



## Division of Surface Water

### Response to Comments

**Rules:** Beneficial Use Designation Rules, OAC Chapter 3745-1

#### Agency Contact for this Package

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Ohio EPA held an interested party comment period from March 12, 2015 to April 13, 2015 regarding the Water Quality Standards program beneficial use designation rules. This document summarizes the comments and questions received during the associated comment period.

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

#### General/Overall Concerns

- Comment 1:** EPA commends OH for following through on their commitment to do use updates based on their monitoring work. (U.S. EPA, Region 5)
- Response 1:** Comment acknowledged. No response necessary.
- Comment 2:** We reviewed the list of proposed use changes and all of the changes appear to be scientifically defensible and consistent with the requirements of the CWA and Federal regulations. (U.S. EPA, Region 5)
- Response 2:** Comment acknowledged. No response necessary.
- Comment 3:** We note that some of the changes are upstream of waters containing federally-listed mussels. EPA anticipates conducting Endangered Species Act consultation with the USFWS regarding the proposed

**changes and associated changes to applicable water quality criteria. Therefore, any information on water quality in the affected segments and the listed mussel waters and/or efforts by Ohio to protect listed mussel species downstream of the segments proposed for new or revised use designations would be helpful to EPA in consulting with USFWS. (U.S. EPA, Region 5)**

**Response 3:** Ohio EPA does not have any information beyond that provided in the biological and water quality surveys for the water bodies included in this rulemaking.

**Comment 4:** **The anticipated ESA consultation on the use changes will likely focus on potential effects of ammonia on listed mussel species that may be present in the action area because: (1) mussels are sensitive to ammonia, (2) Ohio's existing ammonia criteria vary by aquatic life use class, and (3) Ohio's criteria has not been updated to reflect EPA's publication of 304(a) recommendations in 2013, which incorporates new toxicity data for mussels. Therefore, EPA strongly encourages Ohio to revise its ammonia criteria to be consistent with EPA's current 304(a) recommendations. (U.S. EPA, Region 5)**

**Response 4:** Ohio EPA recognizes the importance of mussels and maintaining water quality criteria protective of all species. The Agency is currently evaluating options regarding a path forward for the adoption of revised aquatic life criteria for ammonia. Commitments on rule adoption will be made in the Agency's 106 grant work plan.

3745-1-16

**Comment 5:** **The Clean Water Act requires that implementing state agencies conduct use attainability analyses (UAAs) when downgrades of designated uses are proposed. 40 CFR 131.10(j). Has OEPA conducted the required UAAs for the downgrades considered for Dodson Creek and Osburn Run? It is not clear that UAAs have been conducted. Please provide the results of applicable UAAs to the public.**

**Even if Dodson Creek is not meeting EWH criteria, it may not be downgraded from EWH to WWH unless a UAA has demonstrated that the waterbody does not have the potential to conform with its current designation. Non-attainment is not sufficient, in and of itself, to allow for designated use downgrading. The Clean Water Act mandates that the quality of the nation's waters be restored, as well as maintained. Is OEPA claiming that Dodson Creek lacks the potential to support EWH habitat? If so, under which of the six enumerated 40 CFR 131.10(g) waterbody constraints is OEPA making this determination?**

**Will OEPA conduct a Tier II antidegradation review of any proposed downgrading of Dodson Creek's designated EWH status?**

Similarly, has OEPA conducted a UAA for Osburn Run that has determined there is no potential “for any resemblance of any other aquatic life habitat”? 3745-1-07(B)(1)(g). If so, under which of the six enumerated 40 CFR 131.10(g) waterbody constraints is OEPA making this determination?

Neither stream should be downgraded absent a rigorous scientific determination that they lack the potential to some day attain their designated uses (or to some day resemble any other aquatic life habitat category, in the case of Osburn Run). (Ohio Environmental Council)

**Response 5:**

Ohio EPA conducted a use attainability analysis on Dodson Creek in 2012. Please see the technical support document available at [http://epa.ohio.gov/Portals/35/documents/East\\_Fork\\_LMR\\_TSD\\_2014.pdf](http://epa.ohio.gov/Portals/35/documents/East_Fork_LMR_TSD_2014.pdf) for further information. Habitat quality, as measured at three different locations on Dodson Creek, measured in the 50s to low 60s. QHEI scores in this range are more typical of streams that support a Warmwater community, which is what was clearly documented in the 2012 survey conducted by Ohio EPA biologists. This would relate most closely with 40 C.F.R. 131.10(g) factor 5.

Ohio EPA conducted a use attainability analysis on Osburn Run in 2010. Please see the technical support document available at [http://epa.ohio.gov/Portals/35/documents/SEORT\\_TSD\\_2010.pdf](http://epa.ohio.gov/Portals/35/documents/SEORT_TSD_2010.pdf) for further information. Osburn Run was found to have degraded water quality consistent with acidic mine drainage. Markers that were documented during the survey include elevated iron, manganese, aluminum, and acidity levels and depressed alkalinity and pH values. The 2010 survey of the macroinvertebrates in Osburn Run revealed a poor community. This would relate most closely with 40 C.F.R. 131.10(g) factor 3.

**Comment 6:**

EPA notes that for some waters such as Kyger Creek, Ohio declined to designate an AL use because the appropriate AL use is Primary Headwater Habitat and Ohio lacks that use classification in its rules. EPA notes that OH is required by the CWA to designate aquatic life uses for all its surface waters, including primary headwaters and that adoption of the PHWH aquatic life use would give Ohio a useful tool for recognizing differences in the biological communities between headwaters and other rivers and streams. In addition, EPA recommends that Ohio revise its existing definition of “coldwater habitat, native fauna” at 3745-1-07(B)(1)(f)(ii) to recognize that coldwater fish species may not be present in all waters capable of supporting populations of native coldwater vertebrate and invertebrate organisms and plants. (U.S. EPA, Region 5)

**Response 6:** These comments are outside the scope of the current rules under review. Changes to the rule that is the subject of these comments are not possible. The Division will file these comments for future consideration in the context of possible updates to use designation descriptions. The Division will keep U.S. EPA informed of progress on rule revisions addressing these items.

3745-1-14, 3745-1-15, 3745-1-16, 3745-1-18, 3745-1-27

**Comment 7:** **3745-1-14, 3745-1-15, 3745-1-16, 3745-1-18, 3745-1-27: Proposed omission of the language in paragraph (D) where reference to "letter L" is omitted is detrimental to the rule. A designation of letter L as it refers to the above water body's warmwater habitats implies a designation that protects the warmwater habitats. Omission of this language weakens the rule and the enforcement/protection of warm water habitats by OAC.**

**Solutions:**

**My suggestion is to not omit the language in paragraph (D) of rule numbers 3745-1-14, 3745-1-15, 3745-1-16, 3745-1-18 and 3745-1-27. Omitting the need for a designation of warmwater habitats that are now protected by these rules by the OEPA weakens the rule and removes enforcement/protection of the OAC.**

**(Scott Bushbaum)**

**Response 7:** The Agency is proposing to remove the reference to this symbol in these rules as it refers to a designation that no longer applies to any water bodies listed within these rules.

**End of Response to Comments**