



Brian M. Gresser, P.E.,  
President, AOMWA  
2460 Akron-Peninsula Rd.  
Akron, OH 44313  
(330) 375-2964

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**VIA E-MAIL** ([eric.nygaard@epa.ohio.gov](mailto:eric.nygaard@epa.ohio.gov) and [ashley.ward@epa.ohio.gov](mailto:ashley.ward@epa.ohio.gov))  
Ohio EPA - Division of Surface Water (DSW)  
P.O. Box 1049  
Columbus, OH 43215

**Re: Post-Early Stakeholder Outreach Comment Following Webinar – New Biological Criteria Narrative Rule (OAC 3745-2-03)**

Dear Mr. Nygaard and Ms. Ward:

The Association of Ohio Metropolitan Wastewater Agencies (“AOMWA”) appreciates the opportunity to comment following Ohio EPA’s webinar, and in advance of the Interested Party Review period, concerning DSW’s Biological Criteria Rule (OAC Chapter 3745-2-03). AOMWA is a not-for-profit trade association that represents the interests of public wastewater agencies across the state of Ohio, serving more than 4 million Ohioans and successfully treating more than 300 billion gallons of wastewater each year.<sup>1</sup>

As noted in the current version of OAC § 3745-1-07(C), biological criteria “provide a direct measure of attainment of the warmwater habitat, exceptional warmwater habitat and modified warmwater habitat aquatic life uses.” This recognition plays a significant role in Ohio’s approach to the regulation of water quality and is of great importance to regulated point sources, such as AOMWA’s members, which operate under these regulations. AOMWA therefore has a significant interest in ensuring that any new rulemaking on this issue carries forward this well-established principle and the flexibilities built into the current rule.

As AOMWA mentioned in our February 4, 2019 comment letter concerning the Early Stakeholder Outreach (ESO) Notification, the ESO Notification provided no specific detail regarding changes that were being considered by the Agency. However, Ohio EPA’s October 28, 2019 webinar provided some detail regarding changes being considered. Based on the description of the changes being considered, AOMWA believes that some changes under consideration could potentially affect point sources in a significant manner.

First, AOMWA requested in its February 4, 2019 comment letter that the new rule should maintain existing protections for point sources that are meeting all applicable chemical specific and whole effluent criteria. For example, under the current regulatory framework, additional

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<sup>1</sup> AOMWA members include Akron, Avon Lake, Bowling Green, Butler County, Canton, City of Hamilton, Columbus, Dayton, City of Fairfield, Hamilton County, Lancaster, Lima, Marysville, Metropolitan Sewer District of Greater Cincinnati, Middletown, Newark, Northeast Ohio Regional Sewer District, Portsmouth, Solon, Springfield, Summit County, Wadsworth and Warren.

regulatory controls shall not be imposed on point sources that are meeting chemical specific and whole effluent criteria, *unless* certain conditions are present, such as that “[t]he point sources are shown to be the primary contributing cause of the nonattainment.” OAC 3745-1-07(C)(2)(a). In other words, 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 have little or no environmental benefit.

During the webinar, the Agency explained that it is considering modifying this language so that it reads “[t]he point sources are shown to be *causing or contributing* to the non-attainment of the biological criteria.” This change would be significant and would greatly limit this protection for point sources by allowing additional regulatory controls for any point sources that cause or contribute to non-attainment, no matter how insignificant the contribution. This would be a stark and costly change from the existing rule, which prohibits further regulatory controls unless the point source is the primary cause of nonattainment. It would also ignore evidence of any other dischargers that are the primary contributing sources, and expressly permit the Director to require further costly improvements in this circumstance. AOMWA therefore does not believe this is a minor change as characterized by the Agency at the webinar, and we would be opposed to any change of this nature.

Second, Ohio EPA’s PowerPoint slides associated with the webinar note that the Agency is contemplating adding a “list of considerations for the Director.” It is not clear how these considerations would be incorporated into the regulatory framework. Ohio EPA mentioned that potential considerations could include downstream segments, reasonableness, feasibility, and organisms not included in biological criteria, such as mussels and amphibians. AOMWA requests that the Agency provide additional detail regarding these potential considerations – for example, the term “downstream” is subjective and could be interpreted as a segment in close proximity or at a distant location. In addition, it is still unclear how the Agency intends to incorporate the evaluation of these additional organisms.

Finally, it is not clear to AOMWA how Ohio EPA intends to comply with Ohio’s recent budget bill, HB 166 (signed by the Governor on July 18, 2019), which requires that for any regulatory restriction, two or more existing regulatory restrictions must be removed. Based on the Agency’s webinar, it appears the Agency is considering adopting regulatory restrictions, such as permitting regulatory controls for point sources that contribute only insignificantly to nonattainment, as discussed above. AOMWA requests further clarification of the Agency’s plan to comply with this requirement or, if the Agency believes this requirement to be inapplicable, an explanation as to why this is the case.

AOMWA appreciates your consideration of these comments and Ohio EPA’s willingness to engage AOMWA and other stakeholders on this issue. AOMWA and its members look forward to working with the Agency on this rulemaking moving forward. Should you have any questions, please contact Rees Alexander at [rees.alexander@squirepb.com](mailto:rees.alexander@squirepb.com) or (614) 365-2798. Thank you for your attention to and consideration of these comments.

Sincerely,



Brian M. Gresser, P.E.  
President, AOMWA

cc: (via e-mail)  
Andrew Etter, Squire Patton Boggs (US) LLP  
Rees Alexander, Squire Patton Boggs (US) LLP