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*Via electronic mail (DDAGW_RULECOMMENTS@epa.ohio.gov)*
Rule Coordinator
Ohio EPA, Division of Drinking and Ground Waters ("DDAGW")
P.O. Box 1049
Columbus, OH 43216-1049

**Re: UIC NC 2018; Early Stakeholder Outreach, Underground Injection Control Rules, No Changes 2018**

Dear Rule Coordinator:

On behalf of Freshwater Accountability Project, I am submitting comments on Ohio EPA's Division of Drinking and Ground Waters' ("DDAGW") five-year review of two rules under Ohio's Underground Injection Control ("UIC") Program under the Safe Drinking Water Act ("SDWA"). Specifically, I am commenting on DDAGW's plan to make no changes to OAC 3745-34-03 and OAC 3745-34-10.

Freshwater Accountability Project ("FWAP") is a nonprofit organization with a mission to preserve freshwater supplies through education and community action and is dedicated to promoting health by protecting the environment. FWAP has members located throughout the state of Ohio, including members impacted by underground injection in their communities.

For the reasons further outlined in this comment, FWAP requests that OAC 3745-34-03 be amended such that Ohio EPA may only grant a confidentiality request to the extent necessary to protect information entitled to trade secret protection. FWAP also requests

that OAC 3745-34-10 be rescinded or amended such that the Director is not permitted to reduce the stringency of the requirements that act to safeguard our underground drinking water resources.

## Introduction

Pursuant to R.C. 106.03, when an agency undertakes its five-year review of an enacted rule, it must determine, amongst other things, "whether the rule should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rule was adopted."[1] When OAC 3745-34-03 and OAC 3745-34-10 are reviewed in light of the purpose of the Safe Drinking Water Act, they fall short of the intention of their authorizing statute.

Ohio EPA promulgated OAC 3745-34-03 and OAC 3745-34-10 as part of Ohio's UIC program, under the statutory authority of R.C. 6111.043, a statute created "*in order to control pollution of the waters of the state, to prevent contamination of underground sources of drinking water, and to satisfy all requirements of the 'Safe Drinking Water Act.'*"[2]

The SDWA requires State UIC programs to contain "minimum requirements for effective programs to *prevent* underground injection which endangers drinking water sources."[3] Towards that end, the SDWA requires a state's UIC program to prohibit underground injections not authorized by rule or permit.[4] The SDWA requires that a state's program that provides for the authorization of underground injection via permit must require the applicant for such a permit to "satisfy the State that *the underground injection will not endanger drinking water sources*."[5] Regarding those underground injections authorized via rule, the SDWA states "*no rule may be promulgated which authorizes any underground injection which endangers drinking water sources*."[6]

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[1] R.C. 106.03(A)(1).
[2] R.C. 6111.043(B).
[3] 42 U.S.C. § 300h(b)(1) (emphasis added).
[4] 42 U.S.C. § 300h(b)(1)(A).
[5] 42 U.S.C. § 300h(b)(1)(B)(i) (emphasis added).
[6] 42 U.S.C. § 300h(b)(1)(B)(ii) (emphasis added).

The SDWA defines "underground injection" to include the "subsurface emplacement of fluids by well injection."[7] Notably, this definition "excludes (i) the underground injection of natural gas for purposes of storage; and (ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities."[8] The SDWA also explicitly defines when underground injection endangers drinking water sources, stating

> Underground injection endangers drinking water sources if such injection *may* result in the presence in underground water which supplies *or can reasonably be expected to supply any public water system* of *any* contaminant, and if the presence of such contaminant *may result in such system's* not complying with any national primary drinking water regulation or *may otherwise adversely affect the health of persons*.[9]

Thus, generally, the SDWA requires Ohio's UIC program to be sufficient to prevent *any* underground injection that *may* result in *any* contaminant moving into a *potential* underground source of drinking water in a manner that *may* adversely affect human health or violate a primary drinking water standard. Notably, the language of the SDWA is preventative. **The SDWA does not wait around for the contamination of our underground drinking water resources to happen; it exists to ensure these precious resources are protected, that threats are thwarted before endangerment ever happens.**

It is worth noting that Ohio's responsibility for its UIC program is divided in two parts, with the Ohio Department of Natural Resources ("ODNR") generally regulating those wells related to oil and gas development, production, and waste disposal, and Ohio EPA generally regulating all other types of injection wells.[10] **Importantly, a well may not remain regulated by a single agency throughout its lifetime. For example, a Class II injection well used for the disposal of oil and gas waste and regulated by ODNR may at some point in its life be converted into a Class I well regulated by the Ohio EPA. Thus, any regulation at issue in Ohio EPA's UIC program must be sufficient to address such a scenario.**

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[7] 42 U.S.C. § 300h(d)(1)(A).

[8] 42 U.S.C. § 300h(d)(1)(B).

[9] 42 U.S.C. § 300h(d)(2)(emphasis added).

[10] *See* OAC 3745-34-04. ODNR has regulatory authority over Class II and III wells. Ohio law prohibits Class IV injection wells. OAC 3745-34-08.

For the reasons explained in further detail in the sections of this Comment below, neither OAC 3745-34-03 nor OAC 3745-34-10 serve the requirements of the SDWA nor the stated purpose of their enacting statute R.C. § 6111.043.

## I. OAC Rule 3745-34-03 Confidentiality of Information

OAC 3745-34-03 states that "any record, report, or other information obtained by the [Ohio EPA] shall be made available to the public" except when "such record, report, or other information, or particular part thereof (other than data concerning the amounts of contents of discharges or the quality of the receiving waters)" is shown to be entitled to protection as a trade secret.[11]

The scope of confidentiality granted under OAC 3745-34-03 should be narrowed such that Ohio EPA may only grant a confidentiality request to the extent necessary to protect information entitled to trade secret protection. In its current form, OAC 3745-34-03 may allow for the labeling of large amounts of entire records and reports as "confidential," when only a portion of those documents contains information entitled to trade secret protection. This is inapposite to the stated purpose of R.C. § 6111.043, which is to control pollution entering waters of the state, to prevent contamination of underground sources of drinking water, and to meet all requirements of the SDWA, because access to information about UIC wells is critical to the public understanding the risks posed to their underground water resources, and public involvement is critical to the SDWA's efficacy.

It is through public records that Ohioans are able to gain details about the underground injection activities taking place in their communities. FreshWater Accountability Project and other community advocacy groups rely on public records to monitor activities threatening Ohio's freshwater resources and to inform communities when their resources are at risk. By not specifying that a confidentiality request may only be granted to the extent necessary to protect trade secrets, OAC 3745-34-03 limits the public's access to information impacting these public resources.

The SDWA recognizes the importance citizen knowledge has in protecting underground drinking water resources, going so far as to empower citizens with the ability to enforce

[11] OAC 3745-34-03(A).

against those violating the SDWA through the act's citizen suit provision.[12] Such citizen suit provisions, intended to be useful tools in environmental protection,[13] are only as effective as publicly available information permits them to be.

For these reasons, DDAGW should revise OAC 3745-34-03 to ensure a confidentiality request is granted only to the extent necessary to protect trade secrets. OAC 3745-34-03 should clearly state that, when possible, documents, records, and reports containing trade secrets must be released in their entirety with any information entitled to trade secret protection redacted. Amending OAC 3745-34-03 in this manner would better serve the purpose of R.C. § 6111.043 and better meet the requirements of the SDWA.

## II. OAC Rule 3745-34-10 Waiver of Requirement by Director

Generally, OAC 3745-34-10 endows the Director of the Ohio EPA with the ability to authorize a well with less stringent requirements for operation, monitoring and reporting when certain circumstances arise. These circumstances include when 1) the injection does not occur "into, through or above an underground source of drinking water;"[14] or 2) the injection occurs through or above an underground source of drinking water, but the radius of "endangering influence [as calculated under the chapter] is smaller or equal to the radius of the well."[15] When the injection does not occur into, through or above an underground source of drinking water, the director may also authorize less stringent requirements for area review, construction, and mechanical integrity.[16] **In short, OAC 3745-34-10 weakens Ohio's UIC program by providing enormous discretion to the Ohio EPA Director, which, in turn, places the public's invaluable drinking water sources at risk.**

OAC 3745-34-10(A), which allows the Director to reduce requirements for area of review, construction, mechanical integrity, operation, monitoring, and reporting when the injection does not occur into, through or above an underground source of drinking water appears to entirely ignore the geology of underground water resources in Ohio. Ohio is fortunate to have an abundance of underground aquifers capable of supplying

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[12] *See* 42 USC § 300j-8(a).

[13] *See Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 62, 108 S. Ct. 376, 383 (1987).

[14] OAC 3745-34-10(A).

[15] OAC 3745-34-10(B).

[16] OAC 3745-34-10(A).

public drinking water systems.[17] Much of Ohio's geology is also marked by horizontal and vertical fractures that may provide pathways for pollutant migration into aquifers.[18] It is not necessary for an underground injection to occur into, through or above an aquifer for an injection to pose a threat to one of these drinking water resources. **"The complex nature of ground water contamination will always require site-specific investigations to identify sources and pathways for impacts to ground water."**[19] Yet, OAC 3745-34-10(A) authorizes the Director to reduce requirements for underground injections simply because the injection is not into, above, or through an underwater drinking water source.

Similarly, OAC 3745-34-10(B), authorizes the Director to reduce requirements for those injections with a radius of endangering influence that is smaller than or equal to the radius of the well, even if the injection is through or above an underground source of drinking water. The calculation for determining the radius of endangering influence from the injection well is based on the assumption that the injection zone is homogenous and isotropic.[20] Thus, the radius of endangering influence calculation is not based on site-specific analysis, but relies on stagnant assumptions that may not be applicable to a given location. The fact that a radius of endangering influence, as calculated under OAC 3745-34-32(A)(2), is smaller than or equal to the radius of the well is not a reason to endow the Director with wide discretion to reduce important operation, monitoring, and reporting requirements for injections passing through or above drinking water resources.

OAC 3745-34-10 states that the Director may only exercise his or her authority to reduce UIC requirements "to the extent that the reduction in requirements will not result in an increased risk of movement of fluids into an underground source of drinking water."[21] When the Director lowers standards because the injection does not occur into, through or above an underground source of drinking water, OAC 3745-34-10 requires

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[17] *See* Ohio EPA, Division of Drinking and Ground Waters, *Major Aquifers in Ohio and Associated Water Quality*, TECHNICAL SERIES ON GROUND WATER QUALITY, April 2014, *available at* http://epa.ohio.gov/Portals/28/documents/gwqcp/Aquifer&Geochem_ts.pdf.
[18] *See* Scott C. Brockman and John P. Szabo, *Fractures and Their Distribution in the Tills of Ohio*, 100 OHIO J. OF SCIENCE 3-4:53-54 (2000).
[19] Christopher Kenah, et al., Ohio EPA, *Sensitive Aquifers in Ohio – Relationship to Highly Susceptible Public Water Systems* (2007), *available at* https://pubs.usgs.gov/of/2007/1285/pdf/Kenah.pdf.
[20] OAC 3745-34-32(A)(2)(a).
[21] OAC 3745-34-10(A) and (B).

the Director to prepare a fact sheet that includes a "demonstration that operating, monitoring, or reporting requirements can be reduced with no adverse health or environmental impact."[22]

These clauses admittedly provide a modicum of protection against the Director lowering requirements to such a degree that places underground sources of drinking water at risk. However, the requirement that the Director prepare a fact sheet including a demonstration that the reduction in operating, monitoring or reporting requirements will not adversely impact health or environment does not appear to apply when the Director reduces requirements under OAC 3745-34-10(B). There is also no explicit requirement for the Director to demonstrate in his or her fact sheet that the reduction in requirements for area of review, construction, and mechanical integrity will not adversely impact health or environment. Thus, in the event that the Director lowers requirements for a given injection well under OAC 3745-34-10(B) or reduces requirements for area of review, construction, and mechanical integrity under OAC 3745-34-10(A), the affected public bears the burden of demonstrating that the reduction in requirements increases the risk of movement of fluids into underground sources of drinking water, an endeavor that can take an enormous amount of resources. **In turn, under certain circumstances, OAC 3745-34-10 shifts the burden of ensuring public water resources are protected from contaminants migrating from an injection well from the party carrying out the injection to the affected public.**

The discretion OAC 3745-34-10 gives to the Director to reduce requirements for injection wells is particularly disconcerting given the proposed practice of converting compromised UIC Class II injection wells used for oil and gas waste disposal and regulated by ODNR to Class I disposal wells regulated by Ohio EPA.[23] One example of the unique threats posed by this type of conversion is the common practice of acidizing Class II wells in order to increase porosity surrounding the injection site.[24] Generic zone

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[22] OAC 3745-34-10(C).

[23] *See* Ohio EPA Class I UIC Permit to Operate Applications – Notice of Deficiency, issued to Buckeye Brine October 3, 2017 (detailing Buckeye Brine's application to convert two Class II injection wells to Class I Non-Hazardous disposal wells).

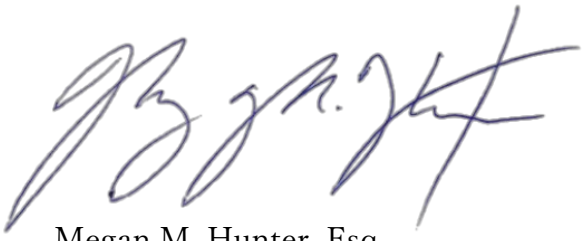
[24] *See generally* American Petroleum Institute, Acidizing Treatment in Oil and Gas Operators, Briefing Paper (2004), *available at* http://www.api.org/~/media/files/oil-and-natural-gas/hydraulic-fracturing/acidizing-oil-natural-gas-briefing-paper-v2.pdf (describing the acidization process generally). *See* Nathan Rutz and Melissa English, Filling the Void: A Citizens' Audit of Ohio Oil and Gas Waste Disposal Wells (Dec. 2014), *available at*

of endangerment calculations or the fact that an injection is not directly into or above an underground source of drinking water cannot account for the impact a history of acidization has had on an injection site and its surrounding area. Nor does the criteria in OAC 3745-34-10(A) or (B) account for a history of injection into a compromised well. At the very least, OAC 3745-34-10 should be rescinded or amended to ensure that the Director may never reduce requirements for UIC permitting and operations when such a conversion is taking place.

## Conclusion

For the reasons contained herein, FreshWater Accountability Project requests that OAC 3745-34-03 be amended such that Ohio EPA may only grant a confidentiality request to the extent necessary to protect information entitled to trade secret protection. FWAP also requests that OAC 3745-34-10 be rescinded or amended such that the Director is not permitted to reduce the stringency of the requirements designed to protect Ohio's invaluable underground drinking water resources.

Respectfully submitted,



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http://ohiocitizen.org/wp-content/uploads/2014/12/Citizen-audit-12-12.pdf (describing the frequent use of acidization at a Class II disposal well currently under review for conversion to a Class I well.).