



Ohio Environmental Council

Comments of the Ohio Environmental Council Regarding the Ohio River Valley Water Sanitation Commission 2018 Review of Pollution Control Standards

The Ohio Environmental Council (the “OEC”) thanks the Ohio River Valley Water Sanitation Commission (“ORSANCO”) for the opportunity to provide public comment on the 2018 review of the Pollution Control Standards. Based on the Commission’s assertion that Alternative 2 is favored by the majority of ORSANCO Commission members, the OEC submits the following comments in opposition of this proposal.

I. Introduction

Article VI of the Ohio River Valley Water Sanitation Compact establishes ORSANCO’s guiding principle: “Pollution by sewage or industrial wastes originating within a signatory State shall not injuriously affect the various uses of the interstate waters as hereinbefore defined.”¹ Article VI further outlines other principles designed to protect the Ohio River after and the signatory States of the Compact from water pollution, requiring treatment of industrial waste and sewage so as to protect the public health. In order to further accomplish this goal, the Compact authorized the established Commission (ORSANCO) “to adopt, prescribe, and promulgate rules, regulations, and standards for administering and enforcing the provisions of this article.”²

Article VII further specifies that the Compact does not limit the power of any of the States to impose “additional conditions and restrictions to further lessen or prevent the pollution of waters within its jurisdiction.”³ Additionally, Article IX establishes the Commission’s authority to perform investigations and issue orders upon municipalities, corporations, persons, and other entities that discharge into the Ohio River and its tributaries.⁴

The federal Clean Water Act substantially changed ORSANCO’s role in the 1970s, given that the U.S. Environmental Protection Agency now coordinated water quality standards at the federal level. Questions arose as to whether ORSANCO was still necessary to achieve the protection of human health and the environment of the Ohio River Valley. In its analysis of the proposed alternatives for the 2018 Review of Pollution Control Standards, ORSANCO notes that in 1975, a study commissioned by the EPA concluded:

¹ Article VI, *Ohio River Valley Water Sanitation Compact*, June 30, 1948.

² Id.

³ Article VII, *Ohio River Valley Water Sanitation Compact*, June 30, 1948.

⁴ Article IX, *Ohio River Valley Water Sanitation Compact*, June 30, 1948.

“ORSANCO should work with the States in developing consistent stream standards for the main stem and tributaries having significant impacts on the main stem; and in periodic review of the standards. *Its interest should be primarily in achieving interstate compatibility and equity.*”

Each State formulates stream standards for its own purposes and also for submission to EPA. However, the emphasis of each State is necessarily on its particular waters both in and out of the Ohio Basin. Since the Ohio [River] is a boundary river, and because there are many other relationships as among the several State segments of the river system, the [ORSANCO] should provide the overall view and the comparative analyses needed for coordination, consistency and equity. ORSANCO’s stream models will be found useful.”⁵

The first Pollution Control Standards were established by ORSANCO on November 13, 1970, establishing “effluent requirements for all discharges of sewage and industrial wastes to the Ohio River.”⁶ Those standards were first reviewed in 1984, and then reviewed every few years between 1987 and 2015, bringing ORSANCO to the current round of revisions in 2018.⁷

Following a review of how States implement the Pollution Control Standards, ORSANCO made a number of factual conclusions in 2015 that influence their decision to pursue Alternative #2 and eliminate most of the Pollution Control Standards. The OEC notes the following factual conclusions identified by ORSANCO:

1. ORSANCO’s water quality standards are implemented by member States through the federal NPDES Program, sometimes without actually adopting the ORSANCO water quality criteria.⁸
2. Member States have applied designated uses to the Ohio River that are comparable to those set by ORSANCO, but usually through their authority under the federal Clean Water Act.⁹
3. Some member States are not yet implementing the ORSANCO mixing zone ban and have no mixing zone ban of their own, while other States implement the mixing zone ban through NPDES permits or through regulatory bans.¹⁰
4. Instead of adopting the ORSANCO discharge requirements, States implement their own requirements under the CWA or State laws; most effluent limits are met or exceeded by alternative programs.¹¹
5. The antidegradation programs of member States are established through State law or under the Clean Water Act, not ORSANCO requirements.¹²
6. The ORSANCO requirement that States may not interfere with another State’s water uses has not been adopted by the States, yet it has been implemented “under other authority including State authority and the

⁵ *Review of ORSANCO Pollution Control Standards: “Alternative #2” Expanded: “Clean Water Act Alternative to ORSANCO PCS Rules”*, Ohio River Valley Sanitation Commission, (April 1, 2017), at 2, <http://www.orsanco.org/wp-content/uploads/2016/09/Preferred-Expanded-Alternative-2-and-Minority-Report.pdf> (emphasis added).

⁶ *Id.* at 6.

⁷ *Id.* at 6 - 7.

⁸ *Id.* at 8.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 9.

¹² *Id.*

federal Clean Water Act.”¹³

In response to these conclusions of fact, the majority of ORSANCO commissioners have adopted the position that the correct course of action is to eliminate the ORSANCO water quality standards, criteria, mixing zone bans, wastewater discharge requirements because the Clean Water Act has succeeded in its purpose and the State programs of member States similarly have succeeded.¹⁴ The OEC disputes this conclusion. First and foremost, the OEC disputes the conclusion that eliminating the force of ORSANCO’s Pollution Control Standards will further the goals of the Clean Water Act and protect human health and the environment. Second, the OEC disputes the conclusion that the federal Clean Water Act has “succeeded” in protecting the Ohio River and its tributaries. Finally, the OEC believes that Alternatives 3 and 4 represent better solutions to protect the Ohio River when compared to Alternative #2.

II. Alternative 2 fails to protect human health and the environment through its abdication of the Pollution Control Standards to the several States of the Ohio River Valley.

The Commission provides the following justification for the elimination of the majority of the Pollution Control Standards: “All member States are implementing approved programs under the federal Clean Water Act.”¹⁵ According to the Commission, these federally accepted programs sufficiently protect the Ohio River, and thus ORSANCO should defer to the U.S. EPA and the programs of these several States.

But this decision seems to contradict the very Compact upon which ORSANCO was established. In the declarations before Article I of the Compact, the member States emphasized that “the abatement of existing pollution in the waters of [the Ohio River basin] are of prime importance to the people...and can best be accomplished through the cooperation of the States situated therein, by and through a joint or common agency.”¹⁶ ORSANCO’s proposed Alternative #2 is not in the spirit of cooperation. In fact, it eliminates a key component of cooperation from ORSANCO’s mission by eliminating coordinated Pollution Control Standards.

In its defense of Alternative #2, the Commission argues that many member States already exceed ORSANCO’s standards under the authority of the Clean Water Act. But in the same breath, ORSANCO States that some member States have not yet implemented either the ORSANCO mixing zone ban, or a mixing zone ban of their own.¹⁷ Yet the Commission proposes as part of Alternative #2 a removal of Chapter 4, which covers mixing zone designations. If the US EPA fails to require these States to provide stringent mixing zone designations for the Ohio River when the federal agency approves their water quality standards, an elimination of ORSANCO’s

¹³ Id.

¹⁴ Id.

¹⁵ Id. at 10.

¹⁶ *Ohio River Valley Water Sanitation Compact*, June 30, 1948.

¹⁷ “It appears that member States generally consider the mixing zone ban of ORSANCO to be part of the implementation of WQS. Significantly, however, the implementation of mixing zone bans for BCCs occurs in three principal ways: (a) independent State bans; (b) direct implementation of the ORSANCO ban in NPDES permits; and (c) *having no mixing zone ban of their own and not yet implementing the ORSANCO mixing zone ban in the issuance of NPDES permits.*” See FN 10.

mixing zone designations is a backtrack on water quality standards designed to protect this valuable water body.

ORSANCO should exist as a secondary backstop for Pollution Control Standards for the Ohio River in the event that an EPA administration exists, such as the current administration, that does not place the protection of human health and the environment as its primary focus. The current administration has pursued, left and right, actions that would degrade this nation's environment. ORSANCO proposes to eliminate its role for setting unifying standards that create equity and uniformity for effluent limitations between the States because the U.S. EPA already does that - yet that is an oversimplification of how the U.S. EPA, especially the current EPA administration, approves water quality standards.

For instance, the Minority Report from ORSANCO itself emphasizes the following:

“ORSANCO’s [Pollution Control Standards] are not redundant to the provisions of the Clean Water Act. A side-by-side comparison of the Minimum Water Quality Criteria with the 122 Minimum Criteria established in the ORSANCO Pollution Control Standards reflects *that there are at least 188 parameters among the 6 signatory States and EPA, for which ORSANCO has a criteria but the State or EPA does not.* Adoption of EPA-developed categorical effluent limitations or water quality-based effluent limits by a State...may not be adequate to protect the aquatic life and uses of the Ohio River.”¹⁸

The minority report further emphasizes that the presence of a parameter under a State program does not insure the implementation of that parameter, and ORSANCO can serve a role in identifying and addressing such inconsistencies between States.¹⁹ If ORSANCO guts the Pollution Control Standards, it will eliminate cognizable principles. Using such principles, ORSANCO can hold States accountable and protect human health and the environment even as State-by-State standards conflict.

But most importantly, the minority mentions recent EPA and other federal actions, such as the elimination of the Stream Protection Rule, and the reconsideration of the “Waters of the United States” definition and effluent guidelines for discharges from electric generation units, as clear indications that “the standards and scope of the Clean Water Act...are neither static, nor necessarily as broad or protective, as might be needed to address the specific needs of the Ohio River Basin.”²⁰

ORSANCO was established to create consistent regulations between the several State *regardless* of what individual State laws require or what federal law requires. As a boundary river, the Ohio River requires a complicated coordinated effort to achieve regulatory certainty for businesses and water treatment and monitoring initiatives. ORSANCO cannot shirk this duty or lessen its responsibility because the States satisfy federal law. ORSANCO was not designed to simply satisfy federal or State law - it was designed to go beyond, to create a legal framework through

¹⁸ Supra FN 5, at 12.

¹⁹ Id.

²⁰ Id. at 13.

which all citizens of the Ohio River Valley would benefit from a robust and thriving Ohio River.

III. The Ohio River Valley needs a unified voice for Pollution Control Standards due to complicated transboundary water quality problems.

As the minority report emphasized, ORSANCO has 188 parameters within the Pollution Control Standards that both States and the federal EPA do not have criteria. At one point or another over the past few decades, ORSANCO concluded using sound science that the Ohio River needed those parameters to satisfy the Article I water protection goals under the Compact.²¹

Instead of retracting the Pollution Control Standards, ORSANCO should actually enforce the standards and find ways to encourage or even require member States to implement all 188 inconsistent parameters. Article IX of the Compact invisions the Commission playing this role when it gave it the power to issue orders upon municipalities, corporations, persons, or other entities that discharge waste into the River. ORSANCO should find ways to further implement these parameters, either through collaboration with State environmental protection agencies or upon their own initiative.

But if these parameters disappear, then in States without one of those 188 parameters, there will not be a legal mechanism through which polluters can be ordered to halt their bad acts. If a plant in West Virginia emits a pollutant that violates Ohio water quality standards, yet West Virginia does not include water quality criteria for that pollutant, complicated transboundary legal disputes could occur. ORSANCO has an opportunity to move one step further and strengthen water quality criteria and work with States to create consistent water quality criteria across the Basin. Eliminating the Pollution Control Standards is a step in the wrong direction.

Furthermore, ORSANCO could be used as a tool through which the States could solve complicated pollutant questions in instances where the federal government has chosen not to act. Consider the recent crisis along the Ohio River where the DuPont plant on the West Virginia side emitted PFOA into the river. The U.S. EPA issued a health advisory for the chemical, but it chose not to issue a National Safe Drinking Water Regulation that required specific actions when a public water system became inundated with the pollutant. The U.S. EPA made this decision even after multiple class action lawsuits were filed against DuPont and similar companies. Additionally, the C8 Science Panel found numerous health risks associated with PFOA, as did the U.S. EPA's own health advisory. More recently, Ohio's Attorney General Mike DeWine filed a lawsuit against DuPont for polluting the Ohio River and harming Ohio citizens, particularly the Little Hocking Water Association.

²¹ "Each of the signatory States pledges to each of the other signatory States faithful cooperation in the control of future pollution in and abatement of existing pollution from the rivers, streams and water in the Ohio River basin which flow through, into or border upon any of such signatory States, and in order to effect such object, agrees to enact any necessary legislation to enable each such State to place and maintain the waters of said basin in a satisfactory sanitary condition, available for safe and satisfactory use as public and industrial water supplies after reasonable treatment, suitable for recreational usage, capable of maintaining fish and other aquatic life, free from unsightly or malodorous nuisances due to floating solids or sludge deposits, and adaptable to such other uses as may be legitimate." Article I, *Ohio River Valley Water Sanitation Compact*, June 30, 1948.

ORSANCO should be stepping into the shoes of the EPA in this sort of situation and promulgating under its Pollution Control Standards water quality criteria for PFOA. The member States could then adopt that standard throughout the Ohio River Valley. Yet if ORSANCO decides to retract the majority of its Pollution Control Standards, the option to regulate a pollutant like PFOA on an interstate level would disappear.

IV. The OEC supports Alternatives 3 or 4 as acceptable versions of the Pollution Control Standards.

Fortunately, ORSANCO has included in its 2018 Review of the Pollution Control Standards two alternatives that would continue to foster cooperation and collaboration between the member States in furtherance of the goals of the Compact. The OEC supports either Alternative 3 or Alternative 4, or a combination of the best features of the two proposals. Alternative 3 would eliminate duplicate efforts of the member States and have ORSANCO issue water quality standards uniformly for each State.²² Alternative 4 would modify the current standards on an individual basis and work with each State to harmonize their current standards.²³

In Alternative 3, ORSANCO states:

“if ORSANCO were the only entity to develop standards and implementation procedures for the [Ohio] River and States adopted these standards, the States [would] save considerable resources. Currently ORSANCO uses this model successfully to develop the 305(b) report for the Ohio River. Also, using this approach will result in a consistent set of standards for the River. This will be a great help to industries in the basin, who always demand consistency and predictability. Also, consistency will help the public better understand water quality issues and avoid confusion that results from this inconsistency. An example: currently States issue conflicting fish consumption advisories for the same River segment.”²⁴

Through Alternative 3, ORSANCO would work diligently to eliminate instances where States have rules that do not satisfy ORSANCO’s standards.²⁵ While Alternative 4 would not create complete unity or equity, it would still keep the Pollution Control Standards intact and chart a pathway toward consistency. Alternative 4 does envision, however, a combined strategy between Alternative 3 and 4:

“[Alternative 4] could be combined with Alternative 3....Combined alternatives would provide a benchmark for TEC and staff review and modification of individual standards as warranted, and the exercise of comparison would help to assure that maintenance of standards in excess of the minimum standards recommended by US EPA is necessary or advisable.”²⁶

The OEC believes that Alternatives 3 and 4 would best protect human health and the environment, improve the water quality of the Ohio River, and further the ideas espoused in the Compact. ORSANCO would be equipped with the tools necessary to deal with complicated

²² *Water Quality Standards Alternative Summary*, Ohio River Valley Water Sanitation Commission, at 5, <http://www.orsanco.org/wp-content/uploads/2016/09/Alternatives-1-5.pdf>.

²³ *Id.*

²⁴ *Id.* at 5 - 6.

²⁵ *Id.* at 6.

²⁶ *Id.* at 7.

water pollution scenarios, such as the inundation of PFOA in the Ohio River Basin, especially when the federal EPA chooses not to act. ORSANCO would provide industries with regulatory certainty by ensuring that each State has the same requirements for water quality standards. By its own calculations, ORSANCO would save the States substantial funds by housing the water quality standards under one roof. And ORSANCO would create a backstop for water quality standards for the Ohio River Basin, ensuring that even as different federal and State administrations make different decisions regarding this nation's environment, the Ohio River is protected for future generations.

V. Conclusion

The OEC thanks ORSANCO for its robust public commenting period so that all interested parties can engage with the Commission on these important decisions. We hope that ORSANCO will closely consider our comments, along with the comments of many of our partner organizations, as it makes its decision regarding the fate of the Pollution Control Standards. In the end, hopefully everyone can come together in unison and support for a set of rules that adequately safeguards the Ohio River Basin and protect this important resource for the member States and their citizens.

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