

Hearing Summary

Rule Package: Operator Certification Rules

Original filing date: April 2, 2018

Public comment start date: April 2, 2018

Public comment end date: May 3, 2018

Public hearing date: May 3, 2018

List of Rules: 3745-7-01, 3745-7-02, 3745-7-03, 3745-7-04, 3745-7-06, 3745-7-07,
3745-7-09, 3745-7-10, 3745-7-11, 3745-7-12, 3745-7-13, 3745-7-15,
3745-7-17, 3745-7-18, 3745-7-19, 3745-7-20 3745-7-21

Were there any participants in this public hearing beyond Ohio EPA staff or JCARR staff?

☒ Yes

☐ No

Were there comments received during the public comment period outside of those presented at this hearing?

☒ Yes

☐ No

This hearing summary has been compiled to meet the requirements of Section 119.03 of the Revised Code.

This hearing summary includes this cover sheet and the following attachments:

1. **Attachment A** - A copy of the public notice for this hearing.
2. **Attachment B** - A copy of the sign-in sheet for this hearing.
3. **Attachment C** - A copy of the script read into the record to begin and end the hearing.
4. **Attachment D** - A copy of the public hearing transcribed.
5. **Attachment E** - A copy of the response to comments.

Ohio EPA's response to comments document includes the comments received, who commented, the agency response to comments, and a statement of whether or not the rule was changed due to the comments.



**BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY**

April 2, 2018

Public Notice: Proposed Rulemaking Governing Operator Certification

Notice is hereby given that the Ohio Environmental Protection Agency, Division of Drinking and Ground Waters (DDAGW) proposed revisions to the rules in Chapter 3745-7 of the Ohio Administrative Code (OAC) and proposed the addition of a new rule to the chapter. The proposed amendments are, in part, a result of the five-year rule review requirements of Section 106.03 of the Ohio Revised Code (ORC).

The proposed new rule establishes requirements for contracted professional operators and contract operations companies. A complete list of the proposed revisions to the existing rules in Chapter 3745-7 of the OAC is included in the Business Impact Analysis. Significant revisions include the following:

- Amending language so that operators are referred to as “professional operators”.
- Modifying the definition of operating experience to limit the amount of laboratory, pre-treatment, collection, distribution, construction inspection and engineering design experience that is allowed to be counted.
- Adding a definition of population.
- Adding requirements for a minimum number of visits by an operator of record to distribution and sewerage systems.
- Establishing a requirement that all exam applicants and professional operators applying for renewal need to document that they reviewed the new “Ohio EPA Professional Operator Certification Training” course.
- Specifying the acceptable formats for record keeping.
- Establishing that renewal applications need to be submitted electronically starting with certificates that expire on December 31, 2018.
- Establishing that renewal applications are due by November 30th of the year the certification expires.
- Revising the notification requirements and responsibilities of backup operators.
- Revising the requirements for training providers.

- Requiring training providers to provide Ohio EPA with attendance records.
- Establishing that failure to document arrival and departure times constitutes a violation of the minimum staffing requirements.

A public hearing pursuant to ORC §106.03 will be conducted on May 3, 2018 beginning at 10 am in Conference Room A at the Ohio EPA, Lazarus Government Center, 50 West Town Street, Columbus, Ohio. All interested persons are entitled to attend or be represented and give their written or oral comments on this proposed rule-making. A presiding officer will be present until all interested persons have been heard.

To facilitate scheduling of oral presentations, persons intending to give testimony at the hearing should ensure that Ohio EPA receives notice of such intent by May 2, 2018, 5:00 p.m. Persons who provide Ohio EPA with prior notice will be heard ahead of persons who register at the hearing. **All visitors to Ohio EPA must register at the Security desk in the lobby upon arrival. Please bring photo identification (such as a valid driver's license). For security reasons, visitors are required to wear their badge at all times while in the building. Please arrive early to complete these procedures.** To provide notice of intent to give oral comments at the public hearing, contact Colin White by mail at Ohio EPA, DDAGW, Lazarus Government Center, 50 West Town Street, Suite 700, Columbus, Ohio 43215, or by phone at (614) 644-2759.

In order to ensure that written comments are considered as part of the official record of this hearing, written comments must be received by Ohio EPA by the close of business May 3, 2018. Written comments on the proposed rules may be given to the presiding officer during the hearing, sent by mail to Colin White at the address above, or sent by email to the following address ddagw_rulecomments@epa.ohio.gov.

To obtain a copy of the proposed rules, contact Colin White at Ohio EPA at (614) 644-2759 or email at Colin.White@epa.ohio.gov. Please request the "Revised OpCert Rules" and be sure to include your name, telephone number, and complete mailing address. There is no charge for proposed rules. The proposed rules will be available on the Agency web page until their adoption or withdrawal. They can be found at <http://epa.ohio.gov/ddagw/rules.aspx> on the "Proposed Rules" tab.

Comments can be submitted in hard copy to the following address: "Ohio Environmental Protection Agency, DDAGW, P.O. Box 1049, Lazarus Government Center, Columbus, Ohio 43216-1049, Attn: Colin White" or by email to ddagw_rulecomments@epa.ohio.gov. Comments should be received at the above address by close of business, May 3, 2018.



SIGN-IN SHEET

Subject: DDAGW Operator Certification Rules

County: Statewide

Date: May 3, 2018

PLEASE PRINT PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME: CHRISTOPHER R. SCHRUFF E-MAIL: cschraff@porterwright.com

MAILING ADDRESS: PORTER, WRIGHT, 41 S. HIGH STREET

CITY: COLUMBUS STATE: OHIO ZIP: 43215

TELEPHONE: 614-227-2097

NAME: STEVE CANTER E-MAIL: SCANTER@ENVENG.COM

MAILING ADDRESS: 13 CHEROKEE TRL.

CITY: NEW RICHMOND STATE: OH ZIP: 45157

TELEPHONE: (513) 553-2707

NAME: John Beckman E-MAIL: John@Besco.co

MAILING ADDRESS: 4259 Armstrong Blvd

CITY: BATAVIA STATE: OH ZIP: 45103

TELEPHONE: 513-509-6723

NAME: Wm Dowling E-MAIL: wdowling@dowlingmedication.com

MAILING ADDRESS: 2072 N. Penn Ad

CITY: AKRON STATE: OH ZIP: 44333

TELEPHONE: 330-607-5144

NAME: _____ E-MAIL: _____

MAILING ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

TELEPHONE: _____

NAME: _____ E-MAIL: _____

MAILING ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

PHONE: _____

Submitted
Written
Comments

Submitted
Written
Comments



SIGN-IN SHEET

Subject: DDAGW Operator Certification Rules

County: Statewide

Date: May 3, 2018

PLEASE PRINT PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME: Dan Ullman E-MAIL: danullman@wineco.com
MAILING ADDRESS: 6141 Centre Park Dr
CITY: West Chester STATE: OH ZIP: 45069
TELEPHONE: 513-755-8050

NAME: Tony Vogel E-MAIL: Tony.Vogel@fairfieldcountyohio.gov
MAILING ADDRESS: 2972 Grace Drive
CITY: LANCASTER STATE: OHIO ZIP: 43130
TELEPHONE: 740-652-7021

NAME: _____ E-MAIL: _____
MAILING ADDRESS: _____
CITY: _____ STATE: _____ ZIP: _____
TELEPHONE: _____

NAME: _____ E-MAIL: _____
MAILING ADDRESS: _____
CITY: _____ STATE: _____ ZIP: _____
TELEPHONE: _____

NAME: _____ E-MAIL: _____
MAILING ADDRESS: _____
CITY: _____ STATE: _____ ZIP: _____
TELEPHONE: _____

NAME: _____ E-MAIL: _____
MAILING ADDRESS: _____
CITY: _____ STATE: _____ ZIP: _____
TELEPHONE: _____

DDAGW Operator Certification Rules Hearing

5/3/18

My name is Mary McCarron. I am with the Public Interest Center. I will be presiding over today's public hearing.

Thank you for taking time to attend this hearing before Ohio EPA. The purpose of the hearing today is to obtain comments from any interested person regarding Ohio EPA's proposed rules.

Ohio EPA Division of Drinking and Ground Waters is proposing to amend rules of the Ohio Administrative Code chapter 3745-7. These rules address requirements of the operator certification program.

These rules have been filed with the Joint Committee on Agency Rule Review. Copies of the rules are available for public review at Ohio EPA's Columbus Office and on our website.

All interested persons are entitled to attend or be represented, and to present oral and/or written comments concerning the proposed rules. All written and oral comments received as part of the official record will be considered by the director of Ohio EPA.

To be included in the official record, written comments must be received by Ohio EPA by the close of business, today, May 3, 2018. These comments may be filed with me today or emailed to ddagw_rulecomments@epa.ohio.gov. All written comments submitted for the record receive the same consideration as oral testimony given today.

Written statements submitted after today may be considered as time and circumstances permit, but will not be part of the official record of the hearing.

If you wish to present oral testimony at this hearing today and have not already signed the registration sheet, please do so at this time. The sheet is available at the registration table. Persons will be called in the order in which they have registered.

There is no cross examination of speakers or of representatives of Ohio EPA in public hearings. Ohio EPA hearings such as this afford citizens the opportunity to provide comments on the official record. Therefore, we will not be able to answer questions during the hearing. However, members of the panel may ask clarifying questions of the person testifying to ensure the record is as complete and accurate as possible.

I will now read the names of those who have registered at this hearing and will give each person an opportunity to testify.

Is there anyone else who wishes to testify at this time?

Seeing no further requests for testimony, I remind you that written comments can be submitted through the close of business today.

Thank you for attending. The time is now 11.12 am and this hearing is adjourned.

BEFORE THE OHIO ENVIRONMENTAL PROTECTION AGENCY

- - -

IN RE: :
:
DDAGW Operator :
Certification Rules :

- - -

Audio Proceedings

- - -

May 3, 2018

- - -

JILLIAN M. VOGEL,
PROFESSIONAL COURT REPORTER

- - -

- - -

FRALEY, COOPER & ASSOCIATES
222 East Town Street, Second Floor
Columbus, Ohio 43215-4620
(614) 228-0018 - (800) 852-6183

- - -

1 APPEARANCES:

2 Kamalpreet Kawatra
3 Colin White
4 Andy Barienbrock
5 Tanushree Courlas
6 Kevin Jarrell
7 Colin Bennett

8 SPEAKERS:

9 Christopher Schraff
10 Steve Canter
11 John Beckman
12 William Dowling

13 - - -
14
15
16
17
18
19
20
21
22
23
24

1 - - -

2 P R O C E E D I N G S

3 - - -

4 MS. MCCARRON: All right. We'll go ahead
5 and get started. My name is Mary McCarron. I'm
6 with the Public Interest Center here at Ohio EPA,
7 and I'll be presiding over today's hearing.

8 Thank you for taking the time to attend
9 the hearing. The purpose of today's hearing is to
10 take comments from any interested person regarding
11 Ohio's EPA proposed rules. Ohio EPA Division of
12 Drinking and Ground Water is proposing to amend
13 rules of the Ohio Administrative Code,
14 Chapter 3745-7. These rules address requirements of
15 the operator certification program. These rules
16 have been filed with the Joint Committee on Agency
17 Rule Review and copies of the rules are available
18 here at the central office and on our website. All
19 interested persons are entitled to attend and be
20 represented and to present oral and/or written
21 comments regarding the proposed rules.

22 All written and oral comments received as
23 part of the official record will be considered by
24 the Director of Ohio EPA. To be included on the

1 official record, written comments must be received
2 by Ohio EPA by the close of business today,
3 May 3, 2018. These comments may be filed with me
4 today or e-mailed to
5 ddagw_rulecomments@EPA.Ohio.gov. That e-mail
6 address is on the public notice that I have at the
7 registration table.

8 All written comments submitted for the
9 record receive the same consideration as any oral
10 testimony given here today. Written statements
11 submitted after today will be considered as time and
12 circumstances permit, but won't be part of the
13 official record of the hearing.

14 I'm going to call folks in the order that
15 they registered today. If you don't want to speak,
16 go ahead and say pass. If you do want to speak, I
17 just ask that you wait until I get over to you with
18 our recorder.

19 There's no cross-examination of speakers
20 or representatives of Ohio EPA in public hearings.
21 Ohio EPA public hearings such as this afford
22 citizens an opportunity to provide comments on the
23 official record; therefore, we won't be able to
24 answer questions during the hearing. However,

1 members of the panel or Ohio EPA staff may ask any
2 clarifying questions of the person testifying to
3 ensure that the record is as complete as possible.

4 And with me today from our Division of
5 Drinking and Ground Water are Kamalpreet Kawatra,
6 Colin White, Andy Barienbrock, Tanushree Courlas --
7 I don't know how to pronounce your last name --
8 Courlas and Kevin Jarrell, and then we also have
9 Colin Bennett with our legal department here, just
10 so you know who all of the EPA folks are.

11 So at this point, I'm going to read off
12 the first person who registered, and that's
13 Christopher Schraff.

14 Would you like to provide testimony?

15 MR. SCHRAFF: Yes.

16 MS. MCCARRON: Excellent. I will be
17 right there.

18 MR. SCHRAFF: I'll give you both a copy
19 of written comments and --

20 MS. MCCARRON: What you're saying.

21 MR. SCHRAFF: -- oral comments. Yeah.

22 MS. MCCARRON: Wonderful. Thank you. So
23 this is where the microphone is. It just needs to
24 point.

1 MR. SCHRAFF: Okay. Good morning. My
2 name is Christopher Schraff. I'm an attorney and
3 counsel to the firm of Porter, Wright, Morris and
4 Arthur, LLP. I'm appearing here today on behalf of
5 the supreme counsel of the House of Jacob, a
6 religious institution with facilities located at
7 25645 Township Road 39, Coshocton, Ohio. Those
8 facilities include a church building, administrative
9 offices, multiple purpose building, dormitories and
10 nine residential units. The House of Jacob has
11 submitted written comments regarding these proposed
12 rules, a copy of which has been submitted to Ohio
13 EPA electronically, and I have brought an extra copy
14 today for the record. This testimony supplements
15 those written comments.

16 The House of Jacob has, for the last
17 two-and-a-half years, been involved in proceedings
18 before Ohio EPA regarding a proposal by Ohio EPA to
19 reclassify the church's water supply system from a
20 Class A system to a Class 1 system. The explanation
21 for this proposed change has varied over time.
22 Originally Ohio EPA claimed that the water system
23 was unclassified, but this was not the case as Ohio
24 EPA -- as Ohio EPA's own records clearly establish

1 that the system had previously been cert --
2 classified as Class A. Ohio EPA then claimed that
3 the population served by the House of Jacob system
4 was greater than 250 based upon an internal
5 calculation performed by Ohio EPA staff not
6 withstanding that the Director had already found
7 that the population served by the House of Jacob's
8 water system was 28.

9 Then the Director amended his proposed
10 action claiming that the improper operation of a
11 manganese treatment system in the House of Jacob's
12 water supply system "may pose a serious public
13 health hazard." Notwithstanding that there are no
14 health-related drinking water standards for
15 manganese which have been adopted in Ohio or by
16 USEPA.

17 The proposed rules that are the subject
18 of this hearing seek to significantly alter the
19 long-standing method of calculating the population
20 served by a public water supply system. The
21 proposed change to OAC 3745-7-01(P) would create a
22 new method for calculating the population of either
23 a community or non-community water system that is by
24 an average of the 60 highest days of population of a

1 system using the methods identified in
2 OAC 3745-81-01(P) (11) (b). That rule states that
3 when the average number of individuals regularly
4 served by a non-community water system, such as a
5 church, cannot be readily determined, the Director
6 shall determine the population served on a
7 case-by-case basis and may consider -- may consider
8 "an actual daily account of individuals, sales
9 receipts, seating capacity or the issued certificate
10 or certificates of occupancy" or "any other
11 information deemed reliable regarding the population
12 served." But OAC 3745-81-01 makes no mention of a
13 60-day averaging period, nor is such an averaging
14 period used for purposes of determining whether a
15 water system is a public water supply. Instead the
16 population is determined by an actual count of
17 residents or by multiplying the number of service
18 collections by an average household size. And in
19 the case of a transient non-community water system
20 such as a church, population counts are not used at
21 all. And I would reference OAC 3745-81-01(P)11(b) ii
22 for that comment. This is because persons don't
23 come into contact with water supplies and such
24 systems that are maintained by churches and other

1 small institutions for extended periods of time, and
2 often not at all. Therefore, the public
3 health-related concerns with such water supplies
4 are, or should be, significantly reduced as compared
5 with water supplies, which provide potable water to
6 persons who use the water regularly over extended
7 periods of time.

8 There are two distinct problems with the
9 proposed rule set forth in OAC 3745-7-01(P). First,
10 the so-called 60 day average does not specify the
11 time period to be used for gathering the highest
12 60 days. Is it 60 days in a calendar year? Three
13 calendar years? Ten years? The entire operating
14 life of the system? The proposed rule doesn't tell
15 us that. This makes the rule vague as to its
16 intention and meaning. Moreover, the proposed rule
17 seems to endorse an averaging system which ignores
18 much of the daily population data for a particular
19 water system by cherry picking the highest 60 days
20 of some indeterminate period in order to reach a
21 skewed average for purposes of classifying it as a
22 public water system in a particular classification

23 Moreover, the proposed rule, when used in
24 conjunction with the language of OAC 3745-81-01(P),

1 also would allow Ohio EPA to continue a bad
2 regulatory habit of relying on surrogate values to
3 determine the actual number of persons regularly
4 using a facility's water supply.

5 For example, by using a certificate of
6 occupancy for a church facility, which might be
7 capable of seating 300 persons for a Sunday service
8 under its certificate of occupancy, the proposed
9 rule ignores the actual number of persons who attend
10 such services. And worse, the proposed rule ignores
11 the number of persons who actually use the water
12 supply of the church on a regular basis, which is
13 the standard for calculating water supply
14 populations under OAC 3745-81-01, as well as Federal
15 drinking water standards. These surrogates for
16 population usage of a water system should not
17 prevail over evidence of actual regular usage of the
18 water system.

19 Typically only a small portion of church
20 goers at any given service avail themselves to the
21 church's water supply facilities. And while most
22 water supplies have meters to provide a record of
23 water usage, Ohio EPA seems to ignore this
24 information and instead utilizes unrealistic

1 estimates of population usage drawn from seating
2 capacities, church attendance figures and other
3 unreliable indicators of water usage in order to
4 determine the population served by a non-community
5 water supply. This practice seems to originate from
6 some desire by Ohio EPA staff to reclassify all
7 churches and similarly situated non-community water
8 supplies; thereby, increasing staffing requirements
9 and operating costs without any evidence that
10 additional staffing and operation costs will protect
11 the public from a demonstrated health risk.

12 This is unnecessary since water supply
13 test results can determine when a water supply is in
14 need of additional staff or operational costs to
15 meet applicable state drinking water standards. It
16 is only those water supplies that regularly violate
17 state drinking water standards or fail to correct
18 operational problems that should be subjected to
19 additional staffing and operational requirements.
20 Those water supplies which are in substantial
21 compliance with health-related drinking water
22 standards should not be required to incur additional
23 regulatory burdens and expense.

24 That Ohio EPA prefers to use hypothetical

1 populations of water supply users is confirmed by
2 another proposed rule change appearing in
3 OAC 3745-7-03(B) and other portions of that rule,
4 which would allow Ohio EPA to reclassify public
5 water supplies based upon "the population the system
6 has the potential to serve." No criteria or
7 definition accompanies the proposed term the
8 population the system has the potential to serve.
9 Nor is there any commonly accepted or understood
10 meaning of that term, which adds yet more ambiguity
11 to the process of identifying a population of water
12 supply users who are regularly served by a water
13 supply system.

14 The term apparently will mean whatever
15 Ohio EPA wants it to mean. Virtually any well in
16 the State of Ohio, public or private, has the
17 quote/unquote potential to serve whatever number of
18 customers that a creative mind might imagine. But
19 this term hardly serves as a standard that gives
20 Ohioans fair notice as to how populations served by
21 a water supply will be calculated.

22 Whatever it means, the proposed rule
23 favors protection of hypothetical or imaginary
24 Ohioans rather than actual Ohioans or actual users

1 who regularly use a public water supply system.
2 Surely Ohio EPA has better things to do than to
3 utilize artificially inflated populations of public
4 water supply users to add additional regulatory
5 costs and staffing to Ohio's churches and other
6 non-community water systems.

7 It appears to us that if Ohio EPA moves
8 forward to adopt these rules, it likely will be
9 necessary for the courts and/or the Ohio General
10 Assembly to intervene in order to provide churches
11 and other small water supplies in Ohio with fair,
12 even-handed and understandable rules governing water
13 supply classifications and other regulatory
14 requirements. Therefore, we would urge Ohio EPA to
15 reconsider this misguided rule making initiative and
16 not adopt the proposed changes to OAC 3745-7-01,
17 Subsection (P) and OAC 3745-7-03, which we have
18 commented upon. Thank you for considering our
19 comments. This concludes my oral testimony.

20 MS. MCCARRON: Thank you.

21 UNIDENTIFIED SPEAKER: (Inaudible)
22 questions.

23 MS. MCCARRON: Yeah. Oh, yeah. Go
24 ahead.

1 UNIDENTIFIED SPEAKER: So are you -- just
2 to be clear, are you asking just that we'll go back
3 to the status quo that was currently written? You
4 also did mention about the daily water usage. So
5 were you (inaudible) the status quo or provide
6 classification based on all water usage?

7 MR. SCHRAFF: In an ideal world, I
8 probably would revisit the current rule and think
9 hard about making it clear that if there is actual
10 evidence of water usage, that that is always the
11 preferred approach rather than using certificates of
12 occupancy, which are really designed to provide for
13 safety within a particular facility and identify the
14 maximum number of people that can be present at that
15 facility at any one time. But that certificate
16 doesn't tell you anything about who's actually using
17 the water, if anyone is. So, yeah, I would revisit
18 the existing rule as will. And I think maybe the
19 Legislature will have to do it if Ohio EPA doesn't
20 want to do it.

21 UNIDENTIFIED SPEAKER: Okay. Thank you.

22 MS. MCCARRON: Thank you.

23 Steve Canter.

24 MR. CANTER: Good morning. My name is

1 Steve Canter. Our firm, Environmental Engineering
2 Service, is a small for-profit, veteran-owned
3 business enterprise; and we employ approximately 25
4 employees. We provide contract operations and
5 engineering design for publicly owned water and
6 wastewater systems. Most of our clients are small,
7 rural publicly-owned facilities.

8 I appreciate our elected officials,
9 Governor Kasich, Lieutenant Governor Taylor and
10 members of the State Legislature for guaranteeing
11 that we citizens have a mechanism to have our voices
12 heard and have an influence on the rule-making
13 process. As of -- again, I apologize in advance for
14 my Appalachian dialect that may not be easy to
15 translate. So -- you know, I hope my remarks don't
16 come across as being antagonistic towards the
17 agency. I'm supportive of the EPA's mission but
18 oppose several parts of the OAC 3745-7 Rule group.

19 My statement here today is supplemented
20 by supporting documents, and I'll -- I would like to
21 read those into the record first. The first is from
22 State Representative Doug Green from Ohio House
23 District 66. It's dated May 1st, addressed to the
24 Ohio Environmental Protection Agency, Attention

1 Colin White, regarding comments to proposed operator
2 certification rules.

3 "Dear Mr. White, I'm writing concerning
4 the Ohio Environmental Protection Agency's proposed
5 revisions to the rules and chapters in
6 Chapter 3745-7 of the Ohio Administrative Code and
7 the proposed addition to the new rule to the
8 chapter. Based upon my review of the rule and
9 discussions with my constituents, including the
10 Village of New Richmond Village Manager and Stephen,
11 I am concerned about the potentially negative impact
12 to small communities and businesses, particularly
13 small businesses, should these rules become
14 effective.

15 Following the May 3, 2018, public
16 hearing, I encourage the Environmental Protection
17 Agency to carefully consider Mr. Canter's concerns
18 provided at the hearing as contained in his
19 May 25, 2017, letter to the agency during the
20 Interested Party Review. I also encourage the
21 Agency to discuss possible revisions to OAC
22 Chapter 3745-7 that may be agreeable to both parties
23 before any action is taken by JCARR.

24 Lastly, it may be prudent for the Agency

1 to TBR the rule, to make revisions and revise
2 file the rule."

3 And that's signed, Representative
4 Doug Green.

5 The second letter is from the entire
6 board of the Highland County Commissioners. May 2nd
7 is the date of this, addressed, again, to
8 Colin White with Ohio EPA.

9 "Dear Mr. White, we are writing concerning
10 the Ohio Environmental Protection Agency's proposed
11 revision to the rules in Chapter 3745-7 of the Ohio
12 Administrative Code and the proposed addition of a
13 new rule to the Chapter.

14 Environmental Engineering Service has
15 been our contract operator for almost 20 years and,
16 as such, has provided Highland County value and
17 high-quality service. As a rural community, we are
18 concerned about the potentially negative impact to
19 small communities and businesses, as noted in
20 Mr. Canter's comments on May 25, 2017, should these
21 rules become effective.

22 Following the May 3, 2018, public
23 hearing, we encourage the Ohio Environmental
24 Protection Agency to carefully consider the concerns

1 provided at the hearing and to discuss possible
2 revisions to Chapter 3745-7 that looking into the
3 future will address the concerns of small and rural
4 communities, as well as those of larger metropolitan
5 areas."

6 As I read my comments, which hopefully I
7 move through failure quickly, they're abbreviated
8 from the written comments. I'll be using several
9 acronyms. One is JCARR, Joint Committee on Agency
10 Rule Review; CSI, Common Sense Initiative; BIA,
11 Business Impact Analysis; and RTC, Response To
12 Comments.

13 During the interested party comment
14 period I sent my concerns in a letter dated
15 May 25, 2017. My comments were directed to the
16 parts of the rule package where I believe the Ohio
17 EPA first exceeded its statutory authority. Two,
18 conflicted with legislative intent. Three, failed
19 to complete an accurate rule summary and fiscal
20 analysis of the amendment. And, four, failed to
21 provide accurate and transparent information
22 contained in the Business Impact Analysis, the BIA,
23 potentially misleading the Common Sense Initiative
24 office that the rules regularity intent justifies

1 its adverse impact on business.

2 Of the six standards or prongs with which
3 JCARR concerns itself, I believe the rule package
4 violates four. Nothing the agency provided in the
5 response to comments is addressed -- has addressed
6 my concerns. In fact, at times the Agency's
7 responses are contradictory to other agency comments
8 and serve to prove my point.

9 I'd first like to -- I'll be commenting
10 on three, I guess you call then subchapters; is that
11 right? The first is Subchapters 3 and 4 will be
12 lumped together, and then I'd like to comment on
13 Subchapter 21.

14 State goal of the executive order
15 2011-01K is that Ohio must work proactively to give
16 innovative people and innovative companies reasons
17 to be here but also must tear down any obstacles
18 that make it more difficult for businesses to
19 operate in Ohio. Agency mandated staffing
20 requirements, hours and numbers -- and number of
21 days have been areas of contention between Ohio --
22 OEPA and the regulated community since the
23 requirements were established in 2006. While
24 there's an obvious need for operators with the

1 appropriate level of certification to provide
2 technical and administrative direction and assume
3 responsibility for the proper operation of
4 facilities, the existing and proposed rules make it
5 more difficult for businesses to provide staffing
6 and supervisory flexibility.

7 Ohio EPA response to comments No. 56 was
8 -- requiring contract operators and contract
9 operation companies to prepare an application and
10 sample contracts are not overly burdensome
11 requirements. This first paragraph, I can't find
12 where it has anything to do with my statements
13 concerning staffing and supervisory flexibility.
14 And I assume the comment was included in the wrong
15 area of the RTC.

16 The second paragraph, the Ohio EPA states
17 regarding minimum staffing requirements. These have
18 been in effect since 2006. I went through the --
19 went through JCARR. Ohio EPA is not aware of any
20 entity that was put out of business because they had
21 to comply with the minimum staffing requirements.

22 The comments in the second paragraph
23 appear to dismiss the need for JCARR's five-year
24 rule reviews. JCARR's responsibility is to review

1 proposed, new, amended and rescinded rules. This
2 statement to me displays that the agency, one,
3 discourages public comments, which take issue with
4 the rule or during subsequent reviews. And, two, an
5 attitude of complacency toward JCARR's oversight
6 role once it gets a rule approved. Further,
7 executive order 2011-01K was not in effect in 2006,
8 and I do not believe the negative impacts to small
9 businesses have been evaluated thoroughly within the
10 context of 2011 executive order.

11 Continuing with that second paragraph
12 response, in my comments, I did not claim that I
13 knew of any company put out of business because they
14 had to comply with minimum staffing requirements. I
15 would ask: Is it the agency's position the
16 companies need to be put out of business before
17 acknowledging problems with its rules? It appears
18 the agency standard for complying with JCARR's six
19 prong is being put out of business before its rule
20 actions are considered detrimental to business.
21 This being the case, the agency is violating the
22 spirit and requirements of the executive order. The
23 agency's approach to the BIA is flawed and this is
24 justification for JCARR to recommend a validation of

1 Subchapters 3 and 4 of Ohio Administrative Code
2 Chapter 3745-7.

3 Also as I read the Ohio Revised Code, the
4 Legislature has not given the Director of the Ohio
5 EPA the authority to define the methods for
6 operating treatment plans. The statutory authority
7 referenced in OAC 3745-7-3 is ORC 6109.04.

8 Likewise, the statutory authority for OAC 3745-7-04
9 is ORC 6111.46. I provide -- I'm not going to take
10 up time to read the referenced portions. They're in
11 my written comments. But simply stated, the means
12 are the instruments or equipment used to accomplish
13 something. And the methods are the techniques and
14 procedures to accomplish it. The Legislature
15 granted OEPA the authority to govern certification of
16 operators, establish qualifications, provide for
17 examinations, et cetera, and provide general
18 supervision of works or means installed for the
19 collection, treatment and disposal of sewage. And
20 in general terms, the two portions of the Revised
21 Code seem to say the same thing; one dealing with
22 water, the other with wastewater.

23 Approval of the means used in water and
24 wastewater systems has been the sole domain of the

1 regulators, and the methods were the exclusive
2 responsibility of the operator or permit holder.
3 This is primarily because the operator was viewed as
4 the party best suited to decide what works and what
5 does not -- what works and what does not work in the
6 operation of specific treatment works in collection
7 and distribution systems. By creating rules to
8 define staffing requirements, the Ohio EPA is
9 determining methods used in operations which the
10 Legislature specifically did not grant the Ohio EPA.

11 Furthermore, very few Ohio EPAs that
12 inspect -- Ohio EPA employees that inspect these
13 facilities have the proper operator certification to
14 know what does work best. By extension of the
15 current rules' logic, individuals conducting
16 oversight should have the same minimal certification
17 as the operators of the facilities which they are
18 providing general supervision. But I'm not
19 necessarily requesting that Ohio EPA employees be
20 required to obtain operator's certification.

21 Ohio EPA response No. 59 states Ohio EPA
22 relies on the water -- on the operators to be the
23 expert on operating the public system, treatment
24 works or sewage system. That is why Ohio EPA

1 believes the operator should be at a facility for a
2 minimum amount of time to apply that knowledge and
3 ensure the protection of public health and safety.
4 Minimum staffing requirements were developed as part
5 of the rule package that became effective
6 December 21, 2006, when staffing requirements were
7 developed in conjunction with the stakeholders work
8 group, which consisted of operators representing the
9 varying types of facilities in Ohio. These
10 operators felt the minimum staffing requirements
11 that have been in Ohio EPA rules for over 10 years
12 were the minimum amount of time that a properly
13 certified operator must spend at a facility -- at a
14 particular facility in order to protect the health
15 and safety of the public and the environment.

16 Ohio EPA acknowledges in its response
17 No. 59 that it relies on the operator to be the
18 expert on the operation of the water and wastewater
19 system, then goes on to make the rather strange
20 observation after implicitly saying that it is not
21 the expert, that it knows how a plant should be
22 staffed. There was a lot of contention when these
23 rules became effective in 2006, and they indicate
24 that the regulated community within the stakeholders

1 group endorsed the staffing requirements is somewhat
2 disingenuous. These provisions were forced on the
3 regulated community by nature of EPA controlling the
4 stakeholders group.

5 Ohio EPA then in response 58 stated Ohio
6 EPA considers the minimum staffing requirements to
7 be necessary to assure the proper operation of water
8 systems. Ohio EPA considers minimum staffing
9 requirements to be a feature of operation and
10 maintenance that affects the proper treatment
11 disposal of sewage and industrial waste. And the
12 statement goes on pretty much to reflect what was
13 noted earlier.

14 So to me it also appears that the Ohio
15 EPA is confusing its general supervision authority
16 with that direct supervision. I do not believe in
17 1997 the Ohio Legislature granted the Ohio EPA under
18 the certification provisions of ORC 6109.04 the
19 authority to dictate and micromanage staffing levels
20 for every facility in the state. Further, I'm
21 reasonably confident that the Ohio legislature's
22 intent was not for the Ohio EPA to direct
23 communities how they must manage staffing 10 to 20
24 years down the road from the effective date of the

1 law.

2 And my comments mirror my concerns in
3 ORC 6111.46, as they do in 6109.04. Ohio EPA
4 responded that they do not plan on removing the
5 existing minimum staffing requirements for the
6 reasons they stated above. And I am requesting that
7 OAC 3745-7, Subchapters 3 and 4 are suggesting that
8 they violate JCARR's first and third prongs
9 throughout. And I request that JCARR recommend a
10 validation of these subchapters. If Ohio -- Ohio
11 EPA believes it should regulate methods, the Ohio
12 EPA should lobby the state Legislature for the
13 appropriate authority.

14 And my comments on 3745-7-21 -- this is
15 the new chapter proposed in the rule. Like my
16 comments above regarding Subchapters 3 and 4, the
17 statutory authority granted the Ohio EPA does not
18 extend to approving business contracts between the
19 owners of water and wastewater facilities and the
20 individuals or firms providing operational services
21 as would be required by Subchapter 21. Should this
22 rule become effective, the rule would allow Ohio EPA
23 staff to interject themselves in private business
24 matters and contracts.

1 In response to No. 62, Ohio EPA stated
2 that it's not seeking to impose itself on private
3 business matters or approve business contracts
4 between owners and contract contractors/contract
5 operation companies. The provisions in the rule
6 require contract operator or contract operations
7 company to provide a sample contract as part of the
8 process in becoming an approved contract operator or
9 contract operations company. In order to make sure
10 the contract has provisions that address the minimum
11 requirements of the proposed rule, Ohio EPA -- and
12 I'd like to highlight this. Ohio EPA is not asking
13 for details regarding monetary compensation. And
14 then it goes on to say Ohio EPA wants to ensure
15 there is a clear understanding of each party's role
16 and responsibilities in regards to taking care of
17 the facility.

18 ORC 6109.04 and 6111.46 did not provide
19 for the Ohio EPA to regulate or develop regulations
20 concerning activities of individuals or firms from a
21 business perspective period. Response No. 62
22 through omission is misleading to JCARR. The
23 proposed OAC 4745-7-21 would require contract
24 companies and individuals to, No. 1, maintain a copy

1 of the contracts, not a sample contracts, on-site at
2 the public water system or wastewater works for
3 inspection by Ohio EPA. Secondly, maintain a copy
4 of the contract for a period of three years after
5 the end date of the contract. Thirdly, provide a
6 copy of the contract within five days of request by
7 Ohio EPA. Stating that the Ohio EPA is not asking
8 for details regarding monetary compensation is -- to
9 I guess say it politely -- is not accurate and
10 serves to mislead the members of JCARR and the
11 interested public.

12 Secondly, it appears that the proposed
13 Subchapter 21 unfairly discriminates against private
14 businesses, especially small business enterprises.
15 The proposed rule does not require agency review an
16 approval of contracts between unions providing
17 facility operations and the owners of such
18 facilities, public or private. Union agreements
19 impact the largest number of contracted operators
20 working at the largest facilities and serving the
21 larger population centers throughout Ohio. These
22 agreements are uniformly restricting this to duties,
23 times worked, emergency callouts, requirements of
24 operators and at times, limit the owner's ability to

1 direct work. Ohio EPA should be more concerned with
2 the impact of union agreements in the operator rules
3 because of the large number of people served by
4 these facilities in our state instead of trying to
5 enact more regulations on small businesses.

6 A follow-up comment to that in my letter
7 is the agency declined to comment regarding what I
8 just read. I believe OAC 3745-7-21 -- or the
9 proposed OAC 3745-7-21 unfairly discriminates
10 against private businesses, especially small
11 business enterprise, does not address business
12 arrangements that impact the largest number of
13 contract operators working at the largest facilities
14 and serving the larger population centers throughout
15 Ohio. I felt a need to repeat that because of the
16 large number of people served by the larger
17 communities that typically have union operators.

18 I requested in my May 7, 2017, letter
19 that Subchapter 21 be removed in its entirety from
20 the proposed rule. And if this action is opposed by
21 the EPA, documentation should be provided that
22 demonstrates its process and consider the
23 requirements of the executive order 2011-01K.
24 Response No. 63 to that comment was Ohio EPA

1 considers the regulation of contract operation
2 companies and contracted professional operators to
3 be necessary to ensure the proper operation of water
4 systems and proper treatment and disposal of sewage
5 and industrial waste. Therefore, Ohio EPA is within
6 its authority, according to ORC Section 6109-04 --
7 and to skip to the end, cite the other ORC section
8 -- when it exercised general supervision of a
9 feature of operation and maintenance that affects
10 the proper treatment and disposal of sewage and
11 industrial waste.

12 EPA goes on to say recent enforcement
13 cases have indicated a clear need to have provisions
14 and spell out the responsibilities of contract
15 operation companies and contract operators. First,
16 Ohio EPA admits it has rules or resources in its
17 toolbox which allow enforcement. Secondly, using
18 the logic of -- pardon me. The EPA stated in
19 Response 63, where does the agency believe its
20 authority ends? If this rule becomes effective, the
21 Ohio EPA, under Subchapter 21, becomes the sheriff,
22 judge and jury and would have the power to
23 essentially shut a business down with the following
24 provision: Failure to comply with the provisions of

1 Chapters 6111 and 6109 in the Revised Code and the
2 rules promulgated thereunder may result in
3 withdrawal of the Director's approval.

4 And what I had to say here, I guess, is
5 more philosophical to you. We are a nation in a
6 state of flux. And we're guaranteed protections
7 with checks and balances built into our state
8 constitution. Where in our constitution or the
9 Revised Code has the Director of the EPA been given
10 the authority to educate and issue punishment
11 unilaterally? And I'm not here to go off on a
12 patriotic tangent, but the values reflected in
13 Subchapter 21 are not those which I served in the
14 military, in the Vietnam war and had friends die at
15 the fence. And I apologize.

16 I have many comments on the business
17 impact analysis and the flaws and how JCARR should
18 consider those and invalidate those three sections
19 of the rules based on some of the provisions of
20 JCARR's six prongs to do that. But from a personal
21 level, when these rules were out for interested
22 party review, you know, I try to do my due
23 diligence. When Ohio EPA passes a rule, if I don't
24 like it, I'm going to grumble and fuss, but I'm

1 going to abide by the rule because that's what I do.

2 But in the process of my due diligence, I
3 made an inquiry with my insurance company regarding
4 the term "professional" being added to -- to the
5 rules. I specifically object to it. But, you know,
6 I just wanted to see what was coming down the road.
7 And after checking our, I think -- no. I checked in
8 May, and our insurance policy renewed in September
9 of 2017, and I was given a non -- or a non-renewal
10 notice because of these words in the rule; really
11 because of my inquiry wanting to make sure I covered
12 by bases. And, you know, what -- I made the EPA
13 aware of this and what ensued was a bureaucratic
14 disaster that went back and forth between two
15 agencies that -- that were trying to justify one or
16 the other.

17 My gripe wasn't with my insurance
18 company. I believe my insurance company is a
19 business, and they can decide their own risk and,
20 you know, I have to live with it. But this -- my
21 experience through that process, having my insurance
22 non-renewed and EPA washing its hands of it and
23 walking away has really, really irritated me and
24 left a bad taste in my mouth.

1 So wrapping up my thoughts for the day, I
2 consider it a privilege to be a citizen of Ohio.
3 And it's something that I don't take for granted,
4 but as I look around our nation and our state, every
5 day something is exposed that erodes public
6 confidence and trust in government institutions.
7 I'm on the downhill side of my years, but if there's
8 any hope for my grandchildren and their children
9 that they can experience the liberties and greatness
10 of this country that my parents were afforded, the
11 government needs to begin conducting its affairs
12 within the framework and limits that we citizens
13 have established through the elected Legislature.
14 Before Ohio EPA proposes and updates rules, instead
15 of telling us, Oh, yes, we do have the power to do
16 this, they should start asking, Do we really have
17 the authority to do this?

18 I know it's late in the rule process for
19 this package, and it's human nature to dig our heels
20 in; but there are procedures available that allow
21 for a time-out. Please don't let the ticking clock
22 or pride interfere with conducting a thorough review
23 and making the appropriate changes to these rules
24 based upon the request of those who cared enough to

1 be here today. Thank you.

2 MS. MCCARRON: John Beckman.

3 MR. BECKMAN: Yeah. My name is
4 John Beckman; Beckman Services, a small company, 15
5 employees in southwest Ohio. We don't have a lot of
6 plants that we operate. We operate a few plants for
7 small -- mostly privately owned systems. And, you
8 know, we've done this since 1973. And my father for
9 many years, prior to these rules, was -- he was --
10 and I don't recall if he was a Class 2 or Class 3
11 operator. He passed away. And they were all
12 operated under him. He directed the operations. We
13 didn't need EPA to come and say, Okay, this plant
14 needs to be done three days a week. We had a plant
15 that we did five days a week because that's what it
16 needed. And it seems to me that the -- it's ever
17 broadening what we need to do, and we're to abide by
18 EPA's rules.

19 What I've seen in this with the contract
20 reviews, adding the professional, if this goes in
21 effect, we may just close down the operations side
22 of our business. The -- it's a competitive business
23 on the private side. We would have to add
24 professional liability insurance. It would more

1 than likely cause more owners to not have an
2 operator because it can't afford to pay for --
3 professional liability insurance is not cheap. You
4 know, these -- you have a small facility, whether it
5 be a church, a school, an apartment complex, it
6 affects them all. You know, they raise their rate
7 because rates go up for the operators, and now the
8 rent goes up or whatever the case may be. I always
9 thought EPA's mandate was to protect the water, not
10 to tell us how to do what we do.

11 And I'd also like to say I -- we'd like
12 to echo what -- Steve's comments. He was a little
13 more in depth in the rules than I have been. And I
14 thank him for making me aware of some of these
15 changes that I would not have been aware of.

16 In 2006 I was blind sided by this. I was
17 -- I guess I need to pay more attention to your
18 website and when they come out. I was informed by a
19 local municipality when they were first -- when they
20 were first coming online that they were coming. And
21 he didn't know how they were going to abide by it,
22 as a county sewer department. At that point, they
23 didn't have the staff.

24 Operators is not a growing group, that

1 I'm aware of, in the State of Ohio. I don't see a
2 lot of people getting into the water/wastewater
3 sewer business. And so it -- you know, it could be
4 a situation where we don't have the operators we
5 need in the future to cover mandated times that --
6 where you can't have somebody that knows how to
7 operate the facility that doesn't have the license
8 but is operating it under a qualified licensed
9 operator that is -- that trains him, so he knows
10 what to do. And if there are issues, he has an
11 operator. They don't disappear because they're not
12 standing at the wastewater plant. So thank you for
13 your time, and those are my comments.

14 MS. MCCARRON: Thank you.

15 William Dowling.

16 MR. DOWLING: Sure. Ms. McCarron, my
17 name is William Dowling. I am here representing the
18 Bath Church. I am also a member of the Bath United
19 Church of Christ, which is located in Bath Township,
20 Summit County, Ohio. My primary employment is as a
21 mediator and a professor at the University of Akron
22 Law School. I also live a couple miles away from
23 the Bath Church. Written comments were submitted to
24 Mr. White by the senior minister of the Bath Church

1 and the chair of our board. My comments supplement
2 those and are given in my capacity as an attorney.

3 A couple of years ago the Ohio EPA
4 notified Bath Church that it had determined that the
5 church operated a public water system that regularly
6 served an average of over 250 people and that the
7 church was therefore required to have a certified
8 operator on site two times per week, 52 weeks per
9 year. At the church, when we received this
10 notification, we thought it was unfair because our
11 water system is very simple, as I'll describe a bit
12 more later. There were only a significant number of
13 people in the church on occasions, primarily Sunday
14 when they came to church. When they came to church
15 very few of them used water, and we knew that our
16 church uses very little water.

17 So we thought it was unreasonable, and we
18 appealed and the case worked its way through the
19 agency. There was a hearing conducted by the
20 agency's hearing officer. At the hearing,
21 Mr. Barienbrock testified that the way that the EPA
22 determined that we were required to have an operator
23 was taking the average of the 60 highest days of
24 use, and that they had determined in doing that that

1 we had -- that we served over 250 people. That
2 phrase "average of 60 highest days" if you will, of
3 course, come back to you, because that's what they
4 now want to put into their rule.

5 The hearing officer conducted the
6 hearing. And the hearing officer decided that the
7 EPA's requirement was unreasonable and unjustified
8 under their existing rules. And the hearing officer
9 determined that Bath Church was not required to have
10 an operator as EPA was espousing. The hearing
11 officer's recommendation went to the Director. The
12 Director reversed it. He rejected the hearing
13 officer. And he said that we were required to have
14 an operator.

15 And then we appealed that to the
16 environmental review appeals commission, the highest
17 appellate board, the highest sounding board within
18 the agency. And we submitted briefs, which I would
19 hope are available to you. I'll introduce one of
20 them today. And ERAC conducted an oral argument,
21 according to their procedures. And on February 15
22 of 2018, the ERAC issued a decision determining that
23 the Bath Church was not required to have an operator
24 and that the agency's interpretation of its existing

1 rules was unreasonable.

2 And at that point, rather than appeal to
3 court, the EPA published the proposed rule, which if
4 adopted, would overturn the ERAC decision and would
5 ostensibly require Bath Church to have an operator
6 on site twice a week, 52 weeks a year. So that's
7 the procedural background.

8 Let me tell you a little bit about Bath
9 Church. And these facts are all in the record that
10 was developed in the agency. But the Bath Church is
11 a typical church. It has a sanctuary that if it
12 were filled to capacity, it would hold about 500
13 people. But the fact of the matter is it's never
14 filled to capacity. Bath Church has church on
15 Sunday mornings. And when they have church, people
16 come for an hour, maybe 15 minutes early and maybe
17 they stick around 15 minutes later. But very few of
18 them use water. So when they're there, they aren't
19 served by the church's water system. We keep
20 attendance records. And we determined that there
21 were about 40 times in each of the last three
22 calendar years when 250 people came to church on a
23 Sunday.

24 Despite the fact that a significant

1 number of people come to church on Sundays, the
2 church is open virtually every day of the year. On
3 all of the other days, there are very few people
4 there. There's a regular staff of five, I think.
5 And occasionally there are meetings, but never with
6 the kind of numbers that we have on Sundays.

7 Bath Church is located in a suburban,
8 rural area that does not have centralized water;
9 therefore, we are a public water system. We are on
10 a public sewer system, but we have our own well.
11 The equipment in the church consists of a pump, a
12 holding tank and a water softener. The equipment is
13 extraordinarily simple. It is -- as the person who
14 takes care of it testified and is from Davis Water
15 Treatment, he's a certified operator. He said it is
16 a very simple residential water system. It is, in
17 fact, simpler than the one in my basement. The --
18 we had the water metered and the meter shows that
19 the Bath Church uses about as much water as a
20 typical family of three to four people. Okay. So
21 our monthly water usage is about twice what my wife
22 and I use at our home, which has more complicated
23 equipment.

24 Most of the water, as is explained in the

1 record, is used for toilets and cleaning. Bath
2 Church provides bottled water because our members
3 don't like the taste of the well water, although
4 it's safe. There's virtually no cooking in the
5 building. So between watering the grass, toilets
6 and cleaning, we use about as much water as a family
7 of three to four.

8 Every month we have salt delivered by
9 Davis Water Treatment. The person who delivers the
10 water is a certified operator, the type that we
11 would be required to hire twice a week if the EPA
12 has its way. He testified about the simplicity of
13 the water system. And he said that if he were
14 required to come twice a week to monitor our water
15 system, there would be literally nothing for him to
16 do. The system is simple. At my house, where we
17 have equipment like this, somebody from Davis comes
18 once a year to make sure that our system is working.
19 But if he came, there would be nothing to do and he
20 would charge us, as his company requires, \$100 for
21 every visit or in excess of \$10,000 for the year to
22 monitor our water system.

23 So what has the EPA proposed to do here?
24 The EPA has proposed two rule changes that would

1 affect the Bath Church. First of all, they want to
2 amend their rule to state with clarity that the
3 population served means the "average of the highest
4 60 days for the facility." Exactly the standard
5 that Mr. Barienbrock proposed -- stated that we use
6 in the hearing. And they've also proposed to amend
7 the rules to state that the population is based not
8 on the actual number of people served, but on the
9 potential number of people served.

10 So let's look at each of them. First of
11 all, if the EPA bases population on the average of
12 the highest 60 days of use, the method that they
13 were -- that they propounded in our case, it would
14 be a rule that seems to be aimed specifically at
15 churches. If you take an average of the 60 highest
16 days of use, ask yourself: What kind of facilities
17 have significant numbers of people in them 60 days a
18 year, as opposed to other days? Churches, because
19 churches have people who come to church on Sundays
20 and a few holidays during the year. I would suggest
21 that that number is not representative in any way of
22 the actual number of people who use the water
23 system. It requires the computation of an average
24 based on a skewed sample of the 60 highest days of

1 use.

2 This is exactly what Mr. Barienbrock
3 testified should have been -- or was the way that
4 they determined population in the hearing in our
5 case. And the Environmental Review Appeals
6 Commission looked at that position and here's what
7 they wrote. They said although the term "average"
8 may indeed refer to multiple possible -- multiple
9 possible methods of calculation; for example, it can
10 mean mean, median or mode -- and the EPA doesn't
11 tell us which one of those -- an average seeks to
12 express the "central or typical value in a set of
13 data." This is the ERAC. The commission finds the
14 Director's method of calculating population, which
15 counsel asserts is the arithmetic mean of the
16 highest 60 days, fails to express a central or
17 typical value representative of the number of people
18 served by the water system by considering only the
19 highest 60 days a year. The Director inherently
20 ignores relevant data from those facilities that,
21 like Bath Church, are open to the public for more
22 than 60 days per year.

23 The ERAC went on, bath Church asserts
24 that the population should have been computed over

1 approximately 365 days because the church is open to
2 the public nearly 365 days per year. The commission
3 need not resolve that specific issue here because
4 the Director explicitly rejected a case specific
5 determination as to the appropriate number of days
6 over which to average a calculation.

7 Rather, the commission finds only that
8 the Director's default reliance on the highest 60
9 days inappropriately biases the Agency's
10 consideration towards the highest attendance days,
11 rather than a central or typical attendance value.
12 By calculating the arithmetic mean of the highest 60
13 days, the Director fails to compute a representative
14 value for the average population served. The EPA
15 wants a rule that has been rejected by the
16 Environmental Review Appeals Commission.

17 So where did the Ohio EPA get this rule
18 in the first place? We explained that in the brief.
19 I will ask that the -- this body --

20 (Audio malfunction.)

21 MS. MCCARRON: All right. So Tony Vogel
22 was our next registrant, and he said that he didn't
23 have any comments at this time.

24 So with that, I would like to thank

1 everyone for their comments today, remind you the
2 comments are due by the close of business today.
3 And this hearing is adjourned. The time is 11:12.

4 - - -

5 (End of recording.)

6 - - -

C-E-R-T-I-F-I-C-A-T-E

I do hereby certify that the foregoing is a true, correct and complete written transcript of the audiotaped proceedings in this matter, reduced by me into stenotypy, to the best of my ability, and transcribed from my stenographic notes on the 7th day of May, 2018.

Jillian M. Vogel
Professional Reporter and
Notary Public in and for
the State of Ohio

My commission expires February 13, 2021.

BEFORE THE OHIO ENVIRONMENTAL PROTECTION AGENCY

- - -

IN RE: :
:
DDAGW Operator :
Certification Rules :

- - -

Telephonic Audio Proceedings

- - -

May 10, 2018

- - -

JILLIAN M. VOGEL,
PROFESSIONAL COURT REPORTER

- - -

- - -

FRALEY, COOPER & ASSOCIATES
222 East Town Street, Second Floor
Columbus, Ohio 43215-4620
(614) 228-0018 - (800) 852-6183

- - -

1 - - -

2 P R O C E E D I N G S

3 - - -

4 MR. DOWLING: This is Bill Dowling.

5 Today is Thursday, May 10th at 11 o'clock in the
6 morning. And pursuant to the request of the EPA, I
7 am picking up my testimony, at this point, a
8 necessity. It's the result of the malfunction of
9 the recording equipment. So I will pick up the
10 testimony now. And also I want to clarify for the
11 record that I've been advised since the date of the
12 public comment session, that the rule has been
13 withdrawn. And so I am commenting on a proposed
14 rule, as I understand it, is no longer on the table.

15 But, anyway, where did the EPA get the
16 rule that it now proposes? As this body knows, the
17 EPA drinking water scheme is an act pursuant to a --
18 under the Federal Safe Drinking Water Act, which is
19 adopted in 19 -- was adopted in 1975. As we
20 explained in our brief to the ERAC, and I have
21 introduced a copy of it into the record, the
22 language now proposed by the Ohio EPA and their
23 interpretation is directly from the Federal Safe
24 Drinking Water statute. And the Ohio EPA now
25 propounds what we think is clearly a

1 misunderstanding or a misinterpretation of the
2 Federal Safe Drinking Water statute.

3 As we explained in the brief, the Federal
4 Act defines a public water system as a system that
5 "regularly serves an average of at least 25 people
6 daily at least 60 days out of the year." If you
7 look at Ohio's definition of public water system,
8 they have adopted verbatim that language. The Ohio
9 EPA -- are you still there, Mary?

10 MS. MCCARRON: Yes, I am. I'm sorry
11 about that. That was my computer.

12 MR. DOWLING: That's all right. The Ohio
13 EPA reads this rule to require an average based on a
14 sampling of 60 days or based on a sampling of the
15 60 busiest days of the year. But the Federal
16 register, as we explained in our brief, makes it
17 clear that that is not what is intended by the
18 statute; rather the Federal statute was intended to
19 require two things. No. 1, that the average number
20 of people regularly served be the average and
21 computed for all days that water is served to the
22 public, not just for the 60 busiest days of the
23 year.

24 Federal register further makes it clear
25 that the reference to 60 days is that the public

1 drinking water system must serve the public at least
2 60 days per year in order to be considered a public
3 water system. Thus, if there's a campground that's
4 open 60 days a year, it can be a public water
5 system. If it's not open 60 days a year, it's not a
6 public water system. But the EPA's effort to base
7 pop -- base the determination of population of the
8 60 highest days of usage is a misapplication of the
9 Federal rule. Instead, the Federal rule is intended
10 to require that the average of people served be the
11 average of all days a facility is open and serving
12 water.

13 The second major effect of this new rule
14 as made clear by the EPA's proposal is that they
15 would have the population of people served by a
16 water system determined not by the actual usage of
17 the system, but based on the number of people the
18 system has the potential to serve. Under this
19 change, the number of people who use a building and
20 the number of people actually using water becomes
21 totally irrelevant to whether monitoring is
22 required. If they base their determination only on
23 the number of people potentially served, the
24 requirement is based -- because based on the size of
25 the facility alone, you can have a facility that has

1 the potential to serve 250 people; but that actually
2 serves no one because no one comes in the building
3 or no one uses water.

4 As you apply this to churches, churches
5 often have a big sanctuary that has the capacity to
6 serve many people; but, in fact, serves very few or
7 serves many on very short occasions. So you get the
8 requirement of water system monitoring imposed on a
9 church that has a big sanctuary that -- even if few
10 people actually use the water. In fact, you can
11 have it imposed on a facility that has -- that no
12 one enters just because they have a big room. And
13 we would suggest to the EPA that that makes
14 absolutely no sense. The rule itself that is
15 proposed by the EPA gives the EPA absolutely no
16 guidance as to how to determine the number of people
17 potentially served by a public water system.

18 So if you look at those two objections
19 that we have to the rule, you may ask yourself,
20 Well, what is this rule? And I would suggest to the
21 EPA that what it is is the Ohio EPA's anti-church
22 bill. Churches are the single type of buildings
23 that are most likely to host good-sized crowds one
24 day a week or about 60 times per year. And they're
25 also the types of facilities or buildings that are

1 most likely to have the potential to host good sized
2 crowds, even if they don't. For these owners of
3 public water systems, the EPA would require the
4 hiring of water system operators, despite the fact
5 that potentially no one uses their water. And by
6 doing that, the EPA is being, we think, clearly
7 unfair, unreasonable and illogical. In a time when
8 church attendance is down and church budgets are
9 stretched, this rule would impose great expense on
10 churches like the Bath Church without any
11 discernable effect on public health. And we think
12 the rule shouldn't be adopted.

13 The final thing that I'll address here is
14 spurred by the question of the EPA attorney when my
15 fellow attorney was testifying. And that's the
16 question about what -- about whether we believe the
17 rule needs to be changed. And let me say that I
18 think clearly the current rules of the EPA in regard
19 to monitoring water systems do need to be changed.
20 As I discussed before, the Ohio EPA rules contain
21 this confusing language about an average of at least
22 25 people -- or an average of at least 250 people at
23 least 60 days per year.

24 I think the language needs to be
25 clarified. I think that it needs to be clarified

1 that what we're talking about is the average number
2 of people served, the average number of people who
3 use water. And the determination of monitoring
4 should be tied to actual water use. And the average
5 needs to be computed for all days that the facility
6 is open to the public, not just to the 60 highest
7 days of use or to a sample of 60 days of use. It
8 should be computed for all days that the facility is
9 open to the public. As I said before, that's what
10 the Federal statute means and is clarified by the
11 Federal register. And that's what the EPA rules
12 should state. The rules should look at the actual
13 number of people served. If 250 people go to church
14 but virtually no water is used, they're not served.

15 And, finally, I think a reasonable rule
16 has to look at the sophistication and the monitoring
17 needs of the actual equipment in the facility. The
18 Bath Church has a very simple water system. It's a
19 residential type of water system and as the
20 testimony established at our hearing, it simply
21 doesn't need monitoring. If a monitor is required
22 for a system like ours that serves about as much
23 water as a family of three to four uses upon
24 average, there is nothing for a -- an operator to do
25 if the operator visits twice a week. The system is

1 simple. There is nothing for them to do. And it's
2 a total waste of money to require monitoring of a
3 system like that.

4 The rule needs to be changed. The rule
5 needs to be clarified, but in the ways that I stated.
6 So thank you for giving me this opportunity.

7 MS. MCCARRON: Thank you so much for
8 being flexible and willing to rerecord your
9 testimony. I apologize again for the technical
10 issues with our digital recorder at that public
11 hearing.

12 MR. DOWLING: No problem. Thanks a lot.

13 - - -

14 (End of recording.)

15 - - -

C-E-R-T-I-F-I-C-A-T-E

I do hereby certify that the foregoing is a true, correct and complete written transcript of the audiotaped proceedings in this matter, reduced by me into stenotypy, to the best of my ability, and transcribed from my stenographic notes on the 10th day of May, 2018.

Jillian M. Vogel
Professional Reporter and
Notary Public in and for
the State of Ohio

My commission expires February 13, 2021.



**Division of Drinking and Ground Waters
Response to Comments**

Proposed Revisions to Operator Certification Rules

- 3745-7-01, Professional operator certification definitions.
- 3745-7-02, Certified professional operators of record.
- 3745-7-03, Public water system classification and staffing requirements.
- 3745-7-04, Treatment works and sewerage system classification and staffing requirements.
- 3745-7-05, Classification of professional operator certification.
- 3745-7-06, Certification of professional operators.
- 3745-7-07, Professional operator in training.
- 3745-7-09, Record-keeping requirements and responsibilities of owners, certified professional operators and certified professional operators of record.
- 3745-7-10, Professional operator certification advisory council.
- 3745-7-11, Duties of the council.
- 3745-7-12, Suspension or revocation of certification.
- 3745-7-13, Reciprocity.
- 3745-7-15, Expiration and renewal of professional operator certification.
- 3745-7-17, Professional operator certification fees.
- 3745-7-18, Conduct during the application and examination process.
- 3745-7-19, Examination providers.
- 3745-7-20, Certification of professional operators who pass an examination from an approved examination provider.
- 3745-7-21, Contract operations companies and contracted professional operators

Agency Contact for this Package

Kamalpreet Kawatra, Division of Drinking and Ground Waters (DDAGW)
(614) 644-2915, kamalpreet.kawatra@epa.ohio.gov

Ohio EPA issued public notice and requested comments for the public hearing comment period of April 2, 2018 to May 3, 2018 on revised rules in the Ohio Administrative Code (OAC). This document summarizes the comments and questions received during the comment period.

Ohio EPA reviewed and considered all comments received during the comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health.

In an effort to help you review this document, the questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

General Comments

- Comment 1: A comment was received on the Response to Comment document following interested party review related to backsliding. "A comment (#26) from NEORSD spoke of allowing an Operator in Training (OIT) in Class III. OEPA's response to that comment indicated that a rollback of that nature, of any existing requirements could possibly be viewed as "backsliding" by USEPA and would threaten the withholding of 20% of WSR Loan funds. The City takes no position on

the original request by NEORSD, however, the suggestion of backsliding coming into play is troubling. Antibacksliding originally pertained to a WWTP placing existing treatment units on standby or otherwise taking treatment units out of service, and thereby theoretically putting at risk the ability to maintain already achieved existing effluent quality. Does OEPA view one or more provisions of the Operator Certification Rules to legitimately fall under Antibacksliding? If so, the City is interested to see any documentation for OEPA's position.

The question of antibacksliding tied in with the only reported comment expressed by USEPA Region 5, in Comment #53. From Comment #53, it appears that none of the proposed revisions were formulated at the behest of USEPA Region 5. The Region 5 comments is portrayed as follows: "... As Ohio finalizes these or future Operator Certification rule revisions, please ensure the rules and program implementation will continue to meet the Final Guidelines for the Certification and Recertification of the Operators of Community and Non-transient Noncommunity Public Water Systems (1999 Federal Register enacting the Operator Certification Program)." (Emphasis added.)

The phrase "will continue" implies the existing program meets federal requirements. Therefore, none of these proposed revisions are federal mandates, but are a choice by Ohio EPA to further restrict the pool of certification candidates and to further prescribe record keeping requirements. If antibacksliding is truly pertinent to Operator Certification rules, then Ohio EPA should be very, very cautious and reluctant to ratchet down on the program and become more restrictive, as in this proposal, if the requirements can never be loosened." (City of Perrysburg)

Response 1: Ohio EPA's certified operator program is approved on an annual basis by the US EPA. Any rule changes made by Ohio EPA are reviewed in the subsequent years review by US EPA. US EPA's operator certification guidelines authorize US EPA to withhold 20% of a state's Drinking Water State Revolving fund capitalization grants if a state is not implementing an EPA approved operator certification program. Ohio EPA realizes the implication of adjusting the definition of operating experience and the adjustments are necessary to ensure that operators who are receiving certificates have received operating experience that is commensurate with the job they will need to perform as an operator of record at each classification. These changes are necessary to ensure the protection of public health and the environment.

Comment 2: The proposed rule does not consider negative impact on taxpayers. "I am concerned that the proposed rules will have an adverse impact on businesses and local government agencies charged with providing safe drinking water and sewage treatment to its rate payers. There is nothing in the proposed rules that appears to have any financial consideration to the negative impact on rate payers. (Environmental Engineering Service)

Response 2: Impacts on ratepayers are hard to define and, in this case, the requirements may reduce impacts on ratepayers. Provisions prior to the minimum staffing requirements contained in these rules required facilities to have a full-time employee responsible for water and wastewater operations and only allowed contract operations for Class A and Class 1 facilities. At that time the minimum staffing requirements were implemented, they provided an avenue for many small and medium sized facilities to actually reduce their costs by only meeting the minimum standards. Systems have been meeting these requirements for over 10 years, so there should not be any current negative impact on ratepayers. The rules also provide some provisions for the reduction of minimum staffing requirements and new methods for evaluating classification.

Comment 3: The proposed rule conflicts with the legislative intent of the Ohio Revised Code, if not exceeding the Ohio EPA's statutory authority. (Environmental Engineering Service)

Response 3: These rules neither conflict with the legislative intent of the Ohio Revised Code nor exceed Ohio EPA's statutory authority. ORC 6109.04 and 3745 give Ohio EPA broad authority to adopt, amend, and rescind such rules in accordance with Chapter 119. of the Revised Code. In particular, these statutes provide authority for Ohio EPA to adopt provisions necessary or desirable for assurance of proper operation of water systems. Similarly, provisions in ORC 6111 and 3745 give similar broad authority to Ohio EPA to exercise general supervision of the treatment and disposal of sewage and industrial wastes and the operation and maintenance of works. Such general supervision shall apply to all features of construction, operation, and maintenance of the works

Comment 4: Comment was received on the response to comments document, question no. 68. The comment stated that the BIA is not correct. (Environmental Engineering Service)

Response 4: The questions in the BIA are answered to the best of our ability and knowledge. The sources of our cost information are specified in the BIA. The cost has been revised to include the cost for meeting minimum staffing requirements for class I distribution and sewerage systems.

Comment 5: The rules do not comply with Executive Order 2011-01K(EO).

Response 5: This rule package complies with the executive order and has been reviewed by the CSI Office. Ohio EPA would point to the following provisions of paragraph 2 of the executive order and its efforts to meet those provisions:

- a. These regulations are being established through the agency rule-making process;
- b. These rules to the extent practical have been written in plain English with technical terms defined.
- c. Ohio EPA has complied with all requirements of the CSI office.
- d. Ohio EPA has participated in the electronic notification process.
- e. Ohio EPA has attempted to balance the critical objectives of the rules and the cost of compliance by the regulated parties. The perspectives of small businesses have been considered in the rulemaking process and are documented in the BIA.
- f. Ohio EPA has evaluated our regulatory framework and has determined these provisions are necessary in order to accomplish the regulatory objective of protecting public health and safety and ensuring the provision of safe drinking water.
- g. Provisions included in this rule package provide the ability and, in some cases, require operators and businesses to submit information electronically.
- h. Ohio EPA did not receive any recommendations for changes from the CSI Office.
- i. Ohio EPA has amended and removed unnecessary, ineffective contradictory, redundant, inefficient and needlessly burdensome provisions from this rule package. Such provisions were identified during internal review as well as external stakeholder review

Comment 6: Comment was received regarding Question no. 56 in the response to comments document. The comment letter stated "The Agency's response in the first paragraph of Response 56 does not have anything to do with my concerns regarding staffing and supervisory flexibility. I assume this comment was included in the wrong area of RTC. Comments in the second paragraph appear to dismiss the need for JCARR 's 5-year rule reviews. JCARR's responsibility is to review proposed

new, amended, and rescinded rules. This statement to me displays that the Agency: (1) discourages public comment which take issue with the rule during subsequent reviews; and (2) an attitude of complacency toward JCARR oversight once it gets a rule approved. Further, Executive Order 2011-01K was not in effect in 2006 and I do not believe the negative impacts to small businesses have been evaluated thoroughly within the context of the 2011 EO. I question how having the certified operator physically present for the hours and days required by the rule, is more effective than utilizing a competent noncertified individual under the direct supervisory control of the certified operator in responsible charge (OIC)? Competent individuals accountable directly to the OIC and performing their tasks under the direction of the OIC are more efficient, cost effective and businesslike methods to operate facilities. The need for operators with the appropriate level of certification to provide technical and administrative direction and assume responsibility for the proper operation of facilities, the existing and proposed rules make it more difficult for businesses to provide staffing and supervisory flexibility.” (Environmental Engineering Service)

Response 6: We would agree the first sentence was in response to other comments. The comments in the second paragraph do not dismiss the need for JCARR’s 5-year rule review, they were intended to clarify that these rules have actually been through JCARR review several times. These rules have a number of provisions built in which provide flexibility such as the allowance of backup operators with an operator of one classification less for up to 30 days, the allowance of a backup operator with one classification less for longer periods upon approval by the Director, reductions in minimum staffing times based on additional operators at the facility and/or levels of automation at the facility. It was suggested that a competent non-certified individual under the direct supervisory control of the certified operator should be allowed to fulfill the staffing requirements. Ohio EPA has already defined who is competent to oversee the technical operation of a facility and that is an appropriately certified operator. The certified operator is the one individual who is required at a facility who has demonstrated the appropriate, education, knowledge and experience to oversee the technical operation of a facility.

The minimum staffing requirements are as follows:

System classification	Staffing requirement
Class A without treatment or only treating with a cartridge filter	At least 30 minutes per week.
Class A with treatment	2 days per week for a minimum of 1 hour per week.
Class I	3 days per week for a minimum of 1.5 hours per week.
Class II	5 days per week for a minimum of 20 hours per week.
Class III and IV	5 days per week for a minimum of 40 hours per week.

The public has expectations that a qualified person is running their water and wastewater systems. While using an uncertified competent person to fulfill the minimum staffing time would certainly be less costly, it would not provide an equivalent level of public health protection and the state would not have the same oversight of these individuals that it does over certified operators. In addition, the rule provides provisions that can allow a reduction in minimum staffing requirements.

Comment 7: Regarding question no. 57 in the response to comments document “The legislature has not given the Director of the Ohio EPA the authority to define the "methods" for operating treatment plants. The statutory authority referenced in OAC 3745-7-03 is ORC 6109.04; likewise, the statutory authority for OAC 3745-7-04 is ORC 6111.46. Provided below are the applicable portions of these statutes for which the legislature granted OEPA its authority.

ORC 6109.04 provides for drinking water facilities as follows: Govern the certification of operators of public water systems, including establishment of qualifications according to a classification of public water systems and of provisions for examination, grounds for revocation, reciprocity with other states, renewal of certification, and other provisions necessary or desirable for assurance of proper operation of water systems.

ORC 6111.46: The environmental protection agency shall exercise general supervision of the treatment and disposal of sewage and industrial wastes and the operation and maintenance of works or means installed for the collection, treatment, and disposal of sewage and industrial wastes. Such general supervision shall apply to all features of construction, operation, and maintenance of the works or means that do or may affect the proper treatment and disposal of sewage and industrial wastes.

Simply stated, the means are the instruments or equipment used to accomplish something. The methods are the techniques or procedures used to accomplish an end. The legislature granted OEPA the authority to govern certification of operators, establish qualifications, provide for examinations, etc. and provide "general supervision... of works or means installed for the collection, treatment and disposal of sewage". It appears OEPA has blurred the line between its authority to supervise the means (instruments or equipment), and the methods (process or way of doing something by which a task is completed). The term "means and methods" is widely used throughout the water and wastewater industry and with regulators to differentiate between equipment (means) and procedure (methods).

Approval of the means used in water and wastewater systems has been the sole domain of the regulators, and the methods were the exclusive responsibility of the operator or permit holder. This is primarily because the operator was viewed as the party best suited to decide what works and what does not work in the operation of specific treatment works and collection & distribution systems. By creating rules to define staffing requirements, the Ohio EPA is determining "methods" used in operations, which the legislature specifically did not grant the OEPA.

Furthermore, very few OEPA employees that inspect these facilities have the proper operator certification to know what works best. By extension of the current rules' logic, individuals conducting oversight should have the same minimal certification as the operators of the facilities for which they are providing "general supervision". I am not necessarily requesting that OEPA employees be required to obtain operator certification to perform their duties.” (Environmental Engineering Service)

Response 7: ORC 6109.04 and 3745 give Ohio EPA broad authority to adopt, amend, and rescind such rules in accordance with Chapter 119. of the Revised Code. In particular, the statute provides that Ohio EPA can adopt provisions necessary or desirable for assurance of proper operation of water

systems. It is necessary to establish a minimum amount of time for a properly certified operator to spend onsite at a treatment facility. The operator of record is the only person Ohio EPA requires a facility to have, so without the requirement for a minimum amount of time to be spent at the facility, there would be no way to ensure that a properly trained person even visited the facility. Provisions in ORC 6111 and 3745 give similar broad authority to Ohio EPA to exercise general supervision of the treatment and disposal of sewage and industrial wastes and the operation and maintenance of works. Such general supervision shall apply to all features of construction, operation, and maintenance of the works.

ORC 6109.04, 6111.46 and 3745 provide Ohio EPA with the authority to regulate the operation of drinking water and waste water treatment plants. Operation includes the operation of equipment at a plant, in addition to other facets of running a plant. The requirement for having an operator of record and the requirement that an operator of record comply with minimum staffing requirements are means to ensure that the facility adequately manned by an expert to ensure provision of safe drinking water and to safely treat wastewater.

Comment 8: Regarding question number 59 in the response to comments document “Ohio EPA acknowledges in Response 59 that it relies on the operator to be the expert on the operation of water and wastewater systems. It then goes on to make the rather strange observation, after implicitly saying it is not the expert, that it knows how a plant should be staffed. There was a lot of contention when these rules became effective in 2006 and to indicate that the regulated community within the stakeholders group endorsed the staffing requirements is disingenuous. These provisions were forced on the regulated community by nature of EPA controlling the stakeholder's group.

Comparing the OPEPA website listing of EPA employees assigned to operator certification duties and the OEPA List of Active Operators (3/21/2018), no one has Wastewater Treatment or Water Supply Certificates. I suggest the Agency allow the experts to determine what is best for each facility and focus on its statutory obligations.” (Environmental Engineering Service)

Response 8: Ohio EPA agrees that when these rules were originally proposed there was a lot of contention. However, in order to resolve that contention, Ohio EPA embarked upon a unique process that involved the formation of a stakeholder's workgroup that consisted of members representing a variety of interests in the field of water and wastewater treatment. The stakeholder's workgroup went through every rule in this chapter and came to a consensus on the absolute minimum amount of time a qualified person should be at a facility. The existing rules were a result of that process. Evidence that this is widely accepted is the fact that Ohio's major organizations representing water and wastewater facilities and operators the Ohio American Water Works Association (AWWA), Ohio Water Environment Association (OWEA) and Ohio Association of Metropolitan Wastewater Authorities (AOMWA) did not provide comments on the minimum staffing requirements for the treatment facilities. Concerns that they had regarding visits to collection and distribution systems were resolved with language developed in cooperation. In addition, these rules have several provisions that will allow for reductions in minimum staffing times based on additional operators at the facility and/or levels of automation at the facility.

The comment states that members of Ohio EPA's operator certification staff are not certified. This statement is true, and it is by design that staff performing the administrative functions

related to operator certification do not have certificates. Having certified operators performing the administrative duties would create the potential for conflicts of interest, because the operators would potentially be required to approve their own or a close colleagues' applications for examination, renewal or contact hour credit. The commenter has suggested that the Agency allow experts to determine what is best for systems. Chapter 3745-7 of the Ohio Administrative Code has provided a method for Ohio EPA to utilize subject matter experts for providing guidance to the Director and the operator certification program. OAC Rule 3745-7-10 establishes a group of subject matter experts called the Operator Certification Advisory Council who provide recommendations to the Agency regarding matters associated with operator certification, classification and minimum operating requirements. Seven members of this group are Class 3 or higher certified operators in the fields of water and wastewater.

Comment 9: Regarding response number 60 in the response to comment document, "As the term "means and methods" is a firmly established idiom in the water and wastewater industry, had the legislature intended to give the Ohio EPA the authority to regulate methods, including staffing levels, the statute would have been worded to grant this authority. I believe (1) that the Ohio EPA is exceeding its statutory authority by including minimum staffing requirements (methods) for the operation of public water systems, sewerage systems, treatment works, and appurtenances; and (2) the rules as proposed contradict the requirements and spirit of Executive Order 2011-01K. (Environmental Engineering Service)

Response 9: Ohio EPA worked with a stakeholder's workgroup and used a consensus-based process to develop the minimum amount of time that the members felt an operator should spend at each type of plant. ORC 6109, 6111 and 3745 give Ohio EPA broad authority to ensure the proper operation of water and wastewater facilities and the protection of public health. The agency would argue that term "means and methods" is not a firmly established idiom used in the development or implementation of the Agency's rules. ORC 6109.04, 3745 and 6111.46 provide Ohio EPA with the authority to regulate the operation of drinking water and waste water treatment plants. Operation includes the operation of equipment at a plant, in addition to other facets of running a plant. In addition, the requirement for having an operator of record and the requirement that an operator of record comply with minimum staffing requirements are means to ensure that the facility adequately manned by an expert to ensure provision of safe drinking water and to safely treat waste water.

Comment 10: Regarding response no. 58 in the response to comment document, "It appears the Ohio EPA is confusing its general supervision authority with that of direct supervision. I do not believe in 1997 the Ohio Legislature granted the Ohio EPA, under the certification provisions of ORC 6109.04, the authority to dictate and micromanage staffing levels for every water facility in the state. Further, I am reasonably confident that the Ohio Legislature 's intent was not for the Ohio EPA to direct communities how they must manage staffing 10 -20 years down the road from the effective date of law.

Likewise, I do not believe the Legislature through ORC 6111.46 granted Ohio EPA the authority, nor was it the legislative intent to assign staffing levels for various wastewater facility classifications." Suggestion was made that OAC 3745-7-03, Parts C, D & E, and OAC 3745-7-04 Parts C & D be removed and that other sections currently referencing these parts be modified to reflect their removal. (Environmental Engineering Service)

Response 10: As stated above, the provisions in the statutes provide broad authority to develop the rules that have been proposed. See response no. 7.

Comment 11: Comment was received that adding the word “professional” would result in small businesses to have a professional liability insurance. This will result in more owners to not have an operator because they will not be able to pay for it. (Beckman Services)

Response 11: Ohio EPA met with the Department of Insurance and its industry liaison to determine if adding the word “professional” would require the purchase of professional liability insurance. The liaison indicated that he had polled his members and did not believe this was a concern. It was agreed that this change simply identifies the person as a professional and that calling an operator a “professional operator” does not require a professional liability insurance policy. Rules established for professional engineers in Ohio specifically have a requirement for professional liability insurance and these rules have no such requirements. Another commenter had made a comment that his insurance was not being renewed as a result of this proposed rule change. A review of documentation submitted by that commenter indicates that the word professional was not the reason for his policy not being renewed. The insurance policy was not renewed due to reasons other than the word “professional” being included before the term “certified operator”.

Business Impact Analysis

Comment 12: Regarding question number (3) in the BIA and response no. 69 and 70 in the response to comments document

Response no. 3 in the BIA is misleading and inaccurate “The Agency’s statement is potentially misleading to the public and JCARR in that it implies an all-encompassing requirement of the SDWA, when it only applies to federal funding and operator certification issues. Other OEPA rules, not this rule package, address potential contaminants found in drinking water.” Response no. 69 in the response to comments document “I believe this to be another example where the Agency’s response is potentially misleading to JCARR, the CSI office and the public through its responses in the BIA... adequately does not necessarily translate to accurate. The Agency’s response of: “Yes, these rules enable Ohio EPA to administer the Safe Drinking Water Act (SDWA), as well as retain primary enforcement authority from the Federal Government and this rule is used to protect the public from potential contaminants found in drinking water as outlined in the SDWA” is inaccurate and evades BIA Question #3. Ohio EPA needs to be transparent in all areas and not misrepresent the intent of federal rules. Its answer remains misleading as to the federal impetus for this rule package, and again, in my opinion, may mislead elected officials in both the Lieutenant Governor’s office and JCARR. Bordering states such as Indiana and Kentucky, which are governed by the same federal requirement, do not mandate the unnecessary and burdensome staffing requirements currently required and proposed by OEPA.” By commenting further, Agency Response #70 corroborates what I highlighted above; the federal rules only apply to certification programs, not to staffing requirements, hours or approving business contracts. Otherwise these minimum requirements would be uniform among the states.” (Environmental Engineering Service)

Response 12: The Agency's statement clearly indicates why the program is required. The commenter indicates that Ohio EPA needs to be transparent and not misrepresent the intent of the federal rule. Ohio EPA has been transparent in its responses.

A review of all state programs conducted when these rules originally went in place indicated 74% of operator certification programs in the United States had requirements that were as stringent or more stringent than what Ohio EPA was proposing. Indiana has requirements for water plant operators to be on site for specified numbers of days per week and at larger facilities requires operators to be onsite during all production of water. On the wastewater side Indiana has provisions that allow it to individually set an amount of time a certified operator is required to spend in operation and reduce the number of plants over which an operator may have responsible charge. Kentucky has requirements that drinking water operators be on site at facilities when water is being produced and at larger facilities an appropriately certified operator is required on other shifts. Kentucky's wastewater program does not have specific staffing requirements but does require operators in responsible charge to respond via phone within thirty minutes and be on site within 1-2 hours depending on the classification of the facility. A review of all state programs conducted when these rules originally went in place indicated 74% of operator certification programs in the United States had requirements that were as stringent or more stringent than what Ohio EPA was proposing.

Comment 13: Regarding question no. (4), response contradicts the response in question (3). (Environmental Engineering Service)

Response 13: Answers to question (3) and (4) do not contradict and explain that need for having the rules as a part of US EPA's requirement for Ohio EPA to have an established program for certifying operators. Failure to have U.S. EPA approved program would result in losing 20% of the federal funding provided for the Ohio's Revolving Fund Loan Program.

Comment 14: Suggestion was made that the agency needs to reevaluate how it measures success in response no. 6. "The Agency will base success by the number of hours and days an operator is present at facilities. I believe success should be based on a facility's ability to provide safe drinking water and/or treating and discharging wastewater to at least the degree required by its NPDES permits." (Environmental Engineering Service)

Response 14: The agency will base success of these rules on compliance rates which in turn will accomplish what the comment suggests, which is to ensure appropriate staffing with technical expertise to ensure the availability of safe drinking water and that treatment and discharges comply with the applicable NPDES permit. The rules thereby increase compliance rates.

Comment 15: Regarding question no. (11), "OEPA's response appears to contradict its statement in Regulatory Intent Item 6, in that it will measure performance by looking at operator log books. The EO requires agencies to provide transparent and measurable outcomes in each regulation to help the agency and the public determine whether the regulation is effective. It is my opinion that the proposed rules do not comply with this requirement of the EO." (Environmental Engineering Service)

Response 15: The responses to questions 11 and 6 in the BIA are consistent and do not contradict. Question (6) provides ways by which the agency can measure success of this regulation such as through reportable data, during sanitary surveys or reviewing log books, and ensuring

minimum staffing is met. Question 11 asks whether the rule is performance based. The agency has indicated that the rules are not performance based.

Comment 16: Regarding question no. (12), “The Agency's response is inaccurate in that it duplicates the desired outcome of these rules in existing EPA regulations.” (Environmental Engineering Service)

Response 16: Ohio EPA interprets this question to mean that the commenter believes that other existing Ohio regulations regulate operator certifications for public water systems and waste water treatment works. The question has been answered appropriately since there are no existing Ohio regulations, other than these rules, that regulate drinking water and waste water operator certifications.

Comment 17: Regarding question no (13), “OEPA indicates it will rely entirely on staff for implementing and ensuring the regulation is applied consistently. Based on goals stated in the EO, government must be held accountable to justify that every regulation in place serves a purpose and is implemented in the most effective manner possible. There are no provisions stated in the rules or the BIA for government accountability. (Environmental Engineering Service)

Response 17: Response number 13 in the BIA indicates agencies’ plans for implementation and ensuring the rules are applied consistently. Some of the methods described are developing internal procedures and guidance documents for staff to use in implementing rules, giving presentations on rule updates and regularly notifying staff of rule updates. Ohio EPA staff are required to conduct periodic sanitary surveys and inspections to ensure proper operations of public water systems and waste water treatment facilities. During these visits operator log books are reviewed to ensure compliance with the rules. Provisions included in this rule also require electronic submission of staffing data for review by Ohio EPA. These are the most effective and efficient methods to perform these duties. Ohio EPA is also actively involved in giving presentations on rules throughout the state.

Comment 18: Regarding questions nos. 14 and 15, comment was received that agency failed to account for the cost of the following:

- a. The additional cost and time required for small businesses for mobilization to provide 5-day per week coverage at Class II, III & IV facilities.
- b. By adding the word " Professional" to the term certified operator, even though duties will not change, small businesses will very likely be required to purchase professional liability insurance, in addition to general liability insurance. (Environmental Engineering Service)

Response 18: It is not clear what exact provision of the rule this comment is directed to. It could be toward a requirement that a representative of the facility owner shall visit the facility 5 times per week or to the requirement that Class II collection and distribution systems must be visited by a certified operator 5 day per week. In either case, this cost was considered in the analysis of costs for staffing the facilities with an appropriately certified operator. Class II, II and IV facilities all have a requirement to be staffed by an appropriately certified operator 5 day per week. Time spent fulfilling the distribution or collection system visits can be counted toward the minimum staffing requirements (specific clarification was added in this rule package to make that clear) therefore the cost is included in Ohio EPA’s initial cost estimate and the

same would apply to visits required by an owner's representative. The certified operator counts as an owner's representative and would thereby meet this requirement when fulfilling the minimum staffing requirement. Ohio EPA would argue by the very nature of their size and complexity Class II, III and IV facilities would not be likely to be associated with small businesses other than a small business may be contracted to operate one of these facilities and as described above the visits would be covered when the company met the minimum staffing requirement. The rules have several provisions allowing for reduction in the amount of time the operator of record is required to be onsite. Should those provisions be taken advantage of, the overall cost of compliance could be much less. The cost has been updated to include the cost of minimum staffing requirements for Class I collection and distribution systems. These costs do not take into account the rule's several provisions allowing for reductions in the amount of time the operator of record is required to be onsite. Should those provisions be taken advantage of, the overall cost of compliance could be much less.

There is no requirement to obtain professional liability insurance contained in this rule. See response 11.

Comment 19: Regarding question nos. 16 and 18, the agency failed to include the adverse impacts to all small business such as contract operators, and privately-owned waste water facilities. (Environmental Engineering Service)

Response 19: There is a great deal of flexibility built in to these rules that allow small businesses and large governmental organizations to comply with these rules. If other suggestions were provided, Ohio EPA would evaluate those suggestions and incorporate them into this rule package provided they adequately protected public health and the environment. Ohio EPA would contend that a majority of the public water systems and wastewater systems are Class 1 or lower and are in fact run by small businesses. These rules were drafted to balance the need to ensure public health and safety with the concerns of small businesses. Several of the provisions that have been added are designed specifically to assist in protecting the small business owners of water and wastewater systems.

OAC Rule 3747-7-01

Comment 20: Clarify the amended language for calculating population served by public water systems. After adjusting language in the rule to address concerns indicating that actual flow from a system should be a criteria on which to base classification of a facility a comment was received that requiring the population to be calculated based on an average of the highest sixty days, specifically for non-transient non-community public water systems, ignores the actual population served and overestimates actual exposure. "The proposed change to OAC 3745-7-01(P) would create a new method for calculating the population of either a community or noncommunity water system, i.e. by an average of the 60 highest days of population of a system, using the methods identified in OAC 3745-81-01(P)(II)(b). That rule states that "when the "average number of individuals regularly served" by a noncommunity water system (such as a church) cannot be readily determined, the Director shall determine the population served on a case-by-case basis, and may consider "an actual daily count of individuals, sales receipts, seating capacity or the issued certificate or certificates of occupancy" or "any other information deemed reliable regarding the potential population served." But OAC 3745-81-01(P)(II) makes no mention of a 60-day averaging period; nor is such an averaging period used for purposes

of determining whether a water system is a public water supply. Instead, the population is determined by "an actual count of residents or by multiplying the number of service connections by the average household size; and in the case of a transient noncommunity water system (such as a church), population counts are not used at all. See OAC 3745-81-01(P)(II)(b)(ii). This is because persons do not come into contact with water supplies at such systems for extended periods, and often not at all. Therefore, the public health-related concerns with such water supplies are (or should be) significantly reduced as compared with water supplies which provide potable water to persons who use the water regularly over extended periods of time.

There are two distinct problems with the proposed rule. First, the so-called 60-day average does not specify the time period to be used for gathering the 60 highest days. Is it 60 days in a calendar year? 3 calendar years? 10 years? The entire prior operating life of the system? The proposed rule does not tell us. This makes the rule vague as to its intention and meaning. Moreover, the proposed rule seems to endorse an averaging system which ignores much of the daily population data for a particular water system by "cherry picking" the 60 highest days of some indeterminate period in order to reach a skewed "average" for purposes of classifying of a public water system".

Response 20: The commenter is referring to definitions regarding determining whether or not a system is a public water system. By the time that a system is being classified, it has already been determined to meet the criteria in OAC Rule 3745-81. The provisions in 3745-7-01(P) regarding population apply strictly to chapter 3745-7 of the OAC which deals specifically with certified operators. This definition is solely being used to assist in ensuring public health and safety by determining the correct level of certified operator necessary at each facility. The definition clearly indicates that this is for the purposes of this chapter only.

This definition of population is being added to clarify how Ohio EPA will determine population solely for the purpose of classification. There are provisions in this proposed rule that clearly identify the limitations of this definition.

The commenter has misstated the language of 3745-81-01(11)(b), the actual language states "When the average number of individuals regularly served by a noncommunity water system cannot be readily determined, the director shall determine the population served on **a case by case** basis. In making this determination, the director **may** consider an actual daily count of individuals, sales receipts, seating capacity or the issued certificate or certificates of occupancy as in the case of a building as defined by section 3781.06 of the Revised Code, or any other information deemed reliable regarding the potential population served."

Ohio EPA is simply attempting to establish a definition of population that ensures a system can clearly identify a population and know the required level of certified operator for a facility. The current version protects public health and the environment. This rule allows a facility to confidently and consistently understand their classification and the impact the classification will have.

The facility classifications contained in the tables of OAC Rule 3745-7-03 have already taken potential exposure into account and only transient systems over a certain size are required to have a certified operator based on the numbers of people who could potentially be impacted or the average daily flow.

The commenter indicates the time period is not specified. However, the definition of “Average Daily Flow” clearly states, “The average of the 60 highest daily flows during any one calendar year period.”

The commenter goes on to indicate the rule unfairly “cherry picks” the highest values in a year. The rule is designed to provide an appropriate level of protection to systems that see high levels of attendance at certain times of the year. Ohio EPA is particularly concerned about seasonal type systems (e.g. concert venues, fairgrounds, amusement parks, etc.) that may see high populations for a portion of the year and either may close or have a single caretaker overseeing the facilities. Using a different count like an annual flow divided by 365 would create a situation where appropriate protections were not provided to the public during the busy season. One important factor to note is that in times of no water production or treatment, a certified operator would not be required to staff the facility. There are already provisions established in OAC Rule 3745-7-03 that make this clear.

Comment 21: Comment was received on 75% reduction of time for non-operator positions in Paragraph (O)(2)(b)(ii) of the proposed rule. “The Agency’s response to the overwhelming objection to the new proposed standard is understood. The Agency suggests that enforcement cases in the past few years have made it clear that individuals who have received their certifications through the sole use of the types of experience discussed have left them ill-prepared to take on the operation of a facility as an operator of record.

Respectfully, the City submits that the 75% reduction of time for non-operator positions will provide a significant negative impact to the industry as a whole regarding its ability to promote licensure with folks that do not hold an official “Operator” title. As many Commentators stated, it is continuing to be more and more difficult to attract skilled employees to the profession. Arguably, the Agency, simply based on a job description, cannot assume it understands the entirety of job tasks individuals perform, and by disqualifying some individuals out-of-hand does not guarantee a facility will not be better run. A Chemist responsibility may be very different in a 100 MGD facility versus a 5 MGD facility, and to limit the licensure based on the job description is unrealistic and unfair.” (City of Columbus)

“City of Perrysburg shares the positions expressed by many public utility systems, large and small, regarding proposed limitations on definitions of operating experience, i.e. laboratory and pretreatment, etc. It is clear from the Agency’s responses to comments that the Agency is unmoved by those comments and intends to proceed with those limitations. The City is nevertheless, on the record in opposition to this rule proposal.” (City of Perrysburg)

Response 21: Ohio EPA met with AWWA and AOMWA and made changes to language in the rules to make it clear that Ohio EPA will accept information regarding an applicant’s actual job duties and will not solely rely on a title. It is imperative that applicants be able to document a minimum amount of actual experience in operating a facility prior to being given a certification that allows them to be in charge of a facility.

Comment 22: Comments were received on the added language in the proposed rule requiring public water systems to obtain an operator based on their “potential to serve” a population. The comment letters stated that the proposed language would require churches and small public water systems to obtain an operator based on their occupancy, rather than the actual population served or water

usage. The comments stated that since the actual population served is less than the potential population to serve, the proposed rule is unfair and unreasonable.

"EPA now has proposed a rule requiring a professional water system operator for a system that "has the potential to serve" a population greater than 250. By this change, the operator requirement would be triggered not by the actual number of persons who are served by the water system, but by the potential number served. Under the proposed rule, the EPA would apparently require the presence of a water system operator at Bath Church because its sanctuary is big enough hold over 250 people (i.e. it has the potential to serve over 250 people), despite the fact there are rarely 250 people in the building. In fact, the number of people potentially served by a water system has no bearing whatsoever on the number of people actually served by the system. Basing the proposed rule on building capacity is unfair and unreasonable. A reasonable operator requirement would be based on the actual number of people served by a water system, not on the number potentially served. The most damaging effect of the proposed rule would likely be on churches and facilities like ours that have the potential to serve many people but in fact serve far less." (Bath United Church)

"The proposed rules which are the subject of this hearing seek to significantly alter the longstanding method of calculating the population served by a public water supply system. The proposed change to OAC 3745-7-01(P) would create a new method for calculating the population of either a community or noncommunity water system, i.e. by an average of the 60 highest days of population of a system, using the methods identified in OAC 3745-81-01(P)(II)(b). That rule states that "when the "average number of individuals regularly served" by a noncommunity water system (such as a church) cannot

be readily determined, the Director shall determine the population served on a case-by-case basis, and may consider "an actual daily count of individuals, sales receipts, seating capacity or the issued certificate or certificates of occupancy" or "any other information deemed reliable regarding the potential population served." But OAC 3745-81-01(P)(II) makes no mention of a 60-day averaging period; nor is such an averaging period used for purposes of determining whether a water system is a public water supply. Instead, the population is determined by "an actual count of residents or by multiplying the number of service connections by the average household size; and in the case of a transient noncommunity water system (such as a church), population counts are not used at all. See OAC 3745-81-01(P)(II)(b)(ii). This is because persons do not come into contact with water supplies at such systems for extended periods, and often not at all. Therefore, the public health-related concerns with such water supplies are (or should be) significantly reduced as compared with water supplies which provide potable water to persons who use the water regularly over extended periods of time. There are two distinct problems with the proposed rule. First, the so-called 60-day average does not specify the time period to be used for gathering the 60 highest days. Is it 60 days in a calendar year? 3 calendar years? 10 years? The entire prior operating life of the system? The proposed rule does not tell us. This makes the rule vague as to its intention and meaning. Moreover, the proposed rule seems to endorse an averaging system which ignores much of the daily population data for a particular water system by "cherry picking" the 60 highest days of some indeterminate period in order to reach a skewed "average" for purposes of classifying of a public water system.

Moreover, the proposed rule, when used in conjunction with the language of OAC 3745-81-01(P)(II)(b), also would allow the Ohio EPA to continue a bad regulatory habit of relying upon "surrogate" values to determine the actual number of persons regularly using a facility's water supply. For example, by using the certificate of occupancy for a church facility, which

might be capable of seating 300 persons for a Sunday service under its certificate of occupancy, the proposed rule ignores the actual number of persons who attend such services; and worse, the proposed rule ignores the number of persons who actually use the water supply of a church --- and who use the water supply regularly --- which is the standard for calculating water supply populations under OAC 3745-81-01, as well as federal drinking water standards. These surrogates for population usage of a water system should not prevail over evidence of actual, regular usage of water system.

Typically, only a small portion of churchgoers at any given service avail themselves of the church's water supply facilities. And while most water supplies have meters to provide a record of water usage, Ohio EPA seems to ignore this information, and instead utilizes unrealistic estimates of population usage drawn from seating capacities, church attendance figures and other unreliable indicators of water usage in order to determine the population served by a noncommunity (i.e. church) water supply.

This practice seems to originate from some desire by Ohio EPA staff to reclassify all churches and similarly situated noncommunity water supplies --- thereby increasing staffing requirements and operating costs --- without any evidence that additional staffing and operational costs will protect the public from any demonstrated health risk.

This is unnecessary since water supply test results can determine when a water supply is in need of additional staff or operational costs to meet applicable state drinking water standards. It is only those water supplies which regularly violate state drinking water standards or fail to correct operational problems which should be subjected to additional staffing and operational requirements. Those water supplies which are in substantial compliance with health-related drinking water standards should not be required to incur additional regulatory burdens and expense.

That Ohio EPA prefers to use hypothetical populations of water supply users is confirmed by another proposed rule change appearing in OAC 3745-7-03(B), and other portions of that rule, which would allow Ohio EPA to reclassify public water supplies based upon "the population the system has the potential to serve." No criteria or definition accompanies the proposed term "the population the system has the potential to serve," nor is there any commonly accepted or understood meaning of that term, which adds yet more ambiguity to the process of identifying a population of water supply users who are regularly served by a water supply system. The term apparently will mean whatever Ohio EPA wants it to mean. Virtually any well in the State of Ohio, public or private, has the "potential" to serve whatever number of customers that a creative mind might imagine. But this term hardly serves as a standard which gives Ohioans fair notice as to how populations served by a water supply will be calculated. Whatever it means, the proposed rule favors protection of hypothetical - or even imaginary-Ohioans, rather than actual Ohioans (or other actual users) who regularly use a water supply system. Surely Ohio EPA has better things to do than utilize artificially inflated "populations" of public water supply users to add additional regulatory costs and staffing to Ohio's churches and other noncommunity watersystems." (House of Jacob)

Comment was received that Ohio EPA has misinterpreted the Federal Safe Drinking Water statute. Ohio EPA requires an average based on a sampling of 60 days or based on a sampling of the 60 busiest days of the year however the federal statute intends it to be the average computed for all days that water is served to the public, not just for the 60 busiest days of the year. Also, the federal

rule clarifies that a drinking water system must serve the public for at least 60 days to be considered as a public water system. Comment was made that the agency's proposed language for determining population based on the potential to serve rather than the actual population or water use is completely unreasonable, specifically, for small public water systems that have a potential to serve more than 250 people but actually serve significantly lesser populations. Suggestion was made that the language needs to be clarified for average number of people served and the determination of monitoring should be tied to actual water use and the average needs to be computed for all the days the facility is open to the public. (Bill Downing)

Response 22: Provisions have been added to the proposed rule which allow systems to calculate a design flow for their system based on actual flows recorded at the facility. This provision offers a regulated facility several options to use when evaluating its classification. Ohio EPA's research of our facility database indicates that more than 3600 facilities may benefit in some way from this provision.

The definition of population in OAC 3745-7-01, is Ohio EPA's attempt to define population in the context of chapter 3745-7 of the Administrative Code. A formal definition has not previously been defined in this rule and this is an attempt to codifying a reasonable definition to ensure consistency among facilities.

A rule that examines a facility's potential to serve is consistent with US EPA guidance on determining whether facilities are regulated. If a facility has the potential to serve a larger number of people, there is a greater potential risk of improperly operated systems generating a public health risk. The proposed rule is designed to ensure consistency among like sized systems and make it easier for business owners to operate in a consistent regulatory environment.

Regarding the comment on misinterpreting the Federal Safe Drinking Water statute, US EPA's regulatory language covers only the determination of whether a system is a public water system or not. Each state has been delegated the authority to design a classification system and the basis for those classifications. Ohio EPA has added a provision that allows a facility to opt into using the actual flows for a facility to be used in determining a classification. As indicated above, this provision has the potential to allow a number of small facilities to reduce their current classification based on flow produced.

Regarding the comment that water supply test results can determine when a water supply is in need of additional staff or operational costs, many of the systems that would be impacted perform minimal water quality monitoring. Visits by a professional who has demonstrated a knowledge of the field is an important tool to ensure public water systems are operating properly. Ohio EPA has seen many situations where water quality results met standards up to the point of a total system failure. An appropriately certified operator can ensure that systems do not fail.

OAC Rule 3747-7-04

Comment 23: Clarify "submitting modified operating plan" in Paragraph (C)(3)(a)(ii) of the proposed rule.

"Any change in the criteria under which the reduction was approved (e.g., retirement of a professional operator listed in the approved staffing plan, loss of the professional operator of record, reduction in the workforce, removal or failure of automation or continuous monitoring, etc.) will require that the treatment works immediately return to compliance

with the minimum staffing requirements in paragraph (C)(1) of this rule. This provision shall not preclude a treatment works from submitting a modified operating plan.

Clarification was added to this provision to illustrate what was meant by "any change in the criteria". This was helpful, and the City suggests adding further clarification to this provision relative to illustrating what is meant by "submitting a modified operating plan."

As it appears now, every time an operator-of-record changes, retires or resigns, a modified operating plan would need to be submitted to maintain the Staffing Reduction originally approved. As turnover can be frequent, it seems highly inefficient to submit another -15-page plan. Perhaps, as long as the replacement ORC has the same required level of Certification as the employee that left. The Agency can add that a Form can be completed with the substitution of names as is done with Signatory Authority notification. If only employee names change, then it shouldn't be necessary to resubmit an entire plan." (City of Columbus)

Response 23: Ohio EPA agrees that if the only change is that an operator is being added or removed from a system's existing plan, all Ohio EPA would look at is the update of the pages which included the person being removed or added. This has been Ohio EPA's practice and ensures that the information in the operating plan is current and updated.

Comment 24 "I would like to add some thoughts to the conversations regarding the staffing rules for lagoons. I understand the rules classify all lagoon systems as class I plants thus requiring 3 visits per week to each plant. We operate lagoon systems for 2 small local villages - Village of New Bloomington and Village of LaRue. Both of these plants have been in operation for around 20 years. We have operated both plants on a once per week basis the entire time with no issues. I believe requiring these villages to now triple the staffing requirements would cause a financial hardship on them. They don't generate a lot of money to add this cost to their budget. In my opinion this would be a waste of what little financial resources they do have.

Also, the lagoon systems do require much in the way of physical operations during our visits. Especially the Village of LaRue as it is a non-aerated lagoon system. There isn't anything mechanical at this plant. We couldn't make any adjustments if we wanted to. We do have the luxury of it being classified as a controlled discharge. When we are not discharging we reduce our visits to the required once per 2 weeks.

I feel that many small villages would appreciate a financial relief by maintaining a 1/week visit schedule. Obviously if there is a problem that needs more attention operators should do all they can to monitor and fix anything that needs attention.

Lastly, since the beginning of 2017 we have not had any violations at either of these plants. As the old saying goes - if it ain't broke, don't fix it." (Marion County Sanitary Engineering Department)

Response 24: Each of the referenced facilities has had minimum staffing requirements in its permit since at least 2014. Ohio EPA developed the minimum staffing requirements for all facilities in cooperation with a stakeholder's workgroup which included operators who determined that the minimum amount of time necessary for Class 1 systems was 3 days per week for a minimum of 1.5 hours per week. The amount of time allows an appropriately certified operator the amount of time necessary to conduct compliance sampling, perform necessary maintenance and ensure compliance at the facility. In particular at a lagoon system the

operator can conduct maintenance on aeration equipment (if applicable), take necessary samples, evaluate effluent and walk the perimeter of the lagoon to ensure the integrity of the berms has not been compromised. As the commenter notes, exceptions are provided that allow visits to be significantly reduced in the event a lagoon has a controlled discharge.

OAC Rule 3745-7-21

Comment 25: “The statutory authority granted the OEPA does not extend to approving business contracts between the owners of water and wastewater facilities and the individuals or firms providing operational services as would be required by OAC 3745-7-21. Should this rule become effective, the rule will allow OEPA staff to interject themselves into private business matters and contracts.” Regarding response no, 62 in the response to comment letter” ORC 6109.04 and 6111.46 do not provide for the Ohio EPA to regulate or develop regulations concerning activities of individuals or firms from a business perspective, period. Response 62, through omission, is misleading to JCARR. The proposed OAC 3745-7-21 would require contract companies and individuals to:

- (1) Maintain a copy of the contracts (NOT SAMPLE CONTRACTS) onsite at the public water system or wastewater works for inspection by Ohio EPA;
- (2) Maintain a copy of the contract for period of three years after the end date of the contract;
- (3) Provide a copy of the contract within five days of a request by Ohio EPA.

Secondly, it appears that the proposed OAC 3745-7-21 unfairly discriminates against private business, especially small business enterprises. The proposed rule does not require Agency review and approval of contracts between unions providing facility operations and the owners of such facilities (public or private). Union agreements impact the largest number of contracted operators working at the largest facilities and serving the larger population centers throughout Ohio. These agreements are uniformly restrictive as to duties, times worked, emergency callout requirements of operators, and at times, limit the facility owner's ability to direct work. OEPA should be more concerned with the impact of union agreements in the operator rules because of the large number of people served by these facilities, instead of trying to enact more regulations on small businesses.

The Agency declined to comment regarding the same requirements for union contracts. OAC 3745-7-21 unfairly discriminates against private business, especially small business enterprises and it does not address business arrangements that impact the largest number of contracted operators working at the largest facilities and serving the larger population centers throughout Ohio.

Rules of this nature clearly extend beyond the statutory authority to govern the certification of operators, establish qualifications, provide for examinations, etc. and provide "general supervision". There are already provisions in OAC 3745-7 to discipline, revoke or suspend certificates and take other action against negligent/incompetent operators. It is not the responsibility, or frankly the business of government, outside of the courts, to impose itself in private business matters.

Executive Order 2011-01K, Part 2, e. requires the OEPA to consider, as early as possible in the development or review of regulations, the perspectives of small businesses. This among other requirements of the Executive Order appear to have been ignored.” Suggestion was

made that OAC Rule 3745-7-21 be removed from the proposed rule, and if this action is opposed by the Ohio EPA, documentation should be provided that demonstrates its process considered the requirements of Executive Order 2011-01K. (Environmental Engineering Service)

Response 25: As stated above the statutory language has given Ohio EPA the authority to make these rules. OAC Rule 3745-7-02(D) currently allows owners of public water systems or wastewater works to enter into a contract for the services of appropriately certified operators. This provision also includes requirements to respond to emergencies, provide reliable operation and maintain a copy of the contract onsite at the facility. Conversations with the commenter have indicated that he believes that Ohio EPA has no business knowing what he charges his customers. Ohio EPA has indicated it has no concerns regarding the monetary compensation a contract operator will receive. Ohio EPA has traditionally told contract operators that monetary compensation could be addressed in an attachment that does not have to be maintained onsite or by redacting the compensation. With the provisions in OAC Rule 3745-7-21 Ohio EPA had planned to use the same methods. Language to reflect this has been added to the rule. Due to the fact that OAC Rule 3745-7-21 requires the maintenance of a contract onsite at the facility that provision will be removed from OAC Rule 3745-7-02 to eliminate duplication.

The commenter goes on to indicate that the rule is discriminating against private business because it does not require the agency to review union agreements. OAC Rule 3745-7-21 addresses a specific provision of OAC Rule 3745-7-02. OAC 3745-7-02(C) requires the professional operator to be an employee of the person owning the system. Employees covered by union contracts are covered under this provision of the rule and as such the owner of the facility has direct control of their actions and can ensure that they are meeting the requirements of OAC Rules. The use of a contract operator is an exception to this requirement and the owner of a facility does not have direct control over the contractor's employees. The use of a contract operator allows facilities the flexibility to not have to hire an employee specifically dedicated to the operation of their facility. Enforcement cases with contract operations companies and contract operators such as Unitech Environmental Services and an operator who operated the City of Sebring and a number of other facilities have demonstrated that the current provisions do not adequately protect small business owners from unscrupulous contract operators that they trust to be professionals in the field. These cases have indicated the need to identify specific requirements for contract operation companies and contract operators to ensure that small business owners who contract with these individuals are protected. The requirements contained in the proposed rule are designed to ensure that Ohio EPA has the ability to address companies whose business practices put the small business owners who hire them into jeopardy of violating rules and creating a threat to public health and safety and the environment.

The commenter indicates that the director is given the authority to adjudicate and issue punishment unilaterally. This statement is inaccurate, Chapter 119 of the Ohio Revised Code establishes an appeals process that would be available to any contract operations company or operator who was facing a disciplinary action in accordance with the provisions of this rule. Proposed actions of the Director include notice regarding appeal rights and how to appeal. Final actions of the Director, likewise, include notice regarding appeal rights and how to appeal.

End of Response to Comments