control features, and retaining experts to assist in planning. The "hammers" of 30 and 45 days reflect the top-down, command and control regulatory approach that unnecessarily burdens businesses. A simple narrative time frame will achieve the same water quality goals without creating "noncompliance of process" issues.

Also, in order to not overwhelm all USEPA offices with applications for approvals of AIM exceptions, sites that are able to make AIM exception claims should be required to

document these exceptions in their SWPPP, subject to disclosures already provided for in the MSGP, but not needing USEPA approval.

11. Request for Comment 21: Additional AIM Tier 1 Trigger for Facility Changes

We oppose this additional AIM Tier 1 trigger based on facility changes, as it is qualitative in nature, and risks subjective interpretation. The AIMs, as proposed, are onerous requirements, unlike a SWPPP review and revision (per Part 4.2 of the 2015 MSGP), so any AIM trigger needs to be quantitative in nature to address actual stormwater pollution.

12. Request for Comment 22: "Aberrant Event" AIM Exception

With reference to our previous AIM general comments, we are in support of extending this "aberrant event" exception from AIM to all three (3) tiers. In addition, we had suggested another exception to the AIM provisions, which is a non-industrial pollutant source demonstration, where the benchmark chemical(s), such as Zinc, is not from the industrial activities of the site (e.g., not in raw materials), but from ubiquitous items (e.g., building envelope, fencing) found in industrial, non-industrial and residential sites.

Also, in order to not overwhelm all USEPA offices with applications for approvals of AIM exceptions, sites that are able to make AIM exception claims should be required to document these exceptions in their SWPPP, subject to disclosures already provided for in the MSGP, but not needing USEPA approval.

13. Request for Comment 23: "Discharges Not Resulting in any Exceedance of Water Quality Standards" AIM Exception

With reference to our previous AIM general comments, we are in support of extending this AIM exception for "discharges not resulting in any exceedance of water quality standards" to all three (3) tiers. Again, in order to not overwhelm all USEPA offices with applications for approvals of AIM exceptions, sites that are able to make AIM exception claims should be required to document these exceptions in their SWPPP, subject to disclosures already provided for in the MSGP, but not needing USEPA approval.

14. Request for Comment 24 & 25: Natural Background AIM Exception

With reference to our previous AIM general comments, we are in support of extending this natural background exception from AIM to all three (3) tiers. However, it is our observation that the definition of "natural background" is too strict to be practically useful. By this, we mean that it is commonly interpreted that "natural background" means pre-Industrial Revolution, undisturbed soils - a situation which does not exist outside of the most pristine of the National Parks.

The reality is that what constitutes natural background is highly location-specific, and as varied as the topography and land use of this country. A greater acceptance of this variability in "natural backgrounds" is needed, as has been the case in other USEPA programs. A good definition of what is "natural" is warranted (e.g., undeveloped, rural, agricultural), but may be a challenge in the current political climate.

We believe that the National Stormwater Quality Database (NSQD) is a good resource to define the "natural backgrounds" from developed, urban areas. If agricultural lands are assumed to constitute the "natural background" of soils, then data from USDA and/or Soil and Water Conservation Districts could also be good resources.

Another suggestion is for USEPA to allow for the methods prescribed in other USEPA programs (e.g., Superfund) for determining natural background for stormwater compliance.
We also agree that the exception for natural and run-on background contributions must allow for a demonstration that but for the background contribution, the facility's discharge would meet benchmarks. In practice, many jurisdictions already acknowledge this important component of a background exception and it would simply reflect the actual facility discharge.

Finally, the run-on exception in Section 5.2.4.2 should be revised to remove the conditions related to notifying the upstream party and USEPA. This poses an onerous burden on the innocent party to play "police". While in some cases the regulated parties will in fact notify the neighboring contributor as a matter of its normal business relationships, in other cases such an approach could result in business interruptions.

15. <u>Appendix Q – Stormwater Control Measures (SCM)</u>
We are strongly opposed to the inclusion of the new Appendix Q of SCMs in the MSGP. Instead, this extensive list of SCMs should be made a separate USEPA guidance document, and not be a part of the MSGP or otherwise imposed as a requirement in any way.

At a time when our leaders are talking about regulatory reform and making regulatory programs more efficient, it is disappointing that USEPA is "ballooning" the MSGP with the proposed **<u>672-page</u>** Appendix Q of SCMs, forming the majority of this **<u>1000+ page MSGP</u>**! USEPA may have intended to provide more guidance to the regulated community with this appendix, but its inclusion has the unfortunate consequence of imposing greater legal jeopardy on the regulated community.

The inclusion of this Appendix Q in the MSGP requires permittees to wade through its 672-pages to ensure compliance with all applicable SCMs, with the real potential of legal liability of missing SCM items, even if due to inadvertent human error. In addition, each SCM in Appendix Q is followed by the requirement for the permittee to state the "Reason Why Inappropriate/Not Done". Again, this raises concerns about "non-compliance of process" for not answering the SCM question to the satisfaction of USEPA and in fact flips the idea of facility-selected BMPs entirely on its head: under the new proposal, USEPA has selected the BMPs as the starting point for facility management.

Another concern with this Appendix Q is that what is now a 672-page appendix will "balloon" out even more with each future MSGP renewal. Therefore, we again strongly oppose the inclusion of this Appendix Q of SCMs in the MSGP, and suggest that it be made a separate USEPA guidance document.

***

The OMA appreciates the opportunity to comment on the MSGP. We look forward to the Agency's incorporation of our recommendations in the final MSGP. If USEPA has any questions regarding the foregoing, please do not hesitate to contact me (614-629-6814) or OMA's environmental counsel, Frank Merrill at Bricker & Eckler LLP (614-227-8871).

Regards,

Rob Brundrett
Director, Public Policy Services

cc: Frank L. Merrill, Esq.

The Ohio Manufacturers' ASSOCIATION

2020-21

OMA Public Policy
COMPETITIVENESS
AGENDA

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OMA

Competitiveness Agenda

Manufacturing drives Ohio's economy. It is responsible for approximately $112 billion (17%) of Ohio's Gross Domestic Product – greater than the contribution of any other Ohio industry sector.

In the competitive domestic and global economies, every public policy decision that affects Ohio's business climate affects Ohio's manufacturing competitiveness. In turn, Ohio's manufacturing competitiveness determines the state's economic growth and job creation.

Ohio manufacturers need public policies that attract investment and protect the state's manufacturing legacy and advantage. These policies apply to a variety of issues that shape the business environment in which manufacturers operate.

THE OMA'S MAJOR POLICY GOALS INCLUDE THE FOLLOWING:

- **An Efficient, Competitive Ohio Tax System**
- **A Lean, Productive Workers' Compensation System**
- **Access to Reliable, Economical, Competitive Energy Resources**
- **A Fair, Stable, Predictable Civil Justice System**
- **Science-based, Technologically Achievable, and Economically Reasonable Environmental Regulations**
- **A Modern, Job-Supporting Infrastructure**
- **An Adequate, Educated, Highly Skilled Workforce**

PolicyGoal:

An Efficient, Competitive Ohio Tax System

For Ohio to be successful in a global economy, the state's tax system must encourage investment and growth. It must be competitive nationally and internationally. A globally competitive tax system is characterized by certainty, equity, simplicity, and transparency. Economy of collections and convenience of payment also are important attributes.

Generally, manufacturers support efforts to broaden the tax base, which enables lower rates. To preserve the integrity of the broad tax base and ensure fairness, credits and exemptions should be reduced and discouraged. Moreover, earmarking and dedicating tax revenues should be discouraged as well.

Government should instead build on initiatives such as the recently revised Jobs Retention Tax Credit and continue creating incentives for capital investment in Ohio. Productivity gains, which keep Ohio manufacturers competitive, are driven by capital investments in technology and equipment. Therefore, tax policies that encourage investment should be a priority.

As Ohio's number one industry and wealth producing sector of the economy, Ohio's tax structure should be maintained to leverage manufacturing. The state should continue to improve its manufacturing climate by removing the sales tax from temporary labor and manufacturing janitorial supplies and services.

Good tax policy also generates necessary revenue to support the essential functions of government. Good budgeting and spending restraint at all levels of government are vital to a competitive tax environment, especially in challenging times.

Major tax reforms approved by the Ohio General Assembly in 2005 – and additional reforms in 2011 through 2015 – significantly improved a tax system that was for many years widely regarded as uncompetitive and obsolete. These reforms reduced overall tax rates, eliminated tax on investment, and broadened the tax base, all of which provide more stable and predictable revenues and simplify compliance.

The elimination of the tangible personal property tax, the corporate franchise tax, and the estate tax has strengthened the competitiveness of Ohio's tax system. So has the reduction of the personal income tax rate, as well as the creation of a broad-based, low-rate commercial activity tax (CAT).

Going forward, these tax policy improvements must be protected. The tax bases should be protected against erosion caused by new credits and carve-outs to narrow special interests. Where possible and reasonable, tax bases should be expanded and tax rates reduced. Ohio has seen an increase in potential CAT exemptions and carveouts. While most of these have not come to fruition, leaders must ignore the siren song and maintain the broad base.

Finally, reducing the number and type of taxing jurisdictions would be beneficial. Because of its complex layering of local and state taxes, Ohio's tax system is at a competitive disadvantage.

ABOUT OHIO'S UNEMPLOYMENT INSURANCE TRUST FUND

The COVID-19 pandemic thrusted the Ohio Unemployment Insurance Trust Fund into default. Coming out of the pandemic, state leaders must work toward aligning benefits with contributions to build a sustainable unemployment trust fund balance. The best solvency plan is one that includes a focus on job creation – because increased employment not only increases fund contributions, but also reduces benefit payouts.

To encourage job growth, unemployment compensation tax rates should be in line with surrounding states, as well as states Ohio competes with to attract and retain new business. Ohio should pause any substantive employer payment increases until sufficient economic recovery has occurred.

PolicyGoal:

A Lean, Productive Workers' Compensation System

An efficient and effective workers' compensation system benefits workers, employers, and the economy of the state. It is built on the following principles:

- Safety is the number one priority for Ohio's manufacturers.
- Injured workers receive prompt benefits that are adequate for returning to work quickly and safely.
- Rates are established by sound actuarial principles, so that employers pay workers' compensation rates commensurate with the risk they bring to the system.
- The system is financed with well-functioning insurance mechanisms, including reserving and investment practices that ensure fund solvency and stability.
- The benefit delivery system deploys best-in-class disability management practices that drive down costs for employers and improve service and outcomes for injured parties.
- The system consistently roots out fraud, whether by employers, workers or providers.

FUNDAMENTAL PRIORITIES FOR FUTURE ACTION INCLUDE:

- The Bureau of Workers' Compensation (BWC) should continue to reform its medical management system to lower costs and improve medical quality through better coordination of care and development of a payment system that creates incentives for best clinical practices. In doing this, the BWC should build on emerging best practices in the private health care system.
- The Ohio General Assembly should enact statutory reforms of benefit definitions so the claims adjudication process is more predictable, less susceptible to fraud and manipulation, and less costly for employers and employees.
- The Industrial Commission should record hearings so the hearing process is more transparent and any appeals have a record on which to build.
- The Industrial Commission should create a mechanism whereby employers can file complaints related to the hearings process without the risk of adverse consequences.

A WORD ABOUT WORKPLACE GUN POLICY

Manufacturers remain concerned with weapons violence and the erosion of private property laws at the expense of more relaxed gun rights. Ohio needs to ensure that businesses are in the driver's seat and can make decisions about whether an individual can bring a weapon, concealed or otherwise, onto their private property.

PolicyGoal:

Access to Reliable, Economical, Competitive Energy Resources

Energy policy can either enhance or hinder Ohio's ability to attract business investment, stimulate economic growth, and spur job creation – especially in manufacturing. State and federal energy policies must 1.) ensure access to reliable, economical, competitive sources of energy, and 2.) promote policies, regulations, and tariff designs that encourage and allow for manufacturers to lower costs through energy management, including efficiency, load management, and behind-the-meter generation.

The OMA's energy policy advocacy efforts are guided by these principles:

- Energy markets free from market manipulation allow consumers to access the cost and innovation benefits of competition.
- Ohio's traditional industrial capabilities enable global leadership in energy product innovation and manufacturing.
- Sustainable energy systems support the long-term viability of Ohio manufacturing.
- Effective government regulation recognizes technical and economic realities.

Shaping energy policy in Ohio that aligns with these principles will support manufacturing competitiveness, stimulate economic expansion and job creation, and foster environmental stewardship.

ENERGY POLICY PRIORITIES ARE:

- To protect customers and markets, repeal and reform House Bill 6 (Ohio's nuclear bailout law) and related legislation.
- Ensure an open and fair electricity generation marketplace in which competition enables consumer choice, which drives innovation.
- Reforming Public Utilities Commission of Ohio (PUCO) rate-making processes by eliminating electric security plans (ESPs) to protect manufacturers from above-market generation charges.
- Correct Ohio case law that denies electric customers refunds from electric utilities for charges that are later determined to be improper by the Supreme Court of Ohio.
- Design an economically sound policy framework for discounted rates for energy-intensive manufacturers.
- Oppose legislation and regulation that force customers to subsidize uneconomical generation, including nuclear and certain coal power plants.
- Encourage electric tariff and rate designs that encourage and allow for manufacturers to lower costs through energy management, including efficiency, load management, and behind-the-meter generation.
- Encourage fair and reasonable power siting regulations that allow new generation facilities in Ohio.
- Support deployment of customer-sited generation technologies, such as co-generation, energy efficiency and demand-side management, to achieve least-cost and sustainable energy resources.

PolicyGoal:

A Fair, Stable, Predictable Civil Justice System

For manufacturers to invest and grow in Ohio – and compete globally – Ohio's civil justice system must be rational, fair and predictable. Manufacturers must be free to innovate and pursue market opportunities without fear of unreasonable exposure to costly lawsuits, while injured parties must have full recourse to appropriate measures of justice.

The OMA supports policy reforms that protect consumers without overly burdening businesses, while also positioning Ohio advantageously relative to other states. The association encourages policymakers to evaluate all proposed civil justice reforms by considering these questions:

- Will the policy fairly and appropriately protect and compensate injured parties without creating a "lottery mentality"?
- Will the policy increase or decrease litigation burdens and costs?
- Will the policy promote or reduce innovation?
- Will the policy attract or discourage investment?
- Will the policy stimulate or stifle growth and job creation?

Ohio has made great strides in reforming its civil justice system over the past decade, and longer. The primary aim of the state should be to preserve those tort reform improvements in areas such as punitive damages, successor liability, collateral sources, statute of repose, and public nuisance. This will protect consumers without unduly burdening businesses, while also positioning Ohio as an attractive state for business investment.

PolicyGoal:

Science-based, Technologically Achievable, and Economically Reasonable Environmental Regulations

EFFECTIVE ENVIRONMENTAL STANDARDS AND REGULATIONS ARE BASED ON THE FOLLOWING PRINCIPLES:

- Provide clarity, predictability and consistency;
- Are based on scientific consensus;
- Provide for common-sense enforcement; and
- Incorporate careful cost-benefit analysis as part of the policymaking process.

Manufacturers urge policymakers to exercise restraint in establishing state environmental regulations that exceed federal standards, and to avoid doing so altogether without clear and convincing evidence that more stringent regulations are necessary. At the same time, manufacturers understand that fair and reasonable regulations must be balanced with responsible stewardship of our natural resources.

Manufacturing leads the way in innovation in solid waste reduction and recycling. Industry is an enormous consumer of recycled materials, such as metals, glass, paper, and plastics; manufacturers therefore are strong advocates for improving recycling systems in Ohio and nationwide.

The state should expand opportunities for industry to reuse non-harmful waste streams. Beneficial reuse policies can result in less waste and more recycling of industrial byproducts. Likewise, Ohio should continue to expand recycling programs that provide feedstock for the state's industrial processes.

With respect to Ohio's waterways, the state should continue to engage with the manufacturing community for solutions to nutrient loading issues and develop non-point source solutions as stringent as manufacturing-point source solutions.

In designing state implementation plans for new federal regulations, the Ohio Environmental Protection Agency should use a transparent process of stakeholder involvement, supplemented by investment in independent research to determine the least costly and most scientifically sound and technologically feasible implementation plans.

PolicyGoal:

A Modern, Job-Supporting Infrastructure

Modern infrastructure is critical for today's advanced manufacturing economy. To remain competitive and maximize the economic benefits of Ohio's manufacturing strength, the state must update and expand Ohio's multi-modal transportation infrastructure, including roads, bridges, rails, and ports. Continued investment in these resources is critical to providing Ohio manufacturers with flexible, efficient, cost-effective shipping options.

The state also must continue to support the development of natural gas pipeline infrastructure that delivers the abundant energy resources from the Utica and Marcellus shale formations to Ohio manufacturers in all parts of the state and other markets. This infrastructure produces a job-creating competitive advantage for Ohio.

INFRASTRUCTURE POLICY PRIORITIES INCLUDE THE FOLLOWING:

- Support the creation of an Ohio Division of Freight to focus regulatory attention on the logistics needs of manufacturers.
- Support state and federal legislation, as well as rules and regulations, that safely provides greater flexibility and efficiency in truck movements.
- Support technology and workforce solutions that address the shortage of truck drivers.
- Ensure Ohio's freshwater ports remain competitive and state-of-the-art in functionality. Advocate for appropriate facility maintenance, including dredging to ensure navigability.
- Preserve access to, and provide responsible management of, Ohio's sources of water.
- Protect cyber infrastructure to safeguard data used by manufacturers and their customers and suppliers.

PolicyGoal:

An Adequate, Educated, Highly Skilled Workforce

A robust economy requires a reliable population of workers with technical knowledge and skills required to meet global standards for quality – and who can think critically and work collaboratively. Sustained growth in manufacturing productivity will require not only a new generation of globally competent workers, but also workers who are willing to embrace lifelong learning to keep pace with technological advancements and global competition.

WORKFORCE DEVELOPMENT POLICY PRIORITIES INCLUDE:

- Focusing state government and industry efforts on industry-led regional sector partnerships, guided by the statewide, OMA-led Workforce Leadership Committee. The committee's mission is to identify industry-specific workforce priorities, set standards for collaboration, align funding streams to minimize duplication of workforce programs and services, and evaluate program and service efficacy.
- Creating statewide strategies with clear funding sources supported by state agencies. Provide financial support for sector partnerships that have 1.) demonstrated industry leadership in their organizational structure, and 2.) gained meaningful commitments by way of financial and volunteer contributions to ensure they are truly demand-driven.
- Expanding the use of innovative earn-and-learn programs, including cooperative education, internships, pre-apprenticeships, and apprenticeships. Earn-and-learn programs enhance talent recruitment and retention because participants are exposed to company-specific, real-world job expectations and experiences. Students and employees develop job-specific and management skills by working closely with company mentors; participating companies benefit from reduced recruitment and training costs, while ensuring knowledge- and skill-transfer from their senior employees.
- Expanding the use of nationally portable, industry-recognized, "stackable" credentials in all sectors of manufacturing. Credentials validate foundational and technical competencies needed to be productive and successful in manufacturing career pathways.
- Incentivizing K-12 schools, as well as two- and four-year higher education institutions, to coordinate outcomes-based education and training programs along industry-driven career pathways. Multiple on- and off-ramps for entry-to leadership-level careers have been mapped to real industry needs and jobs. Industry-recognized credentials and certificate programs are being adopted across institutions to increase stackable and transferable credentials from classroom to workplace. Investment in demand-driven training programs that offer pathways to retain incumbent workers allow them to acquire new skills as job requirements shift.

- Supporting “Making Ohio” – a statewide manufacturing image campaign that is managed by the OMA to create a consistent, positive perception of Ohio manufacturing career opportunities and pathways.
- Urging state agency administrators to accurately measure and communicate the outcomes of recruitment and training efforts – including the number of industry-recognized credentials earned, as well as participation in earn-and-learn programs – while protecting individual privacy concerns. Having systems in place to produce these data will allow policymakers and industry leaders to better understand outcomes and create more informed policies and programs.
- Addressing the school funding disincentive for school districts to refer students to career and technical centers – a vital source of the skills training needed to fill the manufacturing workforce pipeline.
- Ensuring schools have career counselors whose sole focus is career planning – not just college planning – and equip them with an understanding of manufacturing career pathways and the various options for acquiring the skills necessary for success. Task them with sharing this information in meaningful ways with students, parents, teachers, and other influencers to better inform and align student career path choices.
- Providing meaningful professional development opportunities for educators to have exposure to industry so they can incorporate real-life exercises into lesson plans and classroom activities.
- Ensuring that career counselors within the network of OhioMeansJobs centers have a modern and accurate understanding of manufacturing career pathways to be able to share with adult job seekers and career switchers.

The Ohio Manufacturers' Association

The mission of The Ohio Manufacturers' Association is to protect and grow Ohio manufacturing

For more information about the services and activities of the OMA, contact us at (800) 662-4463 or OMA@OHIOMFG.COM or visit OHIOMFG.COM.

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Environment

Auxiliary Container Bill Sent to Governor
September 25, 2020

The Ohio House of Representatives this week voted 58-35 to accept the Senate's changes to **House Bill 242** — often referred to as the "plastic bags bill" in the news media. HB 242 prevents local governments from putting fees or bans on the use of auxiliary containers, such as plastic bags or other types of containers often used in retail and the food and beverage industry. Ohio is a manufacturing leader for these types of containers.

The major change to HB 242 made by the Senate was the inclusion of a 12-month sunset on the pre-emption provision. Several local governments in Ohio had previously banned certain types of containers, although some had already repealed their ban due to COVID-19. Bill supporters say HB 242 provides uniform business regulations across the state.

The OMA supported the bill and will work to increase the length of the pre-emption in future legislation. Gov. Mike DeWine is expected to sign the bill. *9/24/2020*

Cleveland, Cincinnati in Non-Attainment for Ozone Standard
September 18, 2020

This week, the Ohio EPA hosted calls to notify stakeholders in the **Cincinnati** and **Cleveland** areas that both regions will not be in attainment under the federal ozone standard of 2015. Both regions are required to be in compliance with the standard by Aug. 3, 2021.

Because both regions are reporting higher ozone numbers, they will considered as being in "moderate non-attainment." This status change will trigger additional compliance requirements under the federal Clean Air Act, including emissions offsets.

The OMA will continue to work with members and Ohio EPA on Ohio's responses to these new challenges. Ohio EPA says they are working with other states to examine non-point source solutions — not just point sources, which tend to punish manufacturers. *9/17/2020*

Lake Erie Commission Advisory Group Includes OMA Members
September 18, 2020

The **Lake Erie Commission** has voted to establish an advisory group to better vet technology-driven proposals that will help combat harmful algal blooms to protect Lake Erie and Ohio waterways. Among the OMA members that have been named to the **H2Ohio Technology Assessment Program** advisory council are Scotts Miracle-Gro Company and Owens Corning. *9/14/2020*

Ohio EPA Webinar on Regulations in Your Community
September 18, 2020

Late last month, Ohio EPA hosted a webinar titled, "**Environmental Regulations of Businesses in Your Community**." The webinar is now available on demand. It provides an overview of the environmental regulations affecting both large and small businesses in Ohio communities — and explains Ohio EPA's permitting, inspection, and enforcement procedures. *9/17/2020*

Ohio EPA Compliance Assistance Conference Begins Next Week
September 18, 2020

Here's a reminder that this year's Ohio EPA Compliance Assistance Conference, which will be completely online, begins Monday, Sept. 21 and will continue over a three-week period. For details, see **this guide** or go directly to the **registration page**. *9/17/2020*

Ohio EPA Director Laurie Stevenson to Headline OMA Environment Committee's Sept. 29 Meeting
September 11, 2020

Ohio EPA Director **Laurie Stevenson** will address the OMA Environment Committee at its upcoming meeting on Tuesday, Sept. 29. Director Stevenson will provide a complete rundown of the agency's activities and priorities. Please plan to join us by **registering here**. *9/10/2020*

Report: Environmental Agencies Have Ended COVID-19 Enforcement Discretion Policies
September 11, 2020

Earlier this year, the U.S. EPA and other environmental regulators developed temporary enforcement discretion policies to mitigate the impact of the pandemic on their own employees, as well as on the employees of regulated companies and their contractors. States, including Ohio, also adopted their own enforcement discretion policies.

This week, OMA Connections Partner Benesch **published a new bulletin** stating that both U.S. EPA and Ohio EPA have terminated these enforcement discretion policies. According to Benesch, Ohio business "would be wise to assume that environmental regulators will now be deeply skeptical of claims that any ongoing difficulties." *9/10/2020*

Ohio EPA Compliance Assistance Conference Begins Sept. 21
September 11, 2020

This year's Ohio EPA Compliance Assistance Conference, which will be completely online, begins Monday, Sept. 21 and will continue over a three-week period.

The conference's free sessions will focus on compliance with air, waste, and water regulations. Attendees may register for the individual sessions that are most relevant to their business. See **this guide** or go directly to the **registration page**. *9/10/2020*

OMA Submits Comments on Water Quality Standards for Point Sources
September 4, 2020

On August 28, OMA **submitted these comments** to Ohio EPA regarding the agency's Early Stakeholder Outreach (ESO) – OAC Chapter 3745-1-38 – Variances from Water Quality Standards for Point Sources.
OMA highlighted the wide ranging impact of the rule and stressed in particular that greater flexibility is needed with respect to the mercury variance portion of the rule.

We'll will continue to work with Ohio EPA through the rule process. *9/3/2020*

Register for Ohio EPA Virtual Compliance Assistance Conference – Sept. 21 – Oct. 8, No Charge
September 4, 2020

Ohio EPA's popular compliance assistance conference goes virtual. The free **2020 Virtual Compliance Assistance Conference** will provide daily interactive sessions focused on compliance with air, waste, and water regulations, strategically and conveniently spaced over three consecutive weeks. Register for the free sessions individually to tap into the knowledge of fellow business owners, Ohio EPA staff, and invited guests. *9/3/2020*

Roundtable to Focus on Reuse of Textile Materials
August 28, 2020

Does your business have recurring supplies of textile materials or an end-market or solution provider? If so, you can help Great Lakes businesses keep textiles out of the landfill. Ohio EPA invites you to take part in a **virtual roundtable** — held in conjunction with the Ohio Materials Marketplace — at 10:30 a.m. (ET) Tuesday, Sept. 1. *8/24/2020*

OMA Submits Comments on Ambient Water Quality Criteria
August 21, 2020

The OMA this week submitted **comments** regarding the U.S. EPA's *Draft Ambient Water Quality Criteria Recommendations for Lakes and Reservoirs of the Conterminous United States*. The OMA outlined serious concerns regarding the proposed use of the draft recommendations, as well as some of the assumptions underlying the recommendations.

The OMA stated that the draft recommendations, if pursued, "should not be issued as Clean Water Act Section 304(a) criteria, but rather as guidance for the limited purpose of evaluating whether nutrients may be a cause of a confirmed use impairment in a lake or reservoir, and only after the models are revised to address their overly conservative assumptions."

Members with questions should contact **Rob Brundrett**. *8/20/2020*

Ohio EPA Compliance Assistance Conference Set for Sept. 21 – Oct. 8
August 21, 2020

Ohio EPA's Compliance Assistance Conference is going virtual this year. The annual event will be held Sept. 21 through Oct. 8. The free conference will provide daily interactive sessions focusing on compliance with air, waste, and water regulations — spaced over three consecutive weeks. The agency **says** registration and more information will be coming soon. *8/19/2020*

Wanted: Proposals to Address Recycling, Reuse and Remanufacturing Challenges
August 21, 2020

The U.S. Department of Energy said this week that approximately $35 million will be distributed to support research and development that will enable U.S. manufacturers to increase the recovery, recycling, reuse, and remanufacturing of plastics, metals, electronic waste, and fibers. **Learn more** about this initiative to increase U.S. manufacturing competitiveness and promote a sustainable national manufacturing R&D infrastructure. *8/19/2020*

Guidance for Industrial Storm Water Permitting
August 21, 2020

Ohio EPA has put together a **handy document** to help determine if your facility qualifies for a no exposure certification (NOE) for industrial storm water discharge permitting. This guidance will help businesses understand the NOE and changes you can make that may make you eligible for the NOE. *8/20/2020*

Ohio Lake Erie Commission Seeks Comments on Ashtabula River Area of Concern
August 14, 2020

The Ohio Lake Erie Commission and Ohio EPA are accepting comments for the proposed removal of a beneficial use impairment that restricts navigational dredging activities within the Ashtabula River Area of Concern. **Learn more here.** *8/11/2020*

Ohio Submits Ozone Documents to U.S. EPA
July 31, 2020

Last week, Ohio EPA submitted to U.S. EPA the emissions inventory and emission statement program to satisfy attainment demonstration requirements under the 2015 ozone National Ambient Air Quality Standard (**NAAQS**). The submissions and associated attachments **can be read here**. *7/30/2020*

Ohio EPA Comment Opportunities
July 31, 2020

Ohio EPA has a number of upcoming opportunities to comment on a variety of rules, regulations and programs. In order of the fastest approaching deadline, opportunities include:

- Aug. 10, 2020, comments due, Division of Materials and Waste Management (DMWM), **Municipal Solid Waste Landfill Operations Rule: OAC Rule 3745-27-19**.
- Aug. 10, 2020, comments due, Division of Materials and Waste Management (DMWM), **Coal Combustion Residual Rules**.
- Aug. 12, 2020, comments due, Division of Environmental Response and Revitalization (DERR), **Voluntary Action Program**.
- Aug. 13, 2020, comments due and virtual public hearing, Division of Materials and Waste Management (DMWM), **Solid Waste Management District Rule**.
- Aug. 13, 2020, comments due, Division of Air Pollution Control (DAPC), **Sulfur Dioxide Regulations**.
- Aug. 17, 2020, comments due and virtual public hearing, Division of Environmental Response and Revitalization (DERR), **Hazardous Waste Set Gen**

If you are interested in working with the OMA on any of the above, please contact **Rob Brundrett**. *7/30/2020*

Good News for Manufacturers: U.S. EPA Declines to Tighten Ozone Standards
July 24, 2020

Ohio manufacturers should note that the U.S. EPA last week **did not propose stricter ozone standards** despite pressure from environmental groups. The EPA's new proposal retains the 70-part-per-billion (ppb) standard for ozone, commonly referred to as smog, set under the Obama administration. Even under the current standard, the Cincinnati and Cleveland areas are both at high risk of being elevated to "moderate non-attainment" status, which would mean tighter controls on emitting industries. "At a time when we are facing record-breaking unemployment, a lower ozone standard could slow our economic rebound and threaten manufacturing competitiveness," the National Association of Manufacturers wrote in a **statement** of support for the EPA's proposal. *7/20/2020*

White House Overhauls Environmental Reviews to Boost Infrastructure Development
July 24, 2020

In another recent federal development, the Trump administration has **announced** a "top to bottom overhaul" of the regulations to "right-size the federal government's environmental review process." The goal is to speed up approval for major projects like pipelines and highways. The administration's new regulations are expected to reduce the types and number of projects subject to review under the National Environmental Policy Act (NEPA), shorten the timeline for reviews, and drop a requirement that agencies consider the cumulative environmental effects of projects. **Read the National Association of Manufacturers' supportive comments**. *7/20/2020*

Report: U.S. Carbon Emissions From Power Production Dropped 8% Last Year
July 17, 2020

According to a report released last week by Ceres, a non-profit environmental organization, carbon dioxide (CO2) emissions from the U.S. electric power sector fell 8% between 2018 and 2019. This is due largely to the increasingly rapid shift away from coal-fired power, according to **reports**. The U.S. power sector has reduced carbon emissions 30% since the sector's peak in 2007, the report said, even as the economy grew. *7/13/2020*

Ohio EPA Issues General Permit for Impacts to Ephemeral Streams
July 2, 2020

Ohio EPA **has announced** the availability of a general permit that will be available to applicants for projects that impact ephemeral streams, which flow only for a short time, usually after a large storm or snowmelt.

The general permit comes in response to U.S. EPA's recently finalized Navigable Waters Protection Rule. The new federal rule removes certain waters from federal jurisdiction under the federal Clean Water Act. States retain the authority to determine oversight of these non-jurisdictional waters. *6/30/2020*

Ohio EPA Offers Grants for Electric Vehicle Charging Stations
July 2, 2020

Ohio EPA is **accepting applications** for $3.25 million in grants for publicly accessible electric vehicle charging stations. Eligible applicants include public or private entities in the 26 counties that Ohio EPA has identified as eligible to receive funds from the grant program. Applications will be accepted through Sept. 30, 2020. *7/1/2020*

Three States Push to Include PFAS in Stormwater Permit
June 26, 2020

Three states are **urging the U.S. EPA** to impose new mandates related to the monitoring and reduction of per- and polyfluoroalkyl substances (PFAS) from industrial stormwater discharges. Colorado, Massachusetts, and New Mexico recently submitted comments on the draft Multi-Sector General Permit (MSGP) that ask EPA to require permitted industrial facilities to monitor PFAS in their stormwater discharges and to develop practices intended to minimize the potential for PFAS to be introduced into stormwater.

The OMA also **submitted comments** on the draft permit. The comment period closed June 1, and it remains to be seen whether the EPA will adopt the three states' suggestions. If it does, it could have wide-ranging implications for states like Ohio that use the federal MSGP as a model for the state general permit. If your company is tracking PFAS issues in Ohio, contact **Rob Brundrett** to keep up to date on Ohio's PFAS response. *6/25/2020*

Monitoring Ohio's Air Quality From Your Computer
June 26, 2020

Summer heat can bring air quality concerns. Ohio EPA's Division of Air Pollution Control offers an **online air quality data and reporting system** that allows Ohioans to monitor conditions from home or work. Tools include a map showing current air quality in several locations across Ohio, as well as air quality index forecasts. *6/24/2020*

Ohio EPA Accepting Comments About Plan to Study Large Rivers
June 19, 2020

Ohio EPA is accepting public comments regarding the **agency's plan** to study the state's largest rivers in 2020-21. Comments will be accepted through July 8. **Learn more here**. *6/18/2020*

Materials Marketplace to Host Webinar on Film Plastics
June 19, 2020

On Tuesday, June 23, at 11 a.m. (ET), the Ohio Materials Marketplace (OMM) — a free online platform of the Ohio EPA that allows businesses to connect and find reuse and recycling solutions for waste and by-product materials — will conduct a **webinar discussing film plastics**. This material is used in an increasingly wide variety of industrial, commercial and consumer applications, such as boat wrapping, nursery and agricultural sheeting, and single-use plastic bags. *6/18/2020*

OMA Comments on General Permit for Isolated Wetlands and Ephemeral Streams
June 12, 2020

Last Friday, June 5, the OMA **submitted comments** on Ohio EPA's proposed General Permit for Isolated Wetlands and Ephemeral Streams. The new general permit is a product of the recent federal rule addressing "waters of the United States" (WOTUS) under the Navigable Waters Protection Rule. *6/11/2020*

U.S. EPA Clarifies Rules to Prevent Delays of Energy Projects
June 5, 2020

The Trump administration this week **announced** a final rule that clarifies a key section of the U.S. Clean Water Act (CWA) in a move that should expedite the approval of energy infrastructure projects. The U.S. EPA's new final rule on Section 401 of the CWA requires states and Native American tribes to rule on permit requests within one year of being submitted and clarifies that decisions should be based solely on the project's effect on water quality.

Rachel Jones, vice president of energy and resources for the National Association of Manufacturers, **supported the rule change**, saying: "By strengthening the state-federal partnership, the EPA is empowering manufacturers to make sustainable investments." *6/2/2020*

OMA Comments on U.S. EPA Stormwater Permits
June 5, 2020

This week, the OMA **submitted comments** on the U.S. EPA's National Pollutant Discharge Elimination System (NPDES) 2020 Issuance of the Multi-Sector General Permit (MSGP) for stormwater discharges associated with industrial activity. The EPA's draft was more than 1,000 pages. The OMA has followed the MSGP closely for years as it is a good indication of where Ohio EPA will fall on the issue.

In its comments, the OMA wrote: "This proposed draft MSGP continues a recent trend towards a more top-down, command-and-control approach to stormwater regulation, with a highly prescriptive stormwater sampling/corrective action regime as its cornerstone. … This is a most unfortunate trend that increases the regulatory burden on industry with no tie to a corresponding, quantifiable benefit to receiving waters. The new requirements in the proposed MSGP go well beyond what is required by the 2016 MSGP settlement and beyond what

Congress intended in the Clean Water Act." *6/4/2020*

OMA Environment Committee Receives Air Update; Cincinnati, Cleveland Could See Tighter Ozone Regs
May 29, 2020

This week, the OMA Environment Committee met virtually for its second meeting of 2020. Among the guest speakers was Bob Hodanbosi, the longtime chief of air pollution control at Ohio EPA, who updated members on Ohio's current air quality status.

While Ohio has seen "dramatic improvement" in its air quality, Hodanbosi reported that it's "not good enough" to meet certain federal standards, primarily in the category of ozone. The Cincinnati and Cleveland areas are **both at high risk** of being elevated to "moderate non-attainment" status due to the more stringent, 70-parts-per-billion ozone standard imposed by the U.S. EPA in 2015. An elevated status for either city would mean tighter controls on emitting industries. See Hodanbosi's **PowerPoint presentation**.

OMA members also heard updates on federal and state issues, as well as a report from OMA Environmental Counsel Frank Merrill of Bricker & Eckler. The committee **will meet again Sept. 29**. *5/28/2020*

Senate Passes Amended Auxiliary Container Pre-Emption Bill
May 29, 2020

The Ohio Senate has passed **House Bill 242**, legislation that is supported by the OMA and packaging manufacturers to **prohibit** local governments from placing fees or taxes on auxiliary containers or packaging, including bags. Last week, the Senate committee that heard the bill added an amendment that sunsets HB 242's provisions after 12 months. The bill will go to the House for a potential concurrence vote. *5/28/2020*

OMA Files Comments on SIP Nuisance Rule
May 29, 2020

Last week, the OMA led a coalition of business groups by **filing comments** to the U.S. EPA's correction of the inclusion of Ohio's air pollution nuisance rule. The comments support the U.S. EPA's proposal to remove the nuisance rule from Ohio's state implementation plan (SIP).

Ohio's public nuisance provision is a general rule prohibiting public nuisances and has no connection with the purposes for which SIPs are developed and approved. Manufacturers often find themselves in the crosshairs of lawsuits based on the SIP provision, even while in compliance with the permit limits. *5/28/2020*

Environment Legislation
Prepared by: The Ohio Manufacturers' Association
Report created on September 28, 2020

HB7 **H2OHIO PROGRAM** (GHANBARI H, PATTERSON J) To create the H2Ohio Trust Fund for the protection and preservation of Ohio's water quality, to create the H2Ohio Advisory Council to establish priorities for use of the Fund for water quality programs, and to authorize the Ohio Water Development Authority to invest the money in the Fund and to make recommendations to the Treasurer of State regarding the issuance of securities to pay for costs related to the purposes of the Fund.

Current Status: 10/22/2019 - Senate Finance, (First Hearing)

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-7

HB94 **LAKE ERIE DRILLING** (SKINDELL M) To ban the taking or removal of oil or natural gas from and under the bed of Lake Erie.

Current Status: 9/17/2019 - House Energy and Natural Resources, (First Hearing)

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-94

HB95 **BRINE-CONVERSION OF WELLS** (SKINDELL M) To alter the Oil and Gas Law with respect to brine and the conversion of wells.

Current Status: 9/17/2019 - House Energy and Natural Resources, (First Hearing)

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-95

HB242 **BAN PLASTIC BAG FEES** (LANG G, JONES D) To specify the authority to use an auxiliary container, to temporarily prohibit the imposition of a tax or fee on those containers, and to apply existing anti-littering law to those containers.

Current Status: 9/23/2020 - Consideration of Senate Amendments; House Does Concur, Vote 58-35

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-242

HB340 **DRAINAGE LAW** (CUPP B) To revise the state's drainage laws.

Current Status: 9/22/2020 - Senate Agriculture and Natural Resources, (Third Hearing)

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-340

HB491 **PLASTIC POLLUTION AWARENESS DAY** (CRAWLEY E) To designate the fifteenth day of February as "Plastic Pollution Awareness Day."

Current Status: 2/11/2020 - Referred to Committee House State and Local Government

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-491

HB497 **SAFE DRINKING WATER ACT** (LIGHTBODY M, RUSSO A) To require the Director of Environmental Protection to adopt rules establishing maximum allowable contaminant levels in drinking water and water quality standards for certain contaminants.

Current Status: 2/11/2020 - Referred to Committee House Health

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-497

HB522 **WASTE DISPOSAL - CONSERVANCY DISTRICTS** (SOBECKI L, SWEARINGEN D) To authorize conservancy districts to provide for the collection and disposal of solid waste.

Current Status: 3/10/2020 - Referred to Committee House State and Local Government

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-522

HB675 **REGARDING CLEAN OHIO PROGRAM** (HILLYER B, SWEARINGEN D) Relating to the Clean Ohio Program and to make an appropriation.

Current Status: 5/27/2020 - Referred to Committee House State and Local Government

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-675

HR247 **AIR QUALITY STANDARDS** (ROEMER B) To respectfully urge Congress and President Donald Trump to amend the Federal Clean Air Act to eliminate the requirement to implement the E-Check Program and direct the Administrator of USEPA to begin new rule-making procedures under the Administrative Procedures Act to repeal and replace the 2015 National Ambient Air Quality Standards; to respectfully urge Congress and President Donald Trump to pass legislation to achieve improvements in air quality more efficiently while allowing companies to innovate and help the economy grow; to urge the Administrator of USEPA to alleviate burdensome requirements of the E-Check Program and the Clean Air Act if Congress and the President fail to act; and to encourage OEPA to explore alternatives to E-Check in Ohio.

Current Status: 2/20/2020 - **PASSED BY HOUSE**; Vote 62-29

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HR-247

HR307 **PLASTIC POLLUTION AWARENESS DAY** (CRAWLEY E) Designating Plastic Pollution Awareness Day in Ohio, February 15, 2020.

Current Status: 2/4/2020 - Introduced

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HR-307

SB2 **STATEWIDE WATERSHED PLANNING** (PETERSON B, DOLAN M) To create a statewide watershed planning structure for watershed programs to be implemented by local soil and water conservation districts.

Current Status: 2/19/2020 - **BILL AMENDED**, House Energy and Natural Resources, (Fifth Hearing)

State Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-2

SB50 **INCREASE SOLID WASTE DISPOSAL FEE** (EKLUND J) To increase state solid waste disposal fee that is deposited into the Soil and Water Conservation District Assistance Fund, and to make an appropriation.

Current Status: 4/2/2019 - Senate Finance, (Second Hearing)

Stae Bill Page: https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-SB-50