



Common Sense Initiative

Mike DeWine, *Governor*
Jon Husted, *Lt. Governor*

Joseph Baker, *Director*

MEMORANDUM

TO: Mandi Payton, Ohio Environmental Protection Agency

FROM: Michael Bender, Business Advocate

DATE: October 15, 2024

RE: **CSI Review – Stormwater Program Rules (OAC 3745-39-01, 3745-39-02, 3745-39-03, and 3745-39-04)**

On behalf of Lt. Governor Jon Husted, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

Analysis

This rule package consists of four amended rules proposed by the Ohio Environmental Protection Agency (OEPA) as part of the statutory five-year review process. This rule package was submitted to the CSI Office on July 22, 2024, and the public comment period was held open through August 22, 2024. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on July 22, 2024.

Ohio Administrative Code (OAC) 3745-39-01 contains definitions pertaining to stormwater and municipal separate storm sewer systems (MS4s), in addition to incorporating materials by reference. The rule is amended to update language, add a citation, reference the 1990 U.S. census rather than the 2010 U.S. census in the definitions for the terms "large MS4" and "medium MS4," include public park districts as an example of an MS4, and update the effective dates for certain federal statutes and regulations. OAC 3745-39-02 establishes the objectives of the OEPA stormwater management program for small MS4s. The rule is amended to update language and the rule title. OAC 3745-39-03 specifies the National Pollutant Discharge Elimination System (NPDES) requirements for small

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MS4s. The rule is amended to update language, citations, and a website link as well as align the designation criteria for small MS4s with U.S. EPA rules. OAC 3745-39-04 specifies the NPDES requirements for industries, including construction activities, and for large and medium MS4s. The rule is amended to update language and typography as well as make a technical correction.

During early stakeholder outreach, the OEPA sent electronic notification to its Division of Surface Water (DSW) rulemaking interested party list and posted a fact sheet on DSW's website on August 23, 2023, notifying stakeholders of the opportunity to submit comments through September 22, 2023. The OEPA received comments from the Ohio Coal Association (OCA) and the Ohio Manufacturers' Association (OMA). The OMA simply requested to be included in certain future rulemaking aspects, while the OCA suggested that the definition for "surface waters of the state" should include an exclusion of ephemeral features rather than simply refer to the definition in OAC 3745-1-02. The OEPA declined to make this change due to a desire for consistency in defining the term, further noting that the definition does not specifically include or exclude ephemeral features. During the CSI public comment period, the OEPA received comments from the Ohio Environmental Council (OEC) and the Ohio Department of Transportation (ODOT).

The OEC encouraged the OEPA to amend the rules to address water quality volume, riparian buffer protection, groundwater recharge, thermal impacts, hydrology impacts, and road salt use. The OEPA replied that most of these topics are already addressed in its current requirements, particularly for its NPDES Construction Stormwater general permit and its NPDES Small MS4 general permit. The OEPA added that it continues to evaluate streams and the data it receives through its water quality monitoring and total maximum daily load programs so that it can make changes when appropriate but would not implement any of the OEC's suggestions at this time. The OEC also urged the OEPA to prepare a report on the cumulative impacts of development and stormwater to streams since the stormwater program's inception. The OEPA responded that it was open to discussing options for how to best design such a study and whether it could be incorporated into its current surveys. The OEPA also answered a couple of questions asked by the OEC for clarification. ODOT recommended that the OEPA clarify which requirements must be met by a small MS4 seeking to be covered under the Small MS4 general permit. The OEPA agreed and made the clarification. ODOT further recommended that the OEPA be more specific about which areas are regulated by the stormwater management program for small MS4s. The OEPA replied that its proposed changes mirror the U.S. EPA's updated regulations and therefore declined to make any changes on this topic. Lastly, the OEPA revised the rules to make technical and grammatical corrections.

The business community impacted by the rules includes industries required to obtain coverage under a stormwater NPDES permit and businesses located within small MS4 boundaries. The adverse impacts created by the rules include the requirement to prepare and submit an NPDES permit application, the costs associated with implementing the stormwater management program, and

associated fees. According to the OEPA, municipalities may charge a stormwater utility fee to cover the costs of implementing the stormwater management program, though the fee itself is not required by the rules. Permit application fees are \$200 for MS4s, \$350 for industrial stormwater, and \$200 plus \$20 per whole disturbed acre above five acres with a maximum disturbed acreage fee of \$300 for construction stormwater. Annual discharge fees for MS4s are \$10 per one-tenth of a square mile of area permitted with a maximum fee of \$10,000. When conducting stormwater rulemaking in 1990, the U.S. EPA provided estimates for the costs associated with developing and submitting the permit applications covered by the rules in this package. Such estimates included an annual cost of \$4.2 million for MS4s applying for NPDES permits for discharges, an average of \$76,681 and 4,534 hours of preparation for a large municipality's permit application, an average of \$49,249 and 2,912 hours of preparation for a medium MS4's permit application, an annual respondent cost of \$9.5 million and 271,248 hours of preparation for NPDES permit applications and related notices from facilities with discharges associated with industrial activity, an average cost of \$1,007 and approximately twenty-eight hours of preparation for an individual industrial permit application, and an average cost of \$17 and a half-hour of preparation for the notification and notice of intent to be covered by a general permit. The OEPA states that the adverse impacts to business are justified to comply with federal law and regulations, maintain fishable and swimmable waters, protect spawning and wildlife habitats, prevent contamination of drinking water, and minimize the impacts of pollutants in stormwater discharges on receiving stream water quality.

Recommendations

Based on the information above, the CSI Office has no recommendations on this rule package.

Conclusion

The CSI Office concludes that the Agency should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.