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Client Alert: Ohio EPA Seeks to Amend Regulations Governing Variances of Water Quality Standards for Point Sources

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On July 31, 2020, Ohio EPA issued an Early Stakeholder Outreach¹ for revisions to Ohio Administrative Code ("OAC") 3745-1-38 Variances from water quality standards for point sources. Comments on this rulemaking are due **August 31, 2020**. A copy of the Early Stakeholder Outreach can be found [here](#).

What Is the Purpose of the Current Rule?

Under Ohio EPA's water quality standards regulations, the "director may grant a variance to a water quality standard ... in a national pollutant discharge elimination system (NPDES) permit"² for an initial time period of five years.³ A variance may be granted if certain conditions are met:

- If data and information provided by the permittee or information independently available to the director indicates that attainment with a water quality standard is not feasible because: (1) naturally occurring pollutant concentrations prevent attainment of a water quality standard; (2) certain flow conditions prevent attainment of a water quality standard; (3) human-caused conditions or sources of pollution prevent attainment of a water quality standard; (4) dams, diversions, or other modifications preclude attainment of a water quality standard; (5) physical conditions related to natural features of a water body preclude attainment of a water quality standard; or (6) controls more stringent than those required by CWA 301(b) and 306 would result in substantial and widespread economic and social impact.⁴
- The permittee demonstrates that the requested variance complies with the antidegradation requirements in Ohio Adm.Code 3745-1-05.⁵

What Revisions Is Ohio EPA Considering?

Ohio EPA intends to update the multiple discharger mercury variance conditions and add a multiple discharger ammonia variance for lagoon systems.

Ohio EPA also is considering revisions to this regulation to address the federal water quality standard variance requirements adopted in 2015 at [40 CFR 131.14](#). U.S. EPA adopted this provision after finding the states lacked consistency regarding how the states granted variances. Ohio EPA intends to amend Ohio Adm.Code 3745-1-38 to be consistent with the federal requirements. This will result in some significant changes to Ohio EPA's current process for approving or denying variance requests.

Ohio EPA's current review of variances provides for public notice and comment on the decision regarding granting the variance.⁶ Once the variance is incorporated into an NPDES permit, the permit is also subject to public notice and comment.⁷ However, the variance is not promulgated as a separate provision of the water quality standards. Under the 2015 federal rule, each variance (individual or multiple discharger) must be promulgated as a provision of the water quality standards and is subject to the triennial review of the water quality standards.⁸

Ohio EPA's current regulations require that the information relied upon to grant a variance must be available to the director of U.S. EPA. Under the 2015 federal rule, the variance must be approved by U.S. EPA.

Finally, there is increased documentation that must be submitted to U.S. EPA for approval or disapproval of the variance.

At this time, Ohio EPA has not issued draft language regarding revisions to OAC 3745-1-38. However, any revisions to the variance process could lead to increased regulatory burden on permittees and could lengthen the timeframe for promulgating a variance and implementing it into an NPDES permit. This could be problematic when a variance is needed to avoid violating a water quality standard. It could also lead to increased regulatory costs when seeking a permit.

If you have any questions about this early stakeholder outreach, contact [Cheri Budzynski](#) at cbudzynski@shumaker.com or 419.321.1332.

¹"The first step in the rule-making process is for Ohio EPA to identify that a rule needs to be amended, rescinded, or created. In response to EO 2011-01K, Ohio EPA has added an additional step to ensure stakeholders are brought into the rule process as early as possible. This additional interested party notification and request for information will allow for early feedback before the rule language has been developed by the Agency." Early Stakeholder Outreach – Variances from water quality standards for point sources (OAC 3745-1-38).

² OAC 3745-1-38(A).

³ OAC 3745-1-38(B).

⁴ OAC 3745-1-38(C)(1).

⁵ OAC 3745-1-38(C)(2).

⁶ OAC 3745-1-38(E).

⁷ R.C. §119.03.

⁸ Clean Water Act §303(c)(1) requires states to review water quality standards every three years and revise them when necessary.