

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: OAC Chapter 3745-111, "ERC Banking Program"

Rule Number(s): OAC Rules 3745-111-01 to 3745-111-05

Date: September 30, 2014

Rule Type:

- | | |
|----------------------------------|---|
| <input type="checkbox"/> New | <input checked="" type="checkbox"/> 5-Year Review |
| <input type="checkbox"/> Amended | <input checked="" type="checkbox"/> No Change |

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

The rules in OAC chapter 3745-111 establish Ohio EPA's "Emission Reduction Credit (ERC) Banking" program. The ERC program establishes a voluntary statewide ERC Banking Program that creates a consistent method for generating and transferring ERCs for future use in offsetting emissions in Ohio's nonattainment areas (PM 2.5 and 8-hour ozone). The ERC Banking System tracks the generation, transfer and use of ERCs for nitrogen oxides (NOx), volatile organic compound (VOC), sulfur dioxide (SO2), fine particulate (PM2.5), carbon monoxide (CO) and lead (Pb).

DAPC created the ERC Banking Program to assist large air pollution sources, or "major" facilities, in obtaining emission offsets for their New Source Review (NSR) requirements. The emission offset rules found in OAC Chapter 3745-31 (3745-31-24 and 3745-31-25) require any newly constructed or modified "major" source to offset their emission increases with creditable emission reductions from an existing source located in a similar geographical area.

Ohio EPA has prepared a detailed fact sheet for this program, which is available on our website at: <http://epa.ohio.gov/portals/27/ERC/doc/ERCfactsheet.pdf>.

Upon review of these rules, Ohio EPA has determined that the ERC banking program remains necessary, but is without need of changes. The rules are, therefore, being presented as "no-change" rules.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

| Rule Number | Authorizing Statute | Proposed Action |
|--------------------|----------------------------|------------------------|
| 3745-111-01 | 3704.03(F) | No Change |
| 3745-111-02 | 3704.03(F) | No Change |
| 3745-111-03 | 3704.03(F) | No Change |
| 3745-111-04 | 3704.03(F) | No Change |
| 3745-111-05 | 3704.03(F) | No Change |

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program? If yes, please briefly explain the source and substance of the federal requirement.

OAC chapter 3745-111 is not specifically required under Section 110 of the Clean Air Act (CAA) which requires all states to develop a plan for attaining and maintaining the national

ambient air quality standards (NAAQS). The rules in this chapter do, however, provide invaluable assistance to the regulated community in the generation, transfer and use of ERCs for the purpose of obtaining permits-to-install as required in OAC Chapter 3745-31 which is a federally enforceable part of Ohio's SIP under the CAA.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

The rules in this chapter provide for the establishment of an ERC bank to facilitate the generation, transfer and use of ERCs for the purpose of obtaining a permit-to-install under OAC Chapter 3745-31. The bank provides a central location where regulated sources having available offsets can make the offsets visible and available to regulated sources needing the offsets, providing for a quicker and more efficient permitting process.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

The ERC Banking Program was originally requested by the regulated community as a way to provide a more efficient and reliable method for the identification, transfer and use of ERCs. It is in the interest of both the regulated community and the Ohio EPA to maintain this bank. Generating and depositing ERCs into the ERC banking system enables businesses to identify credits needed to build new facilities or expand an existing one. This program fosters economic development in nonattainment areas and can provide an added economic opportunity for existing businesses through the sale of their existing credits.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

The rules in this chapter facilitate the easier movement of ERCs between regulated parties and, in so doing, speed the permitting process resulting in lower permitting costs and a quicker start to the project than if companies had to search for credits themselves.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

Ohio EPA established an initial 30-day public comment period ending November 8, 2013. Ohio EPA Division of Air Pollution Control (DAPC) sent the notices of our request for comments electronically to the 1,248+ members of Ohio EPA's electronic Interested Parties

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CSIOhio@governor.ohio.gov

list for DAPC rulemaking. DAPC also posted the notice on our website and placed the notice in the Director's Weekly Review publication.

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

Ohio EPA did not receive any input from interested parties during the early stakeholder outreach comment period.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

The rules in OAC chapter 3745-111 are not based on scientific data. The rules establish an administrative program through which ERCs are identified, quantified, transferred and utilized by the regulated community.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

The rules in this chapter provide a basic banking system to facilitate the identification and transfer of ERCs. This program was initially developed based on the needs of the regulated community, using the input of the regulated community. Because the program was developed as it was, Ohio EPA considers the program as contained in these rules to be the best alternative.

11. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

The ERC banking program contained in the rules of this chapter set out a basic banking program for the identification, transfer and use of ERCs. To maintain order within this program, it is necessary to establish rules for how ERCs are identified and added to the bank. Once an ERC is verified, it is then at the discretion of the owner of the ERC whether they wish to keep the ERC or transfer the ERC to another party.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The Ohio EPA is the only agency having jurisdiction over the control of air pollution, and is specifically directed, under ORC 3704.03(F) to issue air pollution control permits. The rules in this chapter facilitate the permitting process, are unique within the Ohio EPA, and do not duplicate the rules of this or any other agency.

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13. Please describe the Agency’s plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

Ohio EPA’s ERC Banking Program was originally implemented in 2009 and has been utilized by hundreds of sources for both listing and purchasing offsets. Ohio EPA does not charge any fees for utilizing the banking system. When an entity comes forward with an ERC to be verified, Ohio EPA will check the ERC, verify that it is indeed permanent, surplus, and quantifiable as required in the rule and enter the ERC in the banking system.

Ohio EPA maintains a webpage at: <http://epa.ohio.gov/dapc/erc/erc.aspx> regarding the ERC banking program. All available ERCs, both verified and unverified, that have been entered into the banking system are available to view on this website. Once an ERC is verified and entered into the system, Ohio EPA does not enter into, nor become a party to, any activities involving the transfer of ERCs between parties. The only paperwork required is a transfer notification so that Ohio EPA can update our website of available ERCs.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community;**
- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**
- c. Quantify the expected adverse impact from the regulation.**

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

The rules in this chapter establish the ERC banking program, a voluntary program for the identification, quantification, transfer and use of ERCs in the state of Ohio. Because the program is voluntary, Ohio EPA does not consider there to be a cost of compliance, however, should a facility decide to participate in the program, there would be a cost associated with some of the paperwork required by the program.

To begin participation in the program, a facility must submit a “General Notification and Deposit” Form (ERC Form -1). This is a multi-page form requesting information that can be used to verify the ERC and then post the ERC as available on the banking website. Ohio EPA estimates that the form could be completed from information already on hand at most facilities in a few hours’ time. It is estimated that the cost to complete the document is a few hundred dollars.

Forms must also be completed any time an ERC owner transfers or uses an ERC. Again, the forms can be completed using data on hand for the cost of a few hundred dollars per form. All ERC forms are available on Ohio EPA's website at: http://epa.ohio.gov/dapc/ERC/erc_form.aspx .

It is generally understood that, when transferring ERCs from one entity to another, there is a cost involved. This cost, be it monetary or other, is strictly between the parties involved. Ohio EPA is not a party to the transfer, nor is Ohio EPA involved in any negotiations. Ohio EPA's transfer form does request information on the cost of the exchange, but makes it plain that this information is optional and need not be provided.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

Ohio EPA does not see the ERC Banking Program as having an adverse impact on the regulated community. Just the opposite, by pre-verifying the offsets and making them readily available, these rules facilitate quicker identification and transfer of offsets, and considerably shorten the permitting process for facilities needing offsets.

Additionally, by giving facilities with available offsets a venue in which to advertise the offsets, the banking program can be used as a economic facilitator to help facilities find a party interested in receiving their ERCs and, thereby, fostering economic development in nonattainment areas and providing an added economic opportunity for existing businesses.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

The rules in OAC Chapter 3745-111 do not provide an exemptions. The ERC banking program is an optional program and, as such, does not need exemptions. The program does provide facilities with the opportunity to bank unverified offsets, however, before the offsets can be transferred and used, they must go through the verification process as required by federal law.

17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

The Ohio EPA uses enforcement discretion regarding fines and penalties for facilities committing a first-time violation are typically waived. The procedures specified in the agency's "Compliance Assurance through Enforcement" program are used to ensure implementation of the regulations.

18. What resources are available to assist small businesses with compliance of the regulation?

The following resources are available:

- Ohio EPA's Office of Compliance Assistance and Pollution Prevention (OCAPP) is a non-regulatory program that provides information and resources to help small businesses comply with environmental regulations. OCAPP also helps customers identify and implement pollution prevention measures that can save money, increase business performance and benefit the environment. Services of the office include a toll-free hotline, on-site compliance and pollution prevention assessments, workshops/training, plain-English publications library and assistance in completing permit application forms. Additional information is available at <http://www.epa.ohio.gov/ocapp>.
- Ohio EPA also has a permit assistance web page (http://www.epa.ohio.gov/dir/permit_assistance.aspx) that contains links to several items to help businesses navigate the permit process, including the Permit Wizard, Answer Place, Ohio EPA's Guide to Environmental Permitting and eBusiness Center.
- Ohio EPA maintains the Compliance Assistance Hotline 800-329-7518, weekdays from 8:00 a.m. to 5:00 p.m.
- US. EPA Small Business Gateway also has information on environmental regulations for small businesses available at <http://www.epa.gov/smallbusiness/> and a Small Business Ombudsman Hotline 800-368-5883.
- Ohio EPA's Division of Air Pollution Control (DAPC) maintains a State Implementation Plan (SIP) Development section through which SIP related rulemaking is performed. DAPC rule writer Paul Braun, the primary contact for this rulemaking, is available to answer questions. He can be reached by calling 614-644-3734 or by e-mail at paul.braun@epa.ohio.gov.