10:00 a.m. (EST)
1-866-362-9768
552-970-8972#

Environment Committee

April 10, 2019

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2019 Environment Committee Calendar
Meetings will begin at 10:00 a.m.

Wednesday, April 10
Wednesday, June 12
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OMA Environment Committee Meeting Sponsor:

SQUIRE PATTON BOGGS

OMA Environment Committee

April 10, 2019

Agenda

Welcome & Roll Call	Chairman Julianne Kurdila, ArcelorMittal
NAM Update: PM 2.5/Ozone	Laura Berkey-Ames, NAM, Director, Energy and Resources Policy
Public Policy Report	Rob Brundrett, OMA Staff
Guest Speaker	Laurie Stevenson, Director, Ohio EPA
Lake Erie Bill of Rights	Frank Merrill, Bricker & Eckler LLP
Counsel's Report	Frank Merrill, Bricker & Eckler LLP
Lunch	

Please RSVP to attend this meeting (indicate if you are attending in-person or by teleconference) by contacting Denise: dlocke@ohiomfg.com or (614) 224-5111 or toll free at (800) 662-4463.

Additional committee meetings or teleconferences, if needed, will be scheduled at the call of the Chair.

OMA Environment Committee Meeting Sponsor:

SQUIRE PATTON BOGGS

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.

Laura Berkey-Ames
Director, Energy and Resources Policy
National Association of Manufacturers

For more than twelve years, Ms. Berkey-Ames has represented the interests of various trade associations before Congress and the Administration. In her role as Director, Energy and Resources Policy at the National Association of Manufacturers (NAM), Ms. Berkey-Ames works closely with Congress and the Administration advocating on behalf manufacturers' interests in chemical facility security, clean air issues, energy efficiency, sustainability, hazardous and nonhazardous waste, chemicals in commerce, and environmental justice.

Prior to coming to the NAM, Ms. Berkey-Ames represented the American Fuel & Petrochemical Manufacturers where she focused on legislation impacting facility security, chemicals in commerce, cybersecurity, drones, and various modes of transportation and critical infrastructure. Ms. Berkey-Ames has also advocated on behalf of the American Public Works Association and the Air-Conditioning, Heating, and Refrigeration Institute in the areas of homeland security, emergency management, and energy efficiency.

Ms. Berkey-Ames holds a BA in Political Science and a MA in Applied Politics from The American University in Washington, D.C.

TIMELINE FOR REVIEWS OF THE OZONE & PM NAAQS

On May 9, 2018, EPA Administrator Scott Pruitt directed that the review of the primary and secondary ozone NAAQS be completed by the end of October 2020 and that the review of the primary and secondary NAAQS for PM be completed by December 31 of that year.[1] Although Mr. Pruitt is no longer Administrator, the Agency's present leadership has remained committed to this schedule.

In order to meet it, EPA's staff has indicated the following schedule for review of the ozone NAAQS:

- Spring 2019: Release of a draft Integrated Science Assessment ("ISA') for public comment and CASAC review
- Fall 2019: Release of a draft Policy Assessment ("PA") (which will contain assessments of exposure and risk that EPA has in the past generally included in a separate Risk and Exposure Analysis ("REA")) for public comment and CASAC review
- Early Spring 2020: Issuance of the final ISA and PA
- Spring 2020: Proposed decision
- Late 2020: Final decision

With regard to its review of the PM NAAQS, EPA released a draft ISA in October 2018 for public comment and CASAC review. Comments on this draft were due in December and CASAC met that month to review the draft. EPA's staff has indicated the following schedule for the completion of the PM NAAQS review:

- Summer 2019: Release of a draft PA (with analyses found in the past in a separate REA) for public comment and CASAC review.
- Late 2019-Early 2020: Issuance of the final ISA and PA
- Spring 2020: Proposed decision
- December 2020: Final decision

These timelines were both extremely ambitious. The partial government shutdown from December 21, 2018 – January 25, 2019 is a complicating factor that could further reduce the chance that EPA could meet either of them. That chance is lessened still more by CASAC's concern about (1) the lack of provision for second drafts of any of these documents: (2) the Committee's ability to provide meaningful feedback on the draft documents without assistance on some issues from additional technical experts; and, (3) the desire expressed by some members of CASAC for a stand-alone REA.

[1] Although review of the current secondary NAAQS is intended to be completed on this schedule, EPA has separated consideration of the ecological effects of PM and intends to address them together with the secondary NAAQS for NOx and SOx, perhaps through some type of joint standard.

NATIONAL ASSOCIATION OF Manufacturers

Ross E. Eisenberg

Vice President
Energy & Resources Policy

October 24, 2018

EPA Docket Center
U.S. Environmental Protection Agency
Mail Code C-439-02
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Call for Information on Adverse Effects of Strategies for Attainment and Maintenance of National Ambient Air Quality Standards; Docket ID EPA-HQ-OAR-2018-0365; FRL-9979-05-OAR

The National Association of Manufacturers (NAM), the nation's largest manufacturing association, representing manufacturers in every industrial sector in all 50 states, submits these comments in response to the above-referenced request by the Environmental Protection Agency's (EPA) Office of Air Quality Planning and Standards for information to assist the Clean Air Scientific Advisory Committee's (CASAC) review of national ambient air quality standards (NAAQS).

I. CASAC Must Comply Fully with Section 109(d)(2)(C).

Section 109(d)(2)(A) of the Clean Air Act created CASAC and sets the criteria for appointment to the committee.[1] Section 109(d)(2)(B) and (C) set forth CASAC's responsibilities.[2] Specifically, these responsibilities are:

> (B) Not later than January 1, 1980, and at five-year intervals thereafter, the committee referred to in subparagraph (A) shall complete a review of the criteria published under section 7408 of this title and the national primary and secondary ambient air quality standards promulgated under this section and shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate under section 7408 of this title and subsection (b) of this section.
>
> (C) Such committee shall also (i) advise the Administrator of areas in which additional knowledge is required to appraise the adequacy and basis of existing, new, or revised national ambient air quality standards, (ii) describe the research efforts necessary to provide the required information, (iii) advise the Administrator on the relative contribution to air pollution concentrations of natural as well as anthropogenic activity, and (iv) advise the Administrator of any adverse public

[1] 42 U.S.C. § 7409(d)(2)(A).
[2] *Id.* at § 7409(d)(2)(B)-(C).

> health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of such national ambient air quality standards.[3]

To our knowledge, CASAC has not once conducted the full review called for in Section 109(d)(2)(C)(iv) to "advise the Administrator of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance" of a NAAQS. In fact, in 2011, former CASAC Chair Dr. Roger McClellan testified to Congress that, "I am not aware that CASAC has ever advised EPA to take account of the role of socioeconomic factors, unemployment or other risk factors influencing the health endpoints under consideration."[4] Former CASAC member Dr. Robert Phalen testified at the same hearing that his CASAC panel on particulate matter "was not allowed to adequately discuss the adverse consequences associated with their standards."[5]

During the most recent Ozone NAAQS review cycle, despite the NAM's repeated efforts to convince CASAC to comply with the statute—even appearing at a CASAC hearing in North Carolina to testify—we were told that even though the statute requires CASAC to carry out such an analysis, it could not do so because it was not given such a charge by EPA. CASAC Chair Dr. Christopher Frey then communicated to EPA that "CASAC would be receptive to a request from EPA" to carry out its duties under Section 109(d)(2)(C)(iv).[6]

The NAM believes CASAC must, as a matter of law, be required to carry out the full set of analyses set forth in Section 109(d)(2)(C). Section 109(2)(C) states that CASAC *shall* advise the Administrator; in other words, it is not optional. In the context of each five-year review cycle for each criteria pollutant, EPA must require CASAC to analyze and advise the Administrator on "any adverse public health, welfare, social, economic, or energy effects" of the NAAQS, and CASAC must comply. The NAM supports the May 9, 2018 "Back to Basics" memorandum from the EPA Administrator that commits to full CASAC statutory compliance and the development of a standardized set of charge questions to CASAC to frame the entirety of the NAAQS review.

II. Failure to Comply with Section 109(d)(2)(C) Negatively Impacted the 2015 Ozone NAAQS Review.

The Supreme Court has held that EPA cannot consider costs when establishing or revising a primary or secondary NAAQS. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 471 (2001). However, this does not absolve EPA from all consideration of adverse impacts. As Justice Breyer explained in his concurrence in *Whitman*, EPA may take into account contextual factors when determining the levels that are requisite to protect public health with an adequate margin of safety. More importantly, the prohibition in consideration of costs does not mean EPA can simply ignore all adverse impacts in all cases. During the 2015 Ozone NAAQS review cycle, CASAC's Section 109(d)(2)(C) advice would have been helpful to the Administrator, and the lack of this statutorily-required advice negatively impacted the Administrator's final decision.

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[3] *Id.*

[4] Hearing before the House Committee on Science, Space and Technology, Subcommittee on Energy and the Environment, "Quality Science for Quality Air," Tuesday, Oct. 11, 2011, Hearing Print at 87, *available at* https://www.gpo.gov/fdsys/pkg/CHRG-112hhrg70587/pdf/CHRG-112hhrg70587.pdf.

[5] *Id.* at 38.

[6] Letter from Dr. Christopher Frey to EPA Administrator Gina McCarthy, June 26, 2014, *available at* https://yosemite.epa.gov/sab/sabproduct.nsf/5EFA320CCAD326E885257D030071531C/$File/EPA-CASAC-14-004+unsigned.pdf.

For instance, the 2015 Ozone NAAQS were promulgated at a time when the 2008 Ozone NAAQS had not yet been fully implemented. The Obama Administration ceased implementation of the 2008 Ozone standard for two years while it explored tightening the standard further. This implementation backlog meant that states would have to begin implementing the even-tighter 2015 standard while also trying to "catch up" on implementing the 2008 standard. Complying simultaneously with the two rules has placed a substantial and unnecessary additional burden on both states and regulated entities.

To meet the stricter Ozone standard issued by the EPA in 2015, states must impose significant additional emission reduction obligations on existing sources across all sectors of the economy, many of which have already incurred substantial capital expenditures for pollution control and may not be able to sustain more. In many cases, those sources will have to rely on EPA-defined "unknown controls" that have yet to be developed and whose feasibility and costs cannot be reliably predicted.

Regulatory and permitting requirements associated with ever-tightening Ozone NAAQS are making it increasingly difficult for manufacturers to invest, expand and innovate—which are critical to a strong economy. New and modified sources under the 2015 Ozone NAAQS are subject to more costly and stringent permitting obligations under the New Source Review (NSR) program. For sources in nonattainment areas, the more stringent Lowest Achievable Emission Rate (LAER) standard will be applied and emission offsets must be acquired. Manufacturers struggle to get their necessary air permits to expand and operate even in areas of the country that are in attainment, because of the thin margin between federal standards and background air quality levels.

III. Economic and Energy Impacts of the 2015 Ozone Standard that Should Have Been Considered by CASAC and the EPA.

In 2014 and 2015, the NAM commissioned studies by NERA Economic Consulting to analyze the potential economic impacts of a stricter ozone standard of 60 parts per billion (ppb) and 65 ppb, respectively.[7] NERA found that, at 60 ppb, EPA only identified one-third of the controls needed to meet a lower standard; the other two-thirds were to come from "unknown controls" the EPA had not yet identified. EPA chose to estimate the cost of unknown controls through a modeling exercise; NERA found that EPA's "unknown controls" analysis did not adequately address major gaps in data on compliance technologies and their costs. NERA instead employed an evidence-based approach to measure potential unknown controls. This approach consisted of the following steps:

1. The most recent EPA information on projected 2018 baseline VOC and NOx emissions which were supplemented by baseline emission projections for electric generating units (EGUs);
2. NERA's assessments (based upon earlier EPA analyses) of emission reductions that would be required for all regions of the United States to come into attainment;
3. Cost and emission reduction information for what EPA considers to be "known" controls; and

[7] National Association of Manufacturers, "Potential Economic Impacts of a Stricter Ozone Standard," *available at* http://www.nam.org/Data-and-Reports/Reports/Potential-Economic-Impacts-of-a-Stricter-Ozone-Standard/.

4. NERA's estimates of the emission reductions and potential costs per ton of what EPA refers to as the "unknown" controls necessary to achieve attainment in each affected state."[8]

To generate its estimates of the cost of a 60 or 65 ppb Ozone standard, NERA used EPA estimates on known controls and then generated estimates of unknown controls using the process above, which evaluated compliance measures such as scrappage or modification of power plants, factories, heavy-duty vehicles, off-road vehicles and passenger cars. Since more than 60 percent of the controls and technologies needed to meet a 60 ppb Ozone NAAQS were unknown to EPA, a stricter standard could reasonably result in the closure of plants and the early scrappage of equipment used for manufacturing, construction, and agriculture.[9] Across the board, the NERA study results were alarming. Unlike regulations that target specific sectors, a new Ozone standard would directly affect virtually every sector of the economy because a wide range of stationary, mobile and area sources emit ozone precursors (NOx and VOCs).[10]

A 60 or 65 ppb Ozone standard would have a lasting, negative impact on every facet of the U.S. economy. A standard of 60 ppb could reduce U.S. GDP by $270 billion per year and result in 2.9 million fewer job equivalents per year on average through 2040.[11] For employed individuals, a 60 ppb ozone standard "would lower potential wage rates by an average of 1.2 percent . . . through 2040. . . Lower real wage rates reduce workers' incomes even if they continue to work the same number of hours. However, a lower real wage rate also decreases people's desire to work. With fewer hours worked, total labor income declines by a greater percentage."[12] Consequently, annual household spending would also be reduced on average by $1,570.[13] Even if EPA lowered the ozone standard to only 65 ppb, this would still have a detrimental impact on the economy. GDP would be reduced by $140 billion annually and 1.4 million job equivalents would be lost through 2040.[14] Potential wage rates could decrease by 0.6 percent and cost the average household $840 per year in the form of lost consumption.[15] Taken together, NERA's results clearly demonstrate that a stricter Ozone NAAQS would ignite a vicious cycle that would harm the economy, energy security and manufacturers' competitiveness.

A 60 or 65 ppb Ozone standard would also negatively impact energy. The United States is currently experiencing an energy renaissance that is fostering energy independence, infrastructure development, and strengthening our ability to compete in the global marketplace. A stricter Ozone standard would severely impair this energy renaissance, casting a shadow over our country's energy markets and current prosperity. NERA predicted that a "more stringent ozone standard is projected to lead to the premature retirement of additional coal-fired

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[8] NERA Economic Consulting, *Assessing Economic Impacts of a Stricter National Ambient Air Quality Standard for Ozone*, at S-4 (2014), *available at* http://www.nam.org/Issues/Energy-and-Environment/Ozone-Regulations/NERA-NAM-Ozone-Full-Report-20140726/.

[9] *Id.*

[10] *Id.* at S-2.

[11] *Id.* at 25, 28.

[12] *Id.* at 26-7.

[13] *Id.*

[14] NERA Economic Consulting, *Economic Impacts of a 65 ppb National Ambient Air Quality Standard for Ozone: Updated Estimates* (2015), *available at* http://www.nam.org/Data-and-Reports/Reports/Ozone-Impact/NERA-NAM-Ozone-August-2015-Update.pdf.

[15] *Id.*

power plants."[16] Moreover, a 60 ppb Ozone NAAQS could, on average, raise natural gas prices for residential and industrial customers by 7 percent and 12 percent, respectively, through 2040. The electricity sector would also suffer under this scenario. Residential and industrial electricity prices could on average increase to 3.3 percent and 5.5 percent, respectively, through 2040.[17] Energy markets would also be impacted if Ozone NAAQS were set at 65 ppb. Through 2040, average natural gas prices for residential and industrial customers would increase by 3.3 percent and 5.6 percent, respectively. Residential and industrial electricity prices would also rise on average by 1.2 percent and 2.1 percent over that same timeframe.[18] The EPA has yet to address the potential impacts tighter ozone standards could have on energy production and costs. A stricter ozone standard would result in the vast majority of the country being classified as "nonattainment" areas. This would further limit supplies of critical energy resources, hinder infrastructure development, and drive up costs for manufacturers and households.

The full reports from NERA's 2014 and 2015 Ozone NAAQS studies are attached to these comments. The information contained in these reports would have been highly relevant to CASAC's Section 109(d)(2)(C) advice to the Administrator regarding adverse public health, welfare, social, economic, or energy effects which may result from Ozone NAAQS attainment. Consideration of this information would have undoubtedly led to a better-informed 2015 Ozone regulation.

IV. Better Regulations Will Lead to a Better Environment

Manufacturers are committed to protecting the environment and have made significant investments to reduce their environmental impact. The results are impressive. the manufacturing sector has reduced its emissions of nitrogen oxides (NOx) by 53 percent since 1970; carbon monoxide (CO) by 70 percent since 1970; sulfur dioxide (SO2) by 90 percent since 1970; coarse particulate matter (PM10) by 83 percent since 1970; volatile organic compounds (VOC) by 47 percent since 1970; fine particulate matter (PM2.5) by 23 percent since its peak in 1999; and greenhouse gases (GHGs) by 10 percent over the past decade while contributing 19 percent more value to the American economy.[19] By driving down emissions through innovation and substantial investment, American manufacturers are able to make modern, everyday life possible and more effectively compete in the global marketplace.

Manufacturers will continue to reduce our environmental impact. In turn, laws and regulations should be designed with the utmost care to ensure that they are effective in achieving their desired objectives while simultaneously avoiding unnecessary adverse economic and social impacts. Measures to protect environmental quality must always utilize sound science and employ rigorous economic analyses to better understand potential impacts and cost-benefit relationships. Importantly, measures to protect environmental quality should also integrate a complete cumulative analysis of the impacts on regulated industries, manufacturers, and the economy. The NAAQS recommendations put forth by the CASAC will play a prominent role in determining which areas of the country will be able to attract new economic activities to create jobs, and which areas will find themselves constrained by regulatory burdens. Ultimately,

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[16] NERA Economic Consulting, *Assessing Economic Impacts of a Stricter National Ambient Air Quality Standard for Ozone*, at S-16 (2014).

[17] *Id.* at 28-9.

[18] NERA Economic Consulting, *Economic Impacts of a 65 ppb National Ambient Air Quality Standard for Ozone: Updated Estimates* (2015).

[19] EPA National Emissions Inventory, available at https://www.epa.gov/air-emissions-inventories/national-emissions-inventory-nei.

CASAC's recommendations will help determine the future viability and competitiveness of U.S. manufacturing.

The NAM hopes EPA will use lessons learned from the 2015 Ozone NAAQS review process to ensure CASAC complies fully with the Clean Air Act in carrying out its role in future NAAQS reviews—and before diving headfirst into another tightening of a NAAQS. Thank you for the opportunity to provide these comments; please contact me if the NAM can be of further assistance.

Sincerely,

Ross Eisenberg
Vice President
Energy and Resources Policy

Attachments:

- *Assessing Economic Impacts of a Stricter National Ambient Air Quality Standard for Ozone*, NERA Economic Consulting, July 2014.
- *Economic Impacts of a 65 ppb National Ambient Air Quality Standard for Ozone: Updated Estimates*, NERA Economic Consulting, August 2015.

TO: **OMA Environment Committee**
FROM: **Rob Brundrett**
RE: **Environment Public Policy Report**
DATE: **April 10, 2019**

Overview

Long time Ohio EPA staffer Laurie Stevenson was appointed to the lead the agency by new Governor Mike DeWine in January. Ohio EPA will be coordinating with ODNR and Agriculture during operating budget discussions regarding Ohio water quality and Lake Erie and the new H2Ohio fund. The DeWine administration is taking a new and different approach to Lake Erie and the algal bloom issues than the previous administration. The environment budget contains several policy changes of note.

General Assembly News and Legislation

Senate Bill 2 – Statewide Watershed Planning

The bill creates and funds 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.

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 provides increased state funding to the soil and water conversation districts.

House Bill 94 – Lake Erie Drilling Ban

HB 94 bans the taking or removal of oil or natural gas from and under the bed of Lake Erie.

Toledo Passes Lake Erie Bill of Rights – Choppy Waters Ahead

In a February 26, 2019 special election, Toledo's voters passed the Lake Erie Bill of Rights (the LEBOR). The LEBOR is an amendment to the City of Toledo's Charter that creates a new cause of action for the violation of the right of Lake Erie and its watershed to "exist, flourish, and naturally evolve."

The LEBOR initiative is similar to many other community rights proposals that seek to establish rights for natural resources that citizens can protect through legal action.

The corporations or entities that could be impacted by the LEBOR's enactment range far and wide. Generally, companies that have an Ohio EPA issued water discharge permit authorizing them to discharge into surface waters within the Lake Erie watershed could be affected.

On February 27th, Drewes Farm Partnership v. City of Toledo was filed in federal court in Toledo, asserting many challenges to the LEBOR, including the argument that the LEBOR exceeds Toledo's limited authority to pass legislation and is in violation of state and federal preemption laws. The Drewes case seeks a preliminary injunction to stop the LEBOR going into effect before its defects are litigated.

These, and other legal challenges, are anticipated in the near future, with industry groups, agricultural interest groups, and businesses all interested in challenging the LEBOR for its overreach and broad declarations.

House Bill 166 – State Operating Budget

Governor DeWine introduced his budget bill on March 15. Included in the budget bill is the framework for the new H2Ohio fund. That fund would be used to increase Ohio water quality throughout the state.

The new initiative could provide funding of as much as $900 million over ten years to protect Ohio's water quality spread over three agencies, EPA, Agriculture, and Natural Resources.

Investments would be made in programs affecting state waters including Lake Erie and other rivers, lakes, and waterways. Efforts could include pollution prevention, land-based management programs, water-based restoration programs, as well as science, research and measurement.

Also included in the state operating budget are two provisions that may be of note to manufacturers. The agency is looking to change BAT requirements and asbestos policies. See attached memos.

Regulations

OMA Comments on Ohio EPA Biocriteria

Earlier this year the OMA submitted general comments in response to Ohio EPA's Early Stakeholder Outreach for its Application of Biological Survey Data to Development of Water Quality Based Effluent Limitations (OAC 3745-2-03).

The new rule is intended to provide clarification and additional detail regarding when and how the biocriteria narrative should be used, as well as define what information is needed by Ohio EPA in order evaluate a request to use the biocriteria narrative.

Ohio EPA Proposes New TMDL Rules

Ohio EPA proposed amendments to three Implementation of Water Quality Standards (Modeling) Program Rules in Ohio Administrative Code Chapter 3745-2:

3745-2-04: Determinations preliminary to development of water quality-based effluent limitations
3745-2-10: Waste load allocation for ammonia-nitrogen toxicity
3745-2-12: Total maximum daily loads
These rules are being proposed in order to comply with the five-year rule review requirement and to incorporate revisions consistent with new requirements for Total Maximum Daily Load (TMDL) limits passed in last year's state budget bill.

That bill specifically requires the agency to adopt rules that establish procedures for providing notice to stakeholders and criteria for determining significant public interest in TMDL development.

OMA Comments on Ohio EPA Large River Nutrient Rule

The OMA submitted comments on Ohio EPA's Early Stakeholder Outreach (ESO) — Nutrient Water Quality Standards for Ohio's Large Rivers (OAC 3745-1-36).

This would be a new rule intended to contain Ohio's standards for eutrophication endpoints in Ohio's Large River Assessment Units. Large rivers are those that drain over 500 mi2.

This new proposed rule would establish nutrient standards for these large rivers. In addition, a target phosphorus concentration is being considered for river segments that are over-enriched as demonstrated by the standard.

OMA's comments dove into the technical aspects of the proposal and questioned portions of the ESO. OMA requested that Ohio EPA convene a stakeholder group to provide interested-party feedback, expert support, and industry analysis as part of the rulemaking process for this important nutrient rule.

OMA also submitted more general comments in conjunction with the Ohio AgriBusiness Association.

Thank you to the member companies which submitted comments on this issue. And thank you to the OMA nutrient working group members for your help and feedback with the comments.

Ohio EPA Announces Final Rule for Hazardous Waste Wipes and Apparel Exclusion

Last fall, Ohio EPA announced via public notice a final rule for hazardous waste wipes and apparel exclusions. The final rule concerns an Ohio-specific rule to conditionally exclude contaminated wipes and apparel (that are not currently excluded under the solvent wipe rule) from regulation under the hazardous waste regulations when certain conditions are met.

The apparel would include, but not be limited to, gloves, uniforms, smocks, and coveralls that are laundered and intended for reuse.

OMA sent in several sets of comments during the rulemaking process including this final set of comments submitted in July. The EPA improved the rule from its initial draft, but the rule is still more complicated than it need be.

Ohio EPA Agency News

Stevenson Named Ohio EPA Director

In January, Governor-elect Mike DeWine appointed Laurie Stevenson as the new director of Ohio EPA. Stevenson, who has worked for the agency for more than 20 years in various capacities, most recently held the position of Deputy Director of Business Relations. In that role she served as the front door of the agency, working closely with the regulated community including manufacturers.

Stevenson also lead the agency's E3 Sustainability Awards program, which was started under outgoing director Craig Butler.

Director Stevenson has been a longtime friend of the OMA and has presented to our Environment Committee and at other OMA events dozens of times over the years. We are excited to work with Laurie, and her team, in her new role at Ohio EPA.

Testimony on House Bill 166

Laurie A. Stevenson, Director

Good morning Chairman Hoops, Ranking Member Hicks-Hudson, and members of the House Finance Subcommittee on Agriculture, Development and Natural Resources. My name is Laurie Stevenson, and I am the Director of the Ohio Environmental Protection Agency. I appreciate the opportunity to provide testimony today on Ohio EPA's portion of House Bill 166, Governor DeWine's budget proposal.

Ohio EPA was established in 1972 and we have a mission of ensuring that Ohio's citizens are safe and protected from exposure to contamination in our water, air and on our land. We also have a responsibility to oversee the protection of our wonderful natural resources, so that they can be enjoyed by all of Ohio for generations to come. To fulfill these important responsibilities, we currently have 1,140 full-time staff working throughout the state. During our busy field sampling months, we also employ around 100 seasonal interns who are instrumental in helping us collect important water quality data and information.

We have a headquarters office in Columbus, a field office in Groveport, a laboratory in Reynoldsburg and five district offices. Our diverse team includes biologists, geologists, chemists, engineers, data experts, program managers, communication specialists and administrative support staff. Our core mission is to ensure compliance with environmental laws and regulations, and we do this in many ways. We issue permits to thousands of businesses throughout the state to control discharges of pollution. We conduct field inspections, collect samples and review monitoring reports and data. We respond to complaints from citizens regarding potential environmental problems and have an emergency response team available 24 hours-a-day/7 days-a-week to respond to spills and other emergencies.

Much of the work we do directly relates to Governor DeWine's mission of protecting families and children, including reducing air pollution, protecting sources of drinking water, cleaning up hazardous chemicals and controlling scrap tire dumps to prevent mosquito borne illnesses.

As Director, I take our commitment to ensuring the protection of human health through compliance of our laws very seriously. I began my own career at Ohio EPA as a field inspector, overseeing compliance with the hazardous waste regulations. However, I also recognize that the environmental regulations can be complex and sometimes difficult to understand. This is especially true for small business owners who are working hard to run a successful business, but are not necessarily environmental experts. Small business owners wear many hats in running a business and it can be challenging for them to keep up with changes in the environmental regulations. Small communities responsible for environmental compliance face similar challenges.

For the past 20 years of my career, I have worked in various compliance assistance programs within Ohio, because it is my belief that we have an equally important responsibility to help businesses and communities get access to the tools, information and resources to achieve compliance and be successful. Within Ohio EPA, we have built a strong foundation of assistance programs and services, including helping small businesses with permit applications and other EPA paperwork, providing training and workshops to help businesses understand the regulations, helping small wastewater plants improve their operations and providing funding for communities to address their wastewater and drinking water infrastructure needs. We also help businesses and communities identify and implement sustainable practices that reduce waste and save them money. In 2017, Ohio was the first state in the nation to set up a materials marketplace, a free online tool for businesses and communities to find outlets for their recyclable and reusable materials that would otherwise go to landfills.

Because of these efforts, we believe Ohio EPA is a national leader in the protection of human health and the environment, and an asset when assisting companies that locate and expand in Ohio. It's my priority to ensure we maintain this very important balance of using our regulatory and enforcement tools along with our business assistance tools to maintain a healthy environment and help Ohio grow.

To support the important work we do in all of these areas, our budget proposal for fiscal year 2020 totals $219.7 million. Proposed funding for fiscal year 2021 totals $220.5 million, a slight 0.4 percent increase from fiscal year 2020. By way of background, many of Ohio EPA's programs are funded through permitting, waste disposal and pollution emission fees collected from facilities we regulate.

Only a small proportion of our overall budget, about five percent, is from General Revenue Funds to support the E-Check auto emissions testing program. For each fiscal year in 2020 and 2021, our budget proposes approximately $11 million in General Revenue Funds for administering the E-Check program, which is required in seven Northeast Ohio counties that are not meeting federally mandated ozone air quality standards.

Ohio EPA's budget does not include any fee increases. We are asking to continue our existing fees through the FY20-21 biennium. These fees support air pollution control, surface water and drinking water protection, environmental remediation, emergency response and waste management. These fees support 66 percent of the Agency's budget.

Through restructuring, attrition and careful evaluation of our personnel needs, our proposed budget will reduce our number of full-time equivalents by 41 positions. As vacancies occur, we assess both needs and resources to determine if there are more efficient ways to get work done without diminishing our core program responsibilities. We are mindful of our responsibility for administering the state's dollars carefully and adjusting staffing within our resources, not automatically refilling a vacancy or simply adding more staff when a new program comes along. I will continue to focus in this area to ensure we are operating as efficiently as possible. I am a strong proponent of strategic planning and establishing goals and objectives to keep Agency staff focused and working efficiently towards a common vision. I'm also very interested in getting feedback from our customers and stakeholders so that we can continuously look for ways to improve how we serve them.

I'd like to highlight two noteworthy areas of our budget request that we are excited about because of their alignment with the Governor's vision for investing in Ohio's children and Ohio's future.

The Volkswagen enforcement case settlement provides Ohio a unique opportunity in this budget to protect children from dangerous diesel emissions. Children are the most vulnerable population to the pollutants in diesel exhaust, as their lungs are still developing and they breathe at a faster rate than adults. In two rounds of public comments as we were crafting Ohio's plan to distribute the state's allotment from the VW lawsuit, the most requested use for these funds was school bus replacements. Our plan designates $15 million dollars for SFY 19 through SFY 21 for grants to replace aging diesel school buses with new clean diesel, propane or compressed natural gas buses.

The first $5 million in grants is already at work, replacing 179 old school buses, and reducing more than 38 tons of pollution each year. This benefit should triple when the

remaining funds for school bus replacements are awarded. VW funds also are supporting other projects to protect both children and adults, such as replacing refuse collection and delivery trucks operating daily in neighborhoods; transit buses; and big diesel engines in locomotives and tugboats. We are excited about the opportunity to help Ohio fleet owners retire old, polluting vehicles and replace them with cleaner alternatives.

As emphasized in his first State of the State speech, and displayed in the Executive budget proposal, Governor DeWine is making water quality a top issue of his administration. The Governor has proposed the creation of the H2Ohio Fund to put our state on the path we need to be on to implement solutions that ensure Ohioans have access to clean and safe water. His proposal is also a call to action for all of us to invest in the protection of our most valuable natural resources for the benefit of generations who will be here long after we are gone. His vision is for Ohio because communities throughout the state face water-related challenges.

As the Director of Ohio EPA, I am very excited about his vision and am looking forward to working with him to tackle what I think will be the most important priority of my tenure. I am also looking forward to working closely with the directors of the Ohio Department of Natural Resources and Ohio Department of Agriculture to implement wide-ranging projects that will have a meaningful and measurable impact on improving water quality.

In fiscal year 2020, Ohio EPA will be responsible for administering $8.675 million in H2Ohio funding. The areas that we have prioritized for initial and potential future funding include addressing failing home septic systems, helping provide water and sewer service in disadvantaged communities, targeting daycares for lead line replacement, funding water quality data collection and measurement efforts, and supporting research on innovative treatment technologies to address phosphorus.

In summary, we are doing everything we can as an Agency to help Ohio shine as an innovative and creative state; the place where everyone wants to work, invest and live. While we are a regulatory agency, our customer service and business assistance philosophy can be a key positive driver in creating new jobs and strengthening our communities while also protecting the environment.

As director of Ohio EPA, I share the Governor's vision for protecting our children, serving all Ohioans and preserving our natural resources. I appreciate the opportunity to speak with you today and would be happy to answer any questions you have.

ENVIRONMENTAL PROTECTION AGENCY

Extension of E-Check

- Authorizes the extension of the motor vehicle inspection and maintenance program (E-Check) through June 30, 2025, in counties for which a program is federally mandated.
- Retains all statutory requirements governing the program, including the following:
  - The new contract must ensure that the program achieves at least the same emissions reductions as achieved by the program under the contract that was extended;
  - The Director of Administrative Services must use a competitive selection process when entering into a new contract with a vendor;
  - E-Check must be a decentralized program and include a new car exemption for motor vehicles up to four years old.

Local air pollution control authority

- Modifies the list of agencies that qualify as a local air pollution control authority under the law governing air pollution by eliminating the Mahoning-Trumbull Air Pollution Control Authority, City of Youngstown.

Best available technology requirements for air contaminants

- Eliminates the requirement that the Director establish methods of complying with best available technology (BAT) standards for air contaminant sources in rules and instead requires BAT methods for an air contaminant source to be established in the permit to install issued for the source.
- Alters the methods of complying with BAT requirements and applies BAT requirements only to air contaminants or precursors of air contaminants for which a National Ambient Air Quality Standard has been established under the federal Clean Air Act.
- Clarifies that certain air contaminant sources having the potential to emit ten tons or more of nitrogen oxide per year must meet any applicable reasonably available technology rule in effect as of December 22, 2007.

Asbestos abatement

- Makes changes to the law governing asbestos abatement, including doing the following:
  - Expanding the scope of activities that are subject to regulation by applying the law to activities involving more than three linear or square feet of asbestos-containing material, rather than more than 50 linear or square feet as in current law;
  - Authorizing OEPA to take certain enforcement actions against a contractor licensee or certificate holder if either is violating or threatening to violate specified federal regulations adopted under the Federal Toxic Substances Control Act; and

- Eliminating the Director's authority to approve, on a case-by-case basis, alternatives to the existing worker protection requirements for a project conducted by a public entity.

Open dumping

- Specifies that "open dumping" under the law governing solid and infectious waste includes both of the following:
  - Depositing solid wastes or treated infectious wastes into an abandoned building or structure at a site that is not licensed as a solid waste facility;
  - Depositing untreated infectious wastes into any abandoned building or structure.

Removal of additional wastes at scrap tire sites

- Specifically authorizes the Director to include in a scrap tire removal order a requirement to also remove any additional solid waste or construction and demolition debris (C&DD) unlawfully disposed of at the scrap tire site.
- Authorizes the Director to remove, transport, and dispose of any additional solid wastes or C&DD unlawfully disposed of at a scrap tire site when the Director performs a removal action for scrap tires.
- Specifies that a person to whom a removal order is issued is liable to the Director for the removal, disposal, or transportation costs associated with the additional solid waste or C&DD.
- Specifies that the Director may record such costs in the office of the county recorder where the additional wastes are located as a lien against the relevant property.
- Clarifies that a landowner may recover costs from a responsible party in an amount equal to the costs attributable to the responsible party.

Extension of various fees

- Extends all of the following for two years:
  - The sunset of the annual emissions fees for synthetic minor facilities;
  - The levying of higher fees, and the decrease of those fees at the end of the two years, for applications for plan approvals for wastewater treatment works;
  - The sunset of the annual discharge fees for holders of NPDES permits under the Water Pollution Control Law;
  - The sunset of license fees for public water system licenses;
  - A higher cap on the total fee due for plan approval for a public water supply system and the decrease of that cap at the end of the two years;
  - The levying of higher fees, and the decrease of those fees at the end of the two years, for state certification of laboratories and laboratory personnel for purposes of the Safe Drinking Water Law;

- The levying of higher fees, and the decrease of those fees at the end of the two years, for applications to take examinations for certification as operators of water supply systems or wastewater systems;
- The levying of higher fees, and the decrease of those fees at the end of the two years, for applications for permits, variances, and plan approvals under the Water Pollution Control and Safe Drinking Water Laws;
- The sunset of the fees levied on the transfer or disposal of solid wastes; and
- The sunset of the fees levied on the sale of tires.

Extension of E-Check

(R.C. 3704.14)

The act authorizes the extension of the motor vehicle inspection and maintenance program (E-Check) in Ohio counties where this program is federally mandated by doing the following:

1. Authorizing the Director of Environmental Protection to request the Director of Administrative Services to extend the existing contract (with the contractor that conducts the program) beginning on June 30, 2019, for a period of up to 24 months through June 30, 2021;
2. Requiring the EPA Director, prior to the expiration of the contract extension above, to request the DAS Director to enter into a contract (with a vendor to operate a decentralized program) through June 30, 2023, with an option to renew the contract for a period of up to 24 months through June 30, 2025.

The bill retains the requirement that the new contract ensure that the program achieves at least the same emissions reductions achieved under the contract that was extended. It also retains the requirement that the DAS Director must use a competitive selection process when entering into a new contract with a vendor. Last, the bill retains all statutory requirements governing the program, including requirements that E-Check be a decentralized program and include a new car exemption for motor vehicles up to four years old.

Local air pollution control authority

(R.C. 3704.01 and 3704.111)

The bill modifies the list of agencies that qualify as a local air pollution control authority under the law governing air pollution by eliminating the Mahoning-Trumbull Air Pollution Control Authority, City of Youngstown. Current law requires the Director of Environmental Protection to enter into delegation agreements with local air pollution control authorities listed in current law. As part of the agreement, the local air pollution control authority agrees to perform on behalf of Ohio Environmental Protection Agency (OEPA) air pollution control regulatory services within the political subdivision represented by the local air pollution control authority.

Best available technology requirements for air contaminants

(R.C. 3704.03)

Current law requires new or modified air contaminant sources to install best available technology (BAT) to control air contaminants. It also specifies that BAT requirements must be established in rules adopted by the Director and must be expressed only in one of the following methods that is most appropriate for the air contaminant source or source categories:

1. Work practices;
2. Source design characteristics or design efficiency of applicable air contaminant control devices;
3. Raw material specifications or throughput limitations averaged over a 12-month rolling period; or
4. Monthly allowable emissions averaged over a 12-month rolling period.

The bill eliminates the requirement that the Director establish the BAT methods in rules and instead requires the BAT method for an air contaminant source to be established in the permit to install (PTI) issued for the source. It further specifies that the methods apply only to air contaminants or precursors of air contaminants for which a National Ambient Air Quality Standard has been established under the federal Clean Air Act. Additionally, it alters the fourth BAT method specified above by allowing BAT requirements in a permit issued for an air contaminant source to be expressed as a rolling 12-month summation of the allowable emissions.

The bill also revises BAT methods for PTIs issued on or after August 3, 2009. Under current law, for PTIs issued on or after that date, any new or modified air contaminant source that has the potential to emit, taking into account air pollution controls installed on the source, ten or more tons per year of volatile organic compounds or nitrogen oxides must meet, at a minimum, the requirements of any applicable reasonably available control technology rule in effect as of January 1, 2006, regardless of the location. The bill instead clarifies that this requirement, as it applies to nitrogen oxides, must meet those requirements established in rule as of December 22, 2007.

Asbestos abatement

(R.C. 3710.01, 3710.04, 3710.05, 3710.051, 3710.06, 3710.07, 3710.08, and 3710.12)

The bill makes the following changes to the law governing asbestos abatement, which is administered by OEPA:

1. Expands the scope of activities that are subject to regulation by applying the law to activities involving more than 3 linear or square feet of asbestos-containing material, rather than more than 50 linear or square feet as in current law. (For example, if an activity involves four linear feet, a person will now need to meet certain certification and training requirements that previously would not have applied.)
2. Adds the maintenance of asbestos-containing materials as one of the activities subject to regulation;

3. Adds the operation of asbestos-containing materials as one of the activities subject to regulation;

4. Authorizes OEPA to take certain enforcement actions against a contractor licensee or certificate holder if either is violating or threatening to violate specified federal regulations adopted under the Federal Toxic Substances Control Act;

5. Requires OEPA to deny a contractor license application if the applicant or any of the applicant's officers or employees has been found liable in a civil proceeding under any state or federal environmental law. (Currently, denial is limited to felony convictions.)

6. Eliminates the Director's authority to approve, on a case-by-case basis, alternatives to the existing worker protection requirements for a project conducted by a public entity;

7. Adds both of the following to the list of activities that require a person to be certified as an asbestos hazard evaluation specialist:

   --Inspections; and

   --Assessments of suspect asbestos-containing materials.

8. Adds the oversight of an asbestos hazard abatement activity to the list of activities that require certification as an asbestos hazard abatement project designer;

9. With regard to the certification of an asbestos hazard abatement air-monitoring technician (responsible for environmental monitoring or work area clearance air sampling), eliminates the exemption from certification that applies to industrial hygienists-in-training since the American Board of Industrial Hygiene no longer certifies those hygienists; and

10. Requires a contractor to notify the Director at least ten working days, rather than at least ten days as under current law, before beginning an asbestos hazard abatement project (the change makes Ohio law consistent with federal law).

Open dumping

(R.C. 3734.01)

The bill specifies that "open dumping" under the law governing solid and infectious waste includes depositing solid wastes or treated infectious wastes into an abandoned building or structure at a site not licensed as a solid waste facility. The bill also specifies that "open dumping" includes depositing untreated infectious waste in any abandoned building or structure. Under current law, "open dumping" generally includes depositing solid wastes or treated infectious wastes into a water body or onto the surface of the ground at a site that is not licensed as a solid waste facility; or depositing untreated infectious waste into a water body or onto the ground. Open dumping is generally prohibited and is subject to criminal and civil penalties.

Removal of additional wastes at scrap tire sites

(R.C. 3734.85)

The bill specifically authorizes the Director, when issuing a scrap tire removal order to a property owner, to also require the owner to remove any additional solid waste or construction

and demolition debris (C&DD) unlawfully disposed of at the property. Under current law, the Director may issue a scrap tire removal order when the Director determines that a scrap tire accumulation constitutes a danger to the public health or safety or to the environment.

The bill also generally authorizes the Director, when performing a removal action, to remove, transport, and dispose of any additional solid wastes or C&DD unlawfully disposed of at a scrap tire site if one or more of the following apply:

1. The property owner consents to the removal in writing;
2. The Director, in the removal order, required the removal of the additional wastes.

The bill specifies that a person who receives a removal order is liable to the Director for the removal, storage, processing, disposal, or transportation costs associated with additional solid waste or C&DD. The Director may record these costs, in the office of the county recorder where the property is located, as a lien against the property. Under current law, the costs associated only with the removal of scrap tires may be so recorded.

The bill clarifies that in a civil action for removal (and only removal) costs associated with scrap tires, a landowner may recover the portion, rather than the whole amount as in current law of costs from a responsible party in an amount equal to the portion of costs that the court determines is attributable to the responsible party.

Extension of various fees

(R.C. 3745.11, 3734.57, and 3745.901)

The bill extends the time period for charging various OEPA fees under the laws governing air pollution control, water pollution control, and safe drinking water. The following table sets forth each fee, its purposes, and the time period OEPA is authorized to charge the fee under current law and the bill:

Type of fee	Description	Sunset under current law	Sunset under the bill
Synthetic minor facility: emission fee	Each person who owns or operates a synthetic minor facility must pay an annual fee in accordance with a fee schedule that is based on the sum of the actual annual emissions from the facility of particulate matter, sulfur dioxide, nitrogen dioxide, organic compounds, and lead. A synthetic minor facility is a facility for which one or more permits to install or permits to operate have been issued for the air contaminant source at the facility that include terms and conditions that lower the facility's potential to emit air contaminants below the major source	The fee is required to be paid through June 30, 2020.	The bill extends the fee through June 30, 2022.

Type of fee	Description	Sunset under current law	Sunset under the bill
	thresholds established in rules adopted under continuing law.		
Wastewater treatment works: plan approval application fee	A person applying for a plan approval for a wastewater treatment works is required to pay one of the following fees depending on the date: --A tier one fee of $100 plus 0.65% of the estimated project cost, up to a maximum of $15,000; or --A tier two fee of $100 plus 0.2% of the estimated project cost, up to a maximum of $5,000.	An applicant is required to pay the tier one fee through June 30, 2020, and the tier two fee on and after July 1, 2020.	The bill extends the tier one fee through June 30, 2022; the tier two fee begins on or after July 1, 2022.
Discharge fees for holders of NPDES permits	Each NPDES permit holder that is a public discharger or an industrial discharger with an average daily discharge flow of 5,000 or more gallons per day must pay an annual discharge fee based on the average daily discharge flow. There is a separate fee schedule for public and industrial dischargers.	The fees were due by January 30, 2018, and January 30, 2019.	The bill extends the fees and the fee schedules to January 30, 2020, and January 30, 2021.
Surcharge for major industrial dischargers	A holder of an NPDES permit that is a major industrial discharger must pay an annual surcharge of $7,500.	The surcharge was required to be paid by January 30, 2018, and January 30, 2019.	The bill extends the fee to January 30, 2020, and January 30, 2021.
Discharge fee for specified exempt dischargers	One category of public discharger and eight categories of industrial dischargers that are NPDES permit holders are exempt from the annual discharge fees that are based on average daily discharge flow. Instead, they are required to pay an annual discharge fee of $180.	The fee was due by January 30, 2018, and January 30, 2019.	The bill extends the fee to January 30, 2020, and January 30, 2021.

Type of fee	Description	Sunset under current law	Sunset under the bill
License fee for public water system license	A person is prohibited from operating or maintaining a public water system without an annual license from OEPA. Applications for initial licenses or license renewals must be accompanied by a fee, which is calculated using schedules for the three basic categories of public water systems.	The fee for an initial license or a license renewal applies through June 30, 2020, and is required to be paid annually in January.	The bill extends the initial license and license renewal fee through June 30, 2022.
Fee for plan approval to construct, install, or modify a public water system	Anyone who intends to construct, install, or modify a public water supply system must obtain approval of the plans from OEPA. The fee for the plan approval is $150 plus .35% of the estimated project cost. However, current law sets a cap on the fee.	The cap on the fee is $20,000 through June 30, 2020, and $15,000 on and after July 1, 2020.	The bill extends the cap of $20,000 through June 30, 2022; the cap of $15,000 applies on and after July 1, 2022.
Fee on state certification of laboratories and laboratory personnel	In accordance with two schedules, OEPA charges a fee for evaluating certain laboratories and laboratory personnel. An additional provision states that an individual laboratory cannot be assessed a fee more than once in a three-year period unless the person requests the addition of analytical methods or analysts, in which case the person must pay $1,800 for each additional survey requested.	The schedule with higher fees applies through June 30, 2020, and the schedule with lower fees applies on and after July 1, 2020. The $1,800 additional fee applies through June 30, 2020.	The bill extends the higher fee schedule through June 30, 2022; the lower fee schedule applies on and after July 1, 2022. The bill extends the additional fee through June 30, 2022.
Fee for examination for certification as an operator of a water supply system or wastewater system	A person applying to OEPA to take an examination for certification as an operator of a water supply system or a wastewater system (class A and classes I-IV) must pay a fee, at the time an application is submitted, in accordance with a statutory schedule.	A schedule with higher fees applies through November 30, 2020, and a schedule with lower fees applies on and after December 1, 2020.	The bill extends the higher fee schedule through November 30, 2022; the lower fee schedule applies on and after December 1, 2022.

Type of fee	Description	Sunset under current law	Sunset under the bill
Application fee for a permit (other than an NPDES permit), variance, or plan approval	A person applying for a permit (other than an NPDES permit), a variance, or plan approval under the Safe Drinking Water Law or the Water Pollution Control Law must pay a nonrefundable fee.	If the application is submitted through June 30, 2020, the fee is $100. If the application is submitted on or after July 1, 2020, the fee is $15.	The bill extends the $100 fee through June 30, 2022; the $15 fee applies on and after July 1, 2022.
Application fee for an NPDES permit	A person applying for an NPDES permit must pay a nonrefundable application fee.	If the application is submitted through June 30, 2020, the fee is $200. If the fee is submitted on or after July 1, 2020, the fee is $15.	The bill extends the $200 fee through June 30, 2022; the $15 fee applies on and after July 1, 2022.
Fees on the transfer or disposal of solid wastes	A total of $4.75 in state fees is levied on each ton of solid waste disposed of or transferred in Ohio. The fees are used for administering the hazardous waste (90¢), solid waste (75¢), and other OEPA programs ($2.85), and for soil and water conservation districts (25¢).	The fees apply through June 30, 2020.	The bill extends the fees through June 30, 2022.
Fees on the sale of tires	A base fee of 50¢ per tire is levied on the sale of tires to assist in the cleanup of scrap tires. An additional fee of 50¢ per tire is levied to assist soil and water conservation districts.	Both fees are scheduled to sunset on June 30, 2020.	The bill extends the fees through June 30, 2022.

H2Ohio Initiative to Protect State Water Quality Introduced

March 14, 2019

(TOLEDO, Ohio)—Ohio Governor Mike DeWine today outlined his H2Ohio water quality initiative, which he is introducing as part of his proposed budget for the 2020-2021 biennium.

“Water is vital to everyone, yet communities throughout the state face real and different challenges, such as algae blooms, failing septic tanks, nutrient pollution, and threats of lead contamination,” Governor DeWine said. “We cannot continue to lurch from water crisis to water crisis. I am proposing an H2Ohio initiative that would allow us to invest in targeted, long-term solutions to ensure safe and clean water across the state of Ohio.”

During an event in Toledo, Governor DeWine announced that his proposal would create a special H2Ohio Fund that would be used to protect Ohio’s water quality over 10 years and could amount to approximately $900 million.

“Rather than borrowing to pay to fix our water problems, we want to create a special account, where we can deposit funds to be used specifically for water quality across Ohio,” Governor DeWine said. “We believe that this is a responsible approach to address a critically important issue.”

H2Ohio funding would be used for water programs across the state, including for Lake Erie and other rivers, lakes, and waterways in Ohio, for efforts such as:

- **Prevention and land-based management programs**, such as funding efforts to minimize the introduction of nutrients and other runoff into Ohio waterways, additional staffing at soil and water conservation districts, and more aggressive action to address failing septic systems and other water treatment needs across Ohio.
- **Water-based restoration programs**, such as the creation of more wetlands in targeted areas to naturally filter out nutrients and sediment and utilizing emerging technologies to minimize water quality problems and treat polluted water.
- **Science, research, and measurement**, such as supporting ongoing research and data collection to advise on metrics and measurable goals, and to stay updated on and utilize new prevention and treatment technologies.

Investing in Ohio's Natural Wonders

Ohio is blessed with many natural wonders, including state parks, wildlife, rivers, and lakes. Governor DeWine believes that these God-given gifts make Ohio unique and wonderful, and he believes it is extremely important to preserve the environment for future generations to enjoy.

Governor DeWine's executive budget protects Ohio's natural wonders by:

Creating the H2Ohio Fund to ensure safe and clean water across Ohio by providing the resources necessary to plan, develop, and implement targeted, long-term water solutions. Water is vital, yet communities throughout the state regularly face challenges such as algae blooms, failing septic tanks, nutrient pollution, and threats of lead contamination. The fund would be spent over 10 years for water programs impacting Lake Erie and other rivers, lakes, and waterways and could amount to approximately $900 million.

Investing in the future of Ohio state parks by recommending an additional $43 million in state park improvements to expand capacity, upgrade utilities and safety measures, and to renovate cabins, lodges, campgrounds, and trails. An additional investment of $4.5 million would be dedicated to funding for natural areas and preserves to fight harmful invasive species and to increase public outreach and activities.

Continuing to expand the Ohio Department of Natural Resource's Oil and Gas Program with appropriations increasing from $14 million in fiscal year 2016 to more than $50 million in fiscal year 2020. The increased funding will enable significant progress on plugging orphan wells, with a goal of fixing 300 wells during the biennium.

Reducing air pollution through a proposed $31 million annual effort by the Ohio Environmental Protection Agency (EPA) to replace aging diesel school and transit buses, heavy duty trucks, and cargo handling equipment, and to repower diesel engines in tug boats and locomotives. Governor DeWine wants clean air for Ohio's citizens, and this proposal could eliminate 400 tons of air pollutants.

Restoring Mentor Marsh, which is Ohio's first nature preserve. Governor DeWine is proposing an investment of $1 million for the EPA's continued efforts to restore the marsh. A recent lawsuit settlement of more than $10 million, when received, will also be appropriated through the Controlling Board to bolster ongoing restoration efforts.

Investing $20 million per year in the Soil and Water Phosphorous Program within the Ohio Department of Agriculture to assist in reducing total phosphorus and dissolved reactive phosphorus in the Western Lake Erie Basin.

Investing nearly $500,000 in fiscal year 2020 within the Ohio Department of Natural Resources for dam safety, water management, and floodplain management.

Additionally, Governor DeWine's executive budget recommends $5 million annually for electric vehicle charging infrastructure, and $1 million for environmental education programs.

Bricker & Eckler
ATTORNEYS AT LAW

MEMORANDUM

TO: Rob Brundrett
FROM: Frank Merrill & Christine Rideout Schirra
DATE: April 5, 2019
RE: HB 166 (Operating Budget) – Best Available Technology for Air Contaminants

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House Bill 166 of the 133rd General Assembly introduces proposed amendments to Ohio's best available technology ("BAT") requirements for air contaminants. *See* R.C. 3704.03.

I. Summary

Currently, the law provides that BAT is to be established via the 119 rule process for PTI applications filed three or more years after August 3, 2006, for air contaminants for which a national ambient air quality standard has been adopted pursuant to the Clean Air Act. *See* 3704.03(T). The proposed change removes the 119 rule process requirement for the agency to impose BAT, and instead states that BAT requirements shall be imposed via permit in one of four ways. Substantively, the four ways of imposing BAT are not significantly proposed to change. However, the impact of the proposed changes is that the agency's interpretation of BAT is proposed to be set forth within individual permits to install, rather than via rule:

Sec. 3704.03. The director of environmental protection may do any of the following:

(T) Require new or modified air contaminant sources to install best available technology, but only in accordance with this division. With respect to permits issued pursuant to division (F) of this section beginning three years after August 3, 2006, best available technology for air contaminant sources and air contaminants emitted by those sources that are subject to standards adopted under section 112, Part C of Title I, and Part D of Title I of the federal Clean Air Act shall be equivalent to and no more stringent than those standards. ~~For an air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act, best available technology only shall be required to the extent required by rules adopted under Chapter 119. of the Revised Code for permit to install applications filed three or more years after August 3, 2006.~~

Best available technology requirements <u>for an air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act that are</u> established in ~~rules adopted~~ <u>permits issued</u> under this ~~division~~ <u>section</u> shall be expressed only in one of the following ways that is most appropriate for the applicable source or source categories:

(1) Work practices;

(2) Source design characteristics or design efficiency of applicable air contaminant control devices;

(3) Raw material specifications or throughput limitations averaged over a twelve-month rolling period;

(4) ~~Monthly allowable emissions averaged over a~~ Rolling twelve-month ~~rolling period~~ summation of the allowable emissions.

R.C. 3704.03(T).

As illustrated by the proposed language, the proposed changes also include alteration of the fourth BAT method by allowing for BAT requirements to be expressed as a rolling 12-month summation of the allowable emissions.

The proposed language is similar, but not identical, to the definition of BAT currently in effect in rule. OAC rule 3745-31-01(T) currently states:

> "Best available technology" or "BAT" means any combination of work practices, raw material specifications, throughput limitations, source design characteristics, an evaluation of the annualized cost per ton of air pollutant removed, and air pollution control devices that have been previously demonstrated to the director of environmental protection to operate satisfactorily in this state or other states with similar air quality on substantially similar air pollution sources.

OAC 3745-31-01(T). Ohio Administrative Code 3745-31-05(A)(3) further discusses BAT in the context of permits to install and specifies when the Director shall evaluate and determine BAT, and situations in which a BAT determination is not required.

Lastly, HB 166 proposes to revise BAT methods for permits to install issued on or after August 3, 2009. Under current law, for permits to install issued on or after that date, any new or modified air contaminant source that has the potential to emit, taking into account air pollution controls installed on the source, ten or more tons per year of volatile organic compounds or nitrogen oxides must meet, at a minimum, the requirements of any applicable reasonably available control technology rule in effect as of January 1, 2006, regardless of the location. The proposed language clarifies that this requirement, as it applies to nitrogen oxides, must meet those requirements established in rule as of December 22, 2007:

> For permits to install issued three or more years after August 3, 2006, any new or modified air contaminant source that has the potential to emit, taking into account air pollution controls installed on the source, ten or more tons per year of volatile organic compounds or nitrogen oxides shall meet, regardless of the location of the source, at a minimum~~, the~~:
>
> -- For volatile organic compounds, the requirements of any applicable reasonably available control technology rule in effect as of January 1, 2006~~, regardless of the location of the source~~;
>
> -- For nitrogen oxide, the requirements of any applicable reasonably available control technology rule in effect as of December 22, 2007.

R.C. 3704.03(T).

II. Assessment

While the substantive methods of imposing BAT set forth in the Revised Code are not proposed to significantly change, the proposed change to impose BAT through individual permits rather than by rule is a significant procedural change that will undoubtedly impact business in numerous ways. Imposing BAT on a permit-by-permit basis rather than via rule clearly adds an element of uncertainty. Permittees will continue to have the option of appealing their permit to ERAC if the agency imposes an interpretation of BAT that the permittee disagrees with.

Bricker & Eckler
ATTORNEYS AT LAW

MEMORANDUM

TO: Rob Brundrett
FROM: Frank Merrill & Christine Rideout Schirra
DATE: April 5, 2019
RE: HB 166 (Operating Budget) – Asbestos Abatement Laws

House Bill 166 of the 133rd General Assembly introduces proposed amendments to Ohio's asbestos abatement laws. *See* R.C. 3710.01, 3710.04, 3710.05, 3710.051, 3710.06, 3710.07, 3710.08, and 3710.12.

I. Summary

Several of the proposed changes to Ohio's asbestos abatement rules are fairly broad in scope. The current law regulates impacts to asbestos-containing materials ("ACM") of more than 50 linear feet or 50 square feet. R.C. 3710.01(B). Most significantly, the proposed changes would expand the scope of activities subject to regulation to activities involving more than 3 linear feet or 3 square feet of ACM. Additional proposed changes include adding "maintenance" and "operation" of ACM to the list of activities subject to regulation:

> (B) "Asbestos hazard abatement activity" means any activity involving the removal, renovation, enclosure, repair, ~~or~~ encapsulation, or operation and maintenance of reasonably related friable asbestos-containing materials in an amount greater than ~~fifty~~ three linear feet or ~~fifty~~ three square feet. ~~"Asbestos hazard abatement activity" also includes any such activity involving such asbestos-containing materials in an amount of fifty linear or fifty square feet or less if, when combined with any other reasonably related activity in terms of time and location of the activity, the total amount is in an amount greater than fifty linear or fifty square feet.~~

R.C. 3710.01(B).

H.B. 166 also proposes to revise the definition of "asbestos hazard abatement project." R.C. 3710(D). Under the previous definition, a project met the definition of "asbestos hazard abatement project" if one or more asbestos hazard abatement activities were conducted by one asbestos hazard abatement contractor and were reasonably related to one another. The proposed revisions would revise the definition to include one or more asbestos hazard abatement activities, the sum total of which is greater than 50 linear feet or 50 square feet of friable ACM, or amounts less than 50 linear feet or 50 square feet if, when combined with any other reasonably related activity, the total amount is greater than 50 linear feet or 50 square feet.

Additional proposed changes include:

- Expansion of Ohio EPA's authority to take certain enforcement actions against contractor licensees or certificate holders or deny contractor license applications in certain circumstances (R.C. 3710.06(B)(2)), 3710.12(C)(4));
- Elimination of Ohio EPA's authority to approve alternatives to existing worker protection requirements on a case-by-case basis (R.C. 3710.08(F));
- Expands the activities that require a certified asbestos hazard evaluation specialist to include inspections and assessments of suspect ACM (R.C. 3710.01(F);
- Expands the activities that require a certified asbestos hazard abatement project designer to include oversight of an asbestos hazard abatement activity (R.C. 3710.01(Q));
- Eliminates the exemption from certification that applies to industrial hygienists-in-training, to be consistent with American Board of Industrial Hygiene practices (R.C. 3710.01(S); and
- Requires at least 10 **working** days' notification to Ohio EPA prior to beginning an asbestos hazard abatement project (rather than the 10 calendar days currently required), for consistency with federal law (R.C. 3710.07(B)).

II. Assessment

These proposed changes emphasize the importance of hiring a certified asbestos professional to confirm the presence or absence of asbestos-containing materials any time a facility is considering construction, renovation, or demolition activities, no matter how minor the activity may seem.

OHIO LEGISLATIVE SERVICE COMMISSION

www.lsc.ohio.gov

Office of Research and Drafting

Legislative Budget Office

S.B. 50
133rd General Assembly

Bill Analysis

Version: As Introduced

Primary Sponsor: Sen. Eklund

Amanda George Goodman, Attorney

Summary

- Increases, from 25¢ to 50¢ per ton, one of the state fees levied on the transfer or disposal of solid waste in Ohio, the proceeds of which are deposited in the existing Soil and Water Conservation District Assistance Fund.

Detailed Analysis

Solid waste transfer or disposal fees

The bill increases, from 25¢ per ton to 50¢ per ton, one of the state fees that is levied on the transfer or disposal of solid wastes in Ohio. Under current law, the proceeds of that fee are deposited into the existing Soil and Water Conservation District Assistance Fund.[1] That Fund is used by the Department of Agriculture to provide money to soil and water conservation districts.[2]

In addition to the fee to aid soil and water conservation districts, the following fees are levied on the transfer or disposal of solid wastes in Ohio under current law:[3]

Fee	Fund into which fee is deposited
90¢ per ton	20¢ per ton into the Hazardous Waste Facility Management Fund[4] 70¢ per ton into the Hazardous Waste Clean-up Fund[5]

[1] R.C. 3734.57(A)(4). The fee is effective through June 30, 2020.

[2] R.C. 940.15, not in the bill.

[3] R.C. 3734.57(A).

[4] R.C. 3734.18, not in the bill.

Fee	Fund into which fee is deposited
75¢ per ton	Waste Management Fund[6]
$2.85 per ton	Environmental Protection Fund[7]

All of the fees described above are levied on solid waste transfer or disposal through June 30, 2020.[8]

History

Action	Date
Introduced	02-12-19

S0050-I-133/ec

[5] R.C. 3734.28, not in the bill.

[6] R.C. 3734.061, not in the bill.

[7] R.C. 3734.015, not in the bill.

[8] R.C. 3734.57(A).

February 4, 2019

Attn: Rule Coordinator
Ohio EPA, Division of Surface Water
P.O. Box 1049
Columbus, Ohio 43216-1049
Via Email (dsw_rulecomments@epa.ohio.gov)

Re: Early Stakeholder Outreach: Application of Biological Survey Data to Development of Water Quality Based Effluent Limitations (OAC 3745-2-03)

Dear Rule Coordinator:

The Ohio Manufacturers' Association (OMA) is dedicated to protecting and growing manufacturing in Ohio. The OMA represents over 1,300 manufacturers in every type of manufacturing industry across 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. We appreciate the opportunity to comment on the Early Stakeholder Outreach on the Application of Biological Survey Data to Development of Water Quality Based Effluent Limitations (OAC 3745-2-03).

We understand that this new rule is intended to provide clarification and additional detail regarding when and how the biocriteria narrative should be used, as well as define what information is needed by Ohio EPA in order to evaluate a request to use the biocriteria narrative.

Biocriteria is a significant issue to many of our members and Ohio manufacturers at large. Therefore, we look forward to providing our perspectives as the rulemaking process proceeds. We will submit formal comments when the agency provides its detailed proposal.

We appreciate the opportunity to convey our interest in the topic and look forward to being involved in Ohio EPA's rulemaking process on this subject. We welcome the opportunity to work with Ohio EPA to create a mutually acceptable approach to this issue.

As Ohio EPA develops biocriteria rules or convenes work groups or interested-party meetings, please include the OMA in these developments, including me and OMA's

environmental counsel Frank L. Merrill of Bricker & Eckler. We look forward to working with Ohio EPA on this issue.

Sincerely,

Rob Brundrett
Director, Public Policy Services

Division of Environmental Response and Revitalization
November 2018

The Management of Solvent-Contaminated Wipes and Other Textiles Laundered for Reuse.

THIS POLICY DOES NOT HAVE THE FORCE OF LAW **Hazardous Waste Program**

This Guidance supersedes all previous guidance of solvent-contaminated wipes, because Ohio has adopted the Federal Regulations

What is the Purpose of this Guidance?

On October 31, 2015 Ohio adopted the federal rule titled "*Conditional Exclusion from Hazardous Waste and Solid Waste for Solvent-contaminated Wipes*" into the Ohio Administrative Code (OAC). There are two conditional exclusions in the rules for solvent-contaminated wipes. These exclusions are for solvent-contaminated wipes that are laundered and for wipes that are disposed in a permitted licensed sanitary landfill, a permitted hazardous waste landfill or a municipal waste combustor. The first exclusion is found in OAC rule, *3745-51-04*(A)(26) for laundering and the other exclusion is found n OAC rule *3745-51-04* (B)(18) for disposal. Ohio's rule is now equivalent to the **Federal Regulations** on the management of solvent-contaminated wipes.

WHAT SOLVENT-CONTAMINATED WIPES ARE COVERED?

Wipes, are defined as woven or non-woven shop towels, rags, pads or swabs made of wood pulp, fabric, polyester blends or other material. Solvent-contaminated wipes are wipes that are contaminated after use or after cleaning up a spill with those solvents listed in OAC rule 3745-51-31 or the corresponding commercial chemical product listed in 3745-51-33 or that exhibit a characteristic from a listed solvent or are only ignitable. Wipes that exhibit a characteristic that is not associated with the listed solvents or that contain a listed waste other than those listed below are not covered under the exclusions for solvent-contaminated wipes. Hazardous textiles *are now regulated per* OAC rule 3745-51-06 (A)(3)(e) *as dis*cussed on page 4.

WHAT SOLVENT-CONTAMINATED WIPES ARE COVERED BY THE EXCLUSIONS?

Solvent-contaminated wipes that contain one or more F001-F005 solvents listed in OAC rule ***3745-51-31*** or the corresponding P- or U- listed solvents found in OAC rule ***3745-51-33***. The solvents found in OAC rule ***3745-51-31***, include:

Acetone
Benzene
n-Butanol
Chlorobenzene
Creosols
Cyclohexanone
Tetrachloroethylene
1,2-Dichlorobenzene
Methyl isobutyl ketone
Ethyl acetate
1,1,2- Trichloroethane
Ethyl benzene
2-Ethoxyethanol
Isobutyl alcohol
Methanol
Methyl ethyl ketone
Toluene
Methylene chloride
Xylenes
Trichloroethylene *
(*Only for wipes that are laundered and reused. Wipes contaminated with this solvent are not eligible for the solid waste d*isposal option*.)

- Wipes that also exhibit an ***ignitable*** or ***toxic*** hazardous characteristic resulting from a solvent listed above.
- Solvent-contaminated wipes that exhibit only the hazardous characteristic (before or after use) of ignitability when containing one or more solvents that are not listed in OAC rule ***3745-51-31***. (example; mineral spirits)

The F001 - F005 spent solvent listing, cover only solvents that are used for their solvent properties, that is, to solubilize (dissolve) or mobilize other constituents. For example, solvents would had to be used in degreasing, cleaning, fabric scouring, as diluents (except when used in a product such as paint), extractants, reaction and synthesis media, and similar uses. A solvent is considered 'spent' when it has been used and is no longer fit for use without being regenerated, reclaimed, or otherwise reprocessed.

The Management of Solvent Contaminated Rags and Wipes and Other Textiles

Under the Solvent-Contaminated Wipes rule, disposable wipes are excluded from regulation under Ohio's hazardous waste rules when all of the conditions outlined below are met.

DISPOSAL OF SOLVENT-CONTAMINATED WIPES (TCE not included)

(Hazardous Waste Exclusion) ***OAC rule 3745-51-04(B) (18):*** Solvent-contaminated wipes that are sent for disposal are not hazardous wastes from the point of generation provided the generator meets the following conditions of the exclusion:

CONDITION 1: The solvent-contaminated wipes, when accumulated, stored, and transported, must be held in containers that are:

Closed; non-leaking; and capable of holding free liquids.

A plastic can liner will qualify as a container provided it meets the three conditions listed above.

CONDITION 2: Labeling: Containers must be labeled "Excluded Solvent-Contaminated Wipes".

CONDITION 3: A 180-day accumulation limit from the moment a wipe is first placed into the container.

CONDITION 4: Must not contain free liquids at the point they are sent off-site. "Free liquids" are defined in OAC rule ***3745-50-10*** (A)(51), " No free liquids" is defined in OAC rule ***3745-50-10*** (A)(88) and is based on the EPA methods test ***9095B*** (***paint filter liquids test***) or other authorized state standard.

CONDITION 5: Free liquids must be managed according to hazardous waste rules.

CONDITION 6: Documentation required

- Name and address of landfill or combustion facility
- Documentation of 180-day limit is met
- Description of process used to ensure no free liquids are present.

CONDITION 7: It is disposed in one of the following:

- ***Municipal Waste*** or Industrial Waste Landfill that is permitted, licensed or otherwise authorized by Ohio and meets the requirements of rule ***3745-27-08*** or ***3745-29-08*** of the Administrative Code; or
- Is permitted, licensed, or otherwise authorized by another state that has this exclusion; or
- Disposal in a permitted ***hazardous waste*** landfill; or
- A Municipal Waste Combustor regulated under Section 129 of the Clean Air Act; or
- A ***Hazardous Waste Combustor, Boiler, or Industrial Furnace*** regulated under OAC rules 3745-57, 68 or 266.

THE EXCLUSION FOR THE DISPOSAL OF SOLVENT-CONTAMINATED WIPES DOES NOT INCLUDE:

- Solvent-contaminated wipes that contain listed hazardous waste other than F001 to F005 solvents.
- Solvent-contaminated wipes that exhibit the characteristic of toxicity, corrosivity, or reactivity due to non-listed solvents or contaminants other than solvents.
- Solvent-contaminated wipes that are hazardous waste due to the presence of **trichloroethylene** (TCE).

The Management of Solvent Contaminated Rags and Wipes and Other Textiles

Under the Solvent-Contaminated Wipes rule, reusable wipes are excluded from regulation under Ohio's hazardous waste rules when all of the conditions outlined below are met.

LAUNDERING OF SOLVENT-CONTAMINATED WIPES

(Solid Waste Exclusion) ***OAC rule 3745-51-04(A)(26):*** Solvent-contaminated wipes that are sent for cleaning and reuse are not solid wastes provided the generator and laundry meet the following conditions of the exclusion:

CONDITION 1: Specifically, the solvent-contaminated wipes, when accumulated, stored, and transported, must be held in containers that are:

Closed; non-leaking; and capable of holding free liquids.

A plastic can liner will qualify as a container provided it meets the three conditions listed above.

CONDITION 2: LABELING: Containers must be labeled "Excluded Solvent-Contaminated Wipes".

CONDITION 3: A 180-day accumulation limit from the moment a wipe is first placed into the container.

There are various methods to document that the 180-day accumulation is being met, such as a label with a date, an established schedule for pickups, a log of container dates, etc.

Excluded Solvent Contaminated Wipes

Accumulation Start Date: *

* This is One Option

CONDITION 4: Must not contain free liquids at the point they are sent off-site. "Free liquids" are defined in OAC rule ***3745-50-10*** (A)(51), "No free liquids" is defined in OAC rule ***3745-50-10*** (A)(88) and is based on the EPA methods test ***9095B*** (***paint filter liquids test***) or other authorized state standard.

CONDITION 5: Free liquids must be managed according to hazardous waste rules

CONDITION 6: Maintain the Required Documentation

- Name and address of the laundry or dry cleaner.
- Documentation of 180-day limit is met
- Description of process used to ensure no free liquids are present.

CONDITION 7: The Laundry or dry cleaners' discharge is regulated under ***Clean Water Act***

THE EXCLUSION FOR LAUNDERING OF SOLVENT-CONTAMINATED WIPES DOES NOT INCLUDE:

- Solvent-contaminated wipes that contain ***listed hazardous waste*** other than solvents
- Solvent-contaminated wipes that exhibit the ***characteristic of toxicity***, ***corrosivity***, or ***reactivity*** that is not attributed to the solvent used. (ex: A wipe that also exhibit the characteristic of toxicity for any of the 8 RCRA metals.)

WHAT DOES THIS EXCLUSION MEAN FOR A LAUNDRY?

The Laundry must ensure that any free liquids received in containers of excluded solvent-contaminated wipes are properly evaluated per ***OAC rule 3745-52-11*** and disposed of accordingly.

The Management of Solvent Contaminated Rags and Wipes and Other Textiles

DOES A LAUNDRY NEED A HAZAROUS WASTE PERMIT TO STORE SOLVENT-CONTAMINATED WIPES THAT ARE HAZARDOUS WASTE THAT DO NOT MEET THE DEFINITION OF SOLVENT CONTAMINATED WIPES?

No. If they are handling contaminated wipes, that do not meet the definition of solvent-contaminated wipes, and or other hazardous waste textiles (gloves, aprons, etc.). As long as they are laundered and returned to use, they will be able to meet this new conditional exemption for hazardous waste textiles that are laundered and returned to use found in ***OAC rule 3745-51-06*** (A)(3)(e).

WHAT IS A HAZARDOUS TEXTILE?

These are contaminated wipes and apparel including but not limited to rags, mops, drop cloths, and apparel (e.g., gloves, uniforms, smocks, and coveralls). They are made of woven or unwoven; natural or synthetic materials (e.g., fabric, leather or rubberlike material). These textiles exhibit a characteristic of hazardous waste or are otherwise contaminated with hazardous waste as defined in rule 3745-51-03 of the Administrative Code. Because many of these textiles are intended to be cleaned on-site or sent to a laundry or other cleaning facility for cleaning, they may be excluded from the hazardous waste regulations provided the generator meets all of the conditions of the exclusion.

LAUNDERED and REUSED TEXTILE, WHAT ARE THE CONDITIONS for the EXCLUSION?

- Contaminated wipes and apparel are accumulated, stored and transported in non-leaking, closed containers capable of containing free liquids.
- Contaminated wipes and apparel are not burned for energy recovery.
- Contaminated wipes and apparel are NOT REGULATED by the solvent-contaminates wipes rule.
- No hazardous waste is mixed with the contaminated wipes and apparel.
- Container accumulation textiles contain no "free liquids"
- Develop and implement a written procedure to ensure that the wipes and apparel contain no free liquids
- Contaminated wipes and apparel are cleaned on-site or sent to an off-site laundry or cleaning facility that is subject to regulation under Section 402 or Section 307(b) of the Clean Water Act.

> Note: This is a summary of the conditions for the textile exclusions please see ***OAC rule 3745-51-06*** (A)(3)(e) for a full understanding of each of the conditions of this exemption. (all the conditions must be met)

WIPES CONTAMINATED WITH USED OIL ONLY (Not covered by the other exclusions for laundering or disposal.)

Wipes containing or otherwise contaminated with used oil are regulated under the used oil rules if the used oil has not been removed by a physical separation process (wringing or centrifuging). If the solvent-contaminated wipes have been drained or otherwise had the used oil removed from them and there are no visible signs of free flowing used oil, they are waste that must be ***evaluated*** to determine if they are or are not a hazardous waste.

CAN SOLVENT WIPES CONTAMINATED WITH OIL BE MANAGED UNDER THE RULE?

A wipe that is contaminated with solvent may also be co-contaminated with oil and eligible for the final rule if:

(1) The oil is not listed hazardous waste and
(2) The wipe only exhibits the characteristic of ignitability (Not the characteristic of corrosivity, toxicity, or reactivity).

Contact

For more information, contact the Hazardous Waste Compliance and Inspection Support Unit of the ***Division of Environmental Response and Revitalization*** at 614-644-2924.

Ohio Environmental Protection Agency

John R. Kasich, Governor
Mary Taylor, Lt. Governor
Craig W. Butler, Director

OCT 3 0 2018

United States Environmental Protection Agency
EPA Docket Center
Attn: Docket ID No. EPA–HQ–OAR–2017–0355

RE: Ohio EPA Comments on U.S. EPA's August 31, 2018 Proposed "Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program" [83 FR 44746]

Dear Acting Administrator Wheeler:

The Ohio Environmental Protection Agency (Ohio EPA) appreciates the opportunity to comment on the above referenced U.S. EPA proposed rulemaking regarding Clean Air Act (CAA) Section 111(d) to address greenhouse gas emissions from existing fossil fuel-fired electric generating units (EGUs). U.S. EPA previously finalized an emission guideline under this CAA Section 111(d) for these sources commonly referred to as the Clean Power Plan (CPP). Ohio EPA submitted comments indicating substantial concerns with the proposed CPP on December 1, 2014.[1] U.S. EPA proposed to repeal the CPP on October 16, 2017. [82 FR 48035] Ohio EPA supported such a repeal and provided comments on the proposal on April 25, 2018. And lastly, U.S. EPA provided an advanced notice of this proposed rulemaking (ANPRM) with an opportunity to comment on December 28, 2017. [82 FR 61507] Ohio EPA submitted comments on the ANPRM on February 26, 2018.

The CPP called for the unprecedented overhaul of the power generation, transmission and distribution system to limit carbon dioxide emissions by the federal government under the stationary source control program of CAA Section 111(d). Ohio disagreed with the legal underpinnings of this plan and we support the proposed changes that align the program

[1] Ohio EPA's comments on the proposed repeal does not include all the comments it made on the original proposal (docket ID No. EPA-HQ-OAR-2013-0602) and Ohio EPA does not waive any of the comments previously made that are not repeated here.

with the congressional intent of the CAA. In addition, wholly without intervention from the federal government, Ohio is undergoing a transformation in the energy and electric sector that is market driven. For example, Ohio's generation mix is being positively influenced by shale gas, renewables and energy efficiency which is keeping costs low, as well as reducing emissions. This is being accomplished without additional regulatory burden or other regulatory drivers. Specifically, Ohio utilities have reduced carbon dioxide emissions from electric generation by 38% from 2005 levels without a federal mandate or a multistate agreement.

Make no mistake, Ohio believes we have an obligation to be good stewards of the environment by having an energy policy that is protective of public health and air quality. Ohio EPA requests that U.S. EPA proceed to replace the CPP with ACE. Ace is, in our opinion, lawful, technically sound, and workable and will help Ohio continue to achieve our goal to protect Ohioans and the air we breathe. This is an opportunity for U.S. EPA to correct the significant flaws and illegality of the CPP. Please find attached our comments on the proposed rulemaking to replace the CPP with the Affordable Clean Energy (ACE) rule.

Sincerely,

Craig W. Butler
Director, Ohio EPA

Cc: Robert Hodanbosi, Chief, Ohio EPA Division of Air Pollution Control

Attachment

Ohio EPA Comments on the proposed "Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing regulations: Revisions to New Source Review Program" [83 FR 44746]

Introduction

The State of Ohio has been a manufacturing hub in the heart of the country since the industrial revolution. Fueled by affordable electricity, Ohio is home to a wide range of manufacturing jobs, from steel mills to glass plants to automobile manufacturing plants; these jobs are a vital part of both Ohio's and the country's workforce and economy. Ohio was ranked third in the nation in manufacturing employment in 2011[2]. Any increases to electricity cost, will be very costly.

Manufacturing is not the only important piece of Ohio's economics, electricity is as well. U.S. Department of Labor, Bureau of Labor Statistics estimated in May 2017 Ohio employed 820 power distributors and dispatchers, making Ohio the third largest in the nation to employee workers in this category.[3] In fact, based on July 2018 EIA data, Ohio ranks twelfth in electricity production in the nation[4].

In the eastern and southeastern portions of the State, Ohioans have been mining coal for over two centuries. Our reliance on coal and diverse other mix of generation sources resulted in electricity prices that were 9% below the most up-to-date national 2018 average[5]. Even still, many Ohio families are struggling with high energy prices; 51% of low to middle income households spend an average of 17% of their after-tax income on energy. Increased energy prices would further strain these families[6].

More recently Ohio has become a part of the new shale oil and gas industry with thousands of wells across the State. These wells contribute to the local and State economy by driving down unemployment and providing an economic boost. The renewable energy (RE) industry also continues to grow and diversify Ohio's portfolio with new hydroelectric power plants, wind farms and an emerging solar industry. Several State programs provide significant funding and help in developing end-use energy efficiency (EE). This more balanced Energy Portfolio has, worked to lower the emissions of pollutants, including greenhouse gasses (GHG), across the State.

The stated goal of the CPP was a 32% reduction in carbon dioxide (CO2) emissions from 2005 levels nationwide. For Ohio specifically, the CPP required achievement of a 27.8% reduction in electric generating units (EGU) CO2 emissions from 2012 levels by 2030. Further, the CPP projected that, in the absence of the rule, Ohio's 2020 EGU CO2 emissions would be 103,946,835 tons. The CPP clearly failed to account for the rapidly changing nature of Ohio's fuel mix, which has resulted in dramatic CO2 emission reductions beginning in 2009 and continuing. Figure 1, below, shows annual CO2 emissions from all EGUs reporting emissions to the U.S. EPA's Clean Air Markets Database, years 1995-2017.

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[2] Page 7: http://www.ohiopoweredbymanufacturing.com/oma/OMA-Manufacturing-Counts-2012.pdf
[3] http://www.bls.gov/oes/current/oes518012.htm
[4] http://www.eia.gov/state/?sid=oh
[5] http://www.eia.gov/state/?sid=oh
[6] Eugene M. Trisko, Energy Cost Impacts on Ohio Families, Jan 2016

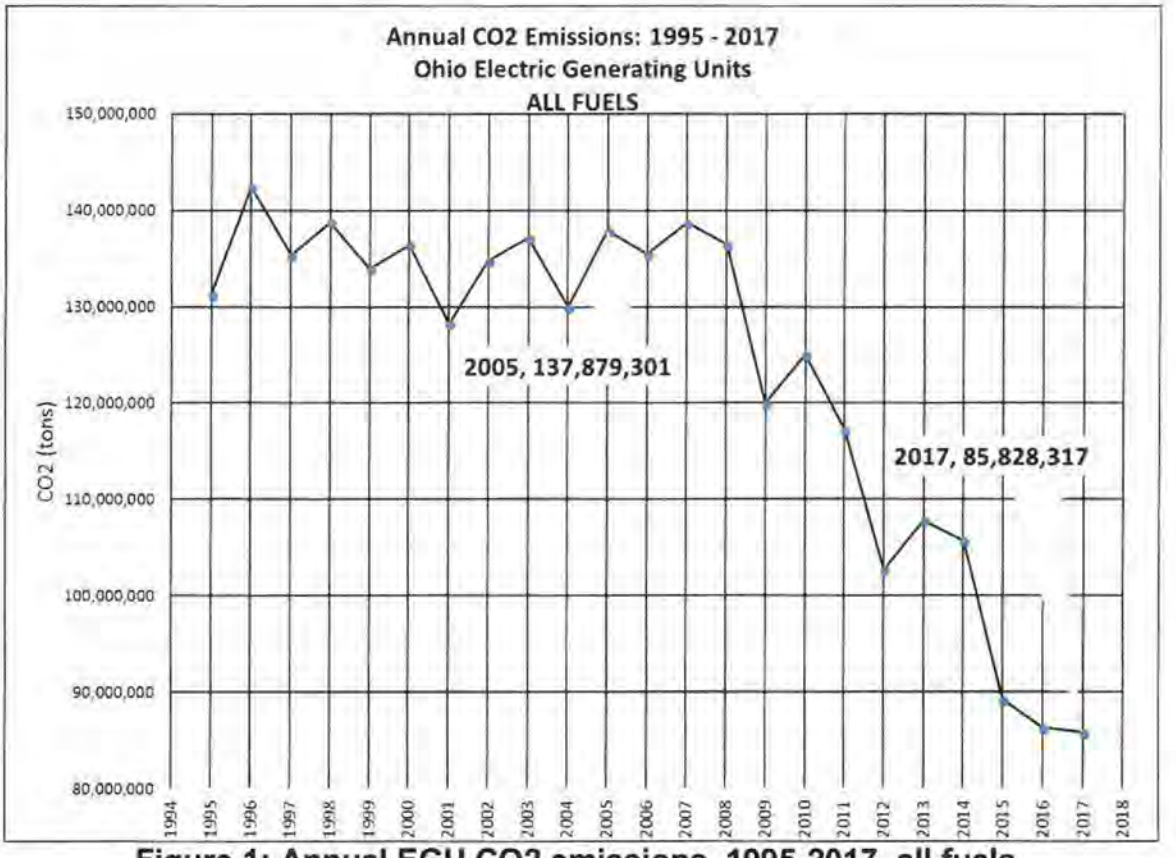

Figure 1: Annual EGU CO2 emissions, 1995-2017, all fuels.

The data in Figure 1 are telling in several ways. First, the significant decrease in CO2 emissions is readily apparent. Emission reductions from 2005 levels, 52,050,984 tons, was achieved in the absence of a federal mandate or a multistate agreement, and represents a 38% reduction in CO2 emissions. This reduction far exceeds the nationwide expectation of a 32% reduction by 2030. It should also be noted that Ohio's 2017 CO2 emissions, 85,828,317 tons, is less than the 88,512,313-ton Step 1 Interim Goal for Ohio as put forward in the CPP. It is remarkable that this Interim Goal was not to be achieved until 2022, and that Ohio achieved this milestone in 2016.

These reductions have occurred due to a combination of programs and initiatives implemented not only by Ohio EPA, but by federal agencies, other State agencies and other public entities, each with their own unique authority and ability to reduce emissions. We have argued and still believe that the CPP reached far into the roles of each of these public entities thus, undermining their authority and ability to implant these programs in the most effective manner, by placing them under the control of the federal government.

Also of great importance is the impact the CPP would have had on Ohio's deregulated energy market. The State of Ohio has transitioned from a vertically-integrated,

traditional rate-of-return utility construct, where an incumbent utility would provide service from generation to local distribution, to a competitive retail generation market, where customers can now choose their generation supplier. Electric utilities were required to divest their EGUs from their transmission and distribution functions. Today, the EGUs that were previously regulated through traditional rate-of-return ratemaking are divested from Ohio's electric transmission and distribution utilities.

The CPP would have impacted not only fossil fuel-fired electricity generators, but also the energy sector as a whole, from generation to transmission. U.S. EPA's own estimates that electricity and natural gas prices would rise as a result of this rule are of concern to Ohioans. The subsequent impact on Ohio residents, Ohio manufacturing, Ohio industrial sector and Ohio commercial sector would have been significant.

The CPP is flawed in its design and construction by attempting to revamp the power generation, transmission and distribution system under Section 111(d) of the Clean Air Act (CAA), a rarely-used section that reserves much authority and flexibility to the States. [82 FR 48035] The U.S. Supreme Court has held that vast regulatory expansions can only stem from clear Congressional authorization. Through its Section 111(d) rulemaking, U.S. EPA developed the CPP to broadly expand its regulatory reach from emission control to power generation, transmission and distribution control without having the clear authority under the CAA. U.S. EPA has the inherent authority to reconsider statutory interpretations as long as the agency provides a reasoned explanation. We believe U.S. EPA has properly exercised that inherent authority by proposing this Affordable Clean Energy (ACE) rule. This ACE rule proposes to replace the CPP in a way more consistent with the plain language and historic application of the Clean Air Act.

Under this proposal, U.S. EPA is soliciting comment on a variety of ACE provisions, including provisions relating to the implementing regulations for not only this Section 111(d) rulemaking but future rulemakings, and also provisions related to new source review (NSR) implications. Ohio EPA is providing our comments below.

1. C-1. U.S. EPA acknowledges rapid changes in the power sector and market drivers have resulted in significant reductions in CO2 emissions from the power sector that were not anticipated at the time of the CPP proposal. However, some Annual Energy Outlook (AEO) cases predict increases in CO2 from the power sector could be realized in the future. Given these uncertainties in long-term projections, U.S. EPA is requesting comment on applicability of those alternative results and on whether and how to consider ongoing and projected trends in developing CO2 emission guidelines for the power sector. [83 FR 44751]

   Ohio EPA agrees that rapid changes can result in quickly outdated data. The work put forth by U.S. EPA, States and affected sources to address Section 111(d) could be quickly overtaken by external market forces making those efforts redundant, or worse, put them in conflict with industry trends that are already reducing CO2

emissions. Therefore, it is essential that U.S. EPA limit the scope of this Section 111(d) proposal to "inside-the-fence" traditional approaches.

2. C-2. This proposal includes additional legal rationale to support heat rate improvements (HRI) as the best system of emissions reduction (BSER) and solicits comment on that rationale. [83 FR 44752-44754]

   First, U.S. EPA explained in the repeal proposal that reduced utilization does not fit within their historical and current interpretation of the BSER and that predicating Section 111(d) on a source's non-performance would inappropriately inject U.S. EPA into owner and operator production decisions. U.S. EPA acknowledges reduced utilization is not a valid system of emission reduction for purposes of establishing a standard of performance.

   Second, U.S. EPA explained in the repeal proposal that interpretive constraints that may apply to interpreting Section 111(a)(1) (determining what types of measures may be considered as BSER) for the purpose of setting a new source standard under Section 111(b) reasonably may be applied to interpreting the BSER for purposes of setting an existing source standard under Section 111(d) as well. Given that "standard of performance" applies to Section 111 as a whole, applying same interpretative constraints may be required. U.S. EPA discussed how the best available control technology (BACT) analysis and BSER are linked by statutory text, explaining the top-down BACT approach and consideration of technical, energy, environmental and economic factors. In reviewing BACT guidance, EPA identified additional interpretive constraints that may be applied to Section 111. U.S. EPA discusses how prevention of significant deterioration (PSD) and Title V Permitting Guidance for GHGs emphasizes that BACT need not necessarily include inherently lower polluting processes that would fundamentally redefine the nature of the source. Specifically, BACT should not regulate the applicant's purpose or objective; e.g., applicants constructing a coal unit aren't required to consider building natural gas.

   Third, notwithstanding the relationship between BACT and BSER, U.S. EPA believes measures "redefining the source" should be excluded from consideration for purposes of Section 111(d). U.S. EPA is proposing the BSER analysis need not include options that would redefine the source and therefore, U.S. EPA did not consider natural gas conversion or refueling.

   Fourth, U.S. EPA describes the legislative history of Section 111 as confirming that Congress intended Section 111 to be source oriented. U.S. EPA compared their role and expertise to that of the Federal Energy Regulatory Commission (FERC), and similarly compared a State EPA's expertise to that of a State's Public Utility Commission. U.S. EPA acknowledges the current shifts in the power sector which already creates strain and reliability concerns, emphasizing the significant

uncertainties, which further supports the unreasonableness of basing BSER on generation shifting measures. U.S. EPA asserts that regardless of future mix, coal will continue to be used and BSER should be focused on making these plants as efficient as possible (taking into consideration technical feasibility considering cost) which will ensure CO2 reductions regardless of future energy mix.

Ohio EPA agrees with the proposal to return to a reading of Section 111(a)(1) (and its constituent term, "best system of emission reduction") as being limited to emission reduction measures that can be applied to or at an individual stationary source. A Section 111(d) plan "establishes standards of performance for any existing source." The plain language construction of the phrase "for any existing source" can only mean that the emissions standard must be set at a level that a source itself can achieve. Since the outset of the program, U.S. EPA has frequently referred to Section 111(d) as a technology-based approach. [40 FR 53340 (Nov. 17, 1974)] For example, in describing the legislative history of Section 111(d), the preamble states that "the intent to require a technology based approach [can] be inferred from placement of the provision in Section 111." [Id. at 53342] The preamble goes on to explain that: "In summary, EPA believes Section 111(d) is a hybrid provision, intended to combine primary State responsibility for plan development and enforcement (as in Section 111) with the technology-based approach (making allowances for the costs of controlling existing sources) taken in Section 111 generally." Because Section 111(d), like Section 111(b), is a source-specific technology-based provision, it follows that the emission guideline based on BSER should be of that nature as well. And in fact, all prior Section 111(d) rules have interpreted the CAA in this way.

The statute plainly focuses on particular sources, not the entire power generation, transmission and distribution system. Section 111(d)(1) specifically requires a State plan which "establishes standards of performance for any existing source" and goes on to state that "[r]egulations by the Administrator under this paragraph shall permit the state in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life [RUL] of the existing source in which such a standard applies." "Existing source" is defined as "any stationary source other than a new source," [Section 111(a)(6)] and "stationary source" is "any building, structure, facility, or installation which emits or may emit any air pollutant" [Section 111(a)(3)]. The statute directs a State to establish and apply a standard of performance only to particular existing sources and to take into account the RUL of those particular existing sources. A plain reading of this provision can only lead one to conclude that Congress meant for the provision to apply to specific individual sources.

Furthermore, Ohio EPA appreciates the return to a more robust cooperative federalism approach to regulating GHGs. Section 111(d)(1) commits U.S. EPA to a

State planning procedure similar to that of a State Implementation Plan (SIP) under Section 110. Accordingly, U.S. EPA must integrate the federal-State division of labor embodied in Section 110 with the Section 111 directive to ensure that sources are subject to emission limits achievable by the BSER that has been adequately demonstrated. States have the authority to establish and enforce a standard of performance that "reflects the degree of emission limitation achievable through application of the best system," Section 111(a)(1), and to devise the rules for implementing and enforcing that standard, Section 111(d)(1). Just as a State develops a SIP under Section 110, a State must come up with a Section 111(d) plan that is workable and cost-effective for that State, taking into account real world realities and challenges.

In addition, USEPA's recognition that its area of expertise is control of emissions at the source and not electricity management rings true to Ohio EPA, which fulfills a similar role in the State of Ohio. Nowhere does the CAA give U.S. EPA the authority to regulate the dispatch of power plants on the interstate grid. In Ohio, it is the EGU owners who decide in what manner to bid into the electricity market and for how much time. It is the Pennsylvania, New Jersey, Maryland (PJM) Regional Transmission Organization (RTO), under the authority of FERC, who determines dispatch order based on utilizing the least expensive resource first to meet energy demand. Ohio EPA only has the authority to regulate emissions of air contaminants from air contaminant sources, and does not have the authority to implement federally enforceable State mandated programs as were proposed in the CPP because they fell "outside-the-fenceline."

Finally, Ohio EPA agrees that the BSER analysis should not include options that would fundamentally redefine the nature of the source, just as the BACT analysis under PSD cannot do so. This decision is for an owner and operator to make when considering how to manage their power assets. Neither U.S. EPA nor Ohio EPA have the authority or expertise to dictate that decision.

3. U.S. EPA solicited comment during the ANPRM on HRI opportunities and numerous commenters, including Ohio EPA, stated HRIs must be evaluated on a unit-by-unit basis and that the operating mode has significant influence (e.g. base, cycling, load following). U.S. EPA acknowledges that heat rate is affected by design characteristics, site-specific factors and other operating conditions. Therefore, U.S. EPA has identified the "most impactful" technologies, equipment upgrades and best operating and maintenance practices and is providing a list of "candidate technologies" constituting the BSER. States will be expected to evaluate each BSER HRI when establishing standards. U.S. EPA is soliciting comment on the list of "candidate technologies" (C-7), any unlisted HRI that should be added (C-6), and how the list of reports, case studies and analyses can inform our understanding of potential HRI opportunities (C-8). [83 FR 44756 - 44760]

Ohio EPA appreciates U.S. EPA's acknowledgement of the need for unit-specific evaluations to be conducted by the States themselves. As U.S. EPA notes, not all of the listed HRIs may be available or appropriate for all types of EGUs and some may have already been deployed. This further reiterates the need for unit-specific evaluations. Ohio EPA also suggests U.S. EPA not finalize an exhaustive list of HRIs that would necessitate resource intensive evaluation while providing negligible benefits.

4. C-9. U.S. EPA continues to raise concerns that unit-level HRIs with reductions in variable operating costs could lead to increased utilization compared to other generating options – the "rebound effect". As a result, U.S. EPA modeled a range of HRIs as a part of the Regulatory Impact Analysis (RIA) and the results indicate no cumulative increases in system-wide emissions relative to a scenario where no action is taken. While individual sources may increase generation, as a group, there is predicted lower emissions. U.S. EPA is seeking comment on the conclusion that system-wide emission decreases due to HRIs are likely to be larger than any system-wide increases due to increased operation. [83 FR 44761]

   Just as with the CPP proposal and the ANPRM, U.S. EPA continues to cite concern that HRIs at coal-fired EGUs might make them more competitive and they will therefore increase their generation making them less effective at reducing CO2 emissions; the "rebound effect." Ohio EPA continues to have difficulty with U.S. EPA's concern regarding a potential "rebound effect." Unfortunately, any proposal that requires investment by an EGU to reduce emissions may result in that EGU operating more to get some return on their investment. This is how the free market should operate and the "rebound effect" should not be considered. Ohio EPA can think of no other federal or State regulatory requirement that requires significant monetary investment in a control strategy that reduces emissions (such as HRIs) coupled with an expectation that the investment should result in status quo or reduced operation. In general, the principle behind investment in control is that more efficient and well controlled facilities will operate more than less efficient and less controlled facilities. Any Section 111(d) plan will require investment of potentially millions of dollars to make coal-fired EGUs more efficient. Any possible "rebound effect" should not be a consideration under any rule.

5. U.S. EPA considered other systems of GHG emission reductions but found them not to be the BSER for reasons discussed in more detail in the proposal. U.S. EPA acknowledges there may be other methods and technologies, but States and sources are best suited to determine if they are appropriate and/or allowable measures. [83 FR 44761-44762]

   C-12. U.S. EPA reiterates the belief that carbon capture and storage (CCS) (including partial) continue to be too costly but is accepting any new information on CCS availability, applicability, costs or technical feasibility. Also, while a comment

number was not provided, U.S. EPA requests comment on if fuel co-firing should be listed as an option in the BSER list. Although U.S. EPA may not consider it BSER, U.S. EPA proposes that States be allowed to use it as a compliance option.

As discussed in response to requests C-17 and C-18 below, Ohio EPA believes it is important to maintain flexibility for States to determine if alternative compliance options, such as fuel co-firing, are appropriate compliance options once a State determines unit specific standards to be met based upon the BSER.

Regardless, Ohio EPA continues to believe CCS should not be considered BSER as CCS is not currently a cost-effective nor technically feasible approach to reduce CO2 at existing EGUs or even new coal-fired EGUs in the United States. Further, establishing such a requirement would mean existing sources would be subject to a more stringent standard under the BSER than that for Section 111(b) new sources. This would be a departure from how "standard of performance" has been used in the past and should be used now.

6. C-13. U.S. EPA is soliciting comment on whether States should determine source specific compliance schedules or if a uniform compliance schedule is appropriate. While the implementing regulations require U.S. EPA's emissions guidelines identify information such as a timeline for compliance with the standards, U.S. EPA is proposing to supersede this in accordance with newly proposed 40 CFR 60.20a and have States include appropriate compliance deadlines as a part of the State plan process. However, if a compliance schedule extends beyond 24 months from State submittal, U.S. EPA propose the State must include legally enforceable increments of progress. 40 CFR 60.24a(d)(1). [83 FR 44763]

   Ohio EPA believes it is necessary for States to determine appropriate compliance schedules due to the source specific nature of this guideline and due to reliability concerns.

   Ohio EPA provided comments on the ANPRM regarding concerns with timing of HRIs. While U.S. EPA has extended the timeline for implementation from 12 to 24 months, it still will likely not be feasible for all HRIs in a State, or across a region or the nation, to be completed within 24 months of plan submittal. This will undoubtedly cause reliability concerns. While longer timeframes are afforded if increments of progress are specified, those required increments of progress may also be challenging to forecast or meet given the nature of the sources subject to this Section 111(d). U.S. EPA needs to ensure flexibility is included in the rule, or at least in the interpretation of the increments of progress requirements. In addition, if increments of progress for every EGU in the State with HRIs extending beyond 24 months are required to be "legally enforceable" at the time of plan submittal, substantial resources and time for developing regulations and/or issuing federally

enforceable permits will be required. This will also be challenging in the regulatory timeframe. At a minimum, U.S. EPA must ensure that "legally enforceable" mechanisms include permits and/or enforceable State orders.

Another factor U.S. EPA is not considering is outage schedules already planned by EGUs. Altering an outage schedule can be quite costly. If U.S. EPA is not flexible on the timing, it could be determined to not be cost effective to implement the HRI.

Further, in viewing U.S. EPA's list of candidate measures, it brings to question how U.S. EPA would envision the timing of implementing HRIs when several may be deemed the standard of performance for a facility, especially a facility with multiple units. Does U.S. EPA expect all HRIs to be conducted within the 24-month time period? How far beyond 24-months would be deemed acceptable? These are factors that warrant significant flexibility in implementing this rule while continuing to ensure grid reliability.

There are many considerations that must be made when implementing HRIs. It is unrealistic to assume that sufficient numbers of HRI projects across Ohio's large coal-fired fleet with meaningful impact on achieving CO2 reductions for Ohio could be completed in short time frames without significantly impacting grid reliability, reserve capacity, and costs to consumers. And Ohio is just one State. These impacts will occur regionally and nationally when all States prepare to implement HRIs at the same time.

7. C-14. U.S. EPA states they envision the State will set standards based on considerations most appropriate to individual sources or groups (e.g., subcategories): historical emission rates, effect of potential HRIs (informed by U.S. EPA's candidate technologies), or changes in operation of the units, among other factors a State thinks are relevant. Although some commenters have suggested providing default methodology that would be presumptively approvable, U.S. EPA is not doing so because it could be viewed as limiting a State's ability to deviate from the prescribed methodology. U.S. EPA is requesting comment on approaches based on use of historical heat rate or emissions data for the individual sources. U.S. EPA suggests the circumstances and considerations in establishing standards for sources undergoing modifications are not the same as those under Section 111(d) but there are parallels and similarities. [83 FR 44764]

   Ohio EPA believes a default methodology could be useful but could also be viewed as limiting. If U.S. EPA intends to provide default methodologies, they should be in the form of non-binding guidance and clearly stated as such. Ohio EPA is most concerned with the timing of this information. If provided, it is essential that such guidance be provided at the time the emission guideline is finalized. Otherwise,

Ohio EPA believes overly-prescriptive and/or ill-timed guidance can be more detrimental than no guidance at all.

8. C-15. 40 CFR 60.22a(b)(2) as proposed will specify an emission guideline include information on the degree of emission reduction but not require U.S. EPA provide a standard of performance that presumptively reflects such degree of emission reduction achievable through application of BSER. Rather, that is the State's role. The proposed new regulation clarifies the statute doesn't require a presumptive numerical standard as a part of the emission guideline. For this emissions guideline, U.S. EPA is proposing that an allowable emissions rate (i.e., rate-based standard in, e.g., lb CO2/MWh-gross) be the form of the standard that States would include in their plan. Secondly, U.S. EPA is proposing the plan include only the one form of standard of performance (i.e., proposing only an allowable emission rate) to create continuity across States, prevent ambiguity, and to ensure as much simplicity as possible. U.S. EPA is soliciting comment on whether other forms of standards of performance should be allowed or whether a different form should be the primary. [83 FR 44764]

   Ohio EPA believes this is an important issue for comment. Ohio EPA believes the nature of this Section 111(d) may be better suited to a different emissions limitation than an hourly limitation, or even better no emissions limitation at all.

   Ohio EPA has provided comment in the past regarding the reality that heat rate degrades over time and variables can cause temporary fluctuations or degradation in heat rates. Sargent & Lundy acknowledge in an October 15, 2014 letter that "the performance of some of the evaluated heat rate improvement strategies degrade over time, even with the best maintenance practices. Therefore, depending on the strategy employed or the technology installed to reduce heat rate at an existing coal-fired EGU the unit heat rate initially obtained may increase over time." How will this be accounted for in an hourly limit? How will this be accounted for over time? This raises the question of how an emissions limit would be established in the first place. Ohio EPA believes much more thought must be given to this issue and an approach be developed that recognizes this reality. Ultimately, an emission rate likely is not appropriate for an HRI. Unlike other control strategies where an actual control device is installed and is expected to provide a percent reduction in a pollutant, this proposed Section 111(d) approach is more like a work practice that is designed to increase the efficiency of the unit itself. It is likely appropriate, and practical, to consider options other than an emissions limitation in this case.

   If this proposal must proceed, U.S. EPA should revise 40 CFR 60.24a(b) so that a standard of performance must be an "allowable rate or limit, design, equipment, work practice or operational standard" established by the State and to also adjust the language in 40 CFR 60.5755a(a)(1) accordingly. This is consistent with the statute and the entirety of the proposed language of 40 CFR 60.24a. Ultimately,

under this Section 111(d) approach, the metric by which success would be determined is by an overall change in heat rate after HRIs are performed compared to prior to the HRI(s) being performed. It should be simple enough to have a legally enforceable requirement to perform an HRI(s) in accordance with best practices under specific compliance timelines, rather than any need to prescribe an emission limit associated with that HRI. This would address the variability in actual heat rate improvement for the same HRIs at different units and the variability of HRIs over time at the unit. Consistent with the statute, it is likely not feasible to prescribe or enforce an allowable emission limit as the standard of performance. A work practice, such as an HRI, may be all that should be required. This has been implemented in other air pollution control programs such as Reasonably Available Control Measures for fugitive dust.

9. C-16. U.S. EPA is requesting comment on the merits of differentiating between gross and net heat rate. Recognizing it could be important for partial load operations and it is also important in recognizing the improved efficiency obtained from equipment upgrades that reduce the auxiliary power demand. [83 FR 44765]

   This further identifies the complexities associated with developing emissions limitations for HRIs. If U.S. EPA must establish an emission limitation requirement, these complexities along with those identified above for request C-15 must be addressed and accounted for.

10. U.S. EPA believes Section 111(d) allows considerable flexibility for states to set standards of performance for units and considerable latitude for implementing measures and standards for affected EGUs and so U.S. EPA proposes under ACE to grant States the freedom to give EGUs a wide range of possible compliance options for sources to use to meet standards. Once a State determines the standard, the State could allow a BSER technology or non-BSER technology or strategy to be used in meeting the standard. To ensure a non-BSER strategy actually reduces the emission rate, U.S. EPA is proposing they meet two criteria: (1) be implemented at the source itself, and (2) are measurable at the source of emissions using data, emissions monitoring equipment, or other methods to demonstrate compliance, such that they can be easily monitored, reported and verified at a unit. [83 FR 44765]

    C-17. U.S. EPA is soliciting comment on whether the two criteria are appropriate or not, and why. Also, whether there may be other compliance flexibilities that might meet the two criteria.

    C-18. U.S. EPA is also soliciting comment on whether certain non-BSER measures should be disallowed and if so under what criteria or rationale.

Ohio EPA believes it is important to maintain flexibility for States to determine if alternative compliance options are appropriate compliance options once a State determines unit specific standards to be met based upon the BSER. It should be up to the State to determine appropriateness of a given non-BSER measure. For example, if it is determined that a candidate HRI is not cost-effective given RUL, but a facility determines implementing that HRI in lieu of a cost-effective HRI is within their business plan, the State should have such flexibility to allow such an option. In addition, regional fuel supplies could make co-firing highly desirable for some sources even though it is not a cost-effective option for all sources and therefore, not appropriate as the BSER.

11. U.S. EPA is acknowledging the States have discretion to consider RUL and other factors in setting standards of performance. Ultimately, RUL impacts cost (i.e., less time to amortize cost of control). U.S. EPA believes when Congress mentions "other factors" that, generally, those other factors are ones that may substantially increase costs relative to a more typical unit. U.S. EPA is proposing one or more of the following factors be used to demonstrate the necessity for a variance from applying the standard of performance for a particular source based on RUL or other factors:
    - Unreasonable cost of control resulting from plant age, location, or basic process design; (expected life, payback period for investments, timing of regulatory requirements)
    - Physical impossibility of installing necessary control equipment; or (space of other physical barriers)
    - Other factors specific to facility (or class of) that make application of a less stringent standard or final compliance time significantly more reasonable. (some HRIs are either not applicable or already implemented)

    [83 FR 44766]

    C-22. U.S EPA is soliciting comment on the manner in which States should be permitted to exercise their statutory authority to take into account RUL and what "other factors" might be appropriate.

    C-23. Further, U.S. EPA proposes this as a unit-by-unit determination weighing both value of cost of installation and CO2 reductions. Therefore, U.S. EPA is proposing these factors are specific to a facility (or class) that make a variance from the emission guideline significantly more reasonable, as allowed under proposed 40 CFR 60.24a(e)(3). U.S. EPA is soliciting comment if other factors should be allowed per the proposed variance provision.

    Section 111(d)(1) requires that U.S. EPA permit States to take into account an affected source's RUL, as well as other factors, when establishing an appropriate standard of performance. It is imperative then for States to have the flexibility take into consideration the degree of reduction, costs, RUL and other limitations, such as

grid reliability, when developing State plans. Maintaining flexibility to make these considerations on a case-by-case basis is important. U.S. EPA's third factor, "other factors specific to the facility" will allow this flexibility provided it is not later interpreted too narrowly (e.g., Ohio EPA interprets grid reliability to fall into this category).

12. C-24. U.S. EPA is proposing if a State uses the variance provision, they must demonstrate in the State plan that such application meets criteria outlined in this proposal, recognizing that some cases may result in no measures being applicable to a source. For example, when a very short RUL is applicable or when all measures have already been implemented. In such cases, U.S. EPA is proposing the State must still establish a standard of performance. U.S. EPA is taking comment on what a standard may look like in these cases. For example, an emission rate and compliance deadline where the rate would only be applicable if the source doesn't shut down by such date. Or, if all measures were already implemented, apply a business as usual rate without allowing backsliding. [83 FR 44766]

    C-25. U.S. EPA is soliciting comment on if there are considerations in utilizing the variance provision, including potential interaction of the compliance flexibilities proposed in this proposal with utilization of the provisions. For example, would allowing trading and use of a variance result in an impermissibly less stringent application of BSER. [83 FR 44767]

    C-26. U.S. EPA is also welcoming comment on the legality and appropriateness of utilizing this provision, generally, and in the context of specific compliance flexibilities that States may employ in developing plans. [83 FR 44767]

    Proposed 40 CFR 60.24a(e)(3) sets forth a description of the factors that a state may consider when applying the standard of performance to a particular source. This provision is consistent with the directive from Congress under Section 111(d)(1) allowing a State to consider RUL, among other factors. As U.S. EPA points out, many of these "other factors" distill down to a consideration of cost and a State must have as much flexibility as possible given the unique circumstances of each source. Ohio EPA believes that U.S. EPA should not be any more specific of how a State handles such situations in this rule. There may be a multitude of scenarios, each with a unique solution, and attempting to define the parameters under which a State may address a scenario could complicate the ability of a State to establish an appropriate standard of performance for a particular source. States will and should carefully assess and prevent any possible negative interactions between a variance and some other option (e.g., trading) and ultimately U.S. EPA is responsible for reviewing and approving or disapproving State plans while ensuring the BSER and emissions guideline are met.

13. C-27. U.S. EPA is soliciting comment on any factors that may play a role in a State setting a standard of performance with considerations to NSR; meaning, in considering candidate technologies States should consider how HRI may trigger NSR and impact cost of the HRI. [83 FR 44767]

    Ohio EPA is providing comments below regarding the continued concerns with HRIs triggering NSR requirements. U.S. EPA's proposed method for addressing potential NSR issues may relieve some sources from NSR but may not relieve others. Regardless, the proposed analyses required to determine if NSR will be applicable will also impose costs. A State must be able to take these costs into consideration as a part of setting a standard of performance while considering RUL and other factors.

14. C-28. U.S. EPA is soliciting comment on whether Section 111(d) authorizes States to include averaging (across a facility and across multiple existing sources) and trading between existing sources in plans. U.S. EPA is proposing to allow averaging among EGUs across a single facility because the BSER is predicated on measures implemented at the facility level. However, U.S. EPA is limiting the averaging to only affected EGUs at the facility because: (1) including non-affected units at the facility might not result in real reductions (e.g., averaging with NGCC that would have operated anyway) and generation shifting to lower emitting units is contrary to the intention of the rule; (2) U.S. EPA is currently considering if NGCC should be included as affected EGUs; and (3) it would mirror the BSER determination of this rule. [83 FR 44767]

    U.S. EPA is also soliciting comment on: if facility wide averaging is appropriate and what other types of considerations should be involved (C-29) [83 FR 44767]; averaging affected EGUs with non-affected sources within a facility in limited case when they represent incremental new non-emitting capacity (e.g., integrated solar) (C-30) [83 FR 44767; and if there is a way to allow trading between effected EGUs across affected sources while not encouraging generation shifting (C-31) [83 FR 44768]

    Lastly, U.S. EPA is soliciting on whether Section 111(d) should be read to not allow trading and averaging between sources (C-32). Specifically, U.S. EPA requests comment on: if averaging across multiple affected sources is allowed in plan, how would the system should conceptually work (C-33); how would it or would it not undermine BSER (C-34); for trading, what type of EM&V criteria should be required (C-35); should compliance instruments be banked (C-36); if averaging across multiple sources, what mechanisms would be needed to ensure compliance is maintained and tracked for purposes of providing for the implementation and enforcement of the standards of performance (C-37); which and/or if technology should be limited in the averaging program; (C-38); whether affected EGUs across

State lines could be able to average and what measures State plans should include to provide for implementation and enforcement of such multi-State averaging (C-39); issues of statutory interpretation, whether they are appropriate interpretations of Section 111(d) (C-40); and whether such averaging, trading, or "bubbling" compliance flexibilities as are available under other sections of title I of CAA suggest that such flexibilities should be afforded under Section 111(d) (C-41). [83 FR 44768]

Where an emissions limitation is necessary, Ohio EPA supports the concept of facility-wide averaging of affected EGUs across a single facility and believes it is consistent with a traditional Section 111(d) approach. U.S. EPA's proposal notes that going beyond affected units at the facility could have practical and legal concerns [83 FR 44768]: (1) inconsistent with proposed BSER applying to and at an individual source; (2) if Section 111(d) authorized trading and averaging then the provision on RUL and other factors could be viewed as superfluous (averaging and trading could be viewed as eliminating the need to consider RUL); and (3) multiple practical concerns like the complexity of developing and implementing a State plan with averaging or trading and difficulty in ensuring robust compliance (e.g., EM&V for trading programs). Ohio EPA has similar concerns on the complexity of implementing an averaging scheme that goes beyond the affected EGUs at a given facility.

As noted in our comments on the ANPRM, Ohio EPA supports trading and market-based solutions, however, in this particular case, if HRIs will comprise BSER, Ohio EPA finds it difficult to envision a trading program that would be meaningful or meet Section 111(d).

U.S. EPA has interpreted the meaning of standard of performance under Section 111(d) to include a cap and trade program when it promulgated the Clean Air Mercury Rule (CAMR). [70 FR 28606 (May 18, 2005)]. CAMR established a national mercury emissions cap for new and existing EGUs. Although a federal appeals court eventually held that U.S. EPA did not properly regulate mercury emissions under Section 111 because the initial delisting of EGUs under Section 112 was unlawful, CAMR is instructive on how a cap and trade program might be justified and designed under Section 111(d). The cap and trade program created by CAMR was based on the availability and installation of control technology. The preamble to the final rule emphasized the fact that the BSER was a combination of the cap and trade mechanism and the technology needed to achieve the chosen cap level. In justifying the emission limits in CAMR, U.S. EPA explained in the preamble that "the technologies necessary to achieve the emission cap limits . . . have been adequately demonstrated." It is clear that CAMR, while broader than previous Section 111(d) rules, was still within the traditional interpretation of standard of performance based on source-specific control technologies and limited

to affected facilities. Therefore, CAMR maintained the source-specific technology-based approach that is the foundation of Section 111.

Here, although a trading program covering an HRI approach for EGUs could be justified as focusing on the technology needed to achieve the chosen cap level, U.S. EPA may be underestimating the current efficiency of the remaining coal-fired EGU fleet. If a unit specific analysis is conducted from the menu of HRIs, it is likely all reasonable HRIs would be implemented. How then would additional credits be generated for trading? It is likely U.S. EPA would need to develop a complex trading program for a relatively small amount of emissions.
Ultimately, Ohio EPA continues to believe that a State could decide that the most appropriate approach may not need to establish emission limitations that necessitate averaging or trading but rather could simply rely on other methods of meeting a standard of performance, such as a work practice (HRI) as discussed in response to request C-15 above.

15. C-42. U.S. EPA is proposing new and carrying forward some of the same implementing regulations for Section 111(d) contained in 40 CFR Part 60, subpart B. U.S. EPA is proposing these apply for States to meet the requirements to include implementation and enforcement provisions under Section 111(d)(1)). U.S. EPA is requesting comment on if these are appropriate to meet these obligations or if other implementation or enforcement measures should be required. [83 FR 44768]

    Ohio EPA is providing comment on specific requests below related to the implementing regulations that are new and being carried forward. In addition to those specific requests, Ohio EPA is providing the following comments on portions for which comment has not been requested or portions for which U.S. EPA states [83 FR 44770] are moved over without change and are ministerial action (and they are not soliciting comment). Note, Ohio EPA finds in some cases the sections referenced as being moved without change in fact do include changes.

    a. With respect to all of 40 CFR 60.23a [83 FR 44804-44805], Ohio EPA strongly suggests modeling the language directly after 40 CFR 51.102, or more efficiently, simply referencing that the notice and hearing requirements under 40 CFR 51.102 are sufficient for meeting the requirements of this rule. U.S. EPA should also apply the McCabe Memo[7] to this proposal as it applies to the SIP program to clarify what is meant by the requirements in 40 CFR 51.102. U.S. EPA should adopt the requirements contained in 40 CFR 51.102 verbatim. This will necessitate an update to paragraph (g) also.

[7] Regional Consistency for the Administrative Requirements of State Implementation Plan Submittals and the Use of "Letter Notices", Janet McCabe, April 6, 2011.

40 CFR 60.23a(d) also contains provisions for notification to the public. This provision requires "prominent advertising" of the hearing and states the internet should be satisfactory. The added sentence regarding the internet adds to much specificity (could be construed as the only alternative besides a newspaper). 40 CFR 51.102 does not include this specificity. This comment also applies to the provision regarding availability of the plan for public inspection. There is no need to include internet as an option. It could be viewed narrowly. "Prominent advertisement" is also clarified in the McCabe Memo.

40 CFR 60.23a(f) also contains provisions requiring maintaining the public hearing record for 2 years. This is an outdated requirement and not necessary. Documenting retention policies at the State level should be sufficient to ensure public records are maintained for sufficient time periods. In Ohio, this record would be maintained for a minimum of 5 years under our retention policy.

b. With respect to 40 CFR 60.25a(e) [83 FR 44805], Ohio EPA strongly suggests U.S. EPA delete this unnecessary provision which requires the State to provide annual reports on progress in plan enforcement. This is an unnecessary and burdensome amount of oversight that is no longer necessary. Furthermore, this paragraph requires information be included in the annual report required under 40 CFR 51.321. 40 CFR 51.321 requires annual emissions reporting under U.S. EPA's Air Emissions Reporting Requirements (AERR). This would require States for the first time to begin reporting CO2 emissions as a part of their annual emissions reporting. Surely this is an unintended consequence of Section 111(d) addressing a non-criteria pollutant with significant implications. There is more than sufficient reporting of GHG emissions under other federal programs and additional GHG reporting should not be necessary as a part of this rule. Ohio EPA urges U.S. EPA to correct this oversite.

c. With respect to 40 CFR 60.28a(a) [83 FR 44807], U.S. EPA proposes that plan revisions be submitted within 12 months, or shorter, if required by the Administrator, after a final revised emission guideline is published. Plan revisions resulting from revised emission guidelines can be just as time consuming and resource intensive, with compliance timeline constraint issues just as relevant, as the original emission guidelines. The same timelines should apply to revisions as an initial plan requirement. This must be addressed to ensure significant issues are not encountered in the future if a revision to the emission guideline (if finalized) occurs.

d. Ohio EPA believes there is a mistake in 40 CFR 60.5770a(b) where January 8, 2014 should be August 31, 2018.

e. There is an error in 40 CFR 60.5790a(a) where requirements from the CPP still remains in the language. Ohio EPA also questions if all the definitions in 40 CFR 60.5805a remain valid and necessary as some are not used in the subpart.

16. C-43. U.S. EPA is proposing States will be required to include monitoring, recordkeeping and reporting (MRR) necessary to provide for implementation and enforcement; however, States would have the flexibility to design their monitoring plan. Acknowledging most affected units already have MRR under 40 CFR Part 75, if the standard of performance is a unit's CO2 emissions rate (e.g., lb/MWh), U.S. EPA is proposing the 40 CFR Part 75 meets the MRR requirement under the emission guideline. States also have discretion to establish averaging times but believes it could have different effects on the demonstration of compliance. Therefore, U.S. EPA is taking comment on if there should be any bounds or considerations to the averaging times allowed. [83 FR 44769]

    Ohio EPA believes 40 CFR Part 75 should be an approvable approach and that a State should have the flexibility to allow for alternate approaches if appropriate and provides for implementation and enforcement. Ohio EPA recommends U.S. EPA relies on the State's expertise and discretion in determining appropriate averaging times and not limit those decisions via regulatory requirements. Rather, U.S. EPA can use the review and approval process to determine if an alternative MRR proposal meets the requirements for implementation and enforcement.

17. U.S. EPA is proposing State plans be submitted electronically. U.S. EPA is soliciting comment on whether electronic submittals are appropriate and less burdensome to States (C-44) or whether this should be the sole means of submitting State plans (C-45). [83 FR 44769]

    Ohio EPA does not believe it is appropriate to require electronic submittals. If U.S. EPA desires to require electronic submittals, then U.S. EPA should provide for a rulemaking that does so for all submittal types and not just in the implementing regulations for specific requirements such as Section 111(d). Ohio EPA currently uses SPeCS and finds it valuable and beneficial for both States and U.S. EPA. However, Ohio EPA still has concerns with the system and prefers the ability to continue to provide paper/e-mailed submissions when necessary.

18. C-46. U.S. EPA is soliciting comment on the list of items, under 40 CFR 60.5740a, that must be in a State plan and whether this list is comprehensive to submit a State plan. [83 FR 44769]

    U.S.EPA is referencing a list that includes several items for which Ohio EPA wishes to express concerns.

First, U.S. EPA is requiring under (a)(3) that the State include a demonstration that each EGU's standard of performance is quantifiable, non-duplicative, permanent, verifiable, and enforceable in accordance with 40 CFR 60.5755a, which provides definitions for each of those except non-duplicative. Ohio EPA is unsure of how non-duplicative would be applied in the context of an HRI project. U.S. EPA should provide more explanation and/or incorporate a definition under 40 CFR 60.5755a However, Ohio EPA is concerned that depending on U.S. EPA's definition, additional concerns could become evident without an opportunity to comment. For example, will U.S. EPA say an HRI that is implemented as a part of another CAA program cannot be used to show compliance under Section 111(d)?

In addition, U.S. EPA also requires a demonstration that the requirements of 40 CFR 60.5755a are met under (a)(4)(v). These paragraphs are duplicative, and one should be removed.

Second, under (a)(4)(i), U.S. EPA is requiring a list of information required for each affected EGU regarding their future operation characteristics. This includes (A) Annual generation; (B) CO2 emissions; (C) Fuel use, fuel prices (when applicable), fuel carbon content; (D) Fixed and variable operations and maintenance costs (when applicable); (E) Heat rates; and (F) Electric generation capacity and capacity factors. Ohio EPA fails to see the relevance of this requirement and it should be removed. It is the State's responsibility to determine the standard of performance by evaluating the menu of HRIs and determining which will be required to be implemented and what the resulting emissions limit should be. Any technical data necessary to support that conclusion would be included and the type of information could vary from source to source and HRI to HRI. The rule should provide nothing more than a general statement requiring technical support information sufficient to support the State's determination.

Third, under (a)(4)(ii), U.S. EPA is requiring a timeline for implementation of EGU-specific actions (if applicable). What does U.S. EPA mean by "actions" and "if applicable"? A timeline of actions as a part of the State plan should only be necessary when the timeline for compliance of an HRI is extended beyond the 24-month period proposed. As written, this paragraph could be construed to require a timeline for implementation within the 24-month period and for other types of actions.

Fourth, under (a)(4)(iii), U.S. EPA is requiring all wholesale electricity prices be reported. This paragraph should be removed. It has no relevance to this proposed Section 111(d) rule. This information is not even within the privy of a State environmental agency's knowledge nor should it be required to be in the future. It has no bearing on the ability for a State to implement and enforce the proposed standard of performance.

Fifth, under (a)(4)(iv), U.S. EPA is requiring this analysis cover a time period extending at least to 2035. This paragraph must be removed. It has no relevance to this proposed Section 111(d) rule. It has no bearing on the ability for a State to implement and enforce the proposed standard of performance. Further, much of this data is not even available, reasonable to request, or accurately forecastable for a period extending to 2035 (e.g., wholesale electricity prices).

U.S. EPA is asking that States predict the future of wholesale electricity prices and unit operations for approximately 15 years into the future. This would be pure guess work that may or may not have any relationship to reality. What if U.S. EPA does not believe our projections are accurate? Is this a reason for plan disapproval? In any event, these factors do not have a bearing on current conditions and the application of Section 111(d) to a facility.

Items one through four above raise another concern regarding confidentiality. Many of the items in this list may be considered business confidential by the affected entities and these same entities would have concerns if their business projections turned out to be inaccurate. Would these entities be held legally responsible for making false statements?

To reiterate, Ohio EPA has significant concern with many of the items being requested above. The proposed list goes far beyond what is necessary under this Section 111(d), may not be applicable under certain scenarios, and would be a resource intensive process for no benefit in this type of State plan. If U.S. EPA desires this type of data, U.S. EPA should find another method than requiring it through this mechanism.

Sixth, under (a)(5), U.S. EPA is requiring the State plan include a timeline of milestones that will be taken between the time of the State plan submittal *and [date three years after final promulgation of this rule in the Federal Register]* to ensure the plan is effective as of [date plan takes effect]. This is terribly confusing and likely erroneous or else needs clarification. As noted in proposed 40 CFR 60.5745a, the State plan is due *[date three years after final promulgation of this rule in the Federal Register]* which therefore means (a)(5) is proposing milestones for 0 days. And if a State plan is submitted late, it could be requiring milestones for a negative amount of time. Regardless, why would milestones be needed for this type of Section 111(d)? U.S. EPA is already proposing that compliance be achieved by affected units within 24 months of submittal of the State plan and any extension beyond would require increments of progress. This is more than sufficient. It should not be necessary for States to provide milestones within the 24-month period if that is what U.S. EPA expects. Ohio EPA suggests U.S. EPA remove this provision.

19. C-50. U.S. EPA is soliciting comment on the substance and the proposed regulatory text for the following changes [83 FR 44770]:

    a. C-52. Updated timing requirements or the submission of State plans. Noting the SIP and FIP timing requirements were revised in 1990 CAA amendments, U.S. EPA is proposing to accordingly update Section 111(d) consistent with Section 110 timing requirements. U.S. EPA is proposing to update the requirements to submit within 9 months (under 40 CFR 60.23(a)(1)) to 3 years after final notice of the availability of the final emission guideline. U.S. EPA is taking comment on this and on any other timeframes that may be appropriate given the flexibilities U.S. EPA intends to provide though this guideline. U.S. EPA is also proposing to give itself discretion to determine in a specific emission guideline that a shorter time period for State submittal is appropriate. [83 FR 44771]

    Ohio EPA notes the current regulations (40 CFR 60.27) state that Administrator may "extend" the time for a plan submission while U.S. EPA is now proposing for all this time period to be "shortened". While we understand U.S. EPA is aligning the time with Section 110, and therefore extending the timing from 9 months to 3 years, we do not believe it necessitates this proposed change. Section 110 has no similar authority to shorten submittal timeframes for States. Ohio EPA suggests U.S. EPA retains the language as is or provides flexibility to either shorten or extend the timeframes as determined necessary by the Administrator.

    b. Updated timing requirement for when increments of progress must be included as part of a State plan. 40 CFR 60.24(e)(1) currently requires any compliance schedule for State plans extending more than 12 months for the date required for submittal include legally enforceable increments of progress for each facility. U.S. EPA is proposing to update in order to align with new timelines proposed. [83 FR 44771]

    Ohio EPA is providing comments regarding timing and increments of progress as a part of our response to request C-13 above.

    c. Completeness criteria and a process for determining completeness of State plan submissions similar to Section 110(k)(1) and (2). Similar to Section 110(k)(1), U.S. EPA is proposing completeness criteria to ensure State plans include certain minimum elements. U.S. EPA is proposing to adopt two types of criteria:

    - Administrative: Based on the 8 elements of Section 110: 1- formal letter, 2-evidence adopted in code or regulation, 3-evidence of legal authority, 4-copy of official regulations or document, 5-evidence procedural requirements followed, 6-public notice consistent with 40 CFR 60.23, 7- public hearing certification, and 8- public comments complication with responses.

- Technical: 1-description of plan approach and geographic scope; 2-identification of each designated facility, emissions standards for each, and MRR; 3-compliance schedules/increments of progress; 4-demonstration the plan is projected to achieve emissions performance under the applicable emission guidelines; 5- documentation of the State recordkeeping and reporting requirements to determine the performance of the plan as a whole; and 6-demonstration that each emission standard is quantifiable, non-duplicate, permanent, verifiable and enforceable.

[83 FR 44772]

With respect to 40 CFR 60.27a(g)(2)(ii) [83 FR 44807], U.S. EPA is proposing the State plan be adopted in the "State code or body of regulations." This is an unduly burdensome requirement that should be updated. 40 CFR Part 51, Appendix V provides for "evidence that the State has adopted the plan in the State code or body of regulations; or issued the permit, order, consent agreement (hereafter "document") in final form. As written in this proposal, it would require all plans to go through a lengthy rulemaking or legislation process before a plan could even be deemed complete. It is essential this is corrected. A permit or consent order should be more than sufficient for adoption of requirements under Section 111(d) just as it is under Section 110. Note, the proposal refers to "document" in paragraph (iv); therefore, it was likely only an oversite in drafting the rule.

With respect to 40 CFR 60.27a(g)(3) [83 FR 44807], U.S. EPA proposes that the technical criteria are reviewed "in order to be deemed complete". Based on the elements in the list this seems less like a completeness determination (as is done for an administrative requirements) and more like an adequacy determination. It could be construed that the completeness determination that would be required by the 6-month mark or be considered complete by operation of law could apply to this list also. For example, U.S. EPA would need to determine that the plan is "projected to achieve emission performance" within the 6-month timeframe or that criteria is deemed complete by operation of law.

d. C-56. Updated definition replacing "emission standard" with "standard of performance." U.S. EPA discusses their belief that the current definition of "emission standard" in the regulations in incomplete and requires clean up. For example, it encompasses equipment standards, which is an alternative form of standard under Section 111(h) under certain circumstances. Section 111(h) provides for other forms of alternatives like work practice standards which aren't covered under the existing definition of "emission standard." Further, the definition encompasses allowance systems which was added after CAMR which was vacated. Therefore, U.S. EPA is proposing to replace the definition with "standards of performance" that tracks with the definition provided under Section 111(a)(1). U.S. EPA is proposing to incorporate Section 111(h)'s allowance for

design, equipment, work practice, or operation standards as alterative standards of performance. The current regulations allow for plans to prescribe equipment specifications when emission rates are "clearly impracticable" as determined by U.S. EPA. Section 111(h)(1) allows for alternatives when standards of performance are "not feasible to prescribe or enforce" as those terms are defined under Section 111(h)(2). U.S. EPA is taking comment on this aspect of the proposal. [83 FR 44773]

Ohio EPA believes replacing "emissions standard" (a non-defined statutory term) with "standard of performance" (a defined statutory term) alleviates much confusion and more closely aligns the rule with the statute. Further, Ohio EPA supports allowing a State to identify a standard of performance prescribing design equipment, work practice, or operational standard, or combination thereof, when an emissions rate or limit is "not feasible to prescribe or enforce" (a concept borrowed from Section 111(h)) under proposed 40 CFR 60.24a(b). The concept of "standard of performance" in Section 111(a)(1) is underpinned by the "application of the best system of emission reduction which . . . has been adequately demonstrated." A system of emission reduction that reflects an infeasible emissions limitation would be neither "best" nor "adequately demonstrated." Thus, an adequately demonstrated best system of emission reduction may not be definitive emission rate or limit but instead may be a design equipment, work practice, or operational standard. A State must have the flexibility to determine whether an emission rate or limit is infeasible for reasons other than because a pollutant cannot be emitted through a particular conveyance or the lack of measurement methodology as contemplated by Section 111(h), and develop a State plan that includes some combination of design equipment, work practice, or operational standard as the appropriate standard of performance under the unique circumstances that confronts the affected sources in that State.

e. Usage of the internet to satisfy certain public hearing requirements. [83 FR 44773]

Ohio EPA has addressed our comments regarding this proposed change above (see comments on C-42).

20. C-57. U.S. EPA argues Section 111(d)(1)(B) must permit States to take into account, among other things, RUL and that Congress explicitly envisioned a State's standard could vary from the guideline. Acknowledging that 40 CFR 60.24(f) contains a variance provision but attaches to that the distinction between health and welfare-based and is only available under U.S. EPA discretion. U.S. EPA notes this provision was promulgated before the addition of the RUL provision and they are inconsistent in that the variance provisions don't envision what is permitted under Section 111(d)(1)(B). U.S. EPA is proposing no distinction between health

and welfare based and is also proposing a new variance provision consistent with Section 111(d)(1)(B) for RUL and other factors, such as timing considerations like expected life of the source, payback period for investments, timing of regulatory requirements, or other unit-specific criteria. U.S. EPA is soliciting comment on how a new variance provision can permit States to take into account RUL and other factors, and what other factors might be. [83 FR 44773]

C-58. In addition, U.S. EPA is taking comment on whether the factors in 40 CFR 60.24(f) are appropriate to carry over to a new variance provision and if they adequately give meaning to the requirements of Section 111(d)(1)(B). These include: unreasonable cost of control resulting from plant age, location, or basic process design; physical impossibility of installing necessary control equipment; or other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable. [83 FR 44773]

Ohio EPA continues to reiterate that RUL and other factors must be permitted to be considered by the State when developing a Section 111(d) plan (see our comments above under C-22/C-23). Ohio EPA believes it is appropriate to clarify this in the implementation rule.

21. U.S. EPA acknowledges this Section 111(d) plan could result in an existing source undertaking a physical or operational change which may require an NSR permit depending on the amount of the emission increase from the change and the air quality in the location of the source. U.S. EPA discusses at length historical rulemakings that attempted to exempt environmentally beneficial projects or provide alternative applicability determinations. U.S. EPA also discussed the comments received throughout the CPP and ANPRM rulemakings, acknowledging the NSR implication being at issue and remaining at issue specifically for HRIs. Ultimately this has led to U.S. EPA proposing a new NSR applicability determination process for these affected units, and potentially other units. U.S. EPA is taking comment on a variety of requests (C-59, C-60, C-61, C-62, C-63, C-64, C-65, C-66, C-67, C-68, C-69, C-70, C-71) related to the NSR issue for which Ohio EPA is providing the following comments. [83 FR 44775-44783]

Ohio EPA continues to have significant concerns also recognizing the unintended consequences and disincentive associated with performing HRIs as a result of NSR requirements.

Triggering NSR adds time and cost for sources and more burden for permitting authorities and could hinder effective and prompt implementation of the Section 111(d) plans. And that time and cost is not offset by a reduction in pollution or health impacts compared to before the HRI would be performed. The HRI itself is the action leading to a reduction in pollution and potential health impacts. It is

essential to the success of this Section 111(d) process that the NSR issue be addressed, or we will likely find that taking into consideration the cost of NSR as a part of development of the standard of performance will lead to fewer HRIs being implemented.

U.S. EPA should choose the least intrusive and time-consuming option for addressing NSR with the least risk of triggering NSR as a result of this Section 111(d) plan. If NSR cannot be avoided for these sources, States must be able to consider the cost and timing of NSR as a factor in setting a standard and a timeline (C-59, C-60). U.S. EPA must be cognizant of the time and effort involved in developing an NSR permit when considering compliance schedules and take into account that multiple sources within the State will be going through the same process, with differing schedules for implementing HRIs, while ensuring grid reliability throughout the entire process. All of this will undoubtedly have an impact on timing.

U.S. EPA requests comment (C-62) on whether an NSR applicability test for EGUs apply to all EGUs as defined in 40 CFR 51.124(q) or whether it should be confined to a smaller subset of the power sector, such as only the affected EGUs making modifications to comply with Section 111(d). Ohio EPA believes an NSR exemption should be confined to sources subject under this Section 111(d).

With respect to U.S. EPA's request for comment (C-65) regarding the potential for emissions increases as a result of the proposed NSR changes, Ohio EPA believes it should not be a consideration. U.S. EPA's analysis shows that national CO2 and other pollutants will essentially stay the same under ACE, or be slightly reduced, when compared to the CPP. But yes, some individual units may increase. As discussed in our response to request C-9 above, any potential risk of a "rebound effect" should not be considered and should not trigger major NSR.

Lastly, regardless of the above, some units may be subject to minor NSR within a State also. U.S. EPA must ensure that any State with a SIP approved minor NSR program is able to amend their requirements to exempt sources from minor NSR without the need for requiring a SIP revision prior to implementation and without the need for any anti-backsliding Section 110(l) demonstrations.

22. C-72. U.S. EPA is requesting comments on the need for State plan submittals and any estimates of burden and suggested methods for minimizing that burden. [83 FR 44783]

    As noted in response to request C-46 above, U.S. EPA should consider providing additional funding to the States to implement this program.

23. U.S. EPA provided its Regulatory Impact Analysis (RIA) results and illustrative scenarios presenting the difference between the CPP and the concepts in ACE and a scenario with no CPP with the purpose of providing sufficient information to understand the impact of a full repeal of the CPP. U.S. EPA acknowledges these scenarios are projected to result in a decrease of annual CO2 emissions of about 7 million to 30 million short tons relative to a future without a Section 111(d) regulation affecting the power sector. U.S. EPA requests comment on the illustrative scenarios although a specific comment number is not provided. [83 FR 44759]

    Ohio EPA wishes to express concern with the comparison of the benefits associated with the CPP compared to ACE. The baseline for comparison should be the current state only, which does not include the CPP. The CPP has not been implemented and continues to be under litigation and any change in pollution or health impacts should only be compared to the current state. Clearly, as shown by U.S. EPA, there will be significant benefits to implementation of ACE.

Bricker & Eckler
ATTORNEYS AT LAW

MEMORANDUM

TO: The Ohio Manufacturers' Association

FROM: Bricker & Eckler LLP

DATE: February 28, 2019

RE: Toledo's "Lake Erie Bill of Rights" Charter Amendment

I. What is the LEBOR and how was it enacted?

In a February 26, 2019 special election, Toledo's voters passed the Lake Erie Bill of Rights ("the LEBOR"). This passage followed an appeal to the Ohio Supreme Court regarding whether or not the initiative could be placed on the ballot.[1] The decision that the LEBOR could move forward as a ballot issue raised alarm in Ohio's agricultural community and beyond. It became law this week, passing with a 61% vote in favor.[2]

The LEBOR is an amendment to the City of Toledo's Charter.[3] The Toledo Charter, like a constitution, outlines the city's powers and plans for governance. The Ohio Constitution allows city residents to propose charter amendments through a petition process that requires signatures by 10 percent or more of the electors in order to place a proposal on the ballot.[4]

[1] In *State ex rel. Abernathy v. Lucas County Board of Elections*, Slip Op. No. 2019-Ohio-201, an opponent of the petition argued that the Charter Amendment exceeded Toledo's authority and filed an action for a "writ of prohibition"—a court order that would require the Lucas County Board of Elections to remove the Charter Amendment from the ballot. The Supreme Court did not grant the request and instead determined that the board's decision to place the Charter Amendment on the ballot was not unlawful because "a board of elections has no legal authority to review the substance of a proposed charter amendment and has no discretion to block the measure from the ballot based on an assessment of its suitability."

[2] https://www.cleveland.com/news/2019/02/toledoans-approve-first-lake-erie-bill-of-rights-farmer-sues-over-laws-constitutionality.html

[3] Full text available at: "The Lake Erie Bill of Rights Citizens Initiative," TOLEDOANS FOR SAFE WATER (accessed Feb. 27, 2019) http://lakeerieaction.wixsite.com/safewatertoledo/lake-erie-bill-of-rights.

[4] OHIO CONSTITUTION, Article XVIII, Sections 8 and 9.

The LEBOR was enacted in response to what it claims is the "imminent danger of irreversible devastation due to continued abuse by people and corporations enabled by reckless government policies, permitting and licensing activities that unremittingly create cumulative harm, and lack of protective intervention."[5] The LEBOR attempts to create a new way for Toledo citizens to exert power over environmental protection, and specifically Lake Erie, by granting new legal rights for Lake Erie and its ecosystem and allowing Toledo and its residents to enforce those legal rights against any government or corporation that violates them. Descriptively, the LEBOR states that one of its objectives is to "shift[ ] public governance from policies that urge voluntary action, or that merely regulate the amount of harm allowed by law over a given period of time, to adopting laws which prohibit activities that violate fundamental rights[.]"[6]

II. What does it require?

The LEBOR creates a new cause of action and an ambiguous new crime for the violation of any of three rights listed in its Section 1:

(a) The right of Lake Erie and "the Lake Erie watershed" to "exist, flourish, and naturally evolve";

(b) The right of "the people of the City of Toledo… to a clean and healthy Lake Erie and Lake Erie ecosystem"[7]; and

(c) The right of "the people of the City of Toledo to a system of government that protects and secures their human, civil, and collective rights," including the "right to self-government in their local community."

Subparagraph (d) provides that these rights are "self-executing and enforceable against both private and public actors."

A new cause of action is created in Section 2, which makes it "unlawful for any corporation or government to violate" any of the foregoing rights.[8]

This section also declares invalid "within the City of Toledo" all permits, licenses, or "privileges" issued by Ohio or the federal government "that would violate the prohibitions of this law." So, for example, any runoff or discharge permits granted by Ohio or federal agencies would not protect a company that has such permits.

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[5] LEBOR Preamble, at ¶1, http://lakeerieaction.wixsite.com/safewatertoledo/lake-erie-bill-of-rights.

[6] *Id.* at ¶ 2.

[7] Lake Erie ecosystem is broadly defined to include "all natural water features, communities of organisms, soil as well as terrestrial and aquatic sub-ecosystems that are part of Lake Erie and its watershed."

[8] The definition of "corporation" is not the model of clarity, defined only as including "any business entity."

This second source of violation sets up a direct tension between environmental permitting and licensing issued at the State and Federal levels, and what is perceived as a "violation" by the LEBOR. The resulting goal of the second source of violation is seemingly to give the City of Toledo veto power over discharge permits or other authorizations that may impact Lake Erie.

Section 3 presents how the Charter Amendment would be enforced by the City of Toledo, and sets forth a harsh scheme that grants original jurisdiction to the Lucas County Court of Common Pleas over any potential "violations": "Any corporation or government that violates [the Charter Amendment] shall be guilty of an "offense" and sentenced to pay the maximum fine allowable under State law for that violation." Per this provision, an action may be initiated by the City or a resident "in the name of the Ecosystem."

Finally, Section 4 states how the City of Toledo intends for the Charter Amendment to relate to other laws—essentially speaking directly to and addressing the elephant in the room—state and federal preemption. It states that violators of the LEBOR will not possess "any other legal rights that would interfere with the LEBOR" including the right to assert an argument sounding in state or federal preemption.

III. What impacts can we expect on manufacturers and others?

The corporations or entities that could be impacted by LEBOR's enactment range far and wide. Companies that have an Ohio EPA issued water discharge permit (an "NPDES permit") authorizing them to discharge into surface waters within the Lake Erie watershed could be affected. For example, manufacturers that have a water discharge permit allowing discharge into the Maumee could run afoul of the new amendment. Even sewage treatment facilities, including that of the City of Toledo itself, have such permits that could be challenged by the LEBOR.[9]

In addition to discharge permits, there are the "general storm water permits" granted to thousands of businesses in the Lake Erie watershed. These general permits allow for runoff at construction and industrial sites. Such activities could also potentially (and likely) run afoul of the LEBOR.

So what should manufacturers in the Lake Erie watershed expect?

1. Will my company be subject to additional regulations?

   No additional regulatory oversight will be created by LEBOR. LEBOR's language does not create regulations that must be followed, nor does it attempt

[9] An analysis of what has contributed to the algae bloom in Lake Erie identified as a significant contributor the Toledo sewer treatment facility, which has been characterized as significantly lacking in appropriate upgrades.

to give any regulatory authority to any office or organization. It purports to be "self-executing." On its own, it would only allow the City of Toledo or citizens of Toledo to bring a legal action for an alleged violation of Lake Erie's legal rights.

2. Will this practice spread statewide?

   Community rights initiatives in Ohio have been limited to several local efforts to amend municipal charters or ordinances with community rights language. There are organizations that are willing to help other communities advance similar community rights initiatives, so it is of course possible. In Ohio, there has not been an attempt to expand community rights on a statewide basis. Doing so would require a petition to be put on a statewide ballot or an action by the Ohio General Assembly and the administration of Governor DeWine.

3. What if my company becomes part of a LEBOR suit?

   First and foremost, contact your attorney and insurance company as soon as possible whenever faced with a lawsuit. However, also keep in mind that LEBOR is presently subject to at least one legal challenge in federal court, with additional challenges likely to be filed. Keep abreast of what is going on in these cases in order to discern the impact on any claim filed against your company. The OMA will be closely tracking LEBOR-related litigation to discern potential impacts to members.

4. What about my existing permits?

   The LEBOR would affect permits, licenses, and other authorizations made by the state and even the federal government. "No permit, license, privilege, charter, or other authorization issued to a corporation, by any state or federal entity, that would violate the prohibitions of this law or any rights secured by this law, shall be deemed valid within the City of Toledo." LEBOR, Section 2(b). All permits issued by the federal EPA, the Ohio EPA, or the federal or state departments of agriculture would be deemed invalid within Toledo to the extent they conflict with a citizen's conception of the LEBOR's provisions. If you presently hold existing permits that you anticipate will run afoul of LEBOR, consult with Ohio EPA or the issuing agency to obtain their recommendation for the impact of LEBOR on your legal rights and permitted activities.

IV. What legal challenges are on the horizon?

The LEBOR initiative is similar to many other community rights proposals that seek to establish rights of natural resources that citizens can protect through legal action. Such efforts have a bad track record in courts nationwide.[10] Courts have

[10] *State ex. rel. Bolzenius v. Preisse*, Slip Opinion No. 2018-Ohio-3708 (A proposed ordinance for a "Community Bill of Rights for Water, Soil, and Air Protection" stated that

consistently determined that the provisions conflict with longstanding constitutional principles that address the relationship between federal, state and local governments; state and local governments cannot eliminate federal rights and local governments cannot deny rights granted by the state. Community rights initiatives also conflict with legal precedent established by the U.S. Supreme Court that guarantees corporate entities constitutional rights. Finally, the State of Ohio holds rights in Lake Erie that Toledo and its residents do not have legal authority to claim. Based upon these legal precedents, it is very possible that an Ohio court would not enforce or uphold a LEBOR action.

In the short time between its passing and now, at least one legal challenge has been filed against LEBOR. On February 27th, *Drewes Farm Partnership v. City of Toledo* was filed in federal court in Toledo, asserting many challenges, including, among others, that the LEBOR: deprives parties of their fundamental right to free speech; violates the equal protection clause by targeting entities based on their status as a business; violates the Fifth Amendment protection against vague laws by exposing parties to strict criminal liability and damages under a "standardless Charter Amendment"; deprives parties of their rights without due process; exceeds Toledo's limited authority to pass legislation and is in violation of state and federal preemption laws; and creates new causes of action without the authority to do so.

The *Drewes* case seeks a preliminary injunction to stop the LEBOR going into effect before its defects are litigated. These, and other legal challenges, are anticipated in the near future, with industry groups, agricultural interest groups, and businesses all interested in challenging the LEBOR for its overreach and broad declarations. The *Drewes* case has not yet been set for hearing on the preliminary injunction that was requested, but once litigated, this lawsuit will likely give a clear indication of how these challenges may play out in the courts.

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natural communities and ecosystems "possess the rights to exist and flourish" within the City of Columbus." The Ohio Supreme Court determined that the proposal created a new cause of action and was beyond a city's legislative power); *Spokane Entrepreneurial Center v. Spokane Moves to Amend the Constitution*, No. 91551-2 (Wa. Feb. 4, 2016) (Washington Supreme Court found community rights amendment to city charter exceeded city's authority when amendment sought to give legal rights to Spokane River); *SWEPI, LP v. Mora County, New Mexico*, 81 F.Supp.3d 1075 (D. N.M. 2015) (Community rights sought to ban oil and gas extraction activities in the County—federal court struck down ordinance for violating Constitution's Supremacy Clause).

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COUNSEL'S REPORT

Frank L. Merrill & Christine Rideout Schirra,
Bricker & Eckler LLP, Counsel to the OMA
April 10, 2019

A. Ohio EPA Activities of Note

1. Governor Appoints Ohio EPA Director Laurie Stevenson

On January 10, 2019, Governor Mike DeWine appointed Laurie A. Stevenson as Director of the Ohio EPA. A public servant of 29 years, Director Stevenson most recently served as Deputy Director for Business Relations at Ohio EPA, where she was the primary point of contact between manufacturers, other regulated entities, and the Agency, helping coordinate permitting and regulatory issues on complex projects in particular. Director Stevenson also served as Chief of Ohio EPA's Division of Environmental and Financial Assistance, which provides financial and technical assistance to businesses and communities in order to achieve compliance with environmental regulations. Director Stevenson previously held positions as the industrial liaison in the Director's Office managing Ohio EPA's Small Business Assistance Office, and in the Division of Hazardous Waste Management. Director Stevenson is anticipated to continue efforts to build an Ohio EPA culture of treating the regulated community as its customer.

2. Lake Erie Bill of Rights

In a February 26, 2019, special election, Toledo's voters passed the Lake Erie Bill of Rights (LEBOR). The LEBOR is an amendment to the City of Toledo's Charter that creates a new cause of action for the violation of the right of Lake Erie and its watershed to "exist, flourish, and naturally evolve." The entities that could be impacted by the LEBOR's enactment range far and wide. Generally, entities that have an Ohio EPA-issued water discharge permit authorizing them to discharge into surface waters within the Lake Erie watershed could be affected.

No additional regulatory oversight will be created by the LEBOR. The LEBOR's language does not create regulations that must be followed, nor does it attempt to give any regulatory authority to any office or organization. It purports to be "self-executing." On its own, it would only allow the City of Toledo or citizens of Toledo to bring a legal action for an alleged violation of Lake Erie's legal rights.

The LEBOR would, however, affect permits, licenses and other authorizations made by the state and even the federal government. Section 2(b) states that "[n]o permit, license, privilege, charter, or other authorization issued to a corporation, by any state or federal entity, that would violate the prohibitions of this law or any rights secured by this law, shall be deemed valid within the City of Toledo." All permits issued by the federal EPA, the Ohio EPA, or the federal or state departments of agriculture would be deemed invalid to the extent they conflict with a citizen's conception of the LEBOR's provisions.

One day after the passage of LEBOR, on February 27, 2019, *Drewes Farm Partnership v. City of Toledo* was filed in federal court in Toledo, asserting many challenges to the LEBOR, including the argument that the LEBOR exceeds Toledo's limited authority to pass legislation and is in violation of state and federal preemption laws (Judge Zouhary, Case No. 3:19-cv-00434). Drewes sought a preliminary injunction to stop the LEBOR from going into effect before its defects are litigated. On March 18, 2019, Judge Zouhary issued an injunction blocking the LEBOR from going into effect while the case is litigated. Both the City of Toledo and Drewes agreed to the injunction.

On March 18, 2019, the environmental group Toledoans for Safe Water asked, on behalf of itself and the Lake Erie Ecosystem, to be permitted to intervene in the lawsuit. On March 29, 2019, the State of Ohio similarly filed a motion to intervene, for the stated purpose of protecting Ohio's interests in supporting its agriculture, environmental, and natural resources laws. Judge Zouhary has not yet ruled on either request for intervention. Numerous legal challenges to the LEBOR are anticipated on the basis of its overreach and broad declarations.

3. Draft Human Health Water Quality Criteria Rules

The Ohio EPA Division of Surface Water issued for interested party review and comment proposed amendments to several rules within Ohio Administrative Code Chapter 3745-1, Ohio's water quality standards. Specifically, Ohio EPA is proposing changes to the numeric water quality criteria for the protection of human health in the Ohio River Mainstem, Ohio River Basin, and Lake Erie Basin. These rules include OAC 3745-1-32 (Ohio river standards), 3745-1-33 (water quality criteria for water supply use designation), and 3745-1-34 (water quality criteria for the protection of human health fish consumption).

The amendments are being proposed as part of Ohio EPA's Triennial Water Quality Standards Review as mandated in the Clean Water Act, in order to be consistent with U.S. EPA's 2015 updates to 94 human health water quality criteria, the Ohio River Valley Water Sanitation Commission's ("ORSANCO") 2015 pollution control standards, and maximum contaminant levels promulgated under the Safe Drinking Water Act. The Division of Surface Water currently applies MCLs only to the Ohio River basin. With this rulemaking, this protection will be extended statewide (to the Lake Erie basin), aimed at protecting the treatment technology at the intakes of the drinking water plants in the Lake Erie basin.

Ohio EPA estimates that 151 of the 3,250 permitted dischargers in Ohio could potentially be negatively impacted by the adoption of these criteria. According to Ohio EPA, of these 151

dischargers, 60 already have limits for one or more of these chemicals that could impact them, and the remaining 91 dischargers monitor for one or more of these chemicals but do not currently have limits. Ohio EPA is accepting comments until May 2, 2019.

4. Water Quality Based Effluent Limitations Early Stakeholder Outreach

In January 2019, Ohio EPA issued an early stakeholder outreach notification pertaining to the application of biological survey data to development of water quality based effluent limitations (currently set forth in OAC 3745-2-03). The agency informed that it plans to provide clarification and additional details on when and how the biocriteria narrative should be used, as well as what information is needed for Ohio EPA to evaluate a request to use the biocriteria narrative. The OMA submitted comments to the agency on February 4, 2019, notifying that biocriteria is a significant issue to many Ohio manufacturers and that the OMA looks forward to submitting formal comments upon receipt of Ohio EPA's detailed proposal and participating in any work groups or interested party meetings.

B. U.S. EPA Activities of Note

1. U.S. EPA and Army Corps Announce New Waters of the United States Rule

On December 11, 2018, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Army Corps) announced new rule language to replace the Obama Administration's 2015 Clean Water Rule, which sought to redefine 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 new rule language follows a February 2017 executive order signed by President Trump that directed the EPA and the Army Corps to rescind and replace the 2015 Clean Water Rule.

The Trump Administration's proposed rule language specifically enumerates six categories of waters that fall within the definition of "waters of the United States" (i.e., traditional navigable waters, tributaries to those waters, certain ditches, certain lakes and ponds, impoundments of jurisdictional waters, and wetlands adjacent to jurisdictional waters) and excludes all others that do not fall within these six categories. The rule was published in the Federal Register on February 13, 2019, and the U.S. EPA and Army Corps will accept public comments on the proposed rule until April 15, 2019.

In 22 states, including Ohio, the Obama Administration's 2015 Clean Water Rule is currently in effect (as opposed to other states where the 2015 Clean Water Rule was ultimately enjoined as a result of three district courts issuing preliminary injunctions on the 2015 Clean Water Rule).

2. Environmental Groups Sue U.S. EPA for Lake Erie Algae Issues

On February 7, 2019, environmental groups filed a federal lawsuit in the Northern District of Ohio against U.S. EPA, alleging that U.S. EPA has allowed Ohio EPA to evade its

legal duty to address nutrient pollution, resulting in harmful algae blooms in the western basin of Lake Erie (Judge Carr, Case No. 3:19-cv-00295). The Plaintiffs, Environmental Law and Policy Center and Advocates for a Clean Lake Erie, assert that Ohio EPA designated western Lake Erie as having "impaired" water quality pursuant to the Clean Water Act in May 2018, only after a previously-filed lawsuit by the same Plaintiffs before Judge Carr of the Northern District resulted in an April 2018 order requiring U.S. EPA to address Ohio's substantial noncompliance with the Clean Water Act (Case No. 3:17-cv-01514).

Plaintiffs assert that Ohio EPA had an obligation pursuant to Section 303(d) of the Clean Water Act to remedy the impaired water quality of western Lake Erie by adopting a Total Maximum Daily Load ("TMDL") for the agricultural runoff pollution that eventually flows into western Lake Erie. The complaint alleges that U.S. EPA lacked a reasonable basis for approving Ohio EPA's 2018 Integrated Report, in which Ohio EPA designated western Lake Erie as a "low priority" for establishing a TMDL. Plaintiffs seek a court order setting a compliance schedule with binding deadlines to address western Lake Erie's impairment under the Clean Water Act in order to ensure progress is made on protections for Lake Erie.

C. Judicial

U.S. Supreme Court to Hear Clean Water Act Groundwater Discharge Cases

On February 19, 2019, the U.S. Supreme Court granted certiorari in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, to decide the issue of whether a National Pollutant Discharge Elimination System ("NPDES") permit is required for activities that release pollutants that are eventually conveyed through groundwater or soil to navigable water. In *County of Maui, Hawaii v. Hawaii Wildlife Fund*, several environmental groups sued the County, alleging that the County's discharge of treated municipal wastewater into underground injection wells without an NPDES permit violated the Clean Water Act when the contaminants migrated through the groundwater to the ocean. The Ninth Circuit agreed with the environmental groups, holding that the County must get an NPDES permit for the discharge of pollutants to navigable waters at "more than de minimis" levels.

The United States and several industry groups filed amicus briefs in support of the County of Maui's cert petition, arguing that the Supreme Court should take the case in order to resolve a circuit split on the question of whether the NPDES permit program applies to activities that cause pollutants to be conveyed through groundwater to navigable water. Similar to the Ninth Circuit, the Fourth Circuit in *Kinder Morgan Energy Partners LP v. Upstate Forever* held that Clean Water Act jurisdiction does extend to pollution caused by unpermitted discharges that reach surface water through groundwater. However, in two opinions issued on September 24, 2018, the Sixth Circuit conversely ruled that discharges of a pollutant to surface waters through groundwater do not require a National Pollutant Discharge Elimination System permit pursuant to the Clean Water Act. The Supreme Court's decision is expected to have far reaching implications for permitting and enforcement pursuant to the Clean Water Act.

Notably, under Ohio law, the definition of "waters of the state" includes groundwater. Ohio EPA has taken the position that impacts to groundwater are subject to regulation under Ohio Rev. Code Chapter 6111.

Environment

Ohio EPA Director Stevenson Lays Out Budget Priorities
April 5, 2019

Ohio EPA Director **Laurie Stevenson** provided **testimony** on behalf of her agency's budget proposal this week in the House of Representatives.
A budget proposal of note for manufacturers is removing the rule process requirement for EPA to impose Best Available Technology (BAT), and instead require the BAT method for an air contaminant source to be established in the permit to install issued for that source.

Director Stevenson will be at the OMA Environment Committee on Wednesday, April 10 to discuss this issue and much more. **Register today** and join your colleagues at the OMA next week. *4/4/2019*

Senate Hears Support for Solid Waste Fee Increase
April 5, 2019

This week the House Finance Committee heard from a supporter of **Senate Bill 50**, which would increase from 25-cents per ton to 50-cents per ton one of the state fees levied on the transfer or disposal of solid waste.
The proceeds of the increase would be used to provide more funding to the local Soil and Water Conservation Districts. Carmella Shale, director of the Geauga County Soil and Water Conservation District, **testified** that the increase is needed because of decreases in state funding over the past ten years.
The OMA and other business interests oppose any new fees on solid waste, especially in light of new funding provisions in **House Bill 166**, the state budget bill, for soil and water conservation districts. *4/4/2019*

DeWine Announces $900M Water Quality Initiative
March 15, 2019

When in Toledo this week, Governor Mike DeWine **announced a new water quality initiative**, H2Ohio. The initiative will be included in his proposed state budget which is expected to be unveiled today.

DeWine said the new initiative could provide funding of as much as $900 million over ten years to protect Ohio's water quality.

Investments would be made in programs affecting state waters including Lake Erie and other rivers, lakes, and waterways. Efforts could include pollution prevention, land-based management programs, water-based restoration programs, as well as science, research and measurement. *3/14/2019*

Senate Debates Solid Waste Fee Increase
March 15, 2019

This week the Senate Finance Committee heard **sponsor testimony** on **Senate Bill 50**, which would increase from 25¢/ton to 50¢/ton one of the state fees levied on the transfer or disposal of solid waste.
The proceeds of the increase would be used to provide more funding to the local Soil and Water Conservation Districts.

The bill sponsor, Senator **John Eklund** (R-Munson Township), also introduced this bill in the 132nd General Assembly. The OMA opposes the increase of the solid waste fee to protect the competitiveness of regulated entities. *3/14/2019*

EPA Decides to Retain 2010 SO2 NAAQS
March 8, 2019

From OMA Connections Partner Dinsmore: "On February 26, 2019, EPA announced its decision to retain the current sulfur dioxide (SO_2) National Ambient Air Quality Standard (NAAQS). The current primary SO_2 NAAQS of 75 parts per billion (ppb) averaged over one hour was established in 2010. …
"Several industry groups asserted that the current SO_2 NAAQS was too tough and argued that EPA should weaken the standard. They recommended that EPA raise the NAAQS to 110 – 150 ppb, but environmental groups argued the standard was not protective enough of human health and should be lowered to 50 ppb. Ultimately, EPA rejected both arguments and determined the current standard "is requisite to protect public health, with an adequate margin of safety, from effects of SO_2 in ambient air." It noted that this was consistent with the April 2018 recommendation of the Clean Air Scientific

Advisory Committee, an independent advisory board. EPA also supported its decision by reiterating that SO_2levels in the United States had dropped by more than 85 percent between 1990 and 2017 and more than 60 percent since 2010.
"As a result of this decision, revisions to state implementation plans will not be triggered, and existing sources will not face potential imposition of requirements for installation of additional controls for SO_2. However, the one-hour standard remains a potential barrier to permitting new projects with significant SO_2 emissions."
Read the full post here. *3/1/2019*

Ohio EPA Helps Businesses Improve Sustainability
March 8, 2019

The **Ohio Materials Marketplace** is a free online platform of the Ohio EPA that allows businesses and organizations to connect and find reuse and recycling solutions for waste and by-product materials.

- Several new materials have been added to the marketplace including: scrap cardboard, expanded polystyrene foam, commingled recyclables, pallet racking, miscellaneous calcium compounds and more!
- 980 members are now in the marketplace.
- The marketplace has helped divert more than 1763 tons (3,526,830 pounds) from the landfill!

Ohio EPA will be hosting its Sustainability Conference in Columbus on April 17, 2019. More information about the conference and registration can be found **here**. *3/4/2019*

Toledo Passes Lake Erie Bill of Rights – Choppy Waters Ahead
March 1, 2019

In a February 26, 2019 special election,Toledo's voters passed the **Lake Erie Bill of Rights** (the LEBOR). The LEBOR is an amendment to the City of Toledo's Charter that creates a new cause of action for the violation of the right of Lake Erie and its watershed to "exist, flourish, and naturally evolve."

The LEBOR initiative is similar to many other community rights proposals that seek to establish rights for natural resources that citizens can protect through legal action.

The corporations or entities that could be impacted by the LEBOR's enactment range far and wide. Generally, companies that have an Ohio EPA issued water discharge permit authorizing them to discharge into surface waters within the Lake Erie watershed could be affected.

On February 27th, ***Drewes Farm Partnership v. City of Toledo*** was filed in federal court in Toledo, asserting many challenges to the LEBOR, including the argument that the LEBOR exceeds Toledo's limited authority to pass legislation and is in violation of state and federal preemption laws. The Drewes case seeks a preliminary injunction to stop the LEBOR going into effect before its defects are litigated. These, and other legal challenges, are anticipated in the near future, with industry groups, agricultural interest groups, and businesses all interested in challenging the LEBOR for its overreach and broad declarations.

More information can be found in this **memorandum** from OMA environmental counsel Bricker & Eckler LLP. *2/28/2019*

Ohio EPA Offers Compliance Help with Conditional Exemption for Hazardous Waste Contaminated Wipes and Apparel
March 1, 2019

The Ohio EPA has established a **web page** to help manufacturers interested in taking advantage of the recently introduced conditional exemption for hazardous waste contaminated wipes and apparel that are laundered and returned for reuse.
The exemption includes – but is not limited to – rags, mops, drop cloths, and apparel (for example, gloves, uniforms, smocks and coveralls), which can be made of woven or unwoven and natural or synthetic materials (fabric, leather or rubber-like material).

Because many of these contaminated textiles are intended to be cleaned onsite or sent to a laundry or similar facility for cleaning, they may be excluded from the hazardous waste regulations provided the facility that generated

the material meets all conditions of the exclusion. *2/28/2019*

Water Takes Priority in the Senate
February 22, 2019

Senate Bill 2 introduced by Senators **Bob Peterson** (R-Sabina) and **Matt Dolan** (R-Chagrin Falls) focuses on improving the health of Lake Erie and Ohio's waters.
The **bill** creates and funds 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.
Governor DeWine has indicated that his state budget would take a comprehensive look at Lake Erie and ways to reduce the impacts of agricultural runoff and the resulting nutrient loading of Lake Erie.

OMA members remain heavily involved in water quality issues and are working to protect manufacturers' interests in any Ohio water quality plan. If you are interested in water issues, please contact OMA's **Rob Brundrett**. *2/21/2019*

Reminder: EPA Reports Due Soon
February 22, 2019

A number of Ohio EPA reports are due in the first half of 2019. Ohio EPA sent letters on January 30th to regulated facilities to remind them of these annual reporting requirements. The reports coming due in April include:

- Annual Emissions Report, due April 15
- Title V Compliance Certification, due April 30
- Quarterly Compliance Report, due April 30

If you need assistance, please use these links and contacts:

- **Emissions Reporting Guidance & Training**
- **Training Videos**
- **Customer Support Center FAQ** – Search for answers or ask new questions
- Air Services Access: **Linda Lazich**, (614) 644-3626
- Air Services Software Support, Emissions Reporting or Facility Profile: **Safaa El-Oraby**, (614) 644-3571
- eBusiness Center PIN or Password: eBiz Helpdesk, (877) 372-2499

2/21/2019

OMA Sits Down with Ohio EPA Leadership
February 15, 2019

This week OMA President Eric Burkland and Public Policy Director Rob Brundrett sat down with the new **Ohio EPA Director Laurie Stevenson** and Assistant Director Laura Factor. Director Stevenson is no stranger to the manufacturing community. The director has worked at Ohio EPA in a wide variety of positions including the head of business relations.

Director Stevenson will be at the OMA Environment Committee meeting on April 10 to discuss the agency's priorities and any state budget issues. All members welcome; you can **register here**. *2/14/2019*
New Ohio EPA Director Laurie Stevenson (center) with Assistant Director Laura Factor, and OMA's Rob Brundrett

OMA Comments on Ohio EPA Biocriteria
February 8, 2019

This week the OMA submitted general **comments** in response to Ohio EPA's

Early Stakeholder Outreach for its Application of Biological Survey Data to Development of Water Quality Based Effluent Limitations (OAC 3745-2-03).
The new rule is intended to provide clarification and additional detail regarding when and how the biocriteria narrative should be used, as well as define what information is needed by Ohio EPA in order evaluate a request to use the biocriteria narrative.

OMA's **Rob Brundrett** is following the issue; contact him if you have questions.*2/7/2018*

Ohio EPA webinar: Conditional Exemption for Hazardous Waste Contaminated Wipes and Apparel
February 8, 2019

This webinar will explain the new Ohio-specific rule to conditionally exclude contaminated wipes and apparel (that are not currently excluded under the solvent wipe rule) from regulation under the hazardous waste regulations when certain conditions are met. The apparel would include, but not be limited to, gloves, uniforms, smocks, and coveralls that are laundered and intended for reuse.

The webinar is on February 20 at 10:00 a.m. **Register here**. 2/4/2019

Jones Day Releases Winter Climate Report
February 8, 2019

OMA Connections Partner Jones Day just published its Winter 2019 **Climate Report**. The publication includes regulatory, litigation and transactional climate updates. *2/7/2019*

Stevenson Named Ohio EPA Director
January 11, 2019

This week, Governor-elect Mike DeWine appointed **Laurie Stevenson** as the new director of Ohio EPA. Stevenson, who has worked for the agency for more than 20 years in various capacities, most recently held the position of Deputy Director of Business Relations. In that role she served as the front door of the agency, working closely with the regulated community including manufacturers. Stevenson also lead the agency's E3 Sustainability Awards program, which was started under outgoing director Craig Butler.

Director Stevenson has been a longtime friend of the OMA and has presented to our Environment Committee and at other OMA events dozens of times over the years. We are excited to work with Laurie, and her team, in her new role at Ohio EPA. *1/10/2018*

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: 3/5/2019 - Referred to Committee House Energy and Natural Resources

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: 3/5/2019 - Referred to Committee House Energy and Natural Resources

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

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: 2/20/2019 - Referred to Committee Senate Agriculture and Natural Resources

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)

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