

To Whom It May Concern:

The Environmental Law & Policy Center, Hoosier Environmental Council, Kentucky Waterways Alliance, Lower Ohio River Waterkeeper, Ohio Environmental Council, Ohio River Foundation, Ohio Valley Environmental Coalition, Sierra Club Cumberland Chapter (Kentucky), Sierra Club Hoosier Chapter, Sierra Club Ohio Chapter, Three Rivers Waterkeeper, Valley Watch, and West Virginia Rivers Coalition (collectively, “Environmental Organizations”), submit these comments to the Ohio River Valley Water Sanitation Commission (“ORSANCO”) regarding the 2018 review of ORSANCO’s Pollution Control Standards (“PCS”). In its solicitation of comments, ORSANCO indicated that a majority of Commissioners support withdrawing from its role in maintaining, administering, and periodically updating the current Pollution Control Standards. The Environmental Organizations strongly oppose that proposal and urge ORSANCO to continue in its role as a source of consistent and expert input on appropriate pollution control standards for the Ohio River. We therefore ask the Commission to reject proposed Alternative 2 in favor of an approach that, consistent with Alternatives 3 and 4, allows ORSANCO to continue to apply its expertise and unique interstate perspective to protect water quality for the entire Ohio River.

## **I. BACKGROUND**

### **A. ORSANCO’s History and Authority**

The Ohio River flows almost a thousand miles through six states, with more states included in its drainage basin. In 1948, eight of those states – Illinois, Indiana, Kentucky, New York, Ohio, Pennsylvania, Virginia, and West Virginia – signed the interstate compact that created ORSANCO and established the commitment of those states 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.” The Compact provides ORSANCO with authority to promulgate rules and issue orders to ensure that “[a]ll industrial wastes discharged or permitted to flow into the aforesaid waters shall be modified or treated, within a time reasonable for the construction of the necessary works, in order to protect the public health or to preserve the waters for [these uses] . . . to such degree as may be determined to be necessary by the Commission after investigation, due notice and hearing.”

As early as 1949, ORSANCO began putting in place water treatment standards to carry out this obligation. In 1972, Congress enacted the “Clean Water Act” (“CWA”) as we know it today, and in 1984 ORSANCO revised its standards to mirror the Clean Water Act structure of designated uses, water quality criteria to protect those uses, and effluent limitations (including mixing zone requirements and a variance procedure). ORSANCO has since reviewed and updated these Pollution Control Standards every three years.

## **B. The 2018 Pollution Control Standards Proposal**

In 2014, ORSANCO established the Ad Hoc Committee on Water Quality Standards Implementation to review how the Pollution Control Standards were being implemented. In 2015 ORSANCO directed the committee to evaluate options relating to ORSANCO's future role in setting water quality standards. The committee subsequently formulated five alternative proposals for ORSANCO's role going forward. These alternatives can be grouped into two categories, with Alternatives 1, 2 and 5 calling for a markedly reduced role and Alternatives 3 and 4 calling for a more focused application of ORSANCO's current standard-setting approach. These five alternatives, and the relevant considerations for each, are described in ORSANCO's Water Quality Standards Alternative Summary.

Alternative 1 would “[e]liminate the Pollution Control Standards Program and defer to the requirements of the Clean Water Act and member state water quality regulations.” The considerations listed in favor of this alternative are that it would potentially “free up resources” to be reprogrammed to other ORSANCO activities, and would also avert the problem that at least one Ohio River state cannot adopt ORSANCO's Pollution Control Standards by reference.

Alternative 2 would suspend the triennial review process for the Pollution Control Standards and deem all states in compliance with the Standards to the extent they are implementing approved programs under the federal Clean Water Act. The description of this alternative presumes that the Pollution Control Standards are redundant and that resources currently dedicated to the PCS could be “redirected to other Commission activities” such as “assessments of the water quality and biological integrity of the water, public out-reach, spill detection and response.”

Alternative 3 would “[u]tilize a cost effective approach to finalize uniform WQS rules for the Ohio River by tasking ORSANCO to take the lead in order to eliminate duplication of efforts among six states and save resources. Also, as a starting point, utilize work done by USEPA to develop WQS to avoid conducting basic research.” This proposal would be aimed at protecting water quality and promoting consistency among states, while reducing the overall costs of developing water quality standards and allowing states flexibility to adopt alternative standards when appropriate. It would also enable ORSANCO to continue carrying out the work plan requirements for its section 106 grant from U.S. EPA, which currently includes development of numeric pollution control standards for the Ohio River and constitutes 50% of ORSANCO's budget.

Alternative 4, similar to Alternative 3, would focus on harmonizing water quality standards across the Ohio River. ORSANCO would look at “standards on an individual basis as warranted,” to ensure coordinated implementation to “restore and maintain the quality of and protect uses of the Ohio River.” This approach would be carried out by the NPDES Committee, working with staff and member states on permitting and certification processes “with a goal of assuring that protection and achievement of pollution controls needed to maintain those uses occurs throughout the Ohio River system.” Even where a state has not formally adopted an ORSANCO standard, the Commission will work with the state so that any permit “achieves a comparable level of protection of the designated uses.”

Finally, Alternative 5 would alter the nature of the PCS, from binding standards to simple recommendations that member states should consider in developing and issuing permits. This alternative rests on the proposition that “the process of promulgating the PCS is redundant of member states’ triennial review of water quality standards.”

ORSANCO has identified Alternative 2 as its “preferred alternative” for consideration in the 2018 PCS review.

## **II. DISCUSSION**

The Commission’s preference for Alternative 2 appears to rest on two primary grounds: first, that it will save resources for ORSANCO to eliminate the Pollution Control Standards from its workload; and second, that the Pollution Control Standards do not serve a significant function in protecting the Ohio River. Neither of these rationales has been adequately explored or supported with detailed facts.

It is entirely reasonable for ORSANCO to be concerned about making the most of its limited financial resources. However, in considering the best use of those resources, it is important to keep in mind that the ORSANCO Pollution Control Standards play an important role in preserving state resources by allowing standards for at least some pollutants, as well as the overall assessment of whether the Ohio River is suffering any serious water quality problems, to be dealt with across the entire river rather than on a state-by-state basis. If ORSANCO were to eliminate the PCS, Ohio River states might well be worse off in the long run without an efficient forum for establishing and updating standards for all pollutants, and an irreplaceable venue for determining a river-wide approach to particularly problematic pollutants.

### **A. Individual Pollutants**

ORSANCO has provided summary-level data from a 2015 staff survey of state water quality standards versus ORSANCO’s Pollution Control Standards, which shows that there are significant discrepancies among state standards. While Alternative 2 presumes that these discrepancies are meaningless and that the PCS and state water quality standards are redundant, that presumption is not backed up by any factual analysis. Moreover, Alternative 2 also assumes that if the PCS were eliminated, ORSANCO could redirect the resources used to maintain the PCS with no adverse effects on ORSANCO or its member states. That reasoning likewise lacks any detailed foundation.

#### **1. The Problem of State-ORSANCO Disparities**

The ORSANCO analysis indicates that, for the pollutants compared as of 2015:

- There are 188 instances in which ORSANCO has criteria but a member state environmental agency does not;
- There are 252 instances in which member state agencies have parameters that are more than 10% less stringent than ORSANCO’s criteria;

- There are 405 instances in which the member state agencies are within 10% of, or more stringent than, the ORSANCO criteria.
- There are 342 instances in which the member state has criteria but ORSANCO does not.

In other words, based on this survey there are 440 pollutants for which the ORSANCO standard is either more stringent than a member state standard or there simply is no state standard. By comparison, there are 747 instances where the state standard is more stringent than or equivalent to the ORSANCO standard, or ORSANCO lacks a standard for the relevant pollutant. Overall, this represents 1187 points of comparison, with 440 – or almost 40% -- where the ORSANCO standard is filling in a gap in state standards or providing a more protective standard.

ORSANCO provided tables containing the information underlying this comparison on February 20, 2018, four days before the deadline for comment, and therefore we have not undertaken a thorough analysis of individual water quality criteria. However, even an initial survey of the data shows that there are concerning inconsistencies and gaps among the state standards. For example, the human health criteria table shows that as of 2015, Ohio and Kentucky both had limits of 10 micrograms per liter for arsenic – significantly higher than ORSANCO’s 0.1 microgram per liter criterion. Similarly, Indiana and Ohio both apparently have criteria for polychlorinated biphenyls (“PCBs”) that are less stringent than ORSANCO’s, which is particularly notable given that the Ohio River’s fish consumption use is partially impaired by PCB contamination. While the explanation for these discrepancies is unknown, it shows that some states’ standards are not as protective as those in other Ohio River states. Without an ORSANCO standard providing uniformity, there is potential for polluting industries to migrate to states with less restrictive criteria, leaving those states downstream or across the river to deal with their pollution without gaining any of the economic benefits.

The Clean Water Act does not provide an efficient tool for states to address such discrepancies on their own. The Supreme Court confirmed in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992), that the U.S. Environmental Protection Agency (“U.S. EPA”) has the authority to consider effects on other states water quality standards when reviewing draft permits under Clean Water Act section 402, 33 U.S.C. § 1342. However, that authority must be applied on a permit-by-permit basis, and is discretionary with U.S. EPA, meaning that policing of interstate discharges through this mechanism would be an onerous and potentially sporadic process without any certain outcome. ORSANCO’s authority to set prospective, uniform standards for the Ohio River is a unique tool not available under the Clean Water Act. Even to the extent states do not directly incorporate the ORSANCO PCS into their water quality criteria, but rather apply them to individual sources through the state permitting process, that is still an improvement over the cumbersome and likely ineffective process available under the CWA

In addition to inconsistent standards, there are some standards where – at least according to the ORSANCO survey – the states have simply left it to ORSANCO to establish criteria. These include gross total alpha, copper, cyanide, fluoride, methylmercury, nitrites, and others. If ORSANCO were to eliminate its Pollution Control Standards, states without standards for those pollutants would presumably have to expend time and resources on filling in those gaps to ensure protection of their portions of the Ohio River.

Overall, this comparison suggests that the ORSANCO standards play a central role in ensuring consistent and up-to-date pollution standards for the Ohio River. Meanwhile, the current proposal provides no estimate, or even description, of what state work would be necessary to make up for the absence of the PCS if they were eliminated. Comments from the POTW Advisory Committee underline this concern, with one commenter pointing out that: “During this time of ‘stressed’ budgets and limited resources, duplication of efforts is definitely a major concern of many organizations at all levels of government (federal, state and local), as well as the public (tax/rate payers) that we serve. Under any future scenario that minimizes PCS activities, it will be important for ORSANCO to continue to provide a forum to discuss water quality standards and to promote consistency among the states to ensure the protection of the Ohio River as a shared resource.” A significant problem with Alternative 2, or any approach that eliminates periodic consideration of river-wide water quality criteria, is the danger that in the absence of ORSANCO standards, inconsistencies will arise without such an adequate forum.

## **2. The Value of River-Wide Water Quality Criteria**

As discussed above, there are clearly significant inconsistencies among state standards for the Ohio River that bear further investigation before ORSANCO can draw any conclusions about the potential costs for states to make up for the loss of the PCS. Meanwhile, the affirmative value of river-wide criteria is clear. There have already been a number of instances where ORSANCO’s Pollution Control Standards have and will continue to play an important role in protecting water quality in the Ohio River.

For example, over the last decade ORSANCO has acted to address a growing concern with levels of Total Dissolved Solids (“TDS”) in the Ohio River, by using an expedited PCS process in 2012 to reinstate a (previously eliminated) limit of 500 mg/L at drinking water intakes in order to protect drinking water quality. ORSANCO staff have subsequently conducted valuable research regarding background levels of TDS in order to support translation of that standard into appropriate permit limits. *See* ORSANCO, *Characterization of Dissolved Solids in the Ohio River and Selected Tributaries* (Feb. 2014), *available at* <http://www.orsanco.org/wp-content/uploads/2016/12/Characterization-of-Dissolved-Solids-in-the-Ohio-River-and-Selected-Tributaries.pdf>. This is an instance where ORSANCO, because of its triennial PCS review process, was well-positioned to react swiftly to a unique Ohio River problem and provide drinking water protection along the entire river, backed up by sound science and expertise. Without the PCS process, it is not clear when affected states – themselves facing budget constraints – might have dealt with this problem and what resources they might have to use to do so. The Water Users Advisory Committee comments similarly identify pollutants such as ammonia, E. coli, temperature, and others as ones where ORSANCO’s standards provide important, uniform water quality protection across the entire Ohio River to the benefit of states as well as their citizens.

Even where addressing a given pollutant is simply a matter of adopting water quality criteria issued by U.S. EPA, ORSANCO can do so efficiently in order to bring the PCS up-to-date for the entire Ohio River at one time. As one example, ORSANCO has repeatedly indicated its readiness to adopt an updated U.S. EPA aquatic life criterion for selenium. Now that the federal criteria have been issued (in summer 2016), ORSANCO can do so. Notably, some states will not

be conducting triennial reviews in which they would address this development for some time – for instance, West Virginia adopted fish tissue limits based on the draft criteria in 2016, but apparently will not address the water column limits in the final criterion until its next triennial review in 2020. By addressing this issue in its 2018 PCS review, ORSANCO will ensure those additional protections are in place significantly earlier. Moreover, in addressing this and other federal criteria, ORSANCO can determine on a river-wide basis whether those criteria are appropriate for the Ohio River rather than leaving individual member states to do so, with potentially disparate results.

Looking ahead, there are emerging pollution issues where ORSANCO's PCS may similarly provide an important avenue to bring the expertise of Commission staff to bear on preserving water quality across the entire Ohio River. In recent years, ORSANCO has been engaged in trying to determine a numeric criterion for nutrient pollution in the Ohio River. This work is timely given that a massive algal bloom occurred on the river in the summer of 2015, and studies show climate change is driving temperature and precipitation changes that may increase the frequency and severity of such algae outbreaks. U.S. Army Corps of Engineers, OHIO RIVER BASIN– Formulating Climate Change Mitigation/Adaptation Strategies through Regional Collaboration with the ORB Alliance 47 (May 2017), *available at* [http://www.corpsclimate.us/docs/USACE%20Ohio%20River%20Basin%20CC%20Report\\_MAY%202017.pdf](http://www.corpsclimate.us/docs/USACE%20Ohio%20River%20Basin%20CC%20Report_MAY%202017.pdf). Although ORSANCO's analysis has not yet identified an appropriate numeric criterion, this is a looming threat to the drinking water, recreation, and aquatic life uses of the Ohio River that ORSANCO cannot ignore. Moreover, as shown in ORSANCO's efforts to date, the Commission's staff has the relevant expertise to adequately and efficiently address this complex issue on a river-wide basis. The alternative might well be for states to waste resources as the question of numeric nutrient limits comes up on a state-by-state or even permit-by-permit basis.

Finally, ORSANCO is currently considering a study of the bioaccumulative pollutants Perfluorooctanoic Acid ("PFOA") and Perfluorooctane Sulfonate ("PFOS"), initially identified as of potential concern in a 2010 report on emerging contaminants (<http://www.orsanco.org/wp-content/uploads/2017/01/A-Screening-Study-Investigating-the-Presence-of-Emerging-Contaminants-within-the-Ohio-River-Basin.pdf>). Recently, as noted in ORSANCO's October 2017 TEC meeting minutes, PFOA contamination of drinking water in the Ohio River watershed has been the subject of significant litigation, and U.S. EPA has released health advisory levels for both contaminants. Although PFOA and PFOS are being largely phased out, replacement chemicals with similar properties may continue to pose a threat to Ohio River water quality. Once ORSANCO determines the scope and seriousness of this issue, it may well be appropriate to address this type of pollution through the PCS.

We could list many more instances of ORSANCO's valuable work in connection with the Pollution Control Standards. However, these examples are sufficient to highlight the key questions that Alternative 2 fails to address:

- Will eliminating the Pollution Control Standards actually significantly reduce ORSANCO's workload? A number of the efforts above, although occurring in conjunction with ORSANCO's PCS reviews, fall within its larger mission of providing

expert scientific monitoring and analysis of water quality issues in the Ohio River. If the PCS were not in place, it seems likely that ORSANCO would still have a role to play in addressing issues such as identification of numeric nutrient criteria or analysis of total dissolved solid levels. Absent a detailed consideration of what work ORSANCO could in fact abandon if the PCS were eliminated, the answer to this question is unclear.

- If eliminating the PCS does truly reduce ORSANCO's activities, will it simply shift work to ORSANCO member states? For pollutants like Total Dissolved Solids, there is a clear need for a limit and analysis of how to apply that limit to sources. ORSANCO is currently providing that information in the context of the PCS. Eliminating that standard, or precluding ORSANCO from adopting such standards in the future, may simply force each state to individually duplicate the Commission's work while introducing the possibility of more disparities among water quality criteria the Ohio River states. As several other commenters have noted, this shift in workload may also result in a commensurate reduction in federal or other funding.
- Will adopting Alternative 2 prevent ORSANCO from addressing emerging pollution issues in a timely manner? Although the Commission could technically resume its role in setting standards, the regular triennial review process encourages all stakeholders to actively consider and address whether existing standards are adequately protecting the Ohio River's water quality. Without that forum for consideration of both urgent problems like TDS and developing issues like nutrient pollution, inadequate or disparate state-level regulation could easily go unaddressed.
- Are there opportunities to increase the efficiency of the PCS process without eliminating ORSANCO's standards altogether? As noted above, there are a number of pollutants for which the PCS and state standards are similar, as well as a number where there are significant differences. We are sensitive to ORSANCO's concerns regarding whether its PCS work is redundant to ongoing state activities under the Clean Water Act. One sensible way to potentially streamline the PCS reviews would be to focus on promoting uniform standards across the Ohio River, especially for pollutants where U.S. EPA has not provided any federal criteria. This would essentially be a combination of Alternatives 3 and 4.

These significant unanswered questions show that the preference for Alternative 2 is not based on a sufficient exploration of the important issues involved in potentially eliminating a role that ORSANCO has played for decades. Fundamentally, we believe that the current PCS process is in fact efficient and focused on the areas where ORSANCO is needed most. Nevertheless, if ORSANCO does decide to refine its approach to the PCS, we urge the Commission to ensure it avoids throwing the baby out with the bathwater and preserves the PCS as a valuable tool for providing efficient and effective water quality standards across the whole Ohio River.

## **B. Water Quality Assessment for the Ohio River**

Sections 305(b) and 303(d) of the federal Clean Water Act require each state to conduct an assessment of the status of its waters every two years and make a determination as to whether

those waters are “impaired” by any pollutant. 33 U.S.C. § 1315(b); 33 U.S.C. § 1313(d); 40 C.F.R. §§ 130.7, 130.8. ORSANCO has prepared a biennial section 305(b) assessment for the Ohio River ever since 2002, offering an expert view “of the degree to which the river supports each of its four designated uses: warm water aquatic life; public water supply; contact recreation; and fish consumption.” Although ORSANCO’s section 305(b) report does not substitute for each state’s duty to assess and determine the impairment status of the portions of the Ohio River within its jurisdiction, the Ohio River states have traditionally relied heavily on ORSANCO’s work in carrying out these Clean Water Act obligations. Often, states simply adopt ORSANCO’s evaluation and conclusions wholesale in determining the impairment status of the Ohio River.

If ORSANCO adopts Alternative 2, this approach will no longer be viable. Currently, ORSANCO’s water quality assessment in its section 305(b) reports is based in large part on application of the numeric criteria included in the Pollution Control Standards. If these criteria are eliminated, ORSANCO will either have to confront the problem of applying potentially hundreds of inconsistent state criteria in assessing the Ohio River’s water quality, and may end up reaching inconsistent conclusions as to impairment status of the river based on those criteria. Alternatively, it may no longer make sense for ORSANCO to conduct the 305(b) assessment for the Ohio River, merely shifting that work to individual states and probably losing efficiencies along the way. That scenario could also result in a reduction in ORSANCO’s funding.

Finally, we note that while these concerns represent our view of the existing information, we requested that ORSANCO share the “Report of the ORSANCO Ad Hoc Water Quality Standards Implementation Committee”, dated May 11, 2015, referenced in some of the materials provided for comment. ORSANCO provided a copy of that report on February 23, the day before the comment deadline. Although we have not had adequate time to review the report for purposes of these comments, we look forward to providing ORSANCO with supplemental comments as appropriate.

### **III. CONCLUSION**

A proposal for ORSANCO to step back from standards it has set in their current form for more than two decades is obviously a significant one. Before the Commission determines the wisest course of action, it must conduct further analysis of the key assumptions here: that the Pollution Control Standards provide no additional water quality protection beyond state standards under the Clean Water Act, and that reducing or eliminating the Pollution Control Standards review process would free up resources without any burden-shifting to states or impacts to funding. While those assumptions may prove true to some extent, we believe the appropriate response is to narrow the focus of ORSANCO’s Pollution Control Standards process along the lines of Alternatives 3 and 4. That approach would keep ORSANCO in the role of doing what it does best: providing significant scientific expertise and a basin-wide perspective on protecting the Ohio River.



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