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VIA EMAIL ONLY

Ohio EPA - Division of Surface Water
Rule Coordinator
dsw_rulecomments@epa.ohio.gov
P.O. Box 1049
Columbus, OH 43215

**Re: Comments on Ohio EPA's Draft Biological Criteria Rules
(OAC §§ 3745-1-07 and 3745-2-03)**

Dear Rule Coordinator:

The Association of Ohio Metropolitan Wastewater Agencies ("AOMWA") appreciates the opportunity to comment on Ohio EPA's Draft Biological Criteria Rules (OAC §§ 3745-1-07 and 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 320 billion gallons of wastewater each year.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 new rule 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

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

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 draft rules would allow regulatory controls even when a point source is merely shown to be “*substantially contributing* to the non-attainment of the biological criteria, based on an assessment of any time or flow period.” This vague “substantially contributing” standard could be misconstrued to encompass those entities that contribute only very small quantities of the parameter associated with nonattainment. This could lead to regulatory controls even when those controls are not likely to result in any proportionate environmental benefit. Accordingly, AOMWA requests that the Agency retain the “primary contributing cause” language.

AOMWA understands based on comments at an October 2019 Ohio EPA webinar that Ohio EPA wishes to retain the traditional flexibility associated with the biological criteria provisions. Consistent with this approach, paragraph OAC § 3745-2-03(E)(2) should be revised to state that “The application of additional or alternate treatment or technology ***at that point source*** can reasonably be expected to lead to attainment of the designated use.” AOMWA submits that this additional language will clarify the provision to ensure that insignificant contributors are not harmed by the revision to OAC § 3745-2-03(E)(1). This language will also clarify that costly regulatory controls will be reserved for cases where there is a reasonable expectation of a resulting environmental benefit.

Second, paragraph OAC § 3745-2-03(B)(4) indicates that determination of wasteload allocations may consider the ability of the receiving water to meet an aquatic life use higher than what is currently designated. AOMWA supports improving receiving water quality and designating higher aquatic life uses when appropriate. However, the language in OAC 3745-2-03(B)(4)—“or preventing the water from meeting a higher life use”—could be construed to allow for more stringent permit limits associated with a higher aquatic life use designation that has not yet been adopted in OAC 3745-1. AOMWA requests (1) removal of this quoted language; (2) the addition of language clarifying that the higher use must be adopted through OAC 3745-1 prior to development of alternate limits; or (3) a clarification in the rule that this language in (B)(4) does not provide regulatory flexibility to apply more stringent effluent limitations than those derived from wasteload allocation calculations.

Third, the draft rules also modify the existing language to weaken protections for point sources. In addition to the weakened protection described above, OAC § 3745-2-03(E)(1) also indicates that regulatory controls may be imposed if the point sources “are shown to be substantially contributing to the non-attainment of the biological criteria, ***based on an assessment of any time or flow period.***” Thus, even if a point source is an insubstantial contributor 99.9 percent of the year, this language could be construed to permit regulatory restrictions on point sources based on a snapshot when they are deemed substantial contributors. AOMWA requests that the Agency delete the “based on an assessment of any time or flow period” phrase.

AOMWA also provides the following specific comments:

- Ohio EPA's Credible Data Rules (OAC Chapter 3745-4) address the submission of qualified data. We do not believe that any heightened standards are necessary or appropriate with respect to biological criteria. As a result, we propose the following change to subsection OAC § 3745-2-03(A)(2): "The biological survey data are deemed credible by rule or collected by a level 3 QDC in accordance with Level 3 methods described in Rule § 3745-4-06 of the Administrative Code ~~and are determined to be of sufficient quality.~~"
- Paragraph (D) implies that the Director monitors *effluent* to evaluate the attainment of the receiving water. We request that this wording be revised to clarify that monitoring may be required in the receiving water body.
- It is unclear what the word "directly" is intended to signify in OAC § 3745-2-03(A)(1). Unless defined or clarified, AOMWA suggests that this word should be deleted.
- AOMWA requests that the language in paragraph OAC 3745-2-03(A) should be revised to mirror the federal regulation, 40 C.F.R. § 122.44(d), and should include the following language: "to cause, or contribute to, an excursion above any State water quality standard..."

AOMWA appreciates your consideration of these comments. Should you have any questions, please contact Rees Alexander at rees.alexander@squirepb.com or (614) 365-2798.

Thank you for your attention to and consideration of these comments.

Sincerely,



John G. Newsome, P.E.
President, AOMWA

cc: (via email)
Rees Alexander, Esq., Squire Patton Boggs (US) LLP