



Environment Committee

February 9, 2012

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2012 Environment Committee Calendar

Thursday, February 9
Thursday, June 28
Thursday, October 18

OMA Environment Committee Meeting Sponsor:



One Firm WorldwideSM



OMA Environment Committee

February 9, 2012

Agenda

Welcome & Roll Call

Special Guest Speaker

- **Brian Hall, Division of Surface Water, Ohio EPA**

Legislative & Regulatory Report

Counsel's Report

Lunch

Committee Meetings begin at 10:00 a.m. and conclude by 1:00 p.m. Lunch will be served.

Please RSVP to attend meetings by contacting Judy: jthompson@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.

Bio Brian Hall

Brian Hall has been Assistant Chief for the Division of Surface Water since 2005. His responsibilities include oversight of the Nonpoint Source, Standards and Technical Support, Water Quality Modeling and Administrative Units.

Before becoming Assistant Chief, Brian was the Manager of the Information Resource Management Section in Surface Water. As manager of that section oversaw permit issuance and compliance reporting operations. Prior to that Brian spent twelve years in the Northeast District Office in the NPDES program.

In 2011, Brian was asked to lead the Ohio Water Resources Council. As the leader Brian is responsible for the oversight and management of the Council that provides a forum for water policy development, collaboration and coordination among state agencies.

Brian has a Bachelor of Science in civil engineering from the University of Akron, is a professional engineer and has a class three wastewater license.

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DSW Regulatory Update

OMA - Environment Committee

Ohio Manufacturer Association
February 9, 2012



DSW Position Changes

- Management Changes
 - Paul Novak overseeing 401/Wetland Group*
 - Trinka Mount managing Lake Erie/Inland Lakes*
 - Tim Campbell SEDO Manager
 - Elizabeth Wick NWDO Manager
 - Debora Roth SWDO Manager
 - * Manage other programs also
- Many Retirements and More Coming



Director's Priorities

- **Clear, Consistent and Timely**
 - Re-tool Enforcement Program
 - Address Permit Backlog
 - Improve Wetland /401 Cert Program
 - Increase General Permits
 - HAB Strategy/Grand Lake St Mary
 - Rule and Statute Review
 - Enhance Agency e-Biz Site (e-applications)
 - E-Document System



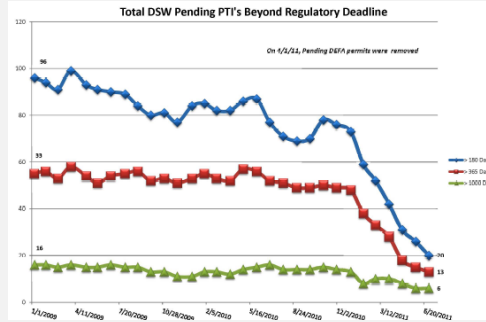
Re-tool Enforcement

- **Compliance Assurance using Enforcement**
 - Timely return to compliance
 - Deter violations
 - Mitigate harm (environment and program)
- **New Enforcement Tools**
 - Bilateral Compliance Agreement
 - Expedited Settlement Agreements
- **Compliance and Enforcement Plan**
 - When trigger significant non-compliance



Address Permit Backlog

- Water Quality (401) Certifications
 - July 2011 – zero backlog
- Permit to Install
 - Average days to process down to 38



Improve Wetland/401 Cert Program

- Improve Timeliness and Consistency
 - Revise 401 Application
 - Pros and Cons
 - Add Mitigation Option- In Lieu Fees
 - Working w/ ODNR, OWDA and TNC
 - Permit Fast Track
 - General Permit – Oil/Gas and Coal Mining



Increase General Permitting

- Wetland General Permit
 - Oil& Gas – comment closed 1/13/12
 - Coal Mining – in development
 - Reauthorize Nationwide Permits – comment closes 3/5/12
- Storm Water NPDES General Permits (5)
 - Multi-Sector Industrial – effective 1/1/12
 - Chagrin Watershed – in development
 - Darby Watershed – comment closed 2/7/12
- Non-Storm Water NPDES General Permits (12)
 - Pesticide Application – effective 10/31/11
 - Home Sewage Treatment System – effective 2/1/12



Algae Strategy & Advisories

- Updated State Strategy on HAB June 2011
- Focus on publicly owned lakes with beaches and boat ramps
- Advisory Levels
 - Algal Bloom (avoid scum)
 - Public Health (swimming not recommended)
 - No Contact (no swimming)
- Working on Update for 2012



Rule/Statute Review & CSI

- Rule Reviews
 - Rules recently at JCARR
 - 401 Certification – isolated stream, antideg (TBR)
 - WQS – new uses, human health, antideg (TBR)
 - PTI Design flow & WQ Trading (1/23/12)
 - Rules going to IPR
 - PTI – Owners Assoc., Sewer Avail (new)
 - Pretreatment (renew)
 - Water Quality Trading (renew)
 - Nutrient Criteria – waiting for US EPA (new)



Rule/Statute Review & CSI (cont.)

- Statute Changes being Considered
 - Reissue NPDES permits in Noncompliance
 - Wetland In-Lieu Fees
- Governor's Common Sense Initiative (CSI)
 - Eliminate excessive and duplicative rules



IT Improvements

- e-Biz Center
 - e-401 application
 - Other e-filing and e-permitting
 - On-line fee payment
- e-Documents Management
 - Pilot project, NOV and Enforcement activities since 2007
 - Goal, make agency records available to public 24/7
- Redesign Agency Internet
- Switched Agency Email Software



Additional DSW Priorities

- Develop Nutrient Reduction Strategy
- Address Total Dissolved Solids (TDS) Issues
- Water Quality Monitoring & Assessment
- Publish 2012 WQ Integrated Report





Ohio's Nutrient Reduction Strategy

- Nutrient problems
 - **Point Source** and **Non-Point Source**
- Strategy Framework
 - Improve storm water management
 - Enhance regulations
 - Expand outreach and education
 - Improve land uses
 - Improve stream habitat
- Need stakeholder input, buy in, and assistance
 - P Taskforce, AG Workgroup, Urban Workgroup

Total Dissolved Solids (TDS) Issues

- Appalachian Coal Mines – US EPA Guidance
- Shale Gas Brine Disposal – Fracking water
- Water Treatment Plants – Drinking water standards
- Existing Ohio TDS Standard
 - 1500 mg/l
 - Studies show not sufficiently protective

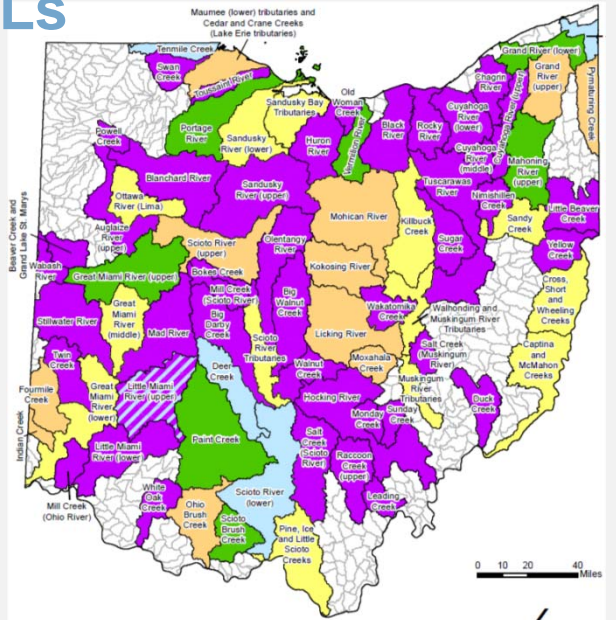


WQ Monitoring & Assessment

- Sample Streams, Rivers and Lakes
 - 300 to 400 sites per year
 - Multi-visits per site
 - 2012 Surveys – Maumee, Black, Mill Creek-Scioto, Stillwater Creek-Tuscarawas, East Fork-Little Miami
- Objectives of Study
 - Meet WQS (designated uses, narrative/numeric criteria, antideg provision)
 - Designated Uses Appropriate
 - Have conditions changed
- TMDL (i.e. corrective action plan) needed if objectives not met



Ohio TMDLs



Ohio's 2012 Integrated WQ Report

- Required by CWA (State WQ Report Card)
 - Section 305(b), water quality inventory
 - Section 303(d), list impaired waters (TMDL)
- Biennially Published,
 - Comments Closed 2/6/12
 - Due April 2012
- Water Quality Listings
 - Human Health (Fish Tissue)
 - Recreation (Bacteria)
 - Aquatic Life
 - Drinking Water



For More Information

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COUNSEL'S REPORT

Frank L. Merrill, Bricker & Eckler LLP, Counsel to the OMA
February 9, 2012

LEGISLATIVE

1. Great Lakes Compact Bill

A bill implementing the Great Lakes Compact has been drafted and circulated among interested parties. OMA attended a meeting on February 7, 2012 with other business trade groups to discuss the bill. OMA will continue to monitor the development of this bill, an earlier version of which was vetoed by Governor Kasich in 2011.

2. Ohio EPA Regulatory Reform Legislation

An omnibus Ohio EPA bill ("Regulatory Reform Legislation") has been drafted to address various areas, including the following:

1. Expand the confidentiality offered to businesses seeking compliance assistance from OCAPP.
2. Grant the Director authority to issue NPDES permit renewals to facilities in noncompliance.
3. Create mechanism to allow for in lieu fee program for wetland mitigation.
4. Exempt coal combustion waste from solid waste management district generation fees.
5. Bureau of Underground Storage Tank Regulation/Voluntary Action Program (BUSTR/VAP) (phase 2) language to allow BUSTR sites with a responsible party to be VAP eligible.
6. Prohibit disposal of secondary aluminum production waste at municipal solid waste landfills.
7. Create a criminal provision for tampering with Public Water Systems.

Senator Schaffer will be the sponsor of the bill (see copy of Ohio EPA summary attached), which is still in the LSC drafting stage. OMA will monitor the developments of this legislation, which is generally supported by OMA and other business trade groups.

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ADMINISTRATIVE

A. Ohio EPA Activities of Note

1. General Industrial Storm Water Permit

On December 20, 2011, Ohio EPA issued its long-awaited NPDES general permit relating to storm water discharges associated with industrial activities. This permit is a renewal of the Industrial Storm Water general permit issued in 2006, but closely mirrors U.S. EPA's Multi-Sector General Permit (MSGP). The new permit is much more extensive (171 pages) and requires monitoring and establishes benchmarks for certain pollutants. This new permit is dramatically different than the previous general permit in that the new permit has effluent benchmarks by industry sector and requires periodic benchmark sampling (with results submitted to Ohio EPA), quarterly visual sampling, and an annual report, among other things. OMA worked with the Director of Ohio EPA and his staff on this renewal permit since earlier this year. OMA pushed back on a lot of the new requirements but were ultimately not successful. OMA was, however, successful in getting Ohio EPA to ease up on some requirements, like applying the benchmarks during the first 3 years of the permit.

2. Water Quality Rule Packages

On February 1, 2012, the Director of Ohio EPA pulled the water quality rule package from JCARR so that they could be further processed through the Common Sense Initiative process. The rule package covers the following areas : a.) Water Quality Standards; b.) Antidegradation; c.) Section 401 Water Quality Certifications; d.) Stream Mitigation

Most of these rules have been under evaluation by Ohio EPA for several years and had been released for interested party review. The public comment period closed on June 6, 2011, and OMA and other business trade groups submitted comments in opposition to many of the proposed rule changes.

3. Ohio EPA Point Source/Urban Runoff Nutrient Workgroup

On January 24, 2012, Ohio EPA kicked off its Point Source/Urban Runoff Nutrient workgroup to evaluate actions to reduce phosphorus and nutrient loadings to Ohio's waterways. OMA is participating in this workgroup, which also includes representatives from businesses, municipalities and environmental groups. The overall objectives of the workgroup are as follows:

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1. Identify actions that can be taken immediately to reduce phosphorus loadings from POTWs, direct and indirect industrial sources and urban storm water;
2. Identify future steps that would improve the cost-effectiveness of point source nutrient controls and urban NPS nutrient reduction strategies; and
3. Identify the likely roadblocks and offer potential solutions for achieving the overall nutrient load reduction targets set for Ohio lakes and rivers.

The workgroup has been asked to complete its recommendations for the Director's consideration by May 2012. A similar workgroup for the agricultural sector has recently completed its recommendations, which are scheduled to be released by the Governor's office this month.

4. Ohio EPA/U.S. EPA Environment Performance Partnership

On December 20, 2011, Ohio EPA announced that it has signed a two-year agreement with U.S. EPA that specifies how both agencies will work together to jointly protect Ohio's environment. This is the first time that Ohio has signed such an agreement with U.S. EPA but follows a national trend of state agencies signing joint agreements with a federal agency. According to Ohio EPA's press release, the purpose of the agreement is to provide states and U.S. EPA with flexibility in achieving environmental results and enhance accountability in achieving environmental progress.

B. U.S. EPA Activities of Note

1. Mercury and Air Toxics Standards

On December 21, 2012, U.S. EPA issued a power plant mercury and toxic air pollution rule which could force retrofitting or retirement of Ohio's older coal-fired power plants. The rule, along with the Cross-State Air Pollution rule (CASPR), has already been identified as the primary reasons for AEP and First Energy to announce closing of some of their older Ohio power plants.

2. Boiler MACT

On December 23, 2011, U.S. EPA issued proposed revisions to its Boiler MACT, which was originally issued on March 21, 2011. Upon issuance of the original Boiler MACT, U.S. EPA issued a notice of reconsideration of some of the provisions of the standards. Public comments on the revised Boiler MACT are due on February 21, 2012. U.S. EPA's summary of the changes in the new version is attached.

On January 9, 2012, the D.C. District Court vacated U.S. EPA's previous stay of the March 21, 2011 Boiler MACT, which had been issued to allow for the

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reconsideration process. On January 19, 2012, U.S. EPA issued a statement that it will not enforce the March 2011 Boiler MACT until the rules are finalized in May of this year.

3. U.S. EPA Report on Oversight of State Enforcement

On December 9, 2011, U.S. EPA and the Office of Inspector General released a report titled “EPA Must Improve Oversight of State Enforcement”. In the Report states are evaluated for performance by program (i.e., water, air, RCRA). Ohio ranked in the top quartile for Clean Water Act performance and RCRA performance, but in the third quartile for Clean Air Act performance. The Report concludes that “EPA does not administer a consistent national enforcement program”. The Report notes that “State enforcement programs are underperforming: EPA data indicate that noncompliance is high and the level of enforcement is low. EPA does not consistently hold states accountable for meeting enforcement standards, has not set clear and consistent national benchmarks, and does not act effectively to curtail weak and inconsistent enforcement by states.”

4. U.S. EPA Releases GHG Emissions Data

On January 11, 2012, U.S. EPA released greenhouse gas (GHG) emission data gathered for 2010 from over 6,700 facilities. Power plants were the largest stationary sources of direct emissions (2,234 million metric tons of carbon dioxide equivalent), followed by petroleum refineries with emissions of 183 mmtCO₂e. CO₂ accounted for 95% of direct GHG emissions, followed by methane at 4%.

JUDICIAL

A. Federal Cases

1. Sackett v. EPA (U.S. Supreme Court)

On January 9, 2012, the Supreme Court heard oral arguments in the *Sackett* case. The case concerns whether a U.S. EPA compliance order (requiring action and imposing penalties) is subject to judicial review and involves the alleged unlawful filling of a wetland in violation of the Clean Water Act. The homeowners (Sackett’s) were issued a compliance order to return their property to a wetland, an order that they could not legally challenge. Their recourse was to ignore the order and then risk civil penalties if U.S. EPA sought judicial enforcement of the order. Justice Alito called U.S. EPA’s actions “outrageous” during oral arguments and took the Deputy U.S. Solicitor General to task on U.S. EPA’s interpretation of its powers. The opinion, which will be handed down later this year, will have broad implications beyond the Clean Water Act.

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B. State Cases

1. State ex rel. DeWine v. Miller (Ohio Court of Appeals - April 21, 2011)

In this case the court of appeals held that a trial court could impose penalties less than the amount of stipulated penalties set forth in a consent decree as a sanction for contempt for violation of the consent order. The court held that this is not an abuse of discretion.

To: OMA Environment Committee
From: Kevin Schmidt, OMA Staff
Re: Environment Update
Date: 2/9/2012

1. Water Rules

At the behest of the OMA and other business groups, Ohio EPA pulled its controversial package of water rules that had been filed in late December, 2011 and refiled them in 2012. By re-filing them in 2012 Ohio EPA's rules must pass Governor Kasich's Common Sense Initiative (CSI).

The centerpiece of the CSI is the Business Impact Analysis which requires Ohio EPA to demonstrate that they have included stakeholders in the development of the rule, that they have evaluated the impact of the rule on businesses, and that the purpose of the rule is important enough to justify that impact.

The OMA commented last year that Ohio EPA, among other things, had not put forth a compelling reason why these new rules were necessary noting that water quality in general is improving.

2. Great Lakes Compact

It is expected that the newest version of the Great Lakes Compact (Compact) implementing language will be introduced soon. The OMA has been participating with a coalition of business interests in the discussion regarding the latest version. Recall, Governor Kasich vetoed the last piece of legislation to reach his desk.

While the latest version does keep the grandfathering provisions and exemptions in, it does lower the threshold by which new or expanded activity would be pulled into the regulatory scheme to 100,000 gallons per day.

The last points of contention are whether or not oil and gas wells should be exempted from the regulation and whether or not permit holders should have the right to be a party to any legal action (clarification, challenge, etc.) regarding their permit. It has been reported that the Governor may veto the legislation if it includes an exemption for the oil and gas industry.

Environment Management

Ohio EPA Refiles Water Rule Package

At the [urging](#) of the OMA and other business groups, Ohio EPA recently refiled a package of water regulations so that the rules are within the jurisdiction of Governor Kasich's newly enacted Common Sense Initiative (CSI). The CSI program requires agencies to file a "business impact analysis." The proposed rules include new state water quality standards and clarify requirements currently in place.

Please make time to [participate](#) in the OMA's Environment Committee on February 9th to learn more about this important regulatory development. Brian Hall, assistant chief of the Ohio EPA Division of Surface Water, will be on hand to brief the committee on H2O matters.

02/03/2012

Environmentalists Win Boiler MACT Case

The Sierra Club convinced the D.C. circuit court this week to strike down U.S. EPA's stay of the highly controversial Boiler MACT rule (Maximum Achievable Control Technology). Last year U.S. EPA was forced to promulgate the Boiler MACT rule due to litigation by environmental groups. U.S. EPA received more than 4800 comments on the rule and opted to issue it but immediately delay, or stay, its effectiveness.

While U.S. EPA is still interpreting the court's decision, the court decision could mean owners and operators of larger boilers will need to install the new control technology by March of 2014 and smaller boilers will need to comply with the new best practices standard by March of this year.

The OMA has opposed this rule since its inception. The U.S. House of Representatives passed [legislation](#) that would provide a clearer and more reasonable implementation path.

01/13/2012

Extended Producer Liability Legislation Back

Senator [Peggy Lehner](#) (R-Kettering) provided sponsor testimony on [Senate Bill 253](#) this week which would create a new take-back mandate for computer and "e-waste" manufacturers. The OMA opposes extended producer liability legislation; manufacturers are already the largest recyclers in society and the private market has a number of recycling options in place.

The bill contains a particularly troublesome provision that creates a new advisory council with a host of duties, one of which is to recommend other products for inclusion in the take-back mandate. This Trojan horse has been used in other states.

01/13/2012

Will We See Federal Legislation Setting a Clean Energy Standard?

[A Clean Energy Standard](#) (CES) is a policy that requires covered electricity retailers to supply a specified share of their electricity sales from qualifying clean energy resources. Under a CES, electric generators would be granted clean energy credits for every megawatt-hour (MWh) of electricity they produce using qualifying energy sources. Utilities serving retail customers would use some combination of credits granted to their own generation or credits acquired in trade from other generators to meet CES obligations. From *OMA Connections Partner, Taft Stettinius & Hollister LLP*.

01/02/2012

2012 Economic Business Forecast - The Keys to Success (or How to Profit in a Crummy Economy) - Independence, OH - 01/25/2012

01/02/2012

Ohio EPA Releases Updated Storm Water Permit

Ohio EPA released this week an updated storm water general permit. This permit includes a host of new industry sectors and contains a number of new requirements.

The OMA worked with Ohio EPA to improve its original proposal. Among changes included in the final permit was the delay of sampling benchmarks until data can be collected to ensure the benchmarks are set appropriately.

OMA environmental counsel Frank Merrill's analysis is [here](#).

12/16/2011

Extended Producer Liability Legislation Introduced

[Senator Peggy Lehner](#) (R-Kettering) introduced [Senate Bill 253](#) which sets up an extended producer liability framework in Ohio. The legislation would require manufacturers of consumer electronics to register with Ohio EPA and include in their registration a description of its take-back program operated by the manufacturer.

The OMA has historically opposed this type of regulation, especially where the private market already addresses the issue. The bill has not been scheduled for a hearing.

12/16/2011

OMA Urges Delay of New Storm Water Permit

The OMA sent a letter to Ohio EPA Director Scott Nally last week asking that the proposed storm water general permit (SWGP) be delayed to allow for additional scientific study.

In its [letter](#) the OMA and its allies wrote: "Because of the imprecise science of establishing benchmarks based on literature without any industry-specific or site-specific information, we encourage Ohio EPA to revise the proposed SWGP to allow for four years of monitoring only for the specified parameters by industry sector. During the first four years of the SWGP, the results of such annual monitoring would be submitted to Ohio EPA for evaluation. For the last six months of the fourth year of the SWGP, Ohio EPA should meet with the affected industries to determine the appropriate benchmarks for the monitored parameters."

12/02/2011

No Charge Webinar on U.S. EPA GHG Reporting Rule on December 13

Ohio University Voinovich School of Leadership and Public Affairs is hosting a no charge webinar on Tuesday, December 13 from Noon until 1:30 p.m. on U.S. EPA's Greenhouse Gas Reporting Rule and its effect on Ohio companies. The impact of the rule will be examined from several different perspectives by a panel of speakers, including:

- Kevin Crist, Director, Center for Air Quality, Ohio University
- Bob Hodanbosi, Chief, Division on Air Pollution Control, Ohio EPA
- Sean Hogan, Senior Analyst, U.S. EPA Greenhouse Gas Reporting Program/Office of Atmospheric Programs
- Andrew D. Shroads, QEP, Senior Air Quality Specialist/Regional Director, Sanford Cohen & Associates, Inc.
- Moderator: Michael Zimmer, Executive in Residence, Ohio University Voinovich School of Leadership and Public Affairs

Email [Elissa Welch](#) to register.

12/02/2011

More Restrictive Great Lakes Compact Unveiled

This week Governor Kasich produced a revamped proposal to regulate large-scale water withdrawals from the Great Lakes watershed. Earlier this year Kasich vetoed Republican legislation to adopt regulations, saying that the proposal didn't go far enough to protect Lake Erie.

The bill's sponsor, Representative Lynn Wachtmann (R-Napoleon), stopped short of offering endorsement, saying parts of the bill are going to "allow way too much future regulation potential by a future governor" that could diminish the ability to draw the water.

Representative Wachtmann tells the [Columbus Dispatch](#) that the governor's proposal lowers the limits of what can be withdrawn from Lake Erie without a permit from five million gallons a day in the prior bill to two-and-one-half million

gallons. Similarly, according to Wachtmann, the governor's new proposal reduces withdrawals from rivers from two million gallons per day to one million.

Interested members should contact OMA's [Ryan Augsburger](#).

11/18/2011

OMA Urges Caution (Again) on Boiler MACT

The OMA joined with the NAM to express continued concern about U.S. EPA's proposed Boiler MACT regulations. A [joint-letter](#) to Senator Sherrod Brown and other key members of the U.S. Senate urges support for bi-partisan legislation (S.1392) that would provide a more certain path forward to achievable rule implementation. The legislation encourages EPA to use existing discretion to provide less costly alternatives.

11/18/2011

Ohio EPA Announces E3 Recognition Program

The Ohio EPA's new [Encouraging Environmental Excellence](#) (E3) program recognizes small to large businesses, non-profit organizations, schools, governments and others committed to environmental excellence. The program rewards those who reduce waste, improve efficiency and work to continuously improve as an environmental steward.

"If you're doing something great for the environment, tell us about it," says Ohio EPA Director Scott J. Nally. "By recognizing Ohio businesses and other organizations, we can improve Ohio's environment through innovation and efficiency."

11/11/2011

U.S. EPA Regulations Under Scrutiny

The National Association of Manufacturers (NAM) is asking U.S. senators to co-sponsor the EPA Regulatory Relief Act of 2011 (S. 1392), aimed at protecting manufacturers from punitive U.S. EPA regulations.

The NAM is asking companies to sign a letter expressing concerns with the regulations in question and urge these senators to co-sponsor the legislation. [Click here](#) for resource materials and to take action.

11/11/2011

Director Nally at the OMA this Week

Ohio EPA Director [Scott Nally](#) visited with the OMA Environment Committee this week to discuss the agency's priorities, including a reform bill aimed at cleaning up outdated regulations within the agency.

The committee also heard from Bob Paduchik of the [American Coalition for a Clean Coal Economy](#). Paduchik spoke on the [Cross State Air Pollution Rule](#) and other U.S. EPA proposals that could result in Ohio utilities shutting down inexpensive coal-fired power plants. Full committee materials can be found [here](#) and [here](#).

11/11/2011

OMA Environment Committee Materials - 11/10/2011

[These are the materials](#) that support the November 10, 2011 OMA Environment Committee meeting, and they have utility to the environment management community of practice among Ohio manufacturers as well.

This [Stormwater Comparison Document](#) is a late addition to the meeting materials.

11/10/2011

Environment Legislation
Prepared by: The Ohio Manufacturers' Association
Report created on February 7, 2012

HB10 REMEDIATION OF CONTAMINATED SITE (SEARS B) To authorize refundable tax credits for the completion of a voluntary action to remediate a contaminated site and for the return of such sites to productive use, and to exempt persons through 2017 who have issued covenants not to sue under the Voluntary Action Program from certain fees and penalties for one year after the issuance of such a covenant.

Current Status: 3/2/2011 - House Ways and Means, (Fifth Hearing)

All Bill Status: 2/23/2011 - House Ways and Means, (Fourth Hearing)
2/16/2011 - House Ways and Means, (Third Hearing)
2/9/2011 - House Ways and Means, (Third Hearing)
2/2/2011 - House Ways and Means, (Second Hearing)
1/26/2011 - House Ways and Means, (First Hearing)
1/11/2011 - Referred to Committee House Ways and Means
1/11/2011 - Introduced

More Information: http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_10

HB133 OIL AND GAS LEASING/DRILLING ON STATE LAND (ADAMS J) To create the Oil and Gas Leasing Board and to establish a procedure by which the Board may enter into leases for oil and gas production on land owned or under the control of a state agency for the purpose of providing funding for capital and operating costs for the agency.

Current Status: 6/30/2011 - **SIGNED BY GOVERNOR**; Eff. 9/30/2011

All Bill Status: 6/24/2011 - Sent to Governor for Signature
6/21/2011 - Consideration of Senate Amendments; Concurred 57-38
6/15/2011 - **PASSED BY SENATE**; Vote 22-10
6/15/2011 - Bills for Third Consideration
6/14/2011 - **REPORTED OUT AS AMENDED**, Senate Agriculture, Environment & Natural Resources, (Second Hearing)
6/7/2011 - Senate Agriculture, Environment & Natural Resources, (First Hearing)
6/2/2011 - Referred to Committee Senate Agriculture, Environment & Natural Resources
5/25/2011 - **PASSED BY HOUSE**; Vote 54-41
5/25/2011 - Bills for Third Consideration
5/24/2011 - **REPORTED OUT AS AMENDED**, House Agriculture and Natural Resources, (Sixth Hearing)
5/17/2011 - **SUBSTITUTE BILL ACCEPTED**, House Agriculture and Natural Resources, (Fifth Hearing)
4/6/2011 - House Agriculture and Natural Resources, (Third Hearing)
3/30/2011 - House Agriculture and Natural Resources, (Third Hearing)
3/23/2011 - House Agriculture and Natural Resources, (Second Hearing)
3/16/2011 - House Agriculture and Natural Resources, (First Hearing)
3/2/2011 - Referred to Committee House Agriculture and Natural Resources
3/1/2011 - Introduced

More Information: http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_133

HB231 LAKE ERIE WATERS (WACHTMANN L) To establish a program for the issuance of permits for the withdrawal and consumptive use of waters from the Lake Erie basin.

Current Status: 7/15/2011 - **VETOED BY GOVERNOR**

All Bill Status: 7/6/2011 - Sent to Governor for Signature
6/28/2011 - **PASSED BY SENATE**; Vote 25-8
6/28/2011 - Bills for Third Consideration
6/28/2011 - **REPORTED OUT**, Senate Agriculture, Environment & Natural Resources, (Second Hearing)
6/23/2011 - Referred to Committee Senate Agriculture, Environment & Natural Resources
6/23/2011 - Senate Agriculture, Environment & Natural Resources, (First Hearing)

6/22/2011 - **PASSED BY HOUSE**; Vote 60-31
6/22/2011 - Bills for Third Consideration
6/21/2011 - **REPORTED OUT AS AMENDED**, House Agriculture and Natural Resources, (Fifth Hearing)
6/15/2011 - **SUBSTITUTE BILL ACCEPTED**, House Agriculture and Natural Resources, (Fourth Hearing)
6/8/2011 - House Agriculture and Natural Resources, (Third Hearing)
6/1/2011 - House Agriculture and Natural Resources, (Second Hearing)
5/25/2011 - House Agriculture and Natural Resources, (First Hearing)
5/17/2011 - Referred to Committee House Agriculture and Natural Resources Subcommittee
5/17/2011 - Introduced

More Information: http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_231

HB257 LAKE ERIE WATERS (MURRAY D) To establish a program for the regulation of withdrawals and consumptive uses of waters from the Lake Erie basin.

Current Status: 6/15/2011 - Referred to Committee House Agriculture and Natural Resources Subcommittee

All Bill Status: 6/14/2011 - Introduced

More Information: http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_257

HB304 LAKE ERIE OIL/NATURAL GAS (ANTONIO N) To ban the taking or removal of oil or natural gas from and under the bed of Lake Erie.

Current Status: 9/13/2011 - Referred to Committee House Agriculture and Natural Resources

All Bill Status: 7/26/2011 - Introduced

More Information: http://www.legislature.state.oh.us/res.cfm?ID=129_HB_304

HCR9 PROPOSED AIR POLLUTION TRANSPORT RULE (THOMPSON A) To urge the Congress, the President of the United States, and the United Environmental Protection Agency to immediately suspend the Proposed Air Pollution Transport Rule.

Current Status: 5/17/2011 - **REPORTED OUT**, House Agriculture and Natural Resources, (Third Hearing)

All Bill Status: 5/11/2011 - House Agriculture and Natural Resources, (Second Hearing)
3/30/2011 - House Agriculture and Natural Resources, (First Hearing)
3/15/2011 - Referred to Committee House Agriculture and Natural Resources
3/15/2011 - Introduced

More Information: http://www.legislature.state.oh.us/res.cfm?ID=129_HCR_9

HR48 STREAM PROTECTION RULE (LANDIS A) To express opposition to the implementation of the stream protection rule and environmental impact statement of the Office of Surface Mining, Reclamation, and Enforcement in the U.S. Department of the Interior.

Current Status: 6/23/2011 - Re-Referred to Committee

All Bill Status: 6/23/2011 - Bills for Third Consideration
5/17/2011 - **REPORTED OUT**, House Agriculture and Natural Resources, (Third Hearing)
5/11/2011 - House Agriculture and Natural Resources, (Second Hearing)
3/30/2011 - House Agriculture and Natural Resources, (First Hearing)
3/15/2011 - Referred to Committee House Agriculture and Natural Resources
3/15/2011 - Introduced

More Information: http://www.legislature.state.oh.us/res.cfm?ID=129_HR_48

SB22 NPDES PERMITS SEWAGE SYSTEMS (SCHAFFER T) To require the Director of Environmental Protection to consider, to the extent allowable under the Federal Water Pollution Control Act, specified factors before issuing NPDES permits for sewerage systems, requiring and approving long-term control

plans for wet weather discharges from sewerage systems, and enforcing provisions of that Act as applied to sewerage systems.

Current Status: 6/30/2011 - **SIGNED BY GOVERNOR**; Eff. 9/30/2011

All Bill Status: 6/22/2011 - Sent to Governor for Signature
6/15/2011 - Consideration of House Amendments; Concurred 33-0
6/7/2011 - **PASSED BY HOUSE**; Vote 95-0
6/7/2011 - Bills for Third Consideration
5/18/2011 - **REPORTED OUT AS AMENDED**, House Agriculture and Natural Resources, (Third Hearing)
3/30/2011 - House Agriculture and Natural Resources, (Second Hearing)
3/16/2011 - House Agriculture and Natural Resources, (First Hearing)
3/10/2011 - Referred to Committee House Agriculture and Natural Resources
3/9/2011 - **PASSED BY SENATE**; Vote 33-0
3/9/2011 - Bills for Third Consideration
3/1/2011 - **REPORTED OUT**, Senate Agriculture, Environment & Natural Resources, (Third Hearing)
2/22/2011 - Senate Agriculture, Environment & Natural Resources, (Second Hearing)
2/15/2011 - Senate Agriculture, Environment & Natural Resources, (First Hearing)
2/2/2011 - Referred to Committee Senate Agriculture, Environment & Natural Resources
2/1/2011 - Introduced

More Information: http://www.legislature.state.oh.us/bills.cfm?ID=129_SB_22

SB140 BITTERING AGENT IN ENGINE COOLANT (BACON K, SKINDELL M) To require the inclusion of a bittering agent in engine coolant and antifreeze.

Current Status: 11/15/2011 - Senate Judiciary, (Second Hearing)

All Bill Status: 4/12/2011 - Senate Judiciary - Criminal Justice, (First Hearing)
4/6/2011 - Referred to Committee Senate Judiciary - Criminal Justice
3/31/2011 - Introduced

More Information: http://www.legislature.state.oh.us/bills.cfm?ID=129_SB_140

SB186 WITHDRAWALS OF LAKE ERIE WATERS (SKINDELL M) To establish a program for the regulation of withdrawals and consumptive uses of waters from the Lake Erie basin.

Current Status: 6/15/2011 - Referred to Committee Senate Agriculture, Environment & Natural Resources

All Bill Status: 6/9/2011 - Introduced

More Information: http://www.legislature.state.oh.us/bills.cfm?ID=129_SB_186



MARY TAYLOR
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FOR IMMEDIATE RELEASE:

January 5, 2012

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CSI Ohio Initiates New Business Rule Review Process

Columbus – Lt. Governor Mary Taylor today announced that all future state agency rules which adversely impact businesses will be subject to analysis under CSI Ohio, the Common Sense Initiative. The analysis will help ensure that those affected by business regulations are given the opportunity to help shape those regulations, and will force agencies to validate that the purpose of the regulation justifies the impact to business.

“CSI Ohio has been working since last January to create a new culture in Ohio government that recognizes that the business community is a partner in our economic success,” said Taylor. “Our rule review process will help formalize that partnership and restore balance to the development of rules which affect the ability of our businesses to survive, grow, and create jobs.”

Senate Bill 2, which Taylor helped draft and shepherd through the General Assembly, provided the framework for the CSI analysis. The bill also required all state agency rules that have an adverse impact on business undergo the analysis before being filed with the Joint Committee on Agency Rule Review (JCARR), beginning January 1, 2012.

The Business Impact Analysis, the centerpiece of the CSI review, forces agencies to demonstrate that they have included stakeholders in the development of the rule, that they have evaluated the impact of the rule on businesses, and that the purpose of the

rule is important enough to justify that impact. After the analysis is complete, it will be turned over to Taylor's CSI office and to the public to determine whether the agencies have made their case. Under Senate Bill 2, JCARR is given new authority to invalidate a rule if the agency is not able to justify its impact on business.

“For the first time in Ohio, we have an accountability mechanism that helps ensure the regulations we develop for business actually serve an important public purpose,” said Taylor. “At the end of the day, I believe we will create more effective regulations and a stronger business climate under this process.”

CSI Ohio was launched on January 10, 2011 by Governor Kasich to reform Ohio's regulatory policies to help make Ohio a jobs- and business-friendly state. CSI Ohio is reviewing Ohio's regulatory system to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Ohioans with ideas on cutting through this red tape are encouraged to visit the CSI website and submit their ideas at www.governor.ohio.gov/CSI.

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June 6, 2011

Via First-Class U.S. Mail

Via E-mail: dsw_rulecomments@epa.state.oh.us

Rule Coordinator
Ohio EPA, Division of Surface Water
P.O. Box 1049
Columbus, Ohio 43216-1049

**RE: Ohio EPA's Draft Rule Changes to the Surface Water Quality Rule Package
Comments of the Trade Association Coalition**

Please accept these comments on behalf of the Ohio Coal Association, Ohio Aggregates and Industrial Minerals Association, Flexible Pavements of Ohio, Ohio Contractors Association, the Ohio Manufacturers' Association, and the Associated General Contractors of Ohio ("Trade Association Coalition") and include this letter in the comment docket for Ohio EPA's draft rule changes to O.A.C. Chapter 3745-1 ("WQ Rules"), O.A.C. Chapter 3745-32 and 3745-45 ("WQC Rules"), O.A.C. 3745-1-56 ("Mitigation Rule"), and O.A.C. 3745-01-05 ("Antidegradation Rule") (collectively, "Comprehensive Water Rules").

By way of background, the signatories to the letter include:

- The Ohio Coal Association, which is a trade association of more than ninety members representing every aspect of the coal mining industry, including coal production, equipment manufacturing and supply, electric power generation, engineering, coal transportation, blasting and other similar enterprises.

- The Ohio Aggregates and Industrial Minerals Association, which is a non-profit business association that represents all of Ohio's non-coal mining operations, including limestone, sand, gravel, aggregates, salt, clay, shale, gypsum, industrial sand, building stone, lime, cement and recycled concrete.
- Flexible Pavements of Ohio, which is a non-profit business association comprised of approximately ninety producers, contractors, consultants, and manufacturers engaged in Ohio asphalt pavement construction industry.
- The Ohio Contractors Association, which is a trade association representing nearly five hundred Ohio companies engaged in heavy, highway, and utility construction.
- The Ohio Manufacturers' Association, which is a trade association which represents Ohio's largest and most diverse economy sector – Ohio's manufacturing companies.
- The Associated General Contractors of Ohio, which is a commercial construction association that represents hundreds of large and small building contractors and subcontractors from all over Ohio.

This Trade Association Coalition includes members representing virtually every aspect of Ohio's earth-moving businesses, and our members collectively seek more permits and approvals from Ohio EPA's Surface Water Division than any other industry or business sector. Our members provide stable jobs and create tax bases in every corner of Ohio. While our associations have diverse membership and business interests, our members all have one commonality: each will be significantly impacted by Ohio EPA's Comprehensive Water Rules. As explained in detail below, as a coalition and as individual associations, we do not support the Comprehensive Water Rules as proposed by Ohio EPA.

INTRODUCTION

The Comprehensive Water Rules represent a significant expansion of the already complex regulatory programs which cumulatively limit the beneficial use of Ohio's water resources to the detriment of all Ohioans. What is striking is that Ohio EPA has not effectively communicated any justification for them. In fact, the only justification advanced by Ohio EPA for these expansive proposed rules is the need to conduct a routine five year rule review and a generalized statement that "rules will ensure that water quality is maintained at a level that is protective of public health and the environment." See Ohio EPA Fact Sheet – *Draft Rules – Surface Water Quality Fact Sheet 1 of 3: Questions & Answers OAC Chapters 3745-1 and 3745-32*. What Ohio EPA has never articulated is why the current rules, if properly and consistently applied, are insufficient to meet all the legal requirements imposed by State and Federal law. It is inconsistent with the express policy of Ohio, as articulated by the Governor and the General Assembly, to increase the regulatory burdens facing all Ohioans when there is no legal requirement to do so. We are not aware of any mandate or deficiency in the current rules that would require such a complex, burdensome and vague expansion of Ohio EPA's regulatory

programs. Unless and until Ohio EPA has adequately explained why these proposed rule changes are necessary, Ohio EPA should not pursue the adoption of these rule packages.

The failure of Ohio EPA to articulate any specific justification for the proposed rules is attributable in part to the fact that there is no pressing need, from a water quality standpoint, to change the current program in such a comprehensive way. Ohio EPA originally proposed prior versions of three of the four rule packages in the Comprehensive Water Rules in the fall of 2008. At that time, Ohio EPA acknowledged that Ohio's existing water quality rules were the structure by which Ohio was able to meet water quality goals for 80% of Ohio's large rivers years ahead of the schedules mandated by State and Federal law. To the best of our ability to determine, Ohio's water quality has not significantly changed since 2008, and any such change is increased improvement. As such, the question remains—why does Ohio EPA feel the need to propose significant new and complex rules? The fact that the Ohio EPA has been working on these rules for almost a decade does not outweigh the fundamental fact that there is no need for such a sweeping change in the rules because Ohio's current rules are sufficient to meet any Federal or State requirements related to water quality.

The fact that the current rules are sufficient to meet State and Federal water quality related mandates suggests that the Comprehensive Water Rules are, in fact, unlawful under both current and prospective statutes governing administrative agency rulemaking. As discussed in more detail below, Governor Kasich, working closely with the General Assembly, has restructured Ohio's administrative procedure statutes to require administrative agencies to more fully review their proposed rules to ensure that all regulations are necessary and that they do not present unreasonable or unnecessary obstacles to economic growth. Further, it was the expressed intent of the Governor and the General Assembly that administrative agencies adopt rules that are fair, effective, necessary and written to impose the lowest cost on Ohioans necessary to achieve any applicable legal mandates. Although these new requirements are not technically effective for administrative agencies until the beginning of 2012, it is inconsistent with the Governor's attempts to revitalize Ohio's economy to force through the most comprehensive set of changes to Ohio EPA's water regulatory programs since their initial adoption in the 1970s without applying these new legal standards for agency rulemaking.

One of the touchstones of the changes to agency rulemaking authority is the requirement that agencies charged with implementing Federal programs highlight and justify where Ohio regulations, as proposed by that agency, are more stringent than Federal requirements. Ohio EPA has failed to meet this requirement and it has not identified whether the Comprehensive Water Rules are more stringent than their Federal counterparts, and if so, what State purpose is served by making the requirements more stringent. This practical and mandated requirement of the new requirements for administrative rulemaking is critical to making Ohio more competitive as well as making Ohio regulations more transparent. To highlight this deficiency, we have compiled a chart containing some of the proposed rules and identifying their corresponding Federal counterparts, if any. *See Attachment A.* It appears from this analysis that Ohio EPA has incorporated into this comprehensive action rules that are not present in Federal law or which are more stringent than Federal law and unnecessary to implement a permitting program under the Federal Water Pollution Control Act. It is inconsistent with the intent of the General Assembly

to propose rules that are significantly more stringent than Federal requirements and then fail to specifically identify and justify these more stringent proposals in a rulemaking package, particularly one of this magnitude.

We also believe that the lack of any justification for adopting the Comprehensive Water Rules runs counter to the existing requirements found in R.C. Chapter 119 for agency rulemaking. In particular, the authority of the Director to adopt rules under R.C. Chapter 6111 is limited to “governing procedure of hearings, the filing of reports, the issuance of permits, the issuance of water pollution control certificates, and all other matters related to procedure.” R.C. 6111.03(G). When read in conjunction with the authority to implement the permitting and other programs of the Federal Water Pollution Control Act, 33 U.S.C. 1251, et. seq., the authority of the Director to adopt rules related to water quality is limited to only those rules necessary to meet Federal requirements. R.C. 6111.03(J). This is consistent with R.C. 6111.041 which requires the Director to adopt water quality standards in accordance with Section 303 of the Federal Water Pollution Control Act, 33 U.S.C. 1313 and conduct hearings following public notice that “specifies the waters to which the standards relate...” before the adoption or amendment of water quality standards. One of the principle mandates of 33 U.S.C. 1313(c)(2) is that any proposed changes by a State to water quality standards advance the purposes of the Federal Water Pollution Control Act. At a bare minimum, therefore, Ohio EPA is legally required to conduct public hearings that specifically address the changes in water quality standards and how such changes impact specific waters of the State and to justify how the changes in the Comprehensive Water Rules advance the purposes of the Federal Water Pollution Control Act.¹

The willingness of Ohio EPA to propose comprehensive changes to the water quality rules governing all waters of the State without conducting more public hearings and greater public outreach, not to mention a more comprehensive assessment of the costs of these changes, runs counter to both Ohio and Federal law. The actions of the Agency also have the practical effect of limiting the ability of impacted members of the public to comment on the Comprehensive Water Rules by essentially burying interested parties in hundreds of pages of complex rules and supporting documentation. The changes proposed by Ohio EPA in the Comprehensive Water Rules will have an impact on every single landowner in Ohio that has any surface water rights, however limited. That said, the Comprehensive Water Rules are so dense, complicated and devoid of supporting documentation that gives reasonable notice of the changes to the public, that only the most sophisticated landowners with significant resources have even a chance of ascertaining the actual impacts of these rules on their particular interests. The dictates of due process and fair notice, not to mention the specific requirements of applicable Federal law, require Ohio EPA to conduct significantly more effective public outreach before imposing increased regulatory burdens on every single landowner in Ohio.

¹We note that the requirement to comply with the Federal Water Pollution Control Act, and the corresponding limits on the rulemaking authority of Ohio EPA in this respect, place certain waters of the State outside of Ohio EPA’s existing rulemaking authority related to water quality. Ohio EPA is restrained by the Constitutional jurisdictional limits of the Federal Water Pollution Control Act, in particular, the definition of navigable waters. To the extent Ohio EPA is attempting to extend the authority granted to it to implement programs under Federal law to cover surface water bodies that are not subject to Federal jurisdiction, Ohio EPA is impermissibly attempting to expand its rulemaking authority beyond the specific limits imposed by statute and the intent of the General Assembly. R.C. 6111.01(H).

The Comprehensive Water Rules are not necessary, introduce additional complexity into Ohio's regulatory processes, contain many overlapping provisions which will make compliance difficult and represent a significant attempted expansion of Ohio EPA's regulatory reach. The complexity of the Comprehensive Water Rules, coupled with numerous vague standards, raise serious concerns about Ohio EPA's ability to fairly and efficiently implement the rules. Rules should be transparent and clearly apprise the public of what standards apply to activities. In stark contrast, the Comprehensive Water Rules are replete with vague standards that leave far too many unanswered questions, or which rely too heavily on the discretion of the Director. These Comprehensive Water Rules will create crippling regulatory uncertainty, greatly increase the cost of economic development and reduce Ohio's ability to encourage development in every business sector in Ohio. It is also unclear where Ohio EPA will secure the necessary resources to implement these rules, review the extensive data and technical documentation required, monitor the mitigation projects and issue timely decisions.

Without question, the Comprehensive Water Rules are exactly the type of rule package that the Governor and the General Assembly want to subject to significantly increased scrutiny. We are not aware of any compelling reason why Ohio EPA should adopt these rules without, at an absolute minimum, subjecting them to the review that will be required of all administrative rules beginning in 2012. It bears repeating that Ohio EPA has not articulated any pressing need for these Comprehensive Water Rules, nor is the agency under any legal mandate to adopt them. Discretion and good government policy strongly weigh in favor of withdrawing these rules at the very least until they can be reviewed under the new standards adopted into Ohio law this year.

Despite our concerns with the regulatory actions taken by Ohio EPA to date and questions regarding the need for, and legality of, the Comprehensive Water Rules, the Trade Association Coalition has committed significant resources to reviewing the Comprehensive Water Rules and developing the specific comments below. That said, these comments should not be viewed as acquiescence by our group that the Comprehensive Water Rules as currently written or structured are acceptable or that these comments identify the only legal or practical defects in the Comprehensive Water Rules. The Trade Association Coalition remains steadfast in its position that these Comprehensive Water Rules should be withdrawn, and to the extent Ohio EPA can justify the need for any changes to the current regulations, the Agency should work cooperatively with all interested parties to craft logical, common sense rules and limited rules that protect Ohio's waters while protecting Ohio's economy. The two concepts are not mutually exclusive but they are not served by proposed regulations that are so complex as to effectively prevent anyone from understanding, let alone quantifying, the costs of the Comprehensive Water Rules.

**OHIO'S COMMON SENSE REGULATION AND NO MORE STRINGENT THEN
FEDERAL LAW CONCEPT FOR REGULATION OF OHIO'S BUSINESSES**

Recognizing the need for regulatory reform to combat business flight from the State of Ohio, Governor Kasich proposed a Common Sense Initiative ("CSI") program which called for a more

business-friendly regulatory environment. Heeding this directive, Ohio lawmakers passed Senate Bill 2, which Governor Kasich signed in March 2011, making the Governor's CSI, including its underlying mandate, the law of Ohio. A cornerstone of the CSI is to ensure that regulations are not overly stringent or costly to Ohio's businesses and to ensure that businesses have the opportunity to meaningfully contribute to the revitalization of Ohio's economy. In short, the CSI program and the Lieutenant Governor's CSI Office created by the statute will result in the elimination of excessive, unnecessary or burdensome regulation and will promote the evaluation of alternative means of regulating (including less stringent means of regulating) and agency accountability.²

The CSI program requires administrative agencies to analyze and justify regulations which have an adverse impact to businesses. As part of this, agency rulemakings will be analyzed based on several characteristics: understandability, effectiveness, efficiency, reduction of adverse impacts on businesses, costs of compliance, consistency, predictability, transparency, flexibility, and alternative means of compliance. Where a regulation deals with environmental protection, CSI requires Ohio EPA to: (i) consider documentation relevant to the need and technological feasibility of the rulemaking, (ii) identify whether the rulemaking is needed to maintain approval to administer/enforce a Federal environmental law or to participate in a Federal environmental program, (iii) identify whether the rulemaking is being adopted to enable the State to obtain approval under a Federal environmental law or program, and (iv) identify whether the rulemaking is more stringent than its federal counterpart, and, if so, the rationale for not incorporating its Federal counterpart. We do not believe that the Comprehensive Water Rules will be able to withstand this type of review. Ohio EPA has offered no evidence of the failure or ineffectiveness of Ohio's current water quality rules, and, in fact, has acknowledged their success in achieving Ohio's water quality goals ahead of schedule. Under the circumstances, there does not appear to be any need for these proposed rules.

Additionally, the Comprehensive Water Rules are so burdensome, costly, and inflexible that they will have a significant and adverse impact on Ohio's businesses, including the ability to plan, develop and make investments for Ohio's future. Given the slowdown in Ohio's economic and business climate and the current efforts of the Governor and the General Assembly to improve the regulatory environment in Ohio, unless Ohio EPA can identify a specific legal mandate that requires such comprehensive changes to Ohio regulations that have met every measurable legal goal for more than 30 years, there is no reason to pursue this rulemaking.

The CSI program requires that any final rules filed with JCARR after January 1, 2012 be subject to an enhanced review to determine if the rules have an adverse impact on business. In light of the significance of the Comprehensive Water Rules to Ohio and the lack of any compelling reason to adopt these rules this year, the Trade Association Coalition requests that to the extent these rules are not withdrawn in their entirety, that the General Assembly be given a chance to

² While not as ambitious as Ohio's CSI efforts, the Trade Association Coalition also believes it relevant that the Obama Administration has also issued Executive Order 13563, Improving Regulation and Regulatory Review, with a similar purpose in mind. 76 Fed. Reg. 3821. The Comprehensive Water Rules do not follow the spirit or intent of this federal Executive Order.

review these rules in accordance with these new requirements for agency rulemaking.

COMMENTS ON SPECIFIC RULE PACKAGES

Rule Package 1: Proposed Water Quality Standards (O.A.C. 3745-1)

Ohio EPA's proposed WQ Rules comprehensively revise Ohio's water quality standards, including water quality standards for 135 different chemicals. Under the WQ Rules, permitted dischargers are required to monitor new parameters and meet stricter effluent levels. As an overarching comment, the Trade Association Coalition objects to Ohio EPA's decision to go beyond the requirements of Federal law without any compelling legal or technical justification for doing so. More concerning, Ohio EPA appears to package the rules such that the rules appear consistent with Federal requirements; however, upon closer review, they are not. For example, with respect to water supply use designations, Ohio EPA asserts that the new, more restrictive limits are consistent with Federal requirements. *See* proposed O.A.C. 3745-1-40. However, in order to make such a statement, Ohio EPA has inappropriately applied contaminant limits applicable to drinking water under the Safe Drinking Water Act to surface waters. To the extent the proposed rules do not identify and justify those instances where the proposed rules are more stringent than the applicable Federal standards, Ohio EPA's proposed WQ Rules are inappropriately more stringent than Federal regulation.

The Trade Association Coalition offers the following specific comments:

O.A.C. 3745-1-01: Purpose and Applicability

- (D)(1): Ohio EPA's concept of requiring no downstream/off-permit degradation is a regulatory creep that Ohio EPA has neither the authority nor regulatory structure to support and enforce. Additionally, the mechanisms by which Ohio EPA intends to measure the chemical, physical and biological conditions are not legal as Ohio EPA has only developed guidance and not regulation.
- (E)(3): This provision is specific to coal remining and sets a "proof" requirement of "demonstrated potential for improved water quality from remining." As Ohio EPA is well aware, all remining improves water quality. As such, Ohio EPA is setting a requirement that is not needed and should be removed.

O.A.C. 3745-1-02: Definitions

- (B)(3): Ohio EPA has remove the term "mortality" from the definition of acute aquatic criterion and replaced it with the term "unacceptable effect." This change creates a subjective determination of "unacceptable effect" and is not reasonable. Ohio EPA should reinstate the term "mortality".

- (B)(21): The definition of “Cold Water Fauna” is overly broad and could encompass fauna not typically deemed cold water. Ohio EPA should revise this definition to limit the application consistent with the comments made in Rule Package 4 below. Ohio EPA should modify Table 7-2 to O.A.C. 3745-1-07.
- (B)(55): The definition of “Lake” has been unreasonably expanded including encompassing private waters not subject to regulation under R.C. Chapter 6111. Ohio EPA should work with regulated business to develop an appropriate definition of “lake.”
- (B)(86): The definition of “Stream” has been unreasonable expanded to include features such as an artificial bed or bank, which could be interpreted very broadly to include areas that are simply not streams. The effect of this works a significant and unlawful expansion of Ohio EPA’s regulatory authority and ignores the existing stream definition codified in R.C. 3745.114 of state law. Ohio EPA should not broaden the definition of stream beyond Ohio law.

O.A.C. 3745-1-07: Beneficial Use Designations³

- (F)(9)(d)(iii): Primary Headwater Habitats-Class III. Ohio EPA has set a characteristic as “high functional value” but there is no metric or other objective, promulgated standard to determine what is characterized as a “high functional value” primary headwater habitat. While the Trade Association Coalition objects to the use of such classifications, if Ohio EPA continues to embrace such a concept, Ohio EPA should work with regulated business to develop objective standards. Additionally, Ohio EPA has set such a restrictive standard for Class III Primary Headwater Habitats that such standard is effectively a prohibition against any impact on a Class III area. Ohio EPA should develop a realistic and reasonable approach to considering impacts to Class III areas.

O.A.C. 3745-1-32: Ohio River Standards

- In this proposed rule, Ohio EPA adopts standards that are more stringent than statewide WQ standards. Such action minimizes the role of ORSANCO and Ohio in the multi-state Ohio River Valley Water Sanitation Compact and overlooks Ohio’s agreement to work cooperatively with surrounding states to address water quality in the Ohio River watershed. Ohio EPA should revise this rule to create a mechanism to update Ohio water quality standards as needed to meet its obligations to work cooperatively on Ohio River issues.

O.A.C. 3745-1-42: Water Quality Criteria for the Base Aquatic Life Use Designation

- This rule sets stringent water quality criteria for the protection of aquatic life that will require industrial users to drastically reduce pollutant levels. The rule sets forth three

³ Please also see comments on the Mitigation Rule related to new beneficial use designations below.

separate standards for 31 different pollutants: the maximum within the mixing zone (“IMZM”), the maximum outside the mixing zone (“OMZM”), and the average outside the mixing zone (“OMZA”). With respect to OMZM and OMZA, the standards generally, but not completely, match U.S. EPA’s National Recommended Water Quality Criteria (“NRWQC”); however, certain provisions have been made more stringent in Ohio’s regulations without justification. For example, Ohio’s Nonylphenol OMZA standard is 6.6 µg/l which is less than the NRWQC freshwater nonylphenol chronic standard of 7 µg/l. The Trade Association Coalition objects to Ohio EPA’s imposition of more stringent standards on Ohio’s businesses without any justification. Additionally, there is no Federal standard that matches the IMZM. Ohio EPA’s creation of a new standard serves no clear environmental benefit and, as such, should be removed.

- Many of the proposed discharge levels, such as those for cadmium, are lower than current discharge limits and are not reasonable or feasible. Ohio EPA has stated that it has based these levels on a U.S. Geological Survey Report “Cadmium Risks to Freshwater Life: Derivation and Validation of Low-Effect Criteria Values using Laboratory and Field Studies” (“Report”). The Trade Association Coalition sees significant problems with use of this Report. First, the Report was developed using Idaho-specific aquatic assemblages, some of which are not present in Ohio. As such, the Report does not account for Ohio-specific considerations that could prove significant with respect to discharge limits. Second, Ohio EPA justifies its use of the Report – which includes non-Ohio species – by noting that such species are representative of “many” Ohio species for which there is no toxicity data. Thus, Ohio EPA acknowledges that it is enforcing a burdensome one-size-fits-all approach that does not consider Ohio’s unique aquatic assemblage or the ability of Ohio’s businesses to comply. Finally, Ohio EPA has not examined these discharge limits in light of the costs of these regulations to the business community. The inability of business to meet these limits, including the significant expense of monitoring and analysis, will force many companies to cease operations. Ohio businesses can ill afford additional job and business losses. As such, the Trade Association Coalition opposes the increasingly stringent discharge limits in the rule and urges Ohio EPA to retain the current discharge limits.

Rule Package 2: Antidegradation (O.A.C. 3745-1-05)

Despite the fact that Ohio EPA only recently updated its antidegradation rule, effective March 2010, Ohio EPA is seeking to significantly revise its antidegradation requirements in this current rule package (“Antidegradation Rule”). Compliance with the Antidegradation Rule requires significant information gathering and preparation by permit applicants. Ohio EPA’s decision to expand and alter its existing antidegradation rule – including 10 new pages of requirements – forces applicants to again adapt regulatory processes at significant expense with no discernible justification.

In addition to our general objection to the Antidegradation Rule, the Trade Association Coalition offers the following specific comments:

O.A.C. 3745-1-05: Antidegradation

- (B)(2)(b): Ohio EPA provides an exemption from the Antidegradation Rule for permits, applications, activities or certifications for an existing source where the net increase is the result of a situation where (1) there was no limit in the immediately preceding NPDES permit, (2) the pollutant was “present or believed present” in the discharge when the prior permit was issued, and (3) there is no increase that is the result of a modification of a facility. The proposed rule does not set forth the method by which Ohio EPA will determine whether the pollutant was “present or believed present” in the discharge when the prior permit was issued. As such, the Trade Association Coalition requests clarity on the mechanisms Ohio EPA proposes to use in making this determination. Additionally, Ohio EPA should clarify that any activities subject to a general permit should be exempt from the Antidegradation Rule.
- (B)(3)(c): The new requirements of this section are extremely onerous and costly with no resulting discernible environmental benefit. For example, one Ohio company has performed antidegradation modeling and estimates that at least 500 manpower hours are necessary to perform the required modeling in the proposed rule. Modeling should not be required and the other requirements should be streamlined to only the specific materials necessary for Ohio EPA to make an informed regulatory decision.
- (C)(1)(c)(i): This new language requires an unreasonably wide area to be evaluated for cumulative stream impact. As an example, one Ohio company has had to perform such a cumulative analysis at the cost of approximately \$25,000 just for this discreet permitting issue. Ohio EPA should modify this provision and provide a more reasonable area for evaluation.
- (C)(1)(c)(ii): Ohio EPA includes new language providing a framework for beneficial use loss and the principle of “no net loss” of wetlands and streams. Specifically, Ohio EPA requires antidegradation reviews for wetlands to “ensure there is no net loss of wetland use.” Federal law establishes no overall net loss of “wetlands base” (as defined by acreage and function) as a goal, not a hard requirement, and provides that it is something for which companies should “attempt to achieve.” *See*, for example, 33 U.S.C. 2317; 40 C.F.R. 258.12. As such, Ohio law is more stringent than Federal law in that it focuses on “use” whereby Federal law views impacts in terms of both acreage and function. At a minimum, Ohio EPA should strive for consistency with Federal law or provide a legally sufficient justification for proposing more stringent requirements and properly quantifying the costs of such requirements.
- (C)(6)(a), (c): For outstanding state waters and certain superior high quality waters, the rule reserves 70% and 35%, respectively, of the remaining available pollutant assimilative capacity for all regulated pollutants for which water quality criteria have been adopted and prohibits allocation to sources unless there is a demonstration that a smaller reserve will “adequately protect” resident or representative species. This requirement exists nowhere in Federal law and as such is considerable more stringent. In

addition, Ohio EPA fails to offer sufficient regulatory guidance on what is considered “adequate protection” of resident or representative species. The Trade Association Coalition requests that Ohio EPA provide further clarification and certainty as to the processes Ohio EPA will use to assess and determine adequate protection.

Antidegradation Support Documents

- The Trade Association Coalition appreciates Ohio EPA’s work and effort to develop technical documents to support and explain the new Antidegradation Rule, including the *Methods and Documentation Used to Identify Outstanding State Water and Superior High Quality Water Candidates for Ohio’s Water Quality Standards*. Although these materials are instructive of Ohio EPA’s interpretation of the proposed rule and offer insight into how Ohio EPA might propose to implement the Antidegradation Rule, these guidance documents are replete with additional policies and regulatory concepts that are likely to be applied as standards in practice. As such, it is important that Ohio EPA clearly indicate that such materials are guidance only and do not have the effect of law and cannot be relied upon by Ohio EPA in reaching a final decision concerning a pending application.

Rule Package 3: Section 401 State Water Quality Certifications (O.A.C. 3745-32 and O.A.C. 3745-45)

In these proposed WQ Rules, Ohio EPA creates a new state water quality certification (“WQC”) program that appears to include Section 401 certifications, Section 10 permits, isolated wetlands, and isolated streams (The confusion created by Ohio EPA’s definitions is discussed below). With the purpose of bringing isolated streams under its permitting purview, the WQC program establishes a new, broad permit that will be required for any discharge or fill into any water in the State (i.e. non-jurisdictional waters).

Procedurally, Ohio EPA issued an earlier version of the WQC Rules, which were made available for public comment in 2008 and for which Ohio EPA received several comments. Of the 26 comments received since 2008, Ohio EPA only responded to one comment and the other 25 “remain under consideration.” See December 2010 Ohio EPA Interim Response to Comments at Comments 1-5, 7-26. Given that Ohio EPA has had these comments for a significant period of time, the agency should respond to these comments prior to the close of the current comment period to afford industry with fair notice of Ohio EPA’s actual position prior to commenting on the new version of the WQC Rules. Rather than restate the comments already submitted, the Trade Association Coalition incorporates, by reference, all of the comments submitted in response to Ohio EPA’s 2008 draft WQC Rules into these comments.

As an overarching point, The Trade Association Coalition is puzzled by Ohio EPA’s intention to be one of the only states pioneering a permitting program for isolated streams without any apparent need to do so and without seeking the approval of the General Assembly. Ohio EPA has not explained what is different or unique about Ohio’s isolated streams that would justify more stringent, economy-killing regulations that are not being proposed in other states. Ohio

EPA's position is even more troubling given that Ohio's General Assembly has not opted to establish an isolated streams permitting program in State law similar to that for isolated wetlands, nor are we aware of any attempt by Ohio EPA to even propose legislative review of this expansion of Ohio EPA's permitting programs. As such, Ohio EPA appears to be intentionally avoiding the input of the General Assembly on this important jurisdictional issue and is acting to regulate isolated streams without any legislative authorization to do so. Additionally, it is important to note that the U.S. Army Corps and U.S. EPA have recently issued draft guidance on identifying waters protected by the Clean Water Act. Since the federal agencies have not finalized any interpretive guidance at this point, Ohio's efforts are certainly, at best, premature. *See* 76 Fed. Reg. 24479.

Ohio EPA should not impermissibly expand its regulatory reach without articulating a clear and justifiable reason to do so and only with the approval and authorization of the General Assembly. To date, Ohio EPA has not offer any legitimate reasons for its actions. As such, the Trade Association Coalition opposes Ohio EPA's proposed changes and provisions encompassing the WQC Rules and urges Ohio EPA to retain its current water quality rules and permitting programs. In addition to these general comments, the Trade Association Coalition has the following rule-specific comments and concerns about Ohio EPA's WQC Rules.

3745-32-01: Definitions

- (D): Ohio EPA's revised definition of "Discharge of dredged material" appears to include within its purview runoff or overflow from a contained land or water disposal area that is not dredged material. Ohio EPA should revise the definition to clarify that such lands or areas are not discharges of dredged material.
- (H): Ohio EPA's revised definition of "Fill material" is more expansive than the Federal definition and includes the filling of an aquatic area "for any purpose". Ohio EPA should remove this purpose language. Additionally, Ohio EPA should either remove or provide definitions for "aquatic area" and "trace quantities" in order to promote regulatory certainty and transparency.
- (J): Ohio EPA's new definition of "Local drainage pattern" should define "alternative watershed boundary" and should clarify that other hydrologic unit watershed boundaries may be used. The definition also ties the local drainage pattern determination from perennial and intermittent streams to natural resource conservation service soil surveys, but does not specify which surveys or the frequency at which such surveys will be published or consulted to determine local drainage patterns. Ohio EPA should clarify the source and frequency of such surveys. In addition, the definition allows alteration of the watershed boundary delineated by the 12-digit hydrologic unit to be expanded or reduced based on "regionally important factors" and "other features affecting the zoogeographical distribution of aquatic species." Ohio EPA should further define these factors and features to promote regulatory certainty and transparency.

- (L): Ohio EPA's new definitions of "Minimal degradation alternative" and "preferred alternative" and definition of "non-degradation alternative" do not appear in Federal law. Ohio EPA should not introduce new concepts or requirements into Ohio's water quality rules that differ or are more stringent than Federal law without legitimate justification to do so and a complete assessment of the costs of such rules.
- (O): Ohio EPA's definition of "non-federally protected waters" is an example of Ohio EPA's attempt to extend its regulatory reach beyond Federal law. The Agency's definition is not only extremely broad and could include any feature that would result from flowing water, it promises to render nearly impossible a permitting process which is already slow and complicated. Fundamentally, the Trade Association Coalition believes Ohio EPA should not be regulating non-federally protected waters. However, to the extent Ohio EPA is attempting to regulate any waters of the State that are beyond the jurisdiction of the Federal Water Pollution Control Act, Ohio EPA should seek specific authorization from the General Assembly prior to proposing any rules regulating these waters.
- (T): Ohio EPA's definition of "State water quality permit" includes Federal Section 401 certifications, Ohio EPA R.C. 6111 permits, or those issued for discharges to non-federally protected waters. This proposal represents a significant expansion of existing permitting programs and Ohio EPA's authority. Moreover, the new regulatory program creates permitting uncertainty and will likely result in a significant administrative bottlenecks. Finally, it is unclear whether these expansions of authority will result in new procedures for existing Section 401 certifications and whether existing permitting requirements for Section 401 certifications will change because of the consolidation into a statewide permitting process that regulates both Federal jurisdictional and non-jurisdictional waters.
- (V): Ohio EPA's WQC Rules cite to R.C. 6111.01's definition of "waters of the state." Despite Ohio EPA's attempted extrapolation in the WQC Rules to include isolated streams (i.e. waters not subject to Federal regulation) in this definition, there is no indication that the General Assembly intended isolated streams to be regulated in a manner similar to Federally regulated waters by Ohio EPA. Notably, no currently existing State environmental statute or rule defines "stream." It is therefore not clear that the General Assembly intended to grant to Ohio EPA the authority to create a regulatory program that mirrors the program established by the Federal Water Pollution Control Act for these purely State regulated waters. It is highly unlikely that the General Assembly intended such a result, and as such, any such proposal violates R.C. 119.03(I).

In addition, Ohio EPA has failed to consider and give effect to the language in R.C. 6111.01's definition of "waters of the state" that excludes from all regulation "those waters that do not combine or affect a junction with natural surface or underground waters". As such, the Trade Association Coalition encourages the Ohio EPA to propose revisions to Ohio's statutory programs for the regulation of waters of the State to the General Assembly rather than through rulemaking under unclear regulatory authority.

O.A.C. 3745-32-02: Applicability

- As noted above, the WQC Rules are a significant expansion of Ohio EPA authority which not only complicates Ohio's permitting programs but portends potential disinvestment or lost economic growth opportunities in the State. As drafted, the applicability provisions do not clearly indicate whether the Section 401 and isolated wetland permitting programs are part of the WQC program or if the WQC is a new, completely separate permit. Either way, the Trade Association Coalition continues to oppose this proposed permit program as an illegal expansion of Ohio EPA's regulatory authority. If Ohio EPA persists in this ill-conceived rulemaking; however, Ohio EPA should clarify the applicability provisions.

O.A.C. 3745-32-03: Individual State Water Quality Permit Application Requirements

- (A): Adding to the confusion and administrative complexity of the WQC Rules, Ohio EPA appears to require applicants for Federal permits or licenses to submit a separate WQC. Ohio EPA should streamline WQC requirements consistent with Federal licensing and permit requirements so that permit application timelines are not significantly increased. In doing so, Ohio EPA should make it clear that activities subject to federal permitting, including SMCRA permitting, are not subject to the WQC Rules.
- (B)(2)(a): Ohio EPA requires that WQC applications include correspondence from the U.S. Army Corps of Engineers ("ACOE") regarding the jurisdictional status of the waters. However, the ACOE, in issuing jurisdictional determinations ("JDs"), does not require identification of features which Ohio EPA may deem to fall under "waters of the state." As such, the JDs will not be especially useful in this regard. Ohio EPA should clearly specify how such features are identified and determined and should clarify that JDs may not be required or applicable in some circumstances.
- (B)(2)(c): In streams with specific aquatic life use designations, Ohio EPA requires a use attainability analysis. As explained in the comments above, this requirement adds cost and complexity to the permitting process, and applicants are tasked to do Ohio EPA's job for the agency. As such, this requirement should be removed.
- (B)(2)(d): Ohio EPA requires an application contain a specific and detailed mitigation proposal which includes the "legal mechanism" for protection in "perpetuity." This requirement is flawed in several respects. First, this regulation is more stringent than Federal law, which requires "long-term" protection, not perpetual protection. Second, although R.C. 6111.30 contains the "perpetuity" language, such term is not defined. Ohio EPA should define this term only consistent with Federal law. Third, as communicated to the Ohio EPA on several occasions, this perpetuity requirement is completely untenable for Ohio's businesses, some of whom lease, rather than own, affected lands or features. This perpetuity requirement promises to detrimentally impact or prevent many projects in the State. Finally, Ohio EPA does not define legal

mechanism; however, such reference clearly differs from Federal regulation requiring long-term protection through real-estate instruments or “other available mechanism as appropriate.” Importantly, the Federal language gives the ACOE discretion on the terms of such mechanisms to address case-by-case project needs; Ohio regulation should contain this similar discretion.

- (B)(4): As stated in (B)(2)(c), the Trade Association Coalition objects to the use attainability analysis requirement. Likewise, we object to Ohio EPA’s unreasonable requirements for such analysis. Specifically, in the situation where the qualitative habitat evaluation index (“QHEI”) score is greater than 40 for a stream, Ohio EPA requires that a representative number of qualitative macro-invertebrates and fish samples for that stream be provided. This regulation is an example of confusing and contradictory agency regulation and interpretation as well as unnecessary regulation in contradiction of the CSI program. As noted in past comments, such requirement contradicts Ohio EPA’s own documentation that streams with QHEI scores less than 45 generally cannot support a warmwater assemblage consistent with the warmwater habitat biological criteria. Additionally, although the regulation says “qualitative macro-invertebrates”, it also says such sampling must be done consistent with quantitative sampling procedures in O.A.C. 3745-1-03 which, for biological sampling, includes quantitative sampling methods. Quantitative sampling methods can be extremely costly and could result in project delays. Ohio EPA should revise this provision consistent with its historic interpretation and QHEI documentation.
- (C): Ohio EPA sets forth very broad criteria for WQC decisions which go well beyond the scope of a specific application or project. Specifically, the regulations prohibit the Director from issuing a permit unless an applicant demonstrates that discharge or fill will not prevent or interfere with attainment of water quality standards or result in the violation of the Federal Water Pollution Control Act. The Director can also consider whether the applicant is currently significantly noncompliant with any other state water quality or isolated wetland permits (including those for another project or activity), and if issuing the permit will result in short or long-term impacts to water quality. Finally, the Director may impose terms and conditions as are appropriate or necessary to ensure compliance with laws and to ensure “adequate protection of water quality and human health.” These criteria have significant potential for regulatory abuse. Moreover, several terms, such as “significant noncompliance” with respect to other projects or activities and “adequate protection of water quality and human health” are subject to multiple interpretations. This provision should be streamlined and the decision making criteria objective and based only on requirements of Ohio law.
- (G)(2): Ohio EPA provides that WQCs can be renewed for 1 period of up to 5 years. Such renewals will be subject to public notice despite the regulation’s requirement that the permittee certify there will be no additional water quality impacts beyond those authorized in the original State permit. This provision exposes permits to another round of opposition and creates business instability in contravention of the CSI program. Ohio EPA should not require additional public notice for such renewals. Additionally, Ohio

EPA should recognize that on larger sites, 10 years may be an insufficient permitting timeframe, and Ohio EPA should amend the provision to allow for additional renewals as needed.

- (J): The regulations permit the Director to require a WQC applicant to perform environmental quality tests, including chemical analyses, sediment or fill material, bioassays, and biological monitoring. Ohio EPA has started requiring unnecessary and expensive biological sampling regardless of any unique project features. In addition, stream sampling locations established by Ohio EPA have historically been arbitrary and without scientific, technical or factual support. Ohio EPA should remove this provision, or, at a minimum, require that such sampling and sampling locations be scientifically, technically and factually supported.

O.A.C. 3745-32-04: Antidegradation Review Requirements

- The Trade Association Coalition disagrees with the entire concept of a full antidegradation review for a state-only permitting program. Although the waters subject to these requirements are biologically insignificant, Ohio EPA has introduced the same regulatory structure associated with impacts to significant jurisdictional waters. Ohio EPA has not justified the need for this comprehensive antidegradation rule, and it should be removed.
- Ohio EPA establishes a new rule which was not available for comment in 2008 and which moves antidegradation review requirements applicable to the WQC program and isolated wetland permit program. Confusingly, Ohio EPA also requires that projects impacting wetlands also meet the specific wetland antidegradation rule, O.A.C. 3745-1-54. Likewise, in several places, the agency states that some provisions apply to streams and wetlands, some refer to other rules for wetlands and still others specify that antidegradation review provisions apply for both streams and wetlands (e.g., avoidance/minimization, impact evaluations, and mitigation). Thus, rather than simplifying permitting procedures, Ohio EPA has significantly complicated them by creating rules which cross-reference each other and obscure any clear understanding of the regulatory requirements associated with an antidegradation review. Ohio EPA should reevaluate the purpose and language of this rule.
- (B): Ohio EPA requires that extensive information be submitted to Ohio EPA in addition to the application information submitted for a permit. The requirements in this rule add significant cost and time to the permitting process without legitimate reason. Ohio EPA should streamline review requirements and should, at a minimum, limit information requirements to project-specific, impact-specific, technically justified factors.
- (D)(2): The concept of this provision is incorrect because it is not possible for an isolated stream to have a cumulative impact. In addition, the requirements are onerous, costly and largely infeasible for truly isolated streams. This provision should be removed.

- (E)(2): Ohio EPA provides that the minimization and avoidance of impacts can be demonstrated by an applicant's nondegradation alternatives and minimal degradation alternative. "Minimal degradation alternative" is defined in proposed O.A.C. 3745-32-01 to include pollution prevention alternatives, best management practices, alternative manufacturing techniques, alternative treatment methods. In addition it includes proposals to discharge a lower loading of pollutants than the preferred alternative treatment technology is capable of achieving. Taken together, applicants may be required to demonstrate minimization and avoidance using not only extremely costly alternatives, but also technically infeasible alternatives. The provision should be removed or, at a minimum, Ohio EPA should consider realistic, reasonable demonstrations of minimization and avoidance of impacts so that realistic alternatives can be presented.
- (E)(3)(a): Ohio EPA requires applicants to take appropriate/practicable steps to avoid all or some impacts to the water body system. This requirement is more stringent than Federal regulation, and, as such, Ohio EPA should remove this provision.
- (E)(3)(b): For Category 4 streams, applicants are required to show "compelling reasons" why all impacts cannot be avoided. Given the inherent discretionary interpretation of "compelling reasons," Ohio EPA should provide demonstrative and reasonable examples of what the agency deems to be a sufficiently compelling reason. In addition, there is no objective mechanism to determine public need. This provision, to the extent necessary, should be revised and restructured.
- (H): With respect to public involvement, it is not the obligation of the Applicant to respond to public comments. To the extent the Director is unable or unwilling to respond to public comments, the Director may request the technical assistance of the applicant, but it is inappropriate to attempt to shift the burden to the applicant of responding to public comments, particularly in situation where the extent of public comment far exceeds the scope of the project or the legal requirements for public participation. Ohio EPA should only require applicants to respond to comments involving concerns of the agency or public comments for which the agency specifically requests an applicant response.
- (I): The regulations require the Director to notify other governmental agencies, including ODNR, U.S. Fish and Wildlife Service, U.S. EPA, and any local agencies of all proposed activities that may lower water quality. The purpose of this provision is unclear, particularly where it would appear to require coordination regardless of whether a particular agency has jurisdiction over, or an interest in, the activity (i.e. this rule is developed for state-only waters). Ohio EPA should revise this provision to provide that coordination is required only where applicable laws require such coordination.

Rule Package 4: Stream Mitigation (O.A.C. 3745-1-56)

The Stream Mitigation Rule ("Mitigation Rule") proposed by Ohio EPA creates a new standard specifying the amount of stream mitigation required when impacts occur to streams authorized

only by a State WQC. In fact, Ohio EPA greatly expands its regulatory reach to any stream in Ohio. The Mitigation Rule greatly decreases the ability of a permit applicant – who is often more familiar with site-specific conditions – to propose appropriate mitigation. In a guidance document issued in conjunction with the Mitigation Rule, Ohio EPA contends that the purpose of the Mitigation Rule is “to be consistent with the Federal mitigation regulatory framework and to amplify the ecological and water quality goals they are premised upon.” *See* Compensatory Mitigation Requirements for Stream Impacts in the State of Ohio (Revision 5.0) (“Guidance”). However, Ohio EPA admits that the Mitigation Rule does not match Federal law, and, in fact, the Mitigation Rule increases the burden of mitigation required above and beyond that required by Federal law. The Trade Association Coalition opposes the Mitigation Rule for several reasons which are articulated in detail in the following paragraphs.

Incorporation of Guidance by Reference

The Mitigation Rule proposed by Ohio EPA incorporates, in its entirety, the Guidance. This Guidance document is not an independent government publication, a peer-reviewed scientific document that has “stood the test of time“ or a reference document from third-party source which is widely accepted in the scientific and regulatory community. The Guidance has no independent status, but rather, by its terms “...provides the mechanism for implementation of the stream mitigation rule O.A.C. 3745-1-56.” In short, this Guidance was written by an Ohio EPA employee with the intent of imposing the requirements of the Mitigation Rule, but without setting forth the actual requirements in the rule itself. By incorporating this document by reference into the requirements of the Mitigation Rule, Ohio EPA seeks to avoid subjecting the details of the Guidance to review by the public or the Joint Committee on Agency Rule Review. This kind of use of a guidance document is nothing more than a transparent attempt to pull off an end run of Ohio EPA’s rulemaking obligations under R.C. Chapters 119 and 6111. The Guidance seeks to expand the Ohio EPA’s jurisdiction beyond the area characterized as “waters of the state” of Ohio, and imposes new, more burdensome and expensive regulatory burdens for any project involving a disturbance to any stream or drainage way in Ohio. Ohio EPA cannot incorporate the Guidance into State law without the benefit of a public process. As such, the Guidance should not be referenced in regulation without subjecting the Guidance to a full rulemaking process.

Small Drainage Way Requirements

Ohio EPA’s proposed Mitigation Rule and the accompanying Guidance seek to impose mitigation requirements on small drainage ways. *See* Proposed O.A.C. 3745-1-56(B)(1)(b); Guidance at 6. However, the Mitigation Rule contains no definition of “small drainage ways”, and presumably, the Mitigation Rule seeks to impose mitigation requirements on local units of government, utilities, and companies which maintain man-made drainage ways on their property. These drainage ways were designed and constructed to prevent flooding of vital infrastructure, such as haul roads, highways, railroad lines, buildings and other facilities and were never intended to function as aquatic habitat. As such, the drainage ways should not be required to perform mitigation as the price for conducting routine, periodic maintenance to keep such drainage ways free from aquatic growth, trash or other obstructions. The environmental impacts

from drainage way maintenance are minimal at best. In fact, these kinds of activities are typically authorized by the ACOE pursuant to Nationwide Permit No. 31 – a permit authorized where there are “minimal individual or cumulative impacts to the aquatic environment from an activity.” 47 F.R. 11092 (March 12, 2007). There is no reason why the Ohio EPA should expect or require any additional mitigation requirements for these kinds of activities.

New Definition of Native Cold Water Fauna

The Mitigation Rule can only be understood by also reviewing several fundamental changes which Ohio EPA proposes to make with respect to the existing water quality standards in O.A.C. 3745-1-01 et. seq. Most important among the proposed changes are Ohio EPA’s proposed expansion of the existing term “coldwater habitat”. Coldwater habitat has been defined for decades to mean waters which either: (a) support trout stocking and management under the auspices of the Ohio Department of Natural Resources or (b) those waters “capable of supporting populations of *native coldwater fish and associated vertebrate and invertebrate organisms and plants on an annual basis.*” (Emphasis added). See existing O.A.C. 3745-1-07(B)(1)(f)(a) and (ii). Thus, the current definition of coldwater habitat requires the presence of native coldwater fish in order for such a designation to be met. This makes sense because, as a general rule, coldwater habitat streams are high quality streams by virtue of the presence of such fish as trout and therefore deserving of enhanced protection.

However, Ohio EPA’s proposed WQ Rules seek to redefine coldwater habitats by introducing a new classification of water body – “native cold water fauna streams” which would replace the current definition of coldwater habitat in O.A.C. 3745-1-07(B)(1)(f)(i) and (ii). Under Ohio EPA’s new definition, a stream may be reclassified as a “native cold water fauna stream” if a stream with a drainage area greater than 1 square mile is found to have “organisms from four taxa of cold water macroinvertebrates.” See Proposed O.A.C. 3745-1-07(F)(4)(b)(ii). Additionally, under Ohio EPA’s Comprehensive Water Rules, a small rivulet with a drainage area less than one mile may also be categorized as a “native cold water fauna stream” if either one reproducing population of coldwater vertebrate (a term which is undefined in the proposed rules, but referenced in Table 7-2 of the proposed rules) or “four taxa of coldwater macroinvertebrates” are found.

Translated to plain English, Ohio EPA’s proposed rule change means that a stream may be re-designated as a cold water stream if either a coldwater vertebrate, presumably a salamander or similar animal, is found in the stream or four types of insects such as those listed on Table 7-2 of the proposed O.A.C. 3745-1-07 can be found during a stream survey. Table 7-2 lists 69 different species of flies (macroinvertebrates) which are proposed to be coldwater fauna. Thus, all that is needed to convert a small stream or rivulet on private property into a “Mitigation Category 4 Stream” is the presence, at any time, of 4 flies listed on Table 7-2 in the vicinity of the stream in question. More significantly, Ohio EPA’s proposed rule eliminates the need for the any coldwater fish to be present before elevating a stream to coldwater status. Instead, a stream may be classified as a coldwater habitat if one species of salamander can be found or four species of flies. Such application has the practical effect of dramatically increasing the likelihood that

streams which are so small that no fish would ever be found will now be re-classified into highly protected coldwater habitats where no disturbances are allowed.

Ohio EPA's proposed re-definition of coldwater habitat streams is not mandated by any Federal law, rule or other overriding directive from U.S. EPA nor does Ohio EPA offer a clear and convincing rationale for such a dramatic expansion of the definition of a coldwater habitat at this time. It is unclear why, in these difficult economic times, such a dramatic change is being made to a regulatory definition of coldwater habitat which has been used for decades in Ohio without any objection from the regulated community.

This proposed definition change produces dramatic impacts when the proposed accompanying Guidance is applied to coldwater native fauna streams, as re-defined in Ohio EPA's proposed rules. The Guidance places cold water native fauna streams in Mitigation Category 4. This category requires the use of a 3:1 mitigation ratio, which requires the creation of new stream mitigation three times that which would be disturbed. Guidance at 7. Moreover, the Guidance makes clear that, in the case of the need to relocate a small rivulet which is characterized as a coldwater native fauna stream under Ohio EPA's proposed rules:

Stream relocation involving Mitigation Category 4 streams is considered to be a severe impact with respect to the existing use of a stream. *Avoidance of these types of impacts is highly recommended.* Guidance at 17 (emphasis added).

If one applies this Guidance in the case of a coldwater native fauna stream, spring or seep in areas of Eastern Ohio where surface mining is conducted, or where support facilities (such as impoundments) are needed to support underground mining, Ohio EPA's proposed rules would virtually prohibit new mining operations, and effectively limit the potential for future coal mining in Ohio. It is clear that Ohio EPA's proposed rule changes will impose a new and, in many cases, an insurmountable hurdle to economic development in Ohio involving construction in the vicinity of a small stream, spring, seep or rivulet which is reclassified as a "native cold water fauna" stream. In any case where any permanent relocation is proposed for a portion of a small stream or rivulet on private property throughout this State, and where that small stream or rivulet can be reclassified as a native cold water fauna stream, the impact will be to block economic development under Ohio EPA's rules and Guidance. As such, the Trade Association Coalition does not support the definition change proposed.

Primary Headwater Habitat Mitigation Requirements

Ohio EPA's Comprehensive Water Rules, including its Mitigation Rule, continues an Ohio EPA staff push for the creation of a new classification of small streams in Ohio—primary headwater habitat streams. Specifically, Ohio EPA's proposed WQ Rules propose to create a category of "primary headwater habitat" for all "small springs, seeps and streams" that contribute "either perennial or seasonal flow to downstream channel segments." See Proposed O.A.C. 3745-1-07(F)(9)(a). As Ohio EPA notes in its proposed rule, "[v]ery often these water bodies are too small to appear on maps of 1:24,000 scale." *Id.* Nevertheless, Ohio EPA proposes a sweeping new requirement for "mitigation" of any disturbances to these tiny springs, seeps and streams.

The Trade Association Coalition objects both to Ohio EPA's intent to create the primary headwater habitat stream classification and to the specific mitigation requirements proposed.

Ohio EPA proposes mitigation requirements for Class I primary headwater habitats, notwithstanding that Ohio EPA describes these small seeps, springs and streams as having "little or no aquatic life potential, except seasonally when flowing water is present for short time periods following precipitation or snow melt." *See* Proposed O.A.C. 3745-1-07(F)(9)(d)(i)(a). Nevertheless, Ohio EPA insists that mitigation be provided for any disturbances to these areas, at a minimum ratio of 1:1, and only after undergoing the new, more expensive mitigation analysis outlined in the Guidance.

Ohio EPA then proposes to define the most protective of primary headwater habitats, the Class III primary headwater habitat, in virtually the same way that it proposes to define a native cold water fauna stream (i.e. by the presence of either a fish, salamander or four flies from Table 7-2 of proposed O.A.C. 3745-1-07). As a consequence, Ohio EPA reinforces its desire to place any seep, spring or stream where four flies can be found to a classification of streams where "avoidance of impact is highly preferred wherever feasible and practicable." *See* Proposed O.A.C. 3745-1-07(F)(9)(d)(iii). Even where Ohio EPA would allow a disturbance to a Class III habitat, a 3:1 mitigation ratio will be required, requiring a property owner (or other applicant) to replace each foot of disturbed Class III primary headwater habitat with 3 feet of new habitat—far more mitigation than is necessary to insure "no net loss" of waters of the State. In short, Ohio EPA wishes to subject economic development and industrial activity in this State to the unguided and unpredictable travel patterns of flies and to impose onerous mitigation requirements on the property owner of any small spring, seep or rivulet where these flies might come to rest for any period of time. It is doubtful that the General Assembly ever intended, let alone authorized, Ohio EPA's jurisdiction under R.C. Chapter 6111 to extend so far. As such, the Trade Association Coalition cannot support this proposed change.

Proposed Expansion of Jurisdiction over Ohio Waters

Ohio EPA's proposed Mitigation Rule incorporates the Guidance's requirements for calculation of mitigation impacts and mitigation requirements. In doing so, the Guidance departs from any recognized definition of stream in calculating the required mitigation for a stream.

First, the Guidance makes clear that:

Preservation of the channel alone will not be accepted without inclusion of the protection of an appropriate adjacent riparian buffer as necessary to ensure protection of the stream. This shall include, at a minimum, the entire flood prone area that is included in the credit calculations for the adjusted flood prone area metric. Guidance at 20.

The Guidance then identifies certain minimum buffer requirements. Guidance at 62. Reference to Table 17 of the Guidance establishes that, even in the case of small rivulets which are to be preserved as part of a mitigation plan, Ohio EPA will require a minimum of 25 feet of preserved buffer area on each side of the stream, with 50 feet proposed as the target buffer area on each

side of a small stream or rivulet. In the case of a larger stream or creek, Ohio EPA will require as much as 150 feet of “buffer” (i.e. half the length of a football field) on each side of a stream or creek as part of a preservation plan in a mitigation proposal, even where an applicant did not propose to disturb that much area on either side of an impacted stream.

Second, the Guidance makes clear that mitigation requirements are to be determined by calculation of the “flood prone area” rather than the length of the watercourse being impacted by the proposed construction. The “flood prone area” is defined by the Guidance to be:

...the area (in units of acres) contiguous to a stream channel or flow path that lies at or below the flood prone elevation, adjusted for soil properties and elevation in accordance with the procedures given in Section 4 or this document.

The calculation of flood prone area does not depend upon the length of stream impacted, but rather must be determined under the Guidance’s requirements only by conducting a complex set of calculations using such data as soils classifications, water elevation in the stream and permeability data. The amount of information required and the level of detailed calculations required will dramatically increase the costs of preparing any application for mitigation of a stream disturbance in Ohio.

Third, the Mitigation Rule seeks to impose prohibitions upon disturbances not only of streams, but also of large areas contiguous to the stream itself. In fact, the Mitigation Rule, and more specifically Ohio EPA’s Guidance document would impose large “no build” zones throughout Ohio, even on the smallest streams and rivulets in the State. There is nothing in R.C. Chapter 6111 which suggests that the General Assembly ever intended to give Ohio EPA such authority nor does Ohio EPA propose to limit this authority where such “no build zones” would effectively cancel underlying mineral interests on a property which are only accessible by disturbing a small surface stream, rivulet or drainage way.

O.A.C. 3745-1-56: Mitigation for Impacts to Streams Authorized Under State WQC

- (C): The Mitigation Rule provides that the Director may reassign a stream to a different mitigation category if there are “technically justified” reasons for making the adjustment, such as downstream adverse impacts that could occur if the stream was classified under its original mitigation category. While this language allows the Director to re-determine the amount of mitigation required based on a stream’s contribution to a cumulative impact to downstream areas, it fails to account for sources completely outside of the applicant’s control which may be causing the impact. Effectively, the Mitigation Rule forces applicants to bear the consequences and the mitigation costs of impacts potentially caused by other sources. Ohio EPA should revise this provision to only require additional mitigation where the Director can demonstrate by a preponderance of evidence that the applicant is in fact responsible for the downstream impacts
- (D)(4)(d): The Mitigation Rule imposes a higher mitigation burden than that required by Federal law. Federal law only requires a 1:1 mitigation ratio, with a potential for a higher

requirement as determined on a case-by-case basis. The Mitigation Rule imposes a graduated step-up of mitigation requirements that culminate in a mandatory 3:1 mitigation credit ratio. These requirements are inconsistent with the Federal regulatory framework that puts the onus on the agency to show on a case-by-case basis, with a documented record, that any mitigation in excess of a 1:1 ratio is necessary. The Mitigation Rule should be changed to be consistent with Federal law.

- (D)(4)(e): The Mitigation Rule punishes a permit applicant for conducting mitigation outside the stream or immediate watershed where the impact occurred by requiring additional mitigation by significant percentages, including up to 40% additional mitigation credits. This additional mitigation goes above and beyond that required by Federal law and adds significant, and potentially prohibitive, costs to projects without justifiable environmental benefit. Ohio cannot afford to lose additional jobs from these projects where such mitigation is not necessary.
- (E): Ohio EPA allows a permit applicant to use a methodology other than the one prescribed in the Guidance only if the applicant makes an affirmative showing to the Director that the methodology used is equally protective as those described in the Guidance. The default position of this Mitigation Rule should not be that the Guidance is the sole correct methodology, but that the Guidance is one potentially methodology when considered in light of site-specific or case-by-case characteristics. Ohio EPA should revise this provision to allow the use of other methodologies.

CONCLUSION AND FOLLOW-UP

There is no need for Ohio EPA to proceed any further with this rulemaking. The agency is not under any legal obligation to do so and has not offered any justification for changing a program that Ohio EPA, itself, has claimed was effective at meeting State and Federal requirements for over thirty years. In light of the lack of any articulated legitimate justification for these Comprehensive Water Rules and the expressed desire of the State to change how agencies adopt rules, Ohio EPA should, at an absolute minimum, delay the adoption of these rules until 2012 so that the new State review process can be utilized. To do so before the effective date of these new requirements is inconsistent with the policies of the current administration and General Assembly and will do nothing but harm the recovery of Ohio's economy.

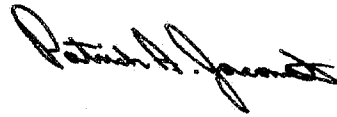
As noted in these comments, the costs of compliance of the numerous new rules will be enormous. The impacts to projects and to Ohio's economy, including small businesses, must be more fully evaluated and considered. To that end, we request that Ohio EPA withdraw the Comprehensive Water Rules and work with all interested to develop succinct and surgical changes necessary to update Ohio's water law to be consistent with Federal requirements.

If you have any questions or would like to engage in dialog with our industry sectors regarding these comments, please coordinate through April Bott, Bott Law Group, at 614-761-2688 or abott@bottlawgroup.com. Thank you in advance for your consideration of these comments.

Sincerely,



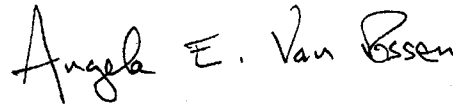
Michael T. Carey
Ohio Coal Association



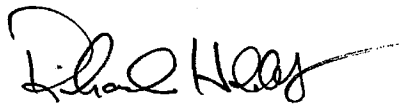
Patrick A. Jacomet
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Association



Clifford Ursich
Flexible Pavements of Ohio



Angela E. Van Fossen
Ohio Contractors Association



Richard Hobbs
The Associated General Contractors of Ohio



Kevin Schmidt
The Ohio Manufacturers' Association

cc: Director Scott Nally
Wayne Struble, Governor's Office
Craig Butler, Governor's Office
Mark Hamlin, Lt. Governor's Office
Members, Ohio General Assembly
Membership of Signatory Trade Associations
April Bott, Bott Law Group
Frank Merrill, Bricker & Eckler
Brian Barger, Brady Coyle & Schmidt

Attachment A to Trade Association Coalition Comments
Ohio EPA's Draft Rule Changes to the Surface Water Quality Rule Package

Comparison Chart

This chart summarizes specific rule changes in Ohio EPA's proposed Comprehensive Water Rules which either conflict with, expand upon, or are more stringent than, Federal law or contain significant provisions not present in Federal law.

Ohio EPA Proposed Rule	Federal Law	Comparison to Federal Law
State Water Quality Permit Program, O.A.C. Chapter 3745-32 et. seq.		
Chapter 3745-32, State Water Quality Permit Program	None.	More expansive than Federal water law. Ohio's new permitting program is more stringent than other states which do not appear to regulate isolated streams, with the exception of potentially North Carolina.
3745-32-01(A), 12-digit hydrologic unit watershed	None.	Definition not present in Federal water law.
3745-32-01(E), discharge of fill material	33 CFR 323.2(f)	More expansive than Federal water law. Contains language not included in Federal law, such as including the addition of fill material into waters of the state "for the purpose of creating uplands, changing the elevation of land beneath the waters of the state, or creating impoundments of water." Also includes bulkheads, fills, and sanitary landfills in examples which are not found in Federal definition. Moreover, definition applies to "waters of the state" which Ohio EPA has significantly expanded beyond Federal "waters of the U.S."
3745-32-01(H), fill material	33 CFR 323.2(e)	More stringent than Federal water law. Ohio definition includes filling of an aquatic area "for any purpose".
3745-32-01(J), local drainage pattern	None.	Definition not present in federal water regulation.
3745-32-01(K), loss of use or elimination of use	None.	Definition not present in Federal water law.

Attachment A to Trade Association Coalition Comments
Ohio EPA's Draft Rule Changes to the Surface Water Quality Rule Package

Comparison Chart

3745-32-01(L), minimal degradation alternative	None.	Definition not present in Federal water law.
3745-32-01(N), non-degradation alternative	None.	Definition not present in Federal water law.
3745-32-01(O), non federally protected waters	None.	More expansive than Federal water law.
3745-32-01(Q), outstanding national resource waters	40 CFR Pt. 132, App. E	More stringent than Federal water law. Defines ONRW to mean surface waters with national ecological or recreational significance whereas Federal law defines them to mean water with "exceptional" recreational or ecological significance.
3745-32-01(S), preferred alternative	None.	Definition not present in Federal water law.
3745-32-01(T), state water quality permit	None.	More expansive than Federal water law.
3745-32-02, applicability	33 USC 1341 et seq.	More expansive than Federal water law.
3745-32-03(A), individual state water quality permit application requirements and procedures	None.	More expansive than Federal water law. Duplicates permit/licensing procedures by requiring applicants for Federal permits/licenses to submit separate application for State permit.
3745-32-03(B)(2)(a), application requirements, correspondence with ACOE	None.	Conflicts with Federal water law. Requires State water quality permit applicants to include correspondence from ACOE regarding jurisdictional status of waters; however, ACOE does not render such determinations for all features which Ohio EPA deems "waters of the state".

Attachment A to Trade Association Coalition Comments
Ohio EPA's Draft Rule Changes to the Surface Water Quality Rule Package

Comparison Chart

3745-32-03(B)(2)(a), application requirements, use attainability analysis	131.10(g),(k)	More expansive than Federal water law. Requires use attainability analysis for streams, such as isolated streams, not covered by Federal Water Pollution Control Act.
3745-32-03(B)(2)(d), application requirements, mitigation proposal	33 CFR 332.7(a), 40 CFR 230.97	More stringent than Federal water law. Requires permit application contain a specific detailed mitigation proposal setting forth the "legal mechanism" for "protection in perpetuity." Federal law requires "long-term protection", not perpetual protection, and ACOE requests, not requires, such protection mechanism. Additionally, Federal law requires "real estate instrument or other available mechanism" not a "legal mechanism". Finally, the proposed regulation provides more stringent protection to mitigation facilities than natural ones without justification.
3745-32-03(B)(4), use attainability analysis	40 CFR 131.10(g),(k)	More expansive than Federal water law. Requires use attainability analysis for streams, such as isolated streams, not covered by Federal Water Pollution Control Act. Also, more expansive than current Ohio EPA required documentation.
3745-32-03(C), criteria for decision by director	33 USC 1341	More expansive than Federal water law.
3745-32-03(G), expiration and renewal	33 USC 1322, 33 CFR 325.2	Inconsistent with Federal water law; more stringent than current practice. Allowing only 1 renewal period of 5 years is more stringent than current practice. In addition, some projects cannot be completed and reclaimed in 10 years.
3745-32-03(J)	33 USC 1313(c)	More expansive than Federal water law.
3745-32-04, state water quality permit and	40 CFR 131.6(d),	Adds complexity to State law.

Attachment A to Trade Association Coalition Comments
Ohio EPA's Draft Rule Changes to the Surface Water Quality Rule Package

Comparison Chart

isolated wetland permit antidegradation review requirements	40 CFR 131.12, 40 CFR 132.1, 40 CFR 132.4(c) and App. E	Contains confusing cross-references and applicability requirements regarding antidegradation.
3745-32-04(D)(2)	None.	More expansive than Federal water law. Federal law does not require cumulative impact analyses for isolated streams.
3745-32-04(E)(3)(a).	33 CFR 332.1	More stringent than Federal water law.
3745-32-04(E)(3)(b)	None	Not present in Federal water law.
3745-32-04(H)	33 CFR 325.2	More stringent than ACOE's procedures; Not present in Federal water law for isolated streams. Ohio EPA requires written public comments be forwarded to applicants and requires applicants to respond to written public comments. ACOE permitting procedures only state that applicants can respond to comments voluntarily. Federal law does not require public involvement process for isolated streams.
Antidegradation Rule, O.A.C. 3745-1-05		
3745-1-05(B)(2)(b)	None.	More expansive than Federal water law.

Attachment A to Trade Association Coalition Comments
Ohio EPA's Draft Rule Changes to the Surface Water Quality Rule Package

Comparison Chart

3745-1-05(C)(1)(c)(ii)	33 USC 2317	Inconsistent with Federal water law.
3745-1-05(C)(6)(a), (c)	None.	Ohio EPA requires antidegradation reviews for wetlands to include an evaluation of impacts and loss of use to ensure there is no net loss of wetland use. Federal law requires – as ACOE goal – no “overall net loss” of “wetlands base”.
3745-1-05(C)(6)(a), (c)	None.	Not present in Federal water law.
Stream Mitigation Rule, O.A.C. 3745-1-56		
Generally	40 CFR Pt. 230, 33 CFR Pt. 332	No separate Federal stream mitigation rule.
3745-1-56(B)	None.	Not present in Federal water law.
3745-1-56(C)	None.	Not present in Federal water law.
3745-1-56(D)	None.	Not present in Federal water law.
3745-1-56(D)(4)(d)	40 CFR 230.93(f), 33 CFR 332.3(f)	More stringent than Federal water law.
3745-1-56(D)(4)(e)	None.	More stringent than Federal water law.
3745-1-56(E)	None.	Not present in Federal water law.

Attachment A to Trade Association Coalition Comments
Ohio EPA's Draft Rule Changes to the Surface Water Quality Rule Package

Comparison Chart

Water Quality Standards, O.A.C. Chapter 3745-1 et. seq.		
3745-1-01(B)	33 USC 1251	More stringent than Federal water law. Applies to "all surface waters in Ohio" which is broader than Federal waters.
3745-1-01(C)(1)(a)	None.	Not present in Federal law.
3745-1-01(C)(3)(a)	40 CFR 131.12	Including potential uses of water in beneficial use designations does not appear in Federal water law.
3745-1-01(D)(1)	40 CFR Pt.132, App. E	More stringent than Federal water law. Federal law requires that "the criteria applicable to the designated use are achieved in the water and that any designated use of a downstream water is protected."
3745-1-01(E)(3)	None.	Not present in Federal water law.
3745-1-02(B)(3), acute aquatic criterion	None.	No similar definition in Federal water law.
3745-1-02(B)(21), cold water fauna	None.	No similar definition in Federal water law.
3745-1-02(B)(31), Ditch maintenance program	None.	No similar definition in Federal water law.
3745-1-02(B)(55), lake	None.	No similar definition in Federal water law.
3745-1-02(B)(86),	No general	No similar definition in Federal water law.

Attachment A to Trade Association Coalition Comments
Ohio EPA's Draft Rule Changes to the Surface Water Quality Rule Package

Comparison Chart

stream	definition.	
3745-1-07(F)(7), limited warmwater habitat	None.	No similar designation in Federal water law.
3745-1-07(F)(8), lake habitat	None.	No similar designation in Federal water law.
3745-1-07(F)(9), primary headwater habitat	None.	No similar designation in Federal water law.
3745-1-07(H), navigation use	None.	Similar language does not appear in Federal water law. Unspecified U.S. EPA guidance cited by Ohio EPA.
3745-1-40, water quality criteria for water supply use designations	40 CFR 131 et seq., 40 CFR 141 et seq., 40 CFR 143.3,	More stringent than Federal standards with respect to phosphorus and silver. Water supply use criteria based on National Primary Drinking Water Regulations ("NPDWR"). The Ohio EPA rules differ from NPDWR in the following ways: (1) Ohio EPA includes a phosphorus standard; there is no Federal phosphorus standard in the NPDWR. (2) Ohio EPA includes a silver standard; at the Federal level, the silver standard is a contained in the non-enforceable Secondary Drinking Water Regulations.
3745-1-42, water quality criteria for the base aquatic life use designation	40 CFR 131.10, allowing states to specify water quality criteria for different uses	More stringent than Federal water law and U.S. EPA's National Recommended Water Quality Criteria with respect to Nonylphenol. No Federal standard that matches the IMZM (maximum within the mixing zone).



January 27, 2012

Director Scott Nally
Ohio Environmental Protection Agency
50 West Town Street, Suite 700
Columbus, Ohio 43216-1049

Dear Director Nally,

We write to you today regarding the Draft Surface Water Rules (rules) that were filed on December 28, 2011. We appreciate Ohio Environmental Protection Agency's (Ohio EPA) hard work and diligence in drafting these rules. However, the groups represented on this letter are disappointed in the manner that the rules were filed as it appears to be in stark contrast with the intent of Governor Kasich's *Common Sense Initiative* (CSI).

As you are aware, Governor Kasich quickly formed CSI shortly after he took office. The purpose of this initiative is to create a transparent regulatory framework that is responsive to the regulated community. The Governor's Executive Order creating CSI specifically stated that Ohio's regulatory processes should be based on transparency, accountability and performance and that the regulated community, Ohio's businesses, should be a partner with state agencies in developing a regulatory framework.

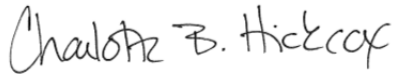
Given the importance that has been placed on the CSI process and the willingness of the Kasich Administration to work with regulated businesses, the signers of this letter, and the thousands of Ohio businesses we represent, find it disturbing that Ohio EPA would file these complex rules just three days before the CSI process took effect. Ohio EPA has acknowledged that these rules are the most extensive revisions in the 30 year history of regulated community including increasing the cost of doing business in Ohio. To file these rules so close to the start of the full CSI program instead of waiting until the first of the year gives the impression that Ohio EPA does not want these rules to go through the increased scrutiny regarding CSI. We strongly believe that Ohio EPA should provide the information necessary to assess the full impact of these rules on the cost of doing business.

Therefore, we respectfully ask that you pull the rules and refile them so that they may go through the full CSI process including increased outreach to stakeholders and deeper analysis of the economic impact. By doing so you will allow the regulated community to play an active role in crafting these rules through substantive discussions and within the spirit of the Governor's vision for the rulemaking process.

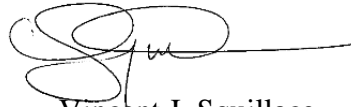
We look forward to working with Ohio EPA throughout this process and we thank you for your attention to this very important issue.

Sincerely,

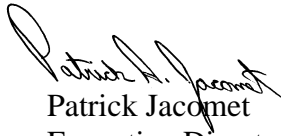




Charlotte Hickcox
Director, Energy and Environmental Policy
Ohio Chamber of Commerce



Vincent J. Squillace
Executive Vice President
Ohio Home Builders Association



Patrick Jacomet
Executive Director
Ohio Aggregates & Industrial Minerals
Association



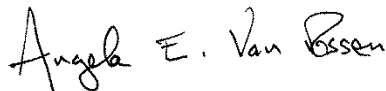
Andrea Ashley
Vice President of Government Relations
Associated General Contractors (AGC) of Ohio



Kevin Schmidt
Director, Public Policy Services
Ohio Manufacturing Association

Cheri A Budzynski

Cheri A Budzynski
Ohio Utility Group



Angela Van Fossen
Director, Legislative & Environmental Affairs
Ohio Contractors Association



Chris Ferruso
Legislative Director
NFIB/Ohio



Dave Sobochan
President
NAIOP

cc: Speaker William Batchelder, Ohio House of Representatives
President Tom Niehaus, Ohio Senate
Senator Frank LaRose, JCARR Chair
Representative Ross McGregor, JCARR Vice Chair
Craig Butler, Ohio Governor's Office
Mark Hamlin, Ohio Lt. Governor's Office



February 6, 2012

Scott Nally
Director
Ohio Environmental Protection Agency
Lazarus Government Center
50 West Town Street, Suite 700
Columbus, OH 43216-1049

RE: Withdrawal of Ohio EPA Surface Water Rule Packages

Dear Director Nally:

On behalf of the Ohio Coal Association, and the other the trade organizations with which we have been working, we collectively would like to express our sincere appreciation for your willingness to consider our comments and concerns with the proposed surface water program rules and take the rather extraordinary step of withdrawing the rules at the public hearing on February 1, 2012. This is an exceptional demonstration of your willingness to take into account all perspectives and concerns, and when necessary, take dramatic action in an effort to support and facilitate the development of effective regulatory programs. We applaud your commitment to these common goals.

As you aptly noted in your statement at the public hearing last week, however, these rules have been circulating in one form or another now for several years. During this period of time, the Ohio Coal Association and the members of our trade association coalition have not only consistently and repeatedly expressed concerns with the rules, including many of the provisions that you withdrew this week, but also a willingness to work with Ohio EPA to re-assess whether there is a sound basis for each requirement and, where there is, to discuss cost effective alternatives to address any pressing regulatory needs. Additionally, we remain concerned with the lack of demonstration that these proposed rule changes are required by federal law. Nothing has changed in this respect. Although the Ohio Coal Association and our trade association coalition remain gravely concerned that the regulatory efforts of Ohio EPA to expand the surface water program and to ratchet down water quality standards presents a clear and present threat of the continued viability of their operations, we acknowledge that there is a critical need at this juncture for open, meaningful, and frank discussion regarding the future of the surface water program in Ohio.

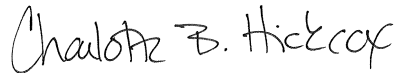
Consequently, under your leadership, we look forward to Ohio EPA demonstrating a genuine willingness to discuss *in a meaningful way* the costs and practical implications of the proposed rules and to work cooperatively with all interested parties and regulated entities to assure there is a sound basis in law and science for each of the Agency proposals. We look forward to engaging with you and your Agency on these important issues before the rule packages are re-filed in any form.

Do not hesitate to contact me at any time, and we look forward to future discussions with the Agency.

Respectfully,



Mike Carey
President
Ohio Coal Association



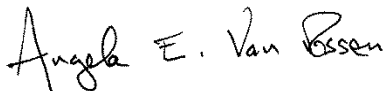
Charlotte Hickcox
Director, Energy and Environmental Policy
Ohio Chamber of Commerce



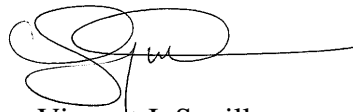
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Director, Legislative & Environmental Affairs
Ohio Contractors Association



Vincent J. Squillace
Executive Vice President
Ohio Home Builders Association

Great Lakes Compact Suggested Changes LSC Draft 129 2010-2 Changes:

1. *Coalition Language:* Line 357: "Facility abandonment" does not include the nonuse or the transfer of a facility's withdrawal and consumptive use capacity unless the nonuse continues for more than thirty-six consecutive, or for a facility withdrawing from Lake Erie or a recognized navigational channel as defined by 1522.10(M), the nonuse continues for fifteen years. The period of nonuse may be extended months and is not extended in accordance with division (B) of section 1522.16 of the Revised Code.

*Need to make same revision to §1522.10 (line 316) for baseline facility abandonment.
2. *Coalition Language:* Line 592: (B) A facility that has a new or increased withdrawal capacity above an applicable threshold amount established in section 1522.12 of the Revised Code if the new or increased maximum daily withdrawal of the facility is less than the applicable threshold amount when averaged over ~~in~~ any ninety-day period;
3. *Coalition Language:* Line 575: (E) The chief shall establish the terms and conditions of an experimental use permit and may suspend ~~revoke~~ such a permit, at any time, if the chief finds that its terms or conditions are being violated or that its terms and conditions are inadequate to avoid significant individual or cumulative adverse impacts on the quantity or quality of the waters and water dependent natural resources of the great lakes basin considered as a whole or the Lake Erie source watershed considered as a whole.
4. *Coalition Language:* Line 718: (B) With regard to the nonuse of a baseline facility's or a facility's withdrawal and consumptive use capacity, not later than sixty days ~~within sixty days~~ after the thirty-six-month time period specified in division (B) or (I) of section 1522.10 of the Revised Code, the owner or operator of the facility may request an extension from the chief to retain the facility's active status.
5. *TNC Language:* Line 529: Insert "as" between "considered" and "a part of the".
6. *Coalition Language:* Line 381: The definition of "waters ~~of the state~~" should be defined as "water means, water or ground or surface water contained within the basin of the Lake Erie source watershed."

* This should be consistent with Section 1.2 of the Compact. Also needs to be corrected throughout the bill where ever "waters of the state" is stated. Should reference only "water". Do not change 1501.32 and 1501.33.
7. *DNR Language:* Line 446: Should read "one thousand feet upstream of the upstream end terminus of the ~~river, stream, or segment that has been~~ designated as a high quality water segment"
8. *Coalition Language:* Line 428: "If a river or stream or segment thereof is designated as a high quality water after the effective date of this section, the threshold established in

division (A)(3)(a) of this section applies to the river or stream or segment thereof and the entire watershed upstream of that river, stream, or segment, provided that the director of environmental protection and the director of natural resources, or their designees, jointly determine that the ~~any~~ proposed withdrawal or consumptive use would cause the high quality water to lose its designation as a high quality water.

9. *Coalition Language:* Line 271: Should read: “Rules adopted under this section shall be developed by the chief of the division of soil and water resources in consultation with a representative stakeholder group and shall be no more stringent than the great lakes-st. Lawrence river basin water resources compact.”

10. *Coalition Language:* Line 894: **Section 3:** (B) The Chief of the Division of Soil and Water Resources shall serve as chairperson of the advisory group. All appointments shall be made to the advisory group not later than forty-five days after the effective date of this section. The advisory group shall make legislative recommendations for the application of Section 4.11.2 of the Great Lakes-St. Lawrence River Basin Water Resources Compact. The recommendations shall be designed to ensure that permits issued under section 1522.12 of the Revised Code, as enacted by this act, will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources of the Great Lakes Basin considered as a whole or the Lake Erie watershed considered as a whole. The recommendations shall not include any change to divisions (B) and (C) of section 1522.13 of the Revised Code, as enacted by this act. In developing its recommendations, the advisory group shall consider the directives in Section 1522.13 divisions (B) and (C) and shall consider recommending an adaptive management approach taking into account scientific and technological advances in accordance with Sections 1.3 and 1.4 of the Compact.

11. *Coalition Language:* Line 934: **Section 5.** For purposes of sections 1522.10 to 1522.21 of the Revised Code, as enacted by this act, any reference to "source watershed" “or Lake Erie source watershed” shall mean the “Lake Erie Watershed considered as a whole”. ~~interpreted in a manner consistent with that term's interpretation as specified in the letter dated December 5, 2005, that was entered into the Congressional Record by then United States Senator George Voinovich on August 1, 2008 (154 Cong. Rec. S8006-S8007 (daily ed. August 1, 2008)(statement of Sen. Voinovich)).~~

12. *DNR Language:* Line 398: **Sec. 1522.12.** (A) For purposes of the compact, not later than one hundred eighty days after the effective date of this section, the chief of the division of soil and water resources shall establish a program for the issuance of permits for the withdrawal and consumptive use of water from the Lake Erie watershed. ~~Upon establishment of the program, the owner or operator of a facility that is not otherwise exempt under section 1522.14 of the Revised Code shall not install or operate the facility or equipment that results in a new or increased withdrawal of any waters of the state within the Lake Erie watershed without first obtaining a withdrawal and consumptive use permit from the chief if the facility meets any of the following threshold criteria:~~

- (1) The facility has a new or increased capacity for withdrawals or consumptive uses from Lake Erie or a recognized navigation channel of at least two and one-half million gallons per day.
- (2) Except as provided in division (A)(3) of this section, the facility has a new or increased capacity for withdrawals or consumptive uses from any river or stream or from ground water in the Lake Erie watershed of at least one million gallons per day.
- (3) (a) Except as provided in division (A)(3)(b) of this section, the facility has a new or increased capacity for withdrawals or consumptive uses from any river or stream in the Lake Erie watershed that is a high quality water of at least one hundred thousand gallons per day. Division (A)(3) of this section does not apply to withdrawals and consumptive uses from outstanding state waters that are designated as such by the environmental protection agency due to their exceptional recreational values.
(b) If a river or stream or segment thereof is designated as a high quality water as of the effective date of this section, the threshold established in division (A)(3)(a) of this section applies to the river or stream or segment thereof and the entire watershed upstream of that river, stream, or segment. If a river or stream or segment thereof is designated as a high quality water after the effective date of this section, the threshold established in division (A)(3)(a) of this section applies to the river or stream or segment thereof and the entire watershed upstream of that river, stream, or segment, provided that the director of environmental protection and the director of natural resources, or their designees, jointly determine that any proposed withdrawal or consumptive use would cause the high quality water to lose its designation as a high quality water. If the directors determine that the proposed withdrawal or consumptive use would not cause the high quality water to lose that designation, the threshold established in division (A)(2) of this section applies to the withdrawal or consumptive use at a point beginning one thousand feet upstream of the terminus of the river, stream, or segment that has been designated as a high quality water or at a point beginning two times the length of the river, stream, or segment that has been designated as a high quality water, whichever is greater.

NEW SECTIONS following 3 (b) above:

Upon establishment of the program, the owner or operator of a facility that is not otherwise exempt under section 1522.14 of the Revised Code shall not install or operate the facility or equipment that results in a new or increased withdrawal of any waters of the state from high quality water as defined in 1522.12 A(3)(a) within the Lake Erie watershed without first obtaining a withdrawal and consumptive use permit from the chief.

Upon establishment of the program, the owner or operator of a facility that is not otherwise exempt under section 1522.14 of the Revised Code and meets the criteria established in 1522 (A)(1) or in 1522.12 (A)(2) shall, upon determination of a complete

application by the chief, be allowed to commence construction without first obtaining a withdrawal and consumptive use permit from the chief.

13. *Coalition Language*: Line 843:

Revised §1522.21

- (A) Before issuance of an order denying the issuance or renewal of a permit under section 1522.12, revoking, or suspending a permit under section 1522.20, denying the transfer of a permit or baseline capacity or removal of a facility from the baseline report under section 1522.15, denying a petition to the chief under section 1522.16, denying a request for confidentiality under section 1522.17, denying the issuance of an experimental withdrawal permit under section 1522.131, or the issuance of an order under section 1522.20, the chief shall issue a proposed order indicating his intent with respect to the foregoing. If the chief receives a written objection from a person who is or will be aggrieved or adversely affected by the issuance of the order, the chief shall conduct an adjudication hearing with respect to the proposed order in accordance with Sections 119.09 and 119.10 of the Revised Code prior to issuance of any order. Any person who is or will be aggrieved or adversely affected by the issuance of the order and who submitted a written objection may be a party to the adjudication hearing. The owner or operator of a facility which has been issued a permit under this Chapter, or an applicant for a permit issued under this Chapter, shall be a party to the defense of the permit in any administrative or legal proceeding in which the owner, operator or applicant's withdrawal and consumptive use permit is at issue
- (B) Any person who is or will be aggrieved or adversely affected by an order of the chief may appeal the order to the court of common pleas of Franklin County or the court of common pleas of the county in which the facility that is the subject of the order is located. The term "aggrieved or adversely affected" shall mean, for purposes of this section [or divisions (A) and (B) of this section], a person with a direct economic or property interest which is or will be adversely affected by an order or rule issued or adopted by the chief. The appeal shall be in writing and shall set forth the action complained of and the grounds upon which the appeal is based. The appeal shall be filed within thirty days of issuance of the order.
- (C) In hearing the appeal, if an adjudication hearing was conducted by the chief in accordance with Sections 119.09 and 119.10 of the Revised Code, the court is confined to the record as certified to it by the chief. The court may grant a request for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the hearing before the chief. If no adjudication hearing was conducted in accordance with Sections 119.09 and 119.10 of the Revised Code, the court shall conduct a hearing de novo.
- (D) If the court finds that the order was lawful and reasonable, it shall make a written order affirming the order. If the court finds that the order was unreasonable or unlawful, it shall make a written order vacating the decision or order or modifying it. The judgment of the court is final unless reversed, vacated, or modified on appeal.
- (E) The filing of an appeal does not automatically suspend the order appealed from. Upon application by the appellant, the court may suspend or stay the order, pending an immediate hearing on the appeal.

- (F) A court of common pleas shall not award attorney's fees to any party to an action under this section.
14. *DNR Language*: Line 498: (G) Provided the proposed new or increased withdrawal is not subject to Prior Notice in Section 4.6 of the compact, the chief shall issue or deny a permit not later than ninety days after receipt of a complete application. The chief shall issue or deny a permit through issuance of an order. The chief shall issue a permit if all applicable criteria for receiving the permit are met as provided in sections 1522.10 to 1522.21 of the Revised Code.
15. *OEC Language*: Line 451: (B) Permits issued under this section shall be issued only for the amount of withdrawal or consumptive use capacity of a facility that meets or exceeds threshold amounts established in division (A) of this section. A permit shall not be required for the portion of the withdrawal and consumptive use capacity of the facility below that threshold amount.
16. *OEC Language*: Line 729: (A) The owner or operator of a facility who is applying for a withdrawal and consumptive use permit shall submit a facility water conservation plan to the chief of the division of soil and water resources that incorporates environmentally sound and economically feasible water conservation measures in accordance with Section 4.11.3 of the compact. If the plan reasonably incorporates environmentally sound and economically feasible water conservation measures applicable to the facility, it shall be deemed to be in compliance with Section 4.11.3 of the compact.
17. *Compact Language*: NEW SECTION: Should a court of competent jurisdiction hold any part of this compact to be void or unenforceable, it shall be considered severable from those portions of the compact capable of continued implementation in the absence of the voided provisions. All other provisions capable of continued implementation shall continue in full force and effect.
18. *Coalition Language*: Line 627: (I) A facility that is exempt from the requirement to obtain a permit under divisions (B) ~~and~~ or (C) of section 1501.33 of the Revised Code.

LSC 129 2010-1

**129th General Assembly
Regular Session
2011-2012**

. B. No.

A BILL

To amend sections 1501.32, 1501.33, 1521.04, 1522.03, 1
and 1522.05, to enact sections 1522.10 to 1522.13, 2
1522.131, and 1522.14 to 1522.21, and to repeal 3
section 1522.07 of the Revised Code to establish a 4
program for the issuance of permits for the 5
withdrawal and consumptive use of waters from the 6
Lake Erie basin. 7

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 1501.32, 1501.33, 1521.04, 1522.03, 8
and 1522.05 be amended and sections 1522.10, 1522.11, 1522.12, 9
1522.13, 1522.131, 1522.14, 1522.15, 1522.16, 1522.17, 1522.18, 10
1522.19, 1522.20, and 1522.21 of the Revised Code be enacted to 11
read as follows: 12

Sec. 1501.32. (A) No person shall divert more than one 13
hundred thousand gallons per day of any waters of the state out of 14
the ~~Lake Erie or Ohio river drainage basins~~ watershed to another 15
basin without having a permit to do so issued by the director of 16
natural resources. An application for such a permit shall be filed 17
with the director upon such forms as the director prescribes. The 18
application shall state the quantity of water to be diverted, the 19
purpose of the diversion, the life of the project for which the 20
water is to be diverted, and such other information as the 21

director may require by rule. Each application shall be 22
accompanied by a nonrefundable fee of one thousand dollars, which 23
shall be credited to the water management fund, which is hereby 24
created. 25

(B) The director shall not approve a permit application filed 26
under this section if the director determines that any of the 27
following applies: 28

(1) During the life of the project for which the water is to 29
be diverted, some or all of the water to be diverted will be 30
needed for use within the ~~basin~~ Ohio river watershed. 31

(2) The proposed diversion would endanger the public health, 32
safety, or welfare. 33

(3) The applicant has not demonstrated that the proposed 34
diversion is a reasonable and beneficial use and is necessary to 35
serve the applicant's present and future needs. 36

(4) The applicant has not demonstrated that reasonable 37
efforts have been made to develop and conserve water resources in 38
the importing basin and that further development of those 39
resources would engender overriding, adverse economic, social, or 40
environmental impacts. 41

(5) The proposed diversion is inconsistent with regional or 42
state water resources plans. 43

(6) The proposed diversion, alone or in combination with 44
other diversions and water losses, will have a significant adverse 45
impact on in-stream uses or on economic or ecological aspects of 46
water levels. 47

The director may hold public hearings upon any application 48
for a permit. 49

(C) ~~Whenever the director receives an application under this 50
section to divert water out of the Lake Erie drainage basin, the 51~~

~~director shall notify the governors and premiers of the other
great lakes states and provinces, the appropriate water management
agencies of those states and provinces, and, when appropriate, the
international joint commission and shall solicit their comments
and concerns regarding the application. In the event of an
objection to the proposed diversion, the director shall consult
with the affected great lakes states and provinces to consider the
issues involved and seek mutually agreeable recommendations.
Before rendering a decision on the permit application, the
director shall consider the concerns, comments, and
recommendations of the other great lakes states and provinces and
the international joint commission, and, in accordance with
section 1109 of the "Water Resources Development Act of 1986," 100
Stat. 4230, 42 U.S.C.A. 1962d-20, the director shall not approve a
permit application for any diversion to which that section
pertains unless that diversion is approved by the governor of each
great lakes state as defined in section 1109(c) of that act.~~

~~(D)~~ The director shall determine the period for which each
permit approved under this section will be valid and specify the
expiration date, but in no case shall a permit be valid beyond the
life of the project as stated in the application.

The director shall establish rules providing for the transfer
of permits. A permit may be transferred on the conditions that the
quantity of water diverted not be increased and that the purpose
of the diversion not be changed.

~~(E)~~(D)(1) Within a time established by rule, the director
shall do one of the following:

(a) Notify the applicant that an application the applicant
filed under this section is approved or denied and, if denied, the
reason for denial;

(b) Notify the applicant of any modification necessary to

qualify the application for approval. 83

(2) Any person who receives notice of a denial or 84
modification under division ~~(E)~~(D)(1) of this section is entitled 85
to a hearing under Chapter 119. of the Revised Code if the person 86
sends a written request for a hearing to the director within 87
thirty days after the date on which the notice is mailed or 88
otherwise provided to the applicant. 89

~~(F)~~(E) The director shall revoke a permit under this section 90
without a prior hearing if the director determines that the 91
quantity of water being diverted exceeds the quantity stated in 92
the permit application. 93

The director may suspend a permit if the director determines 94
that the continued diversion of water will endanger the public 95
health, safety, or welfare. Before suspending a permit, the 96
director shall make a reasonable attempt to notify the permittee 97
that the director intends to suspend the permit. If the attempt 98
fails, notification shall be given as soon as practicable 99
following the suspension. Within five days after the suspension, 100
the director shall provide the permittee an opportunity to be 101
heard and to present evidence that the continued diversion of 102
water will not endanger the public health, safety, or welfare. 103

If the director determines before the expiration date of a 104
suspended permit that the diversion of water can be resumed 105
without danger to the public health, safety, or welfare, the 106
director shall, upon request of the permittee, reinstate the 107
permit. 108

~~(G)~~(F) Any six or more residents of this state may petition 109
the director for an investigation of a withdrawal of water 110
resources that they allege is in violation of a permit issued 111
under this section. 112

The petition shall identify the permittee and detail the 113

reasons why the petitioners believe that grounds exist for the 114
revocation or suspension of the permit under this section. 115

Upon receipt of the petition, the director shall send a copy 116
to the permittee and, within sixty days, make a determination 117
whether grounds exist for revocation or suspension of the permit 118
under this section. 119

~~(H)~~(G) Each permittee shall submit to the director an annual 120
report containing such information as the director may require by 121
rule. 122

~~(I)~~ The director shall issue a permit under division (A) of 123
this section to any person who lawfully diverted more than one 124
hundred thousand gallons per day of any waters of the state out of 125
the Ohio river drainage basin during the calendar year ending 126
October 14, 1984. A person who is eligible for a permit under this 127
division shall file an application under division (A) of this 128
section not later than one hundred eighty days after the effective 129
date of this amendment. 130

A person who applies for a permit under this division need 131
not pay the application fee that is otherwise required under 132
division (A) of this section. In addition, divisions (B) to (H) of 133
this section and rules adopted under section 1501.31 of the 134
Revised Code do not apply to an application that is filed or a 135
permit that is issued under this division. 136

Sec. 1501.33. (A) Except as provided in divisions (B) and 1 137
(C), and (D) of this section, no person shall allow a facility 138
that the person owns or operates to withdraw waters of the state 139
in an amount that would result in a new or increased consumptive 140
use of more than an average of two million gallons of water per 141
day in any thirty-day period without first obtaining a permit from 142
the director of natural resources under section 1501.34 of the 143
Revised Code. ~~The person~~ Prior to developing a new or increased 144

withdrawal or consumptive use capacity that would facilitate a 145
withdrawal requiring a permit under this section, an owner or 146
operator of a facility shall submit an application for a permit to 147
the director on a form ~~he~~ the director prescribes, ~~which~~. The 148
application shall declare and document all of the following: 149

(1) The facility's current withdrawal capacity per day if the 150
withdrawal is to occur at a facility already in operation; 151

(2) The total new or increased daily withdrawal capacity 152
proposed for the facility; 153

(3) The locations and sources of water proposed to be 154
withdrawn; 155

(4) The locations of proposed discharges or return flows; 156

(5) The locations and nature of proposed consumptive uses; 157

(6) The estimated average annual and monthly volumes and 158
rates of withdrawal; 159

(7) The estimated average annual and monthly volumes and 160
rates of consumptive use; 161

(8) The effects the withdrawal is anticipated to have with 162
respect to existing uses of water resources; 163

(9) A description of other ways the applicant's need for 164
water may be satisfied if the application is denied or modified; 165

(10) A description of the conservation practices the 166
applicant intends to follow; 167

(11) Any other information the director may require by rule. 168

Each application shall be accompanied by a nonrefundable fee 169
of one thousand dollars, which shall be credited to the water 170
management fund created under section 1501.32 of the Revised Code. 171

(B) A major utility facility that is subject to regulation 172
under Chapter 4906. of the Revised Code need not obtain a permit 173

under section 1501.34 of the Revised Code. 174

(C)(1) A public water system, as that term is defined in 175
section 6109.01 of the Revised Code, that withdraws waters of the 176
state in an amount that would result in a new or increased 177
consumptive use of more than two million gallons per day need not 178
obtain a permit under section 1501.34 of the Revised Code if any 179
of the following ~~apply~~ applies: 180

(a) The public water system was in operation on ~~the effective~~ 181
~~date of this section~~ June 29, 1988, and no substantial changes are 182
proposed for that system except as specified in division (C)(1)(c) 183
of this section~~+~~. 184

(b) A public water system that is proposed to be constructed 185
or installed, or an existing system for which changes are 186
proposed, encompasses only water distribution facilities~~+~~. 187

(c) A public water system, other than one that encompasses 188
only water distribution facilities, is proposed to be constructed 189
or installed, or substantial changes in the design capacity of an 190
existing system, other than one that encompasses only water 191
distribution facilities, are proposed; the plans submitted for the 192
system to the director of environmental protection under section 193
6109.07 of the Revised Code declare and document the information 194
specified in division (A) of this section and rules adopted under 195
it as determined by the director of natural resources; and the 196
director of environmental protection has applied the criteria 197
specified in division (A) of section 1501.34 of the Revised Code 198
in reviewing and approving the plans as determined by the director 199
of natural resources. 200

(2) Any public water system that withdraws waters of the 201
state in an amount that would result in a new or increased 202
consumptive use of more than two million gallons per day and that 203
does not meet the criteria specified in ~~divisions~~ division 204

(C)(1)(a), (b), or (c) of this section shall obtain a permit under 205
section 1501.34 of the Revised Code. A person who submits plans 206
for such a system under section 6109.07 of the Revised Code may 207
request the director of natural resources in writing to consider 208
those plans as an application under this section. No later than 209
twenty days after receiving the request, the director shall notify 210
the person of one of the following: 211

(a) The plans declare and document the information specified 212
in division (A) of this section and rules adopted under it and are 213
accepted as an application under this section, and the person 214
shall submit to the director the application fee required under 215
division (A) of this section. 216

(b) Additional specified information is necessary before the 217
director can accept the plans as an application. 218

(c) The plans do not meet the requirements of division (A) of 219
this section and rules adopted under it and an application shall 220
be submitted in accordance with this section. 221

(D) A facility that is required to obtain a permit under 222
sections 1522.10 to 1522.21 of the Revised Code need not obtain a 223
permit under section 1501.34 of the Revised Code. 224

Sec. 1521.04. The chief of the division of soil and water 225
resources, with the approval of the director of natural resources, 226
may make loans and grants from the water management fund created 227
in section 1501.32 of the Revised Code to governmental agencies 228
for water management, water supply improvements, and planning and 229
may administer grants from the federal government and from other 230
public or private sources for carrying out those functions and for 231
the performance of any acts that may be required by the United 232
States or by any agency or department thereof as a condition for 233
the participation by any governmental agency in any federal 234
financial or technical assistance program. Direct and indirect 235

costs of administration may be paid from the fund. 236

The chief may use the water management fund for the purposes 237
of administering the water diversion and consumptive use permit 238
programs established in sections 1501.30 to 1501.35 of the Revised 239
Code and the withdrawal and consumptive use permit program 240
established under sections 1522.10 to 1522.21 of the Revised Code; 241
to perform watershed and water resources studies for the purposes 242
of water management planning; and to acquire, construct, 243
reconstruct, improve, equip, maintain, operate, and dispose of 244
water management improvements. The chief may fix, alter, charge, 245
and collect rates, fees, rentals, and other charges to be paid 246
into the fund by governmental agencies and persons who are 247
supplied with water by facilities constructed or operated by the 248
department of natural resources in order to amortize and defray 249
the cost of the construction, maintenance, and operation of those 250
facilities. 251

Sec. 1522.03. ~~(A) Subject to the limitations established in~~ 252
~~division (B) of section 1522.05 of the Revised Code, the director~~ 253
~~of natural resources~~ The chief of the division of soil and water 254
resources shall do both all of the following: 255

~~(1)(A)~~ (A) Adopt rules in accordance with Chapter 119. of the 256
Revised Code for the implementation, administration, and 257
enforcement of ~~this chapter~~ the great lakes-st. Lawrence river 258
basin water resources compact; 259

~~(2)(B)~~ (B) Enforce the great lakes-st. Lawrence river basin water 260
resources compact and take appropriate actions to effectuate its 261
purposes and intent. 262

~~(B) Subject to the limitations established in division (B) of~~ 263
~~section 1522.05 of the Revised Code, any appropriate state agency~~ 264
~~or governmental officer shall enforce the compact and take~~ 265
~~appropriate actions to effectuate its purpose and intent;~~ 266

(C) Adopt rules in accordance with Chapter 119. of the 267
Revised Code for the development, implementation, administration, 268
and enforcement of any permit program established under this 269
chapter. 270

Rules adopted under this section shall be no more stringent 271
than the great lakes-st. Lawrence river basin water resources 272
compact. 273

Sec. 1522.05. ~~(A)~~ Pursuant to Section 9.2 of the great 274
lakes-st. Lawrence river basin water resources compact, the 275
governor may take such actions as are necessary for the initial 276
organization and operation of the great lakes-st. Lawrence river 277
basin water resources council created in Section 2.1 of the 278
compact. Agencies of the state are hereby authorized to cooperate 279
with the council. 280

~~(B)(1) The governor, the department of natural resources, or~~ 281
~~any other agency of the state shall not adopt rules or implement~~ 282
~~any program regulating the use, withdrawal, consumptive use, or~~ 283
~~diversion of water pursuant to Sections 4.10 and 4.12.2 of the~~ 284
~~compact unless the general assembly enacts legislation after the~~ 285
~~effective date of this section authorizing the implementation of~~ 286
~~the program or adoption of rules.~~ 287

~~In addition, the governor, the department of natural~~ 288
~~resources, or any other agency of the state shall not adopt rules~~ 289
~~or implement any mandatory program governing water conservation~~ 290
~~and efficiency pursuant to Section 4.2 of the compact unless the~~ 291
~~general assembly enacts legislation after the effective date of~~ 292
~~the compact authorizing the implementation of the program or~~ 293
~~adoption of rules. However, the governor, the department of~~ 294
~~natural resources, or any other agency of the state may adopt~~ 295
~~rules concerning and may implement voluntary water conservation~~ 296
~~and efficiency programs without authorization from the general~~ 297

~~assembly. Such voluntary programs shall not include any mandatory requirements.~~ 298
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~~(2) Division (B)(1) of this section does not prohibit the effectuation of Sections 4.8 and 4.9 of the compact after the effective date of the compact or prohibit the continued implementation and enforcement by the governor or applicable agencies of this state of laws, rules, or programs regulating the use, withdrawal, consumptive use, or diversion of water that are in effect on or before the effective date of this section. The chief of the division of soil and water resources shall adopt voluntary watershedwide goals, objectives, and standards for water conservation and efficiency consistent with Section 4.2 of the great lakes-st. Lawrence river basin water resources compact.~~ 300
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Sec. 1522.10. As used in sections 1522.10 to 1522.21 of the Revised Code: 311
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(A) "Baseline facility" means a facility identified in the baseline report or a facility added to the baseline report under section 1522.16 of the Revised Code. 313
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(B) "Baseline facility abandonment" means the voluntary and affirmative termination of a baseline facility's withdrawal and consumptive use capacity as listed in the baseline report. 316
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"Baseline facility abandonment" does not include the nonuse or the transfer of a baseline facility's withdrawal and consumptive use capacity unless the nonuse continues for more than thirty-six consecutive months and is not extended in accordance with division (B) of section 1522.16 of the Revised Code. 319
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(C) "Baseline report" means a list of the withdrawal and consumptive use capacities of facilities that was developed for purposes of Section 4.12 of the great lakes-st. Lawrence river basin water resources compact by the department of natural resources and submitted to the great lakes-st. Lawrence river 324
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basin water resources council on December 8, 2009. 329

(D) "Capacity" means the ability of a facility's pumps, 330
pipes, and other appurtenances to withdraw water presented in 331
terms of withdrawal capacity, treatment capacity, distribution 332
capacity, or other capacity-limiting factors. 333

(E) "Compact" means the great lakes-st. Lawrence river basin 334
water resources compact set forth in section 1522.01 of the 335
Revised Code. 336

(F) "Consumptive use" has the same meaning as in section 337
1522.01 of the Revised Code. For purposes of determining a new or 338
increased capacity for consumptive use, "consumptive use" is the 339
use based on a coefficient of consumptive use generally accepted 340
in the scientific community that most accurately reflects the 341
process at a facility or the use based on facility specific data, 342
whichever is more accurate. 343

(G) "Diversion" has the same meaning as in section 1522.01 of 344
the Revised Code. 345

(H) "Facility" means any site, installation, or building at 346
which water withdrawal and consumptive use activities take place 347
or are proposed to take place, that is located at a property or on 348
contiguous properties, and that is under the direction of either a 349
private or public entity. "Facility" includes any site, 350
installation, building, or service area of a public water system 351
at or within which water withdrawal and consumptive use activities 352
take place. 353

(I) "Facility abandonment" means the voluntary and 354
affirmative termination of a facility's withdrawal and consumptive 355
use capacity as listed in a withdrawal and consumptive use permit 356
issued under section 1522.12 of the Revised Code. "Facility 357
abandonment" does not include the nonuse or the transfer of a 358
facility's withdrawal and consumptive use capacity unless the 359

nonuse continues for more than thirty-six consecutive months and 360
is not extended in accordance with division (B) of section 1522.16 361
of the Revised Code. 362

(J) "High quality water" means a river or stream segment that 363
has been designated by the environmental protection agency under 364
Chapter 3745-1 of the Administrative Code as an exceptional warm 365
water habitat, cold water habitat, outstanding state water, or 366
superior high-quality water. 367

(K) "Increased capacity" does not include any capacity that 368
results from alterations or changes made at a facility that 369
replace existing capacity without increasing the capacity of the 370
facility. 371

(L) "Public water system" has the same meaning as in section 372
6109.01 of the Revised Code. 373

(M) "Recognized navigation channel" means that portion of a 374
river or stream extending from bank to bank that is a direct 375
tributary of Lake Erie and that, as of the effective date of this 376
section, is a state or federally maintained navigation channel. 377

(N) "River or stream" means a body of water running or 378
flowing, either continually or intermittently, on the earth's 379
surface or a channel in which such flow occurs. 380

(O) "Waters of the state" has the same meaning as in section 381
1501.30 of the Revised Code. 382

Sec. 1522.11. (A) No person shall install or operate a 383
facility or equipment that results in a new or increased diversion 384
of any waters of the state out of the Lake Erie watershed to 385
another watershed without first obtaining a permit to do so issued 386
by the chief of the division of soil and water resources. An 387
application for such a permit shall be submitted to the chief on a 388
form that the chief prescribes. An application shall be 389

accompanied by a nonrefundable fee of one thousand dollars, which 390
shall be credited to the water management fund created in section 391
1501.32 of the Revised Code. 392

(B) The chief shall approve a permit application submitted 393
under this section only if the chief determines that it meets the 394
criteria required to qualify as an exception to the prohibition 395
against diversions established in Section 4.9 of the compact. The 396
chief shall issue or deny a permit through issuance of an order. 397

Sec. 1522.12. (A) For purposes of the compact, not later than 398
one hundred eighty days after the effective date of this section, 399
the chief of the division of soil and water resources shall 400
establish a program for the issuance of permits for the withdrawal 401
and consumptive use of water from the Lake Erie watershed. Upon 402
establishment of the program, the owner or operator of a facility 403
that is not otherwise exempt under section 1522.14 of the Revised 404
Code shall not install or operate the facility or equipment that 405
results in a new or increased withdrawal of any waters of the 406
state within the Lake Erie watershed without first obtaining a 407
withdrawal and consumptive use permit from the chief if the 408
facility meets any of the following threshold criteria: 409

(1) The facility has a new or increased capacity for 411
withdrawals or consumptive uses from Lake Erie or a recognized 412
navigation channel of at least two and one-half million gallons 413
per day. 414

(2) Except as provided in division (A)(3) of this section, 415
the facility has a new or increased capacity for withdrawals or 416
consumptive uses from any river or stream or from ground water in 417
the Lake Erie watershed of at least one million gallons per day. 418

(3)(a) Except as provided in division (A)(3)(b) of this 419
section, the facility has a new or increased capacity for 420

withdrawals or consumptive uses from any river or stream in the 421
Lake Erie watershed that is a high quality water of at least one 422
hundred thousand gallons per day. Division (A)(3) of this section 423
does not apply to withdrawals and consumptive uses from 424
outstanding state waters that are designated as such by the 425
environmental protection agency due to their exceptional 426
recreational values. 427

(b) If a river or stream or segment thereof is designated as 428
a high quality water as of the effective date of this section, the 429
threshold established in division (A)(3)(a) of this section 430
applies to the river or stream or segment thereof and the entire 431
watershed upstream of that river, stream, or segment. If a river 432
or stream or segment thereof is designated as a high quality water 433
after the effective date of this section, the threshold 434
established in division (A)(3)(a) of this section applies to the 435
river or stream or segment thereof and the entire watershed 436
upstream of that river, stream, or segment, provided that the 437
director of environmental protection and the director of natural 438
resources, or their designees, jointly determine that any proposed 439
withdrawal or consumptive use would cause the high quality water 440
to lose its designation as a high quality water. If the directors 441
determine that the proposed withdrawal or consumptive use would 442
not cause the high quality water to lose that designation, the 443
threshold established in division (A)(2) of this section applies 444
to the withdrawal or consumptive use at a point beginning one 445
thousand feet upstream of the terminus of the river, stream, or 446
segment that has been designated as a high quality water or at a 447
point beginning two times the length of the river, stream, or 448
segment that has been designated as a high quality water, 449
whichever is greater. 450

(B) Permits issued under this section shall be issued only 451
for the amount of withdrawal or consumptive use capacity of a 452

facility that exceeds threshold amounts established in division 453
(A) of this section. A permit shall not be required for the 454
portion of the withdrawal and consumptive use capacity of the 455
facility below that threshold amount. 456

(C) An applicant for a permit shall submit an application to 457
the chief on a form that the chief prescribes. The applicant shall 458
include with the application all of the following: 459

(1) The name, address, and telephone number of the applicant 460
and of a contact person for the applicant; 461

(2) The names, addresses, and other necessary contact 462
information of any other owners and operators of the facility; 463

(3) A description of all of the following: 464

(a) The facility's current withdrawal capacity per day if the 465
withdrawal is to occur at a facility already in operation; 466

(b) The total new or increased daily withdrawal capacity 467
proposed for the facility; 468

(c) The locations and sources of water proposed to be 469
withdrawn; 470

(d) The locations of proposed discharges or return flows; 471

(e) The locations and nature of proposed consumptive uses and 472
the applicable consumptive use coefficient for the facility; 473

(f) The estimated average annual and monthly volumes and 474
rates of withdrawal; 475

(g) The estimated average annual and monthly volumes and 476
rates of consumptive use; 477

(h) The environmentally sound and economically feasible water 478
conservation measures to be undertaken by the applicant; 479

(i) Other ways the applicant's need for water may be 480
satisfied if the application is denied or modified; 481

(j) Any other information the chief may require to adequately consider the application. 482
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(4) A nonrefundable application fee of one thousand dollars the proceeds of which shall be credited to the water management fund created in section 1501.32 of the Revised Code. 484
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(D) Provided that a facility meets all applicable permit conditions, a permit for the facility is valid until the facility is the subject of facility abandonment. Once every five years, the owner or operator of a facility shall certify to the chief that the facility is in compliance with the permit that has been issued for the facility. 487
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(E) No person that is required to do so shall fail to apply for and receive a withdrawal and consumptive use permit. 493
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(F) A permit issued under this section shall include terms and conditions restricting the withdrawal and consumptive use by a facility to amounts not exceeding the capacity of the facility. 495
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(G) The chief shall issue or deny a permit not later than ninety days after receipt of a complete application. The chief shall issue or deny a permit through issuance of an order. The chief shall issue a permit if all applicable criteria for receiving the permit are met as provided in sections 1522.10 to 1522.21 of the Revised Code. 498
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Sec. 1522.13. (A) The chief of the division of soil and water resources shall issue a withdrawal and consumptive use permit for a facility if the chief determines that the facility meets all the criteria established in Section 4.11 of the compact. 504
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(B) In applying the provision of the decision-making standard established in Section 4.11.2 of the compact, the chief shall require that a withdrawal or consumptive use will be implemented so as to ensure that the withdrawal or consumptive use will result 508
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in no significant individual or cumulative adverse impacts on the 512
quantity or quality of the waters and water dependent natural 513
resources of the great lakes basin considered as a whole or of the 514
Lake Erie source watershed considered as a whole. As part of the 515
evaluation of a permit application under Section 4.11.2 of the 516
compact, the chief shall do all of the following: 517

(1) Rely on the best generally accepted scientific methods 518
appropriate for this state derived from professionally accepted 519
resources and practices; 520

(2) Consider the long-term mean annual inflow and outflow of 521
the Lake Erie source watershed; 522

(3) Consider the withdrawal and the portion of the withdrawal 523
that is not returned to the Lake Erie source watershed. 524

(C) Impacts of a withdrawal or consumptive use on the 525
quantity or quality of waters and water dependent natural 526
resources of more localized areas that affect less than the great 527
lakes basin considered as a whole or the Lake Erie source 528
watershed considered as a whole shall be considered a part of the 529
evaluation of whether a proposed withdrawal or consumptive use is 530
reasonable as provided in Section 4.11.5 of the compact. 531

(D) The chief shall not submit an application for a 532
withdrawal and consumptive use permit for regional review under 533
Section 4.5.2(c)(ii) of the compact to the regional body as 534
defined in Section 1.2 of the compact unless regional review is 535
agreed to by the applicant. 536

(E) Nothing in sections 1522.10 to 1522.21 of the Revised 537
Code shall be construed to affect, limit, diminish, or impair any 538
rights validly established and existing under the laws of this 539
state as of December 8, 2008, including, but not limited to, 540
sections 1506.10 and 1521.17 of the Revised Code, or to limit a 541
person's right to the reasonable use of ground water, water in a 542

lake, or any other watercourse in contravention of Section 19b of 543
Article I, Ohio Constitution. 544

Sec. 1522.131. (A) To encourage the development of innovative 545
water use practices and technologies that ensure sustainable water 546
use for industrial, commercial, residential, agricultural, or 547
public purposes, including recreational and cultural resources, as 548
a means to facilitate sustainable economic growth and job 549
creation, the chief of the division of soil and water resources, 550
with the approval of the director of natural resources, may issue 551
experimental use permits. An experimental use permit may be issued 552
in lieu of a withdrawal and consumptive use permit as determined 553
appropriate by the chief. 554

(B) An experimental use permit may be issued if all of the 555
following apply: 556

(1) The experimental use is reasonable based on a 557
consideration of the factors specified in Section 4.11.5 of the 558
compact. 559

(2) The experimental use will use no more water than is 560
necessary to determine the effectiveness and economic feasibility 561
of the experimental use. 562

(3) The experimental use does not reduce the protection 563
afforded the waters and water dependent natural resources of the 564
source watershed as defined in the compact below what is provided 565
in this chapter and rules adopted under it. 566

(C) The chief may refuse to issue an experimental use permit 567
if the chief determines that the proposed use will result in 568
significant individual or cumulative adverse impacts on the 569
quantity or quality of the waters and water dependent natural 570
resources of the great lakes basin considered as a whole or the 571
Lake Erie source watershed considered as a whole. 572

(D) The chief shall issue or deny a permit under this section 573
through issuance of an order. 574

(E) The chief shall establish the terms and conditions of an 575
experimental use permit and may revoke such a permit, at any time, 576
if the chief finds that its terms or conditions are being violated 577
or that its terms and conditions are inadequate to avoid 578
significant individual or cumulative adverse impacts on the 579
quantity or quality of the waters and water dependent natural 580
resources of the great lakes basin considered as a whole or the 581
Lake Erie source watershed considered as a whole. 582

(F) An experimental use permit issued under this section 583
shall expire not later than twenty-four months after the date of 584
issuance of the permit. 585

Sec. 1522.14. The following are exempt from the requirement 586
to obtain a withdrawal and consumptive use permit: 587

(A) A facility or proposed facility that has a withdrawal and 588
consumptive use capacity or proposed capacity below the threshold 589
amounts established in divisions (A)(1) to (3) of section 1522.12 590
of the Revised Code; 591

(B) A facility that has a new or increased withdrawal 592
capacity above an applicable threshold amount established in 593
section 1522.12 of the Revised Code if the new or increased 594
maximum daily withdrawal of the facility is less than the 595
applicable threshold amount when averaged in any ninety-day 596
period; 597

(C) A baseline facility that has not increased its withdrawal 598
and consumptive use capacity beyond the capacity listed in the 599
baseline report and beyond the threshold amounts established in 600
section 1522.12 of the Revised Code; 601

(D) An electric generating facility that increases its 602

consumptive use due to a requirement imposed by a federal 603
regulation that is unrelated to an increase in production at the 604
facility; 605

(E) A facility making a withdrawal and consumptive use from 606
an impoundment of water collected primarily from diffused surface 607
water sources, including a farm pond, golf course pond, nursery 608
pond, stormwater retention pond, or other private pond. The 609
exemption established by this division does not apply to a 610
facility making a withdrawal and consumptive use for industrial 611
purposes or for public water supply purposes. 612

(F) A facility that must temporarily establish a new or 613
increased withdrawal and consumptive use capacity as a result of 614
an emergency for the duration of that emergency that, without the 615
new or increased withdrawal and consumptive use capacity, will 616
result in imminent harm to human health or property; 617

(G) A facility that is establishing a new or is increasing 618
its withdrawal and consumptive use capacity in compliance with an 619
experimental use permit issued under section 1522.131 of the 620
Revised Code; 621

(H) A facility that must temporarily establish a new or 622
increased withdrawal and consumptive use capacity in order to 623
respond to a humanitarian crisis for the duration of that crisis 624
if the new or increased capacity is necessary to assist in the 625
management of that crisis; 626

(I) A facility that is exempt from the requirement to obtain 627
a permit under divisions (B) and (C) of section 1501.33 of the 628
Revised Code; 629

(J) A facility that is subject to regulation under Chapter 630
1514. of the Revised Code; 631

(K) A facility that purchases all of its water from a public 632
water system; 633

(L) A facility that is withdrawing or consumptively using 634
water from an off-stream impoundment that has been substantially 635
filled with a stream withdrawal by a baseline facility or with a 636
stream withdrawal that is subject to a withdrawal and consumptive 637
use permit; 638

(M) A facility that is increasing its withdrawal or 639
consumptive use capacity directly related to supplying a major 640
electric generating facility that is subject to regulation under 641
Chapter 4906. of the Revised Code. 642

Sec. 1522.15. (A)(1) Transfer of a withdrawal and consumptive 643
use permit upon the sale or transfer of a facility may occur so 644
long as the location of the facility, the source of water, and the 645
withdrawal and consumptive use capacities do not change. Transfer 646
of the baseline withdrawal and consumptive use capacity of a 647
baseline facility upon the sale or transfer of the baseline 648
facility may occur so long as the location of the facility, the 649
source of water, and the withdrawal and consumptive use capacities 650
do not change. Transferred capacity of a baseline facility does 651
not require a withdrawal and consumptive use permit. 652

Notice of a transfer shall be provided to the chief of the 653
division of soil and water resources in a manner prescribed by the 654
chief. 655

(2) If a portion of a facility for which a withdrawal and 656
consumptive use permit has been issued is sold or transferred, 657
transfer of the applicable portion of the withdrawal and 658
consumptive use capacity authorized by the withdrawal and 659
consumptive use permit may occur so long as the location of the 660
facility, the source of water, and the total withdrawal and 661
consumptive use capacities do not change. The permittee shall 662
provide notice of such a transfer to the chief in a manner 663
prescribed by the chief. Upon receipt of the notice and if a 664

permit is required for the transferred portion based on the 665
threshold amounts established in divisions (A)(1) to (3) of 666
section 1522.12 of the Revised Code, the chief shall issue a new 667
permit for the transferred portion of the facility to the 668
transferee and a modified permit for the remaining portion of the 669
facility to the original permittee upon a showing that the 670
transferee will meet the conditions of the original permit and all 671
applicable requirements of this chapter and rules adopted under 672
it. Any new permit shall reflect the portion of the withdrawal and 673
consumptive use capacity that has been transferred. 674

(3) If the owner of a baseline facility sells a portion of 675
the baseline facility, transfer of the applicable portion of the 676
withdrawal and consumptive use capacity listed in the baseline 677
report for that facility may occur so long as the location of the 678
facility, the source of water, and the total withdrawal and 679
consumptive use capacities do not change. The owner shall provide 680
notice of such a transfer to the chief in a manner prescribed by 681
the chief. The chief shall not require the owner of the baseline 682
facility or the transferee to obtain a withdrawal and consumptive 683
use permit, but shall update the baseline report to reflect the 684
transfer. 685

(4) The chief may deny a transfer under this section by 686
issuing an order denying the transfer and sending written notice 687
to the permittee and the transferee not later than thirty days 688
after notice of the intended transfer. The chief shall deny the 689
transfer if the chief determines that the transfer will result in 690
noncompliance with this chapter, rules adopted under it, or the 691
terms and conditions of a withdrawal and consumptive use permit. 692

(5) The chief shall remove a facility from the baseline 693
report when the facility is subject to baseline facility 694
abandonment. However, a baseline facility shall not be removed 695
from the baseline report due to the transfer of the facility's 696

<u>baseline capacity.</u>	697
<u>(B) No person shall sell or transfer a withdrawal and</u>	698
<u>consumptive use permit for purposes of evading the requirements</u>	699
<u>established in sections 1522.10 to 1522.21 of the Revised Code.</u>	700
Sec. 1522.16. <u>(A)(1) The owner or operator of a facility may</u>	701
<u>petition the chief of the division of soil and water resources for</u>	702
<u>either of the following:</u>	703
<u>(a) Inclusion in the baseline report if the owner or operator</u>	704
<u>believes that the facility was erroneously excluded from the</u>	705
<u>report;</u>	706
<u>(b) The amendment of the amount of a withdrawal and</u>	707
<u>consumptive use or other information included in the baseline</u>	708
<u>report regarding the facility if the owner or operator believes</u>	709
<u>that the information is incorrect.</u>	710
<u>(2) The chief shall issue an order either approving or</u>	711
<u>disapproving a petition submitted under this section. The chief</u>	712
<u>shall issue the order based on a thorough examination of the</u>	713
<u>circumstances concerning the petition.</u>	714
<u>(3) The chief shall adopt rules in accordance with Chapter</u>	715
<u>119. of the Revised Code that establish procedures for the</u>	716
<u>submission of petitions under this division.</u>	717
<u>(B) With regard to the nonuse of a baseline facility's or a</u>	718
<u>facility's withdrawal and consumptive use capacity, within sixty</u>	719
<u>days after the thirty-six-month time period specified in division</u>	720
<u>(B) or (I) of section 1522.10 of the Revised Code, the owner or</u>	721
<u>operator of the facility may request an extension from the chief</u>	722
<u>to retain the facility's active status. The request shall be made</u>	723
<u>in a manner prescribed by the chief. The chief shall determine the</u>	724
<u>appropriate terms and conditions of the extension, if approved,</u>	725
<u>based on information submitted by the owner or operator. The chief</u>	726

shall issue an order approving or disapproving the request and 727
shall do so in a manner prescribed by the chief. 728

Sec. 1522.17. (A) The owner or operator of a facility who is 729
applying for a withdrawal and consumptive use permit shall submit 730
a facility water conservation plan to the chief of the division of 731
soil and water resources. If the plan reasonably incorporates 732
environmentally sound and economically feasible water conservation 733
measures applicable to the facility, it shall be deemed to be in 734
compliance with Section 4.11.3 of the compact. 735

(B) The chief shall keep confidential any portions of a 736
facility water conservation plan that constitute a trade secret as 737
defined in section 1333.61 of the Revised Code as follows: 738

(1) During the period of time after confidentiality is 739
requested under division (C) of this section and until the chief 740
makes a determination to approve or disapprove the request; 741

(2) On and after the date on which the chief approves a 742
request for confidentiality under division (C) of this section. 743

Any portions of a facility water conservation plan that are 744
kept confidential as provided in this division are not subject to 745
section 149.43 of the Revised Code. 746

(C)(1) The owner or operator of a facility may request that 747
any portions of a facility water conservation plan be kept 748
confidential. The request for confidentiality shall be submitted 749
at the same time that an owner or operator submits a facility 750
water conservation plan under division (A) of this section. The 751
owner or operator shall clearly indicate the information that the 752
owner or operator considers a trade secret and shall label it as 753
"trade secret." Failure to make such a request shall constitute a 754
waiver of the right to prevent public disclosure of the 755
information. A request for confidentiality shall be accompanied by 756

documents that support the request. The documents shall describe 757
the measures that the requestor has taken to safeguard the 758
confidentiality of the information and indicate whether or not 759
others are bound by a confidentiality agreement related to the 760
information. 761

(2) The chief, by order, shall issue a decision regarding the 762
confidentiality request not later than forty-five days after the 763
receipt of the request. Until the decision is issued, the 764
information that is the subject of the request shall be 765
confidential and maintained by the chief in a separate file 766
labeled "confidential." The applicant shall be notified by mail of 767
the decision. 768

Sec. 1522.18. The chief of the division of soil and water 769
resources, on the chief's own initiative or upon written complaint 770
by any person, may investigate or make inquiries into any alleged 771
failure to comply with this chapter, any rule adopted under it, 772
any order issued under it, or the terms and conditions of a permit 773
issued under it. The chief or the chief's duly authorized 774
representative may enter at reasonable times on any private or 775
public property to inspect and investigate conditions relating to 776
any such alleged act of noncompliance and, if necessary, may apply 777
to the court of common pleas having jurisdiction for a warrant 778
permitting the entrance and inspection. 779

Sec. 1522.19. No person shall violate any provision of this 780
chapter, any rule or order adopted or issued under it, or any term 781
or condition of a permit issued under it. 782

Sec. 1522.20. (A)(1) The chief of the division of soil and 783
water resources may issue an order to a person that the chief 784
determines has violated, is violating, or is threatening to 785
violate any provisions of this chapter, rules adopted under it, or 786

permits or orders issued under it. The order shall be effective 787
upon issuance and shall identify the facility where the violation 788
has occurred, is occurring, or is threatened to occur, the 789
specific violation, and actions that the owner or operator of the 790
facility must take to comply with the order. The order shall 791
establish a reasonable date by which the owner or operator must 792
comply with the order. 793

(2) An order issued under division (A)(1) of this section 794
shall be in writing and shall contain a finding of the facts on 795
which the order is based. Notice of the order shall be given by 796
certified mail to the applicable owner or operator of a facility. 797
Notice also shall be provided to a person who initiated a 798
complaint that resulted in the order and shall be posted on the 799
web site of the department of natural resources in a manner 800
prescribed by the chief. 801

(B)(1) The chief, by order, may propose to suspend or revoke 802
a permit issued under this chapter if the chief determines that 803
any term or condition of the permit is being violated. The chief's 804
order shall identify the facility where the violation allegedly 805
occurred, describe the nature of the violation, and prescribe what 806
action the permittee may take to bring the facility into 807
compliance with the permit. The chief shall fix and specify in the 808
order a reasonable date or time by which the permittee must 809
comply. The order shall state that the chief may suspend or revoke 810
the permit if the permittee fails to comply with the order by that 811
date or time. If on that date or time the chief finds that the 812
permittee has not complied with the order, the chief may issue a 813
new order suspending or revoking the permit. 814

(2) The chief or the chief's designee may enter on private or 815
public lands and take action to mitigate, minimize, remove, or 816
abate the conditions caused by a violation that is the subject of 817
an order issued under division (B)(1) of this section. 818

(C) The attorney general, upon written request of the chief, shall bring an action for an injunction or other appropriate legal or equitable action against any person who has violated, is violating, or is threatening to violate any provision of this chapter, any rule or order adopted or issued under it, or any term or condition of a permit issued under it. The attorney general shall bring the action in the court of common pleas of Franklin county or the county where the applicable facility is located. In an action for injunction, any factual findings of the chief presented at a hearing conducted under division (A) of section 1522.21 of the Revised Code is prima-facie evidence of the facts regarding the order that is the subject of the hearing. 819
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(D) A person who violates any provision of this chapter, any rule or order adopted or issued under it, or any term or condition of a permit issued under it is liable to the chief for any costs incurred by the division of soil and water resources in investigating, mitigating, minimizing, removing, or abating the violation and conditions caused by it. Upon the request of the chief, the attorney general shall bring a civil action against the responsible person to recover those costs in the court of common pleas of Franklin county. Moneys recovered under this division shall be deposited in the state treasury to the credit of the water management fund created in section 1501.32 of the Revised Code. 831
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Sec. 1522.21. (A) A person who is issued an order under this chapter, or a rule adopted under it, is entitled to a hearing under Chapter 119. of the Revised Code if the person sends a written request for a hearing to the chief of the division of soil and water resources. The hearing shall be held not later than thirty days after the date on which the notice is received. 843
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(B) A person that has not applied for or been issued a permit 849

under this chapter, but that has a direct economic or property 850
interest that is or may be adversely affected by a decision or 851
order of the chief may appeal the decision or order to the court 852
of common pleas of Franklin county or the court of common pleas of 853
the county in which the facility that is the subject of the 854
decision or order is located. If the court finds that the decision 855
or order was lawful and reasonable, it shall affirm the decision 856
or order. If the court finds that the decision or order was 857
unreasonable or unlawful, it shall vacate the decision or order or 858
modify it. The judgment of the court is final unless reversed, 859
vacated, or modified on appeal. 860

(C) A court of common pleas shall not award attorney's fees 861
to any party to an action under this section. 862

Section 2. That existing sections 1501.32, 1501.33, 1521.04, 863
1522.03, and 1522.05 and section 1522.07 of the Revised Code are 864
hereby repealed. 865

Section 3. (A) The Chief of the Division of Soil and Water 866
Resources, not later than ninety days after the effective date of 867
this section, shall convene an advisory group consisting of the 868
Chief and all of the following: 869

(1) The Chief of the Division of Surface Water in the 870
Environmental Protection Agency or the Chief's designee; 871

(2) The following members appointed by the Chief of the 872
Division of Soil and Water Resources: 873

(a) A representative of a statewide environmental advocacy 874
organization; 875

(b) A water quality expert from the faculty or staff of an 876
Ohio college or university located within the Lake Erie watershed; 877

(c) A representative of a sustainable economic development 878

organization with a primary interest in the Lake Erie watershed.	879
(3) The following members appointed by the President of the Senate:	880
(a) A representative of a statewide business and economic development organization;	881
(b) A representative of an independent business located within the Lake Erie watershed that owns or operates a registered water withdrawal facility.	882
(4) The following members appointed by the Speaker of the House of Representatives:	883
(a) A representative of agribusiness that operates within the Lake Erie watershed;	884
(b) A representative of an independent business located within the Lake Erie watershed that owns or operates a registered water withdrawal facility.	885
(B) The Chief of the Division of Soil and Water Resources shall serve as chairperson of the advisory group. All appointments shall be made to the advisory group not later than forty-five days after the effective date of this section. The advisory group shall make legislative recommendations for the application of Section 4.11.2 of the Great Lakes-St. Lawrence River Basin Water Resources Compact. The recommendations shall be designed to ensure that permits issued under section 1522.12 of the Revised Code, as enacted by this act, will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources of the Great Lakes Basin considered as a whole or the Lake Erie watershed considered as a whole. The recommendations shall not include any change to divisions (B) and (C) of section 1522.13 of the Revised Code, as enacted by this act. In developing its recommendations, the advisory group shall consider recommending an adaptive management	886
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approach taking into account scientific and technological advances 910
in accordance with Sections 1.3 and 1.4 of the Compact. 911

(C) The advisory group shall meet as necessary to accomplish 912
its purpose and shall submit its final recommendations to the 913
Chief of the Division of Soil and Water Resources not later than 914
eighteen months after the effective date of this section. If the 915
advisory group does not reach a consensus regarding its 916
recommendations, the advisory group may submit recommendations 917
representing each of the minority positions within the advisory 918
group. Upon submission of its recommendations, the advisory group 919
shall cease to exist. 920

(D) The Chief shall make legislative recommendations for 921
purposes of Section 4.11.2 of the Compact only after full 922
consideration of the advisory group's recommendations, provided 923
that the advisory group's recommendations are submitted to the 924
Chief not later than eighteen months after the effective date of 925
this section. When making legislative recommendations, the Chief 926
shall consider the economic consequences of determining whether an 927
impact is significant. 928

Section 4. The Chief of the Division of Soil and Water 929
Resources shall add to the list of baseline facilities listed in 930
the baseline report any facility that commenced a water withdrawal 931
after December 8, 2009, but not later than one hundred eighty days 932
after the effective date of this section. 933

Section 5. For purposes of sections 1522.10 to 1522.21 of the 934
Revised Code, as enacted by this act, any reference to "source 935
watershed" shall be interpreted in a manner consistent with that 936
term's interpretation as specified in the letter dated December 5, 937
2005, that was entered into the Congressional Record by then 938
United States Senator George Voinovich on August 1, 2008 (154 939
Cong. Rec. S8006-S8007 (daily ed. August 1, 2008))(statement of 940

Sen. Voinovich)).

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Regulatory Reform Legislative Initiatives 2012

Outreach

Expand the confidentiality offered to businesses seeking compliance assistance from OCAPP

Ohio EPA's Office of Compliance Assistance and Pollution Prevention (OCAPP) currently, under statute, offers confidentiality protection only for small businesses seeking assistance on air permitting. OCAPP is a result of blending/combining what was originally three separate offices/programs (Office of Pollution Prevention, Small Business Assistance Office and the Small Business Assistance Program.) Because of this merger, we frequently work with businesses on a variety of compliance issues, not just air related. The limited confidentiality protection has created a challenging situation (1) in explaining to small businesses why only certain information can be held as confidential and (2) for us in handling records. We feel the lack of full confidentiality is a barrier to businesses in contacting OCAPP for help.

We propose to expand the confidentiality to all programs. We have based our recommended language on other state environmental assistance programs, specifically Indiana's, which we believe is a good model. Their statute provides a good balance between providing the protection to businesses, but also includes safeguards against companies with egregious compliance problems trying to use the program as a shield.

Common Sense Permitting Improvements

Grant the Director authority to issue NPDES permit renewals to facilities in noncompliance

Current authority to the Director is limited and does not allow for an NPDES permit renewal if the applicant is in noncompliance, even if progress is being made toward a resolution. This change would still provide the Ohio EPA director with discretion on renewal issuance for non-compliant applicants, and also all for renewal permits with updated, protective conditions to be issued.

Create mechanism to allow for In Lieu Fee program for wetland mitigation.

We propose to modify the Isolated Wetland Statute (6111.020 - 6111.029) to allow for the creation of In Lieu Fee programs to help facilitate wetland mitigation resulting from impacts to isolated wetlands, and modify ORC 6111.0381 to ensure that it can be used

for the jurisdictional wetlands as well to facilitate wetland mitigation. This program will be an additional tool for those who need to mitigate wetlands on their project site. This will not take the place of the statutorily-mandated avoidance and minimization steps, but be another option once mitigation is required.

Allow temporary storage of Low-Level Radioactive Waste

ORC 3734.027 currently strictly prohibits the acceptance of low-level radioactive waste for transfer, storage, treatment, or disposal by solid waste facilities, infectious waste treatment facilities, and hazardous waste facilities. We continue to have incidents where rad waste shows up at a solid waste landfill. ODH has historically directed the facility to "stage" the material until it decays sufficiently to be disposed at the site. This practice is in conflict with ORC 3734.027, which prohibits a solid waste facility from transferring, storing, treating, or disposing of rad waste. If the generator of the waste can be identified, ODH can authorize the waste to be returned to the generator for storage until it decays sufficiently for disposal. However, the majority of times, when the waste arrives at the landfill, the generator cannot be identified because the waste often comes from a general municipal waste stream which included medical waste from a patient's home.

We propose to revise ORC 3734.027 to allow a solid waste landfill to be authorized by the Ohio Dept. of Health to temporarily store low-level radioactive waste at solid waste landfills. The waste must be stored in such a manner that would remain protective of human health and the environment. This would alleviate the statutory prohibition conflict.

Exempt Coal Combustion Waste from Solid Waste Management District generation fees

In H.B. 153, the biennial budget, we exempted coal combustion waste from disposal fees if that material is disposed of in a municipal solid waste landfill. We did not include an equivalent exclusion for Solid Waste Management District generation fees as we had intended to do in ORC 3734.573. The language is identical to what we included in the budget for disposal fees. The intent is to encourage this material to go to existing landfills. Currently the generators of the waste feel the need to create their own captive disposal sites that are engineered as municipal solid waste facilities and unnecessarily incur the cost of doing so.

Bureau of Underground Storage Tank Regulation/Voluntary Action Program (BUSTR/VAP) (phase 2) language to allow BUSTR sites with a responsible party to be VAP eligible

In H.B. 153, Ohio EPA and the Ohio Department of Commerce/BUSTR changed the statute to allow Class C (orphan) sites to proceed with Corrective Action through Ohio EPA's Voluntary Action Program (VAP). This modification changed both 3746.02 (OEPA) and 3737.87 & 3737.88 (BUSTR). Sites that are affected by this change are "orphaned" sites, such as old gas stations, that do not have a responsible party liable for remediation. Allowing these sites to proceed through Ohio EPA's established VAP

program will allow a third party to remediate the site and potentially reuse the land or create a green space.

This next step addresses those sites that may still have a responsible party liable for the cleanup. It will eliminate the need for a Volunteer under the VAP to have to get a No Further Action (NFA) from BUSTR which can be costly and time – consuming before coming to OEPA with an NFA for the rest of the site.

Good Government

Increase Threshold for use of Scrap Tire Fund for Small tire site clean-up

ORC 3734.85(E) establishes criteria such that an owner of real property, upon which there is located a small accumulation of scrap tires, is not liable for the cost of the removal of the scrap tires. Essentially, this provision allows the state to use Scrap Tire Funds to quickly and efficiently clean up tires on an innocent landowner's property. In Many cases, we are dealing with people who do not have the funds for cleanup; many Times the landowners are elderly people on fixed incomes who have historic dump sites that they may or may not have contributed to. A number of people have purchased property with tires on them, apparently not considering the liability problem. It's quicker and cheaper for Ohio EPA to clean up these sites without having to pursue the enforcement and cost recovery spelled out in the statute.

When the statute was originally written, the number of tires for these small sites was arbitrarily set at 2,000 tires. We would like to increase the number of tire sites that would be eligible for this type of a cleanup by including those sites accumulating no more than 5,000 tires.

Make certified operator testing more accessible

Currently the operator certification tests are offered at one location annually (Columbus). We intend to revise the fee structure to allow for decentralized Operator Certification Testing for Drinking and Waste Water Operators to provide a more geographically-convenient testing option to them.

Change construction and demolition debris (C&DD) language

- Clarify payment of fees for disposal of asbestos

Currently, the C&DD statute requires the payment of fees on the disposal of “construction and demolition debris at a construction and demolition debris facility.” Similarly, the solid waste fee is levied on the disposal of solid waste and the statute specifies that it must be collected on the transfer of solid waste at a solid waste transfer facility or the disposal of solid waste at a solid waste disposal facility.

In addition to the receipt of construction and demolition debris, C&DD facilities can be permitted to receive asbestos (if they have received the appropriate air permit). Some asbestos material is considered to be solid waste, not C&DD. Technically, neither the

C&DD fee nor the solid waste fee statutes address this possibility, and therefore arguably neither fee applies. (This is in contrast to when C&DD is disposed of in a solid waste landfill – the statute clearly specifies that the C&DD fee applies.)

In order to correct this situation, the proposed revisions specify that when asbestos or asbestos-containing material is received at a C&DD facility, the C&DD fees apply. (ORC sections 3714.07 and 3714.073).

- Modify CDD payment of fees to encourage CDD recycling

Management of construction and demolition debris (C&DD) in Ohio is changing. No longer do C&DD owners and operators only dispose of the C&DD they receive. With increasing regularity, the C&DD industry is processing C&DD in an effort to recover recyclable materials, either at the same facility where the landfill is located or at separate recycling operations. Ohio EPA supports the responsible recycling of C&DD in a manner that is protective of public health, safety and the environment. This change will make it clear that C&DD landfills can accept C&DD for recycling and only have to pay fees for the C&DD that is actually disposed in the landfill.

- Add Chapter 3714 to the Statute of Limitations law

This section was omitted when the statute was enacted over 8 years ago and should have been included. We are correcting this with a simple language addition.

- Change the annual hazardous waste reporting requirement to biennial to be consistent with USEPA's requirement.

Currently state law requires reporting annually. US EPA requires a triennial report. We propose to change the requirement to triennial to be consistent with federal regulations.

Revise Solid and Hazardous laws

- Revise the Environmental Background Requirements to apply only to operating facilities

Current statute does not distinguish between transfer of ownership of an operating site/facility and a closed site. We propose to change that statute to clarify that only operating facilities are obligated to comply with the Environmental Background Investigation Unit (EBIU) requirements at the AGO when the property changes ownership.

- Clarify the term "Modification" as used in ORC 3734.41(H) which defines the types of hazardous waste permits subject to scrutiny under ORC 3734.44.

With the enactment of H.B. 435 in 1996, changes were made to Ohio's hazardous waste permitting process for revisions/modifications to generally mirror the federal permit modification process. While the changes eliminated revisions and created different classifications of modifications, the corresponding statute was not changed that

clarified what types of modifications were subject to ORC 3734.44, the compliance history evaluation. We propose to change ORC 3734.41 to make it clear that modifications subject to siting criteria are to be evaluated under ORC 3734.44 as originally enacted in 1988 when the Hazardous Waste Facility Board (HWFB) still existed, but not the other modification classifications.

- *Clarify Ohio EPA's statutory authority to adopt any rule promulgated under RCRA, as amended.*

This statutory change will allow us to adopt rules pursuant to U.S. EPA's requirements under RCRA without first having to seek legislative approval to do so for every new rule-making. In the past, we had to modify the statute to adopt the federal used oil rules and will need to seek legislative approval in order to adopt the federal organic air emission standards for process vents, equipment leaks, tanks, containers and surface impoundments (known as the Subpart AA, BB and CC rules). These organic air emission standards were promulgated in the early 1990s and states are required to adopt these rules to maintain a delegated program. U.S. EPA Region 5 regularly inquires when we will adopt these rules and we continue to tell them we need additional statutory authority.

- *Eliminate "consent to service" requirements for solid waste transport*

The "consent to service" requirement requires persons transporting out-of-state solid waste to an Ohio solid waste facility to complete a consent-to-service document that provides that person's written irrevocable consent to the jurisdiction of Ohio courts. This paperwork must also be submitted to each individual Ohio solid waste facility prior to transport of the waste. The law provides that *"no owner, operator, or employee of a solid waste facility shall accept for treatment, transfer, storage, or disposal at the facility any solid wastes from outside the boundaries of this state unless the facility has received a copy of the consent-to-jurisdiction document..."* Therefore, the law places a burden on the owner, operator, or employee of the Ohio facility to ensure they obtain the consent-to-service document for the driver of that load prior to acceptance of the solid waste and maintain copies of the consent-to-service documents.

Since the initial passage of the "consent to service" requirement in July 1988 to the present, Ohio EPA has not found need to refer to file consent-to-service documents. Whatever usefulness was intended to be served, the past 23 years have demonstrated no significant or practical use by regulators. This is a prime opportunity to accomplish common sense regulatory reform by eliminating an unused statutory requirement.

- *Prohibit Disposal of Secondary Aluminum Production Waste at Municipal Solid Waste Landfills*

Secondary aluminum production wastes are chemically active and when exposed to water, can react and emit toxic, flammable and potentially explosive gases. Secondary aluminum production wastes include dross, salt cake, bag house dust, and shredder waste generated from aluminum smelting operations. Operational problems including

Significant odors, significant leachate generation, high internal landfill gas pressures, high internal landfill temperatures, and unusual subsidence attributed to reactions are known to occur when aluminum production wastes are co-disposed with municipal solid waste.

We want to add language to ORC 3734.02 to prevent the co-disposal of aluminum production wastes and municipal solid waste.

Modify the Infectious Waste Statute to remove dual regulation

Unlike in the late 1980's when Ohio EPA's infectious waste statute was adopted, infectious waste is now heavily regulated by federal agencies as well as OEPA. We seek to amend ORC 3734 to eliminate duplicative oversight, leaving transportation, shipping/labeling and storage requirements to USDOT/PUCO, CDC, OSHA or other federal agencies that have such regulations and to minimize generator management requirements by eliminating the current registration process but retaining simply a notification of generators (excluding households) of infectious waste that includes location information. The statute would not change federal and state safety and transportation requirements such as permitting and licensing of treatment facilities and the prohibition for untreated infectious wastes in landfills.

Create a criminal provision for tampering with Public Water Systems

We are seeking the adoption of statutory provisions similar to those that exist at the federal level (specifically Title 42 Chapter 6A subchapter XII, Part D 300i-1) making it a felony offense to tamper, alter or interfere with the operation of a public water system. Tampering with a public water system, regardless of intent, may present a significant threat to public health and safety. Even events perceived as "just vandalism" can disrupt the provision of water because of uncertainty as to whether water quality has been affected or not. Making this a criminal act provides a strong basis to engage law enforcement in these incidents.

We propose adding criminal provisions for knowing and reckless violations of the safe drinking water regulations. Most other environmental programs have criminal provisions, but drinking water does not. This change would add misdemeanor and felony authorities to bring the drinking water program in line with other environmental programs.



At a Glance

Why We Did This Review

We sought to determine (1) whether the U.S. Environmental Protection Agency (EPA) set clear national performance benchmarks for state enforcement programs, and (2) to what extent EPA headquarters holds regions accountable and supports them to ensure that all state enforcement programs protect human health and the environment. The scope of our review included selected programs under three statutes: Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act.

Background

EPA is the steward of national environmental protection, but states serve as the first line of enforcement in most cases. Past reviews identified widespread problems with state enforcement.

For further information, contact our Office of Congressional and Public Affairs at (202) 566-2391.

The full report is at:
www.epa.gov/oig/reports/2012/20111209-12-P-0113.pdf

EPA Must Improve Oversight of State Enforcement

What We Found

EPA does not administer a consistent national enforcement program. Despite efforts by the Office of Enforcement and Compliance Assurance (OECA) and the EPA regions to improve state enforcement performance, state enforcement programs frequently do not meet national goals and states do not always take necessary enforcement actions. State enforcement programs are underperforming: EPA data indicate that noncompliance is high and the level of enforcement is low. EPA does not consistently hold states accountable for meeting enforcement standards, has not set clear and consistent national benchmarks, and does not act effectively to curtail weak and inconsistent enforcement by states.

OECA has made efforts to improve state performance and oversight consistency, but EPA does not manage or allocate enforcement resources nationally to allow it to intervene in states where practices result in significantly unequal enforcement. As a result, state performance remains inconsistent across the country, providing unequal environmental benefits to the public and an unlevel playing field for regulated industries. By establishing stronger organizational structures, EPA can directly implement a national enforcement strategy that ensures all citizens have, and industries adhere to, a baseline level of environmental protection. EPA could make more effective use of its \$372 million in regional enforcement full-time equivalents by directing a single national workforce instead of 10 inconsistent regional enforcement programs.

What We Recommend

We recommend that EPA establish clear national lines of authority for enforcement that include centralized authority over resources; cancel outdated guidance and policies, and consolidate and clarify remaining enforcement policies; establish clear benchmarks for state performance; and establish a clear policy describing when and how EPA will intervene in states, and procedures to move resources to intervene decisively, when appropriate, under its escalation policy.

Based on EPA's suggestion in its response to our draft report, we recommend that EPA develop a state performance scorecard. EPA did not agree with recommendation 1, agreed with recommendations 2 through 4, and neither agreed nor disagreed with recommendation 5. All recommendations are unresolved pending EPA's corrective action plan.

EPA's Air Toxics Standards Major and Area Source Boilers and Certain Incinerators Overview of Changes and Impacts

ACTION

On December 2, 2011, the U.S. Environmental Protection Agency (EPA) proposed changes to standards that would reduce emissions of air pollutants from existing and new boilers and commercial and industrial solid waste incinerators (CISWI).

Using a wide variety of fuels, including coal, oil, natural gas and biomass, boilers are used to power heavy machinery, provide heat for industrial and manufacturing processes in addition to a number of other uses. EPA's boiler proposals recognize the diverse and complex range of uses and fuels and tailors standards to reflect the real world operating conditions of specific types of boilers. The CISWI proposal recognizes the important relationship to the Non-Hazardous Secondary Materials (NHSM) rule, which defines solid waste for purposes of the air rules. The NHSM rule helps categorize units as either boilers or CISWI units. This fact sheet provides an overview of the benefits of the rules and highlights key changes the agency has made.

BACKGROUND

- These rules are developed under sections 112 and 129 of the Clean Air Act, two provisions that target toxic air pollution.
- Under these sections, EPA is required to set technology-based standards for toxic air pollutants, reflective of levels achieved by the best performing existing sources.
- There are more than 1.5 million boilers in the U.S.
- For 86 percent of all boilers in the United States, these rules would not apply, because these boilers burn clean natural gas at area source facilities and emit little pollution.
- For almost 13 percent of all boilers in the United States, EPA's standards would continue to rely on practical, cost-effective work practice standards to reduce emissions.
- For the highest emitting 0.4 percent of all boilers in the United States, including boilers located at refineries, chemical plants, and other industrial facilities, EPA is proposing more targeted revised emissions limits that provide industry practical, protective, cost-effective options to meet the standards.
- For CISWI units, EPA is proposing revised emission limits for certain units that reflect the best performing commercial and industrial waste incineration units.
- Existing boilers would have three years to comply with these standards and can obtain an additional year beyond that, if technology cannot be installed in time.
- Existing incinerators would need to comply no later than three years after EPA approves a state plan or five years after the publication date, whichever is earlier.

Health Benefits and Costs of the Boiler and CISWI Rules

- EPA has worked throughout this reconsideration process to fully consider all of the information provided to the agency. Based on its review of this information, the agency is proposing to establish standards that are achievable, protective and cost-effective.

- Overall, the changes have retained the significant health benefits and resulted in rules that are simpler to implement. Today's reconsideration also maintains the dramatic cuts in the cost of implementation that were achieved in the final rules issued in March.
- The proposed changes would cut emission of pollutants such as mercury, particle pollution, sulfur dioxide, dioxin, lead, and nitrogen dioxide.
- These pollutants can cause a range of dangerous health effects - from developmental disabilities in children to cancer, heart disease and premature death.
- The proposed standards would have direct benefits to many communities where people live very close to these units.
- Together, the standards will avoid up to 8,100 premature deaths, 5,100 heart attacks, and 52,000 asthma attacks.
- EPA estimates that Americans would receive 12 to 30 dollars in health benefits for every dollar spent to meet the proposed standards.
- The proposed standards reflect the latest and best information provided during the public comment period and after the final standards were issued in March.
- EPA will continue the dialogue on these important standards throughout the public comment period, and encourages stakeholders to provide any additional data that may help better target these standards.

Major and Area Source Boiler Rules

Based on public comments and additional data provided after the rules were finalized, EPA is proposing some significant changes to the required air toxics standards for boilers and incinerators.

- **Area Source Boilers:** Due to how little these sources emit, EPA is continuing to require work-practice standards, which include routine maintenance and tune-ups for 98 percent of area source boilers covered by the proposal. Only 2 percent of area source boilers would need to meet emissions limits. The costs and benefits of the standards remain unchanged.
 - **Initial Tune-ups:** To increase flexibility for these sources: EPA is proposing to create additional subcategories and require initial compliance tune-ups after two years instead after the first year to give facilities ample time to comply with the standards.
 - **Seasonal Use Area Source Units:** EPA is proposing to require seasonal operators to conduct tune-ups every five years instead of every other year. These units are operated less frequently and have less of a need to conduct tune-ups than boilers that are operated year-round.
- **Major Source Boilers:** There are approximately 14,000 major source boilers in the US. Eighty-eight percent of those would be required to conduct periodic tune-ups. Twelve percent would be required to take steps to meet emission standards if they do not already meet the standards. Based on additional data provided after the agency issued final standards in March, EPA is proposing to:

- **Create new subcategories for light and heavy industrial liquids** to reflect design differences in the boilers that burn these fuels. This change would improve the standards' achievability, without decreasing public health protections.
- **Set new emissions limits for PM** that are different for each solid fuel subcategory (e.g., biomass, coal) to better reflect real-world operating conditions.
- **Set new emissions limits for carbon monoxide** based on newly submitted data that shows CO emissions from boilers vary greatly. EPA is proposing to set new limits to more adequately capture that variability.
- **Allow alternative total selective metals emission limits** to regulate metallic air toxics instead of using PM as a surrogate, allowing more flexibility and decreasing compliance costs for units that emit low levels of HAP metals.
- **Replace numeric dioxin emissions limits with work practice standards** to reflect a more robust analysis that shows dioxin emissions are below levels that can be accurately measured.
- **Increase flexibility in compliance monitoring** to remove continuous emissions monitoring requirements for particle pollution for biomass units and to propose carbon monoxide limits that are based on either stack testing or continuous monitoring.
- **Revise emissions limits for units located outside the continental United States** to reflect new data and to better reflect the unique operating conditions associated with operating these units.
- **Continue to allow units burning clean gases** to qualify for work practice standards instead of numeric emissions limits, maintaining flexibility and achievability.

CISWI

Based on public comments, additional data provided, and adjusting the methodology EPA used to develop the final rules, the agency is revising emission limits including those for dioxin and mercury. EPA further clarified what units would fall under the definition of CISWI. EPA also revised some monitoring requirements, which would provide facilities with more flexibility in achieving standards and lower compliance costs.

EPA is also proposing revisions to its final rule which identified the types of non-hazardous secondary materials that can be burned in boilers or solid waste incinerators. Following the release of that final rule, stakeholders expressed concerns regarding the regulatory criteria for a non-hazardous secondary material to be considered a legitimate, non-waste fuel, and how to demonstrate compliance with those criteria. To address these concerns, EPA's proposed revisions provide clarity on what types of secondary materials are considered non-waste fuels, and greater flexibility. The proposed revisions also classify a number of secondary materials as non-wastes when used as a fuel and allow for a boiler or solid waste operator to request that EPA identify specific materials

as a non-waste fuel.

BACKGROUND

In March 2011, EPA published a notice stating that the agency intended to reconsider certain aspects of the boiler and commercial and industrial solid waste incinerator rules. EPA also received more than 50 petitions for reconsideration from industry, states, and environmental groups. Based on these petitions, the agency's own reconsideration and on the additional information industry provided, EPA is proposing important changes to the March 2011 standards. This proposed reconsideration would maintain public health protections through significant reductions in toxic air emissions, including mercury and soot, while increasing the flexibility, consistency and achievability of these standards.

EPA will accept public comment on these standards for 60 days following publication in the Federal Register. EPA intends to finalize the reconsideration in Spring 2012.

HOW TO COMMENT

- The EPA will accept comment on the proposals for 60 days after publication in the Federal Register. Comments, identified by Docket ID Number EPA-HQ-OAR-2002-0058 (boiler major) EPA-HQ-OAR-2008-0790 (boiler area), Number EPA-HQ-OAR-2003-0119 (CISWI) may be submitted by one of the following methods:
 - www.regulations.gov: follow the on-line instructions for submitting comments.
 - E-mail: Comments may be sent by electronic mail (e-mail) to a-and-r-Docket@epa.gov.
 - Fax: Fax your comments to: (202) 566-9744.
 - Mail: Send your comments to: Air and Radiation Docket and Information Center, Environmental Protection Agency, Mail Code: 2822T, 1200 Pennsylvania Ave., NW, Washington, DC 20460.
 - Hand Delivery or Courier: Deliver your comments to: EPA Docket Center, 1301 Constitution Ave., NW, Room 3334, Washington, DC 20004. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.