

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: Storm Water Program and General NPDES Permit Rules

Rule Number(s): OAC 3745-39-01, -02, -03, -04, and 3745-38-02.

Date: July 12, 2018

Rule Type:

☐ New

☒ Amended

☒ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

This rulemaking addresses the Ohio EPA's Storm Water Program administrative permitting requirements for small MS4s, industries, construction activities, and large and medium MS4s under the National Pollutant Discharge Elimination System (NPDES). Rule OAC 3745-38-02 is also being revised in this rulemaking to bring consistency between the NPDES general permit requirements rule and the rest of the Storm Water Program rules in OAC Chapter 3745-39.

A municipal separate storm sewer system is a conveyance or system of conveyances that is owned or operated by a state, city, village, township or other public body designed or used for collecting or conveying storm water to surface waters that is not a combined sewer or part of a Publicly Owned Treatment Works. MS4s owners can also include public universities, local sewer districts, public hospitals, military bases and prisons.

Rule OAC 3745-39-01 contains the rule of procedure and definitions for the chapter. Rule OAC 3745-39-02 contains the objectives of the Storm Water Program for small MS4s. Rule OAC 3745-39-03 contains the NPDES requirements for small MS4s (application requirements, waivers, and storm water management plan requirements). Rule OAC 3745-39-04 describes NPDES permit application applicability, deadlines for submittal, and content requirements. The specific NPDES permit terms and conditions are also being updated in this rulemaking.

Most of the revisions planned for this rulemaking are to mirror the revisions to the federal storm water rules in 40 C.F.R. 122.26 and 40 C.F.R. 122.30 to 122.37, however, the Agency would also like to exempt construction storm water general permit applicants who have paid an application fee within twelve months of the expiration of the past general permit from paying the renewal application fee for the new general permit.

Changes under consideration are listed below by rule:

3745-38-02:

- Adding that the Director shall establish the terms and conditions necessary to meet the requirements of paragraph (C) of rule 39-03 through a comprehensive general permit or a two-step general permit. (from federal regulation in 40 C.F.R. 122.28)
- Exempt construction storm water general permit applicants who have paid an application fee within twelve months of the expiration of the past general permit from paying the renewal application fee for the new general permit.
- Updates to references and style.

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3745-39-01:

- Style and reference updates.
- Movement of the definition for “point source” from rule 3745-39-04 to this rule.
- Creation of an incorporation by reference section.

3745-39-02:

- Deletion of Paragraph (C). This paragraph is unnecessary as this same concept is eluded to in rule 3745-39-01 also.

3745-39-03:

- Restructuring the rule to mirror the newly restructured federal regulations in 40 C.F.R. 122.32 – 122.37 and 122.26 (f).
- Style and reference updates.

3745-39-04:

- Style and reference updates. Mirrors the federal regulation in 40 C.F.R. 122.26.
- Added clarification about co-permittee requirements.
- Included language (also in fed regulations) stating that the Director may require electronic reporting of information.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

OAC Chapter 3745-39 is authorized by Ohio Revised Code 6111.03. Rule OAC 3745-38-02 is authorized by 6111.03(G) and 6111.035.

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

Yes, the rule implements federal requirements. The corresponding federal requirements can be found in 40 C.F.R. 122.26 and 40 C.F.R. 122.30 to 122.37. Ohio EPA has been delegated the NPDES permitting program by the U.S. EPA in accordance with the Federal Clean Water Act. As a delegated state, federal law requires Ohio EPA to administer the NPDES permit program in accordance with minimum U.S. EPA regulations. Rules OAC 3745-39-01 to 39-04 were developed to incorporate federal requirements into the state administrative code. The inclusion of these rule into the OAC provides convenient access to Ohio NPDES rules for our stakeholders.

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4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

No. The rules mirror requirements found in 40 C.F.R. 122.26 and 40 C.F.R. 122.30 to 122.37.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

The Storm Water program seeks to minimize the introduction of pollutants into storm water discharges that enter Ohio's surface waters in order to protect public health and water quality from harmful contaminants and changing stream flows. Storm water runoff from land modified by human activities can harm surface water resources by causing an exceedance of water quality standards by changing natural hydrologic patterns, accelerating stream flows, destroying aquatic habitat, elevating pollutant levels and threaten drinking water supplies. Runoff may contain or mobilize high levels of contaminants, such as sediment, suspended solids, nutrients (phosphorous and nitrogen), heavy metals and other toxic pollutants, pathogens, oxygen-demanding substances (organic material) and floatables.

The highest concentrations of these contaminants often are contained in "first flush" discharges, which occur during the first major storm after an extended dry period. Individually and combined, these pollutants impair water quality, threaten designated beneficial uses and cause habitat alteration or destruction. Urban development creates new pollution sources as population density increases and brings with it proportionately higher levels of pollutants which may be washed into receiving waters by storm water.

Storm water from MS4s in urbanized areas is a concern because of the high concentration of pollutants found in these discharges. Concentrated development in urbanized areas substantially increase impervious areas, such as city streets, driveways, parking lots, and sidewalks, on which pollutants settle and remain until a storm event washes them into storm drains that discharge to surface waters. Common pollutants include pesticides, fertilizers, oils, salt, litter, other debris and sediment. Another concern is the possible illicit connections of sanitary sewers, which can result in bacteria pollutants entering the storm sewer system. storm water runoff picks up these and other harmful pollutants then discharge them, untreated, to water bodies via storm sewer systems. When left uncontrolled, these discharges can result in fish kills, the destruction of spawning and wildlife habitats, a loss of aesthetic value, and contamination of drinking water supplies and recreational water bodies.

The Water Quality Act of 1987 added storm water discharge regulation provisions under the Clean Water Act NPDES permit program. This was in response to research documenting

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water quality impairments from contaminated storm water. The storm water NPDES permit program requires entities to obtain permit coverage and implement best management practices to minimize or eliminate the discharge of pollutants into surface waters. Water quality has improved dramatically in Ohio since the 1970s due to implementation of point source controls under the NPDES permit program.

In regard to Ohio's storm water regulations, although they are based on the federal requirements, by adopting state rules, Ohio EPA has made the program requirements clearer and more readily accessible to the regulated community.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

Ohio EPA, Division of Surface Water measures the success of its programs through biological and chemical sampling and determines whether or not a water body is attaining its designated uses. The status or health of Ohio's streams, rivers and lakes is reported every two years in the Integrated Water Quality Monitoring and Assessment Report, which is available on Ohio EPA's website at:

<http://www.epa.ohio.gov/dsw/tmdl/OhioIntegratedReport.aspx>.

The success of the Storm Water Program regulations will be based on whether or not Ohio EPA detects water quality impairments downstream of storm water sources (industries, small, medium and large MS4s and construction sites). For example, Ohio EPA observed storm water impacts in the Darby Creek watershed associated with development. As a result, a specific construction storm water general permit was created which includes provisions above and beyond the standard construction storm water general permit that were determined to be necessary to protect the watershed from additional development related impacts. Improvements in water quality in the Darby watershed will determine the success of the program's requirements.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

Ohio EPA sent electronic notice to DSW's rulemaking interested party list and posted the Early Stakeholder Outreach fact sheet on DSW's website on June 19, 2017. The comment period deadline was July 19, 2017.

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8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

DSW received one comment letter from Northeast Ohio Regional Sewer District (NEORSDD). Most of the suggestions they provided had to do with the storm water general NPDES permit which is separate from this rulemaking. No changes were made in response to these comments.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

The rule contains administrative requirements for the permit program and is based on the federal regulations. The science is based on this promulgation of these statutes. The federal requirements in 40 C.F.R. 122.26 and 40 C.F.R. 122.30 to 122.37 were used to support this rulemaking.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

Ohio EPA reviewed these rules and determined that revisions are necessary to bring consistency with the newly updated federal regulations. The Agency did not consider alternative regulations as these rules in the state administrative code (OAC) mirror the federal regulations. Rules OAC 3745-39-01 to 39-04 were developed to incorporate federal requirements into the OAC. The inclusion of these rule into the OAC provides convenient access to Ohio NPDES rules for our stakeholders.

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

The regulations for small MS4s require the development of a storm water management program that includes six minimum control measures. The regulations do not dictate what best management practices have to be used to meet the minimum control measures, providing flexibility for the small MS4s.

Rule OAC 3745-39-04 contains administrative requirements for the storm water NPDES permit program. Under the program, all dischargers that meet certain criteria are required to

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obtain coverage under a permit and implement the permit requirements regardless of the discharger's actual impact on the surface water. As a delegated state, Ohio EPA is required to implement the storm water NPDES permit program in accordance with federal regulations, therefore a performance-based regulation approach is not permissible in this case.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

Ohio EPA is the delegated state agency for the storm water NPDES program. Only a review of existing Ohio EPA rules was necessary and no duplication was found.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

The Agency will continue to implement the rule through current practices, which include inspections and reporting requirements to ensure the rule requirements are applied consistently throughout the state.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community;**
- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
- c. Quantify the expected adverse impact from the regulation.**

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a "representative business." Please include the source for your information/estimated impact.

A. The scope of the impacted business community will not change with this rulemaking. Industries required to obtain covered under a storm water NPDES permit are listed in the definition of "storm water associated with industrial activity" in paragraph (B)(15) of rule OAC 3745-39-04. Rules OAC 3745-39-01 to 39-03 do not directly apply to businesses. As mentioned above, the rules apply to public entities that own/operate separate storm sewer systems serving populations less than

100,000. Businesses that may be impacted indirectly are those located within the small MS4 boundaries.

B. The nature of the impact of rule 3745-39-04 on regulated industries includes the requirement to prepare and submit an NPDES permit application to Ohio EPA for review and approval. Businesses located within small MS4s may be impacted indirectly if, for example, the municipality charges a storm water utility fee to cover the cost of implementation of the storm water management program. The rules do not require a storm water utility fee, however it is one way municipalities have funded implementation of storm water requirements. The Agency is also considering exempting certain applicants from renewal application fees for construction storm water general permits.

C. The potential indirect costs to businesses from the small MS4 regulations is not available to the Agency. U.S. EPA estimated in the December 8, 1999 rulemaking that the cost to small MS4s could be \$9.08 to \$9.16 per household. A portion of this cost is passed on to businesses through a storm water utility fee in those municipalities that charge a fee for program implementation.

The fees associated with storm water NPDES consist of:

- Fees associated with permit applications are located in paragraph (S)(1) of the Ohio Revised Code Section 3745.11 and are summarized below.

Storm Water NPDES Sector	Fee
Industrial Storm Water	\$350.00
MS4s	\$200.00
Construction Storm Water	\$200.00 + \$20.00 per whole disturbed acre above 5 acres, with a max disturbed acreage fee of \$300.00

- MS4 annual discharge fees are located in paragraph (L)(4) of the Ohio Revised Code Section 3745.11. The fee is \$100 per square mile of MS4 permitted with a maximum fee of \$10,000.

Beyond the cost of the permit application and MS4 annual discharge fee, Ohio specific cost information is currently not available. U.S. EPA provided an economic impact summary in the preamble of the November 16, 1990 Federal Register notice of the storm water rulemaking. The costs focus primarily on the costs associated with developing and submitting the permit applications covered under the rule.

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U.S. EPA estimated an annual cost of applying for NPDES permits for discharges from MS4s to be \$4.2 million. U.S. EPA estimated that an average permit application for a large municipality would cost \$76,681 and require 4,534 hours to prepare. The average application for a medium MS4 would cost \$49,249 and 2,912 hours to prepare. The annual respondent cost for NPDES permit applications, notices of intent, and notifications for facilities with discharges associated with industrial activity was estimated to be \$9.5 million and 271,248 hours. U.S. EPA estimated that the average cost of an individual industrial permit application would be \$1,007 and 28.6 hours. The average Group application would cost \$74.00 per facility and 2.1 hours. The average cost of the notification and notice of intent to be covered by a general permit was \$17.00 and 0.5 hours.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

In regard to the National Pollutant Discharge Elimination System (NPDES) and Storm Water Program as a whole, the U.S. Congress made the determination that the intent (fishable, swimmable waters) justifies the adverse impact to the regulated business community when they passed the initial and subsequent amendments to the Federal Water Pollution Control Act (also known as the Clean Water Act).

In regard to the current rulemaking, the intent of the Storm Water Program is to minimize the impacts of pollutants in storm water discharges on the receiving stream water quality. Revisions to the draft rule in this rulemaking will have no additional impact on the business community.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

This question is not applicable to small MS4s. As mentioned above the regulations do not apply to businesses.

For industries, construction activities, and large and medium MS4s, the storm water NPDES permit requirements for industries are based on industrial sector classification (i.e., what the industry manufactures) and the size of the construction project. The regulations do include provisions for a conditional exclusion for “no exposure” of industrial activities and materials

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to storm water, which excludes facilities from permit application requirements. This exclusion applies to industrial facilities of any size.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

The failure to get a permit under this rule is not considered a paperwork violation and would not fall under the scope of ORC 119.14. However, the Agency uses enforcement discretion and first-time violations of reporting requirements are typically waived.

18. What resources are available to assist small businesses with compliance of the regulation?

The following resources are available:

- Ohio EPA's Office of Compliance Assistance and Pollution Prevention (OCAPP) is a non-regulatory program that provides information and resources to help small businesses comply with environmental regulations. OCAPP also helps customers identify and implement pollution prevention measures that can save money, increase business performance and benefit the environment. Services of the office include a toll-free hotline, on-site compliance and pollution prevention assessments, workshops/training, plain-English publications library and assistance in completing permit application forms. Additional information is available at: <http://www.epa.ohio.gov/ocapp/ComplianceAssistanceandPollutionPrevention.aspx>.
- Ohio EPA also has a Customer Support Center web page (<https://ohioepa.custhelp.com/app/home/session/L3RpbWUvMTQ0NTg2NTYzNi9zaWQvX1hTRkZWem0%3D>) that contains links to several items to help businesses navigate the permit process, including the Permit Wizard, Frequently Asked Questions (FAQ), training and subscriptions to various program listservs.
- Ohio EPA maintains the Compliance Assistance Hotline 800-329-7518, weekdays from 8:00 a.m. to 5:00 p.m.
- Ohio EPA, Division of Environmental and Financial Assistance's Compliance Assistance Unit provides technical support to small (less than 0.5 million gallons per day) wastewater treatment plants. Additional information is available at: http://epa.ohio.gov/dsw/compl_assist/compasst.aspx.
- U.S. EPA Small Business Gateway also has information on environmental regulations for small businesses available at: <https://www.epa.gov/resources-small-businesses> and a Small Business Ombudsman Hotline 800-368-5888.

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- Ohio EPA's Storm Water Program web page (<http://epa.ohio.gov/dsw/storm/index.aspx>) contains regulations, permits, permit guidance and compliance documents and outreach materials.
- U.S. EPA's Storm Water Program web page (<https://www.epa.gov/npdes/npdes-stormwater-program>) contains background information on the program and guidance documents, regulations, and compliance documents for the construction, industrial and municipal sectors.