

Hearing Summary

Rule Package: Biocriteria package (OAC Chapter 3745-1)

Original filing date: September 11, 2023

Public comment start date: August 28, 2023

Public comment end date: October 16, 2023

Public hearing date: October 16, 2023

List of Rules: 3745-1-07 and 3745-2-03

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 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.

Ohio EPA digitally records all public hearings for rules. The digital recordings are available upon request. These recordings may be sent out for transcription if necessary.

OHIO ENVIRONMENTAL PROTECTION AGENCY

**Public Pre-Notice
Proposed Rulemaking Governing
Water Quality Standards and
Implementation of Water Quality Standards Programs**

Notice is hereby given that the Director of Environmental Protection, under the authority of Sections 6111.041 of the Ohio Revised Code and in accordance with Chapter 119, proposes to amend the following rule of the Ohio Administrative Code:

3745-1-07 Beneficial use designations and biological criteria.

And to add as a new rule:

3745-2-03 Application of biological survey data to development of water quality-based effluent limitations.

These rules address water quality standards and the implementation of those standards.

The purpose of this rule making is to primarily to update the biocriteria narrative portion of the rules to remove a U.S. EPA objection to the current rule and incorporate a Memorandum of Understanding between Ohio EPA and U.S. EPA that was signed in 2000. This rulemaking will also eliminate the Limited Warmwater Habitat use designation, which is obsolete.

The public comment period will run until October 16, 2023. A public hearing on this proposed rulemaking will be held to consider public comments in accordance with Section 119.03 of the Ohio Revised Code. Ohio EPA will be holding an in-person and virtual public hearing on the rules on October 16, 2023 at 10:30 a.m. The in-person hearing will be at the same time and date and will be located at Ohio EPA, Suite 700, 50 W. Town Street, Columbus, Ohio 43215. During the hearing, the public may submit written comments on the record about the proposed rules if participating virtually and verbally if participating in person.

Citizens who want to participate virtually must register in advance for the meeting at: <https://attendee.gotowebinar.com/register/3515814207479490646>

Registration for the in-person hearing is not required. Citizens intending to give testimony at the hearing should notify the Ohio EPA Public Interest Center, P.O. Box 1049, Columbus, Ohio 43216-1049, (614) 644-2160 or by emailing mary.mccarron@epa.ohio.gov. Prior registration will ensure that registrants are heard ahead of those individuals who register at the hearing. Oral testimony may be limited to five minutes, depending on the number of persons testifying. All interested persons are entitled to attend or be represented and to present oral and/or written comments concerning the proposed rule making.

Written testimony should be sent to the attention of Emily Imhoff at the Division of Surface Water, Ohio EPA, P.O. Box 1049, Columbus Ohio 43216-1049 or can be emailed to dsw_rulecomments@epa.ohio.gov. Written comments may also be submitted to the Hearing Officer at the public hearing. Written testimony will receive the same consideration as oral testimony. All testimony received at the hearing or by close of business on October 16, 2023, will be considered by Ohio EPA prior to final action on this rulemaking proposal. Written comments submitted after this date may be considered as time and circumstances permit.

Questions regarding this rule package should be directed to Eric Nygaard, at the Division of Surface Water at Eric.Nygaard@epa.ohio.gov.

To receive a copy of the proposed rules, please contact the DSW receptionist at (614) (644-2001). In addition, full copies of all proposed rules are available for review

at any Ohio EPA district office and at the Ohio EPA central office. The proposed rules are also accessible on the DSW web page at epa.ohio.gov/divisions-and-offices/surface-water/regulations/proposed-rules.

To request a reasonable accommodation due to a disability, visit <https://epa.ohio.gov/ada>

Public Hearing: Biocriteria Proposed Rules (Statewide)

Report Generated:

10/16/2023 11:56 AM EDT

Webinar ID	Actual Start Date/Time	Duration	# Registered	# Attended	Clicked Registration Link	Opened Invitation
894-918-395	10:24 AM	37 minutes	14	10	39	0

Staff Details

Attended	Interest Rating	Last Name	First Name	Email Address	Role	Join Time - Leave Time (Time in Session)	Time Session in
Yes	applicable for	Allen	Cathryn	cathryn.allen@epa.ohio.gov	Organizer	EDT (37 minutes)	37 minutes
No	applicable for		Emily Imhoff	emily.imhoff@epa.ohio.gov	External Organizer	--	--
No	applicable for		Mandi Payton	amanda.payton@epa.ohio.gov	External Organizer	--	--
No	applicable for staff		Mary McCarron	mary.mccarron@epa.ohio.gov	External Organizer	--	--

Attendee Details

Attended	Interest Rating	Last Name	First Name	Email Address	Registration Date/Time	Join Time - Leave Time (Time in Session)	Time Session in	Unsubscribed
Yes	93	Banvard	Honor	honor.banvard@jcarr.state.oh.us	10/16/2023 10:19 AM EDT	10/16/2023 10:27 AM EDT - 10/16/2023 10:39 AM EDT (13 minutes),10/16/2023 10:27 AM EDT - 10/16/2023 10:27 AM EDT (1 minute),10/16/2023 10:54 AM EDT - 10/16/2023 10:54 AM EDT (1 minute)	13 minutes	No
Yes	92	Cheng	Fang	facheng@columbus.gov	08/28/2023 10:08 AM EDT	10/16/2023 10:30 AM EDT - 10/16/2023 10:36 AM EDT (7 minutes)	7 minutes	No
Yes	91	Dougherty	Trent	tdougherty@mwbinst.com	10/16/2023 08:54 AM EDT	10/16/2023 10:31 AM EDT - 10/16/2023 10:36 AM EDT (6 minutes)	6 minutes	No
Yes	91	Hood	Mariah	10117778@id.ohio.gov	10/12/2023 08:49 AM EDT	10/16/2023 10:33 AM EDT - 10/16/2023 10:37 AM EDT (5 minutes)	5 minutes	No
Yes	93	Lehmann	Adam	adam.lehmann@hamilton-co.org	08/28/2023 10:13 AM EDT	10/16/2023 10:42 AM EDT - 10/16/2023 10:48 AM EDT (6 minutes),10/16/2023 10:53 AM EDT - 10/16/2023 10:56 AM EDT (3 minutes),10/16/2023 10:58 AM EDT - 10/16/2023 11:00 AM EDT (3 minutes)	12 minutes	No
Yes	92	McClatchey	Becky	rmcclatchey@clermontcountyohio.gov	08/28/2023 09:49 AM EDT	10/16/2023 10:29 AM EDT - 10/16/2023 10:37 AM EDT (8 minutes)	8 minutes	No
Yes	99	Morgan	Christine	chris@morganatlanta.com	10/16/2023 09:42 AM EDT	10/16/2023 10:28 AM EDT - 10/16/2023 11:00 AM EDT (33 minutes)	33 minutes	No
Yes	100	Slone	Lee	lslone@mdllp.net	10/06/2023 10:47 AM EDT	10/16/2023 10:25 AM EDT - 10/16/2023 10:25 AM EDT (1 minute),10/16/2023 10:25 AM EDT - 10/16/2023 11:00 AM EDT (36 minutes)	36 minutes	No
Yes	93	Wick	Elizabeth	ewick@enviroscienceinc.com	10/16/2023 08:48 AM EDT	10/16/2023 10:25 AM EDT - 10/16/2023 10:36 AM EDT (11 minutes)	11 minutes	No
Yes	92	Wise	R. C.	villageadministrator@villageofgambier.org	08/28/2023 12:32 PM EDT	10/16/2023 10:32 AM EDT - 10/16/2023 10:39 AM EDT (7 minutes)	7 minutes	No
No	0	Boesinger	Hannah	hannah.boesinger@lakeerie.ohio.gov	08/31/2023 07:49 AM EDT	--	--	No
No	0	DeJarlais	Christina	christina_dejarlais@oxy.com	08/28/2023 10:27 AM EDT	--	--	No
No	0	Gonya	Cory	cory.gonya@nutrien.com	08/28/2023 01:28 PM EDT	--	--	No
No	0	Telep	Justin	Telepj@neorsd.org	08/30/2023 12:04 PM EDT	--	--	No

DSW Biocriteria Rules

Oct. 16, 2023

Hello and welcome to Ohio EPA's public hearing regarding Division of Surface Water's proposed rules. My name is Mary McCarron and I'm hosting today's public hearing. With me today from Ohio EPA are Emily Imhoff, Melinda Harris, and Eric Nygaard. In a moment, we will move to the public hearing where we will take official comments on the proposed rules.

For those attending online, you may submit any comments you have about the proposed rules in the Questions pane at any time.

We will not be responding to any comments submitted during the public hearing today. I will read aloud any comments we receive in the GoTo platform.

Before we get started, I'd like to go over a few items to help our attendees navigate the GoTo platform.

On this slide here you will see an example screenshot of your Attendee interface. You should see something that looks like this on your computer desktop on the right-hand side of your screen. For this public meeting you are listening in using your computer audio. If you are having sound issues or if the slides stop advancing, try refreshing your browser. If that doesn't work, try logging off and logging back in.

Please submit public comments by clicking on the question mark icon and typing them into the Questions pane on your attendee interface. You may send your comments in at any time. All comments submitted will be read aloud for the whole audience to hear.

You can also click on the document icon to view included handouts.

We will now begin the hearing.

PUBLIC HEARING SPEECH

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 Surface Water proposes to amend Ohio Administrative Code, Chapter 3745-1-07 Beneficial use designations and biological criteria.

And to add as a new rule Chapter 3745-2-03 Application of biological survey data to development of water quality-based effluent limitations.

These rules address water quality standards and the implementation of those standards.

The purpose of this rule making is to primarily to update the biocriteria narrative portion of the rules to remove a U.S. EPA objection to the current rule and incorporate a Memorandum of Understanding between Ohio EPA and U.S. EPA that was signed in 2000. This rulemaking will also eliminate the Limited Warmwater Habitat use designation, which is obsolete.

These rules have been filed with the Joint Committee on Agency Rule Review. Copies of the rules are available for public review on our website and in the handouts section in GoTo.

All interested persons are entitled to attend or be represented, and to present written comments concerning the proposed rules. All written 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, Oct. 16, 2023. These comments may be typed into the GoTo platform today or emailed to dsw_rulecomments@epa.ohio.gov. All emailed comments submitted for the record receive the same consideration as typed comments 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.

This hearing affords citizens an opportunity to provide input. Therefore, we will not be able to answer questions today.

YOU MAY NOW SUBMIT COMMENTS IN WRITING. I will read aloud any comments we receive in the Questions pane. I will keep the chat open until 11:00 a.m. to provide time for participants to type in comments.

CLOSING

After the hearing closes, we will accept written comments through 5:00 p.m. today. You can send those comments to the email address on the screen.

Thank you for your comments, cooperation, and participation in Ohio EPA's decision-making process. The time is now _____ and this hearing is concluded.



Environmental Protection Agency

Division of Surface Water Response to Comments

Rules: OAC 3745-1-07 and 3745-2-03

Biocriteria package

Agency Contact for this Package

Division Contact: Mariah Hood, Division of Surface Water, (614) 644-2865, Mariah.Hood@epa.ohio.gov

Ohio EPA held a comment period beginning on August 28, 2023, and a public hearing on October 16, 2023, regarding proposed Water Quality Standards rule amendments. This document summarizes the comments and questions received during the public comment period, which ended on October 16, 2023. No comments were received at the public hearing.

Ohio EPA reviewed and considered all comments received during the public 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: **Biological criteria “provide a direct measure of attainment of the warmwater habitat, exceptional warmwater habitat, and modified warmwater habitat aquatic life uses.” OAC 3745-1-07(C). Accordingly, these criteria play a significant role in assessing water quality and in ensuring that regulatory controls are imposed only when appropriate. AOMWA is concerned that the new rulemaking inappropriately fails to carry forward these well-established principles associated with biological criteria.**

First, the rules should maintain existing protections for point sources that are not the primary cause of nonattainment under certain conditions. Under the current regulatory framework, when a point source meets all applicable chemical specific and whole effluent chemical criteria, additional regulatory controls shall not be imposed, unless certain conditions are present, including that “[t]he point sources are shown to be the primary contributing cause of the nonattainment.” OAC § 3745-1-07(C)(2)(a). That is, if a point source is not a primary cause of nonattainment for the applicable biological criteria, and the associated chemical specific aquatic life criteria and whole effluent criteria are being

met, then additional regulatory controls cannot be imposed. This aspect of the rules appropriately requires a relationship between a facility's discharge and the receiving water body's nonattainment. Conversely, it protects point sources from the imposition of costly requirements that may provide little or no environmental benefit. This feature of the existing rules reflects good public policy by placing the regulatory focus on the primary cause of the nonattainment, while avoiding imposing costly obligations on the Publicly Owned Treatment Works and other point sources when they are not the primary source of the problem.

By contrast, the Proposed Rules would allow regulatory controls merely when "point sources are shown to be a primary cause of the non-attainment." AOWMA is concerned with this language because one could argue that there are many "primary causes" of nonattainment in a watershed, and we are concerned that the amendment targets minor sources. AOMWA grew more concerned when we suggested that the Agency define "primary cause," and the Agency refused to do so. AOMWA requested that Ohio EPA define "primary cause" to mean a source that contributes greater than 40% of the total pollutant load.² This revision would ensure that insignificant sources are not required to install costly regulatory controls. However, Ohio EPA declined to accept this clarification. It appears that Ohio EPA is retaining discretion to require costly regulatory controls even from sources that contribute a small portion of the load.

When we conferred with the Agency regarding this issue, the Agency indicated that they intend to require regulatory controls when doing so would "move the needle" on attainment, and the Proposed Rules would reflect current practice. However, AOMWA believes that the current rules strike the appropriate balance and the proposed revisions upset this balance. If Ohio EPA were not interested in targeting insignificant sources, then the Agency could have either (1) left this rule language alone or (2) revised these rules to provide additional assurance to the regulated community by defining "primary cause." We submit that Ohio law should retain some reasonable parameters in these circumstances. [Frank Greenland, Association of Ohio Metropolitan Wastewater Agencies (AOMWA)]

Comment 2:

Second, when chemical aquatic life criteria and whole effluent criteria are being met, Ohio EPA's amendments appear to be designed to impose regulatory controls on minor contributors in another manner. The same sentence in the Proposed Rules states: "The point sources are shown to be a primary cause of the non-attainment of the biological criteria, based on an assessment of annual or seasonal pollutant dynamics in the receiving water(s)." Similar to the comment above, AOMWA has concerns

**with the apparent goal of targeting point sources by modifying the framework so that even minor sources are considered “a primary cause” of non-attainment, even if they are a marginally significant cause of the issue for a single season.
(AOMWA)**

Response 1 and 2: Ohio EPA discussed these comments with AOMWA and clarified the intent behind the proposed rule language, revisions to which were made to address stakeholders’ comments in the draft Interested Party Review version of the rule.

The Agency reiterates its position that the proposed rule language maintains the existing protections for point sources provided by the current rule and does not interfere with the Agency’s ability to address point-source-caused problems in permit or TMDLs. The rule as proposed allows for ‘a primary cause’ to be determined by a waterbody-specific model. No scientifically meaningful definition of ‘a primary cause’ can be set outside of a model. Any such models and allocations are available for stakeholder review and comment as part of the NPDES permit or TMDL development process.

End of Response to Comments