CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: **Ohio Environmental Protection Agency**

Regulation/Package Title: **Water Quality Standards Beneficial Use Designations**

Rule Number(s): **3745-1-13**

Date: **October 5, 2016**

Rule Type:

- X New
- ☐ Amended
- X 5-Year Review
- X Rescinded

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.

General Background Information

This rulemaking addresses the water quality standards (WQS) program beneficial use designation rule found in Ohio Administrative Code (OAC) Chapter 3745-1 for one drainage basin in the state.

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.

   Under the Clean Water Act (CWA) states are required to have water quality standards that protect lakes, rivers, streams or other surface waters from pollution. Ohio's water quality standards are in OAC Chapter 3745-1. The required components of a water quality standards program include: beneficial use designations; narrative and numeric criteria protective of the use designations; and implementation procedures used to evaluate decisions that could result in the lowering of water quality (referred to as the antidegradation policy or rule).

   Water quality standards are then used in other CWA programs such as the National Pollutant Discharge Elimination System (NPDES) permits, the Section 404 and Section 401 water quality certification program and the establishment of Total Maximum Daily Loads (TMDLs). Any impacts to the business community are realized only through the implementation of water quality standards in these other regulatory programs.

   Beneficial use designations are the water quality goals for lakes, rivers, streams and other water bodies. Designations include such uses as aquatic life habitats (warmwater, coldwater, etc.), recreation (bathing waters, primary contact, secondary contact) and water supplies (public, agricultural, industrial). Beneficial use designations are assigned to specific water bodies in OAC Chapter 3745-1. Each of the 23 major drainage basins or watersheds in the state is assigned a rule in the chapter. This rulemaking addresses the use designation rule for the Central Ohio tributaries drainage basin, OAC 3745-1-13. The existing rule is being rescinded and replaced with a new rule because more than 50% of the rule is being revised.

   Three broad types of changes are being considered:

   - Changing beneficial use designations for specific water bodies;
   - Adding water bodies that are currently undesignated to the rules; and
   - Verifying existing beneficial use designations already listed in the rules.

   See the associated fact sheet for this rulemaking for additional information.

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

   The Ohio statute authorizing these rules is Ohio Revised Code 6111.041.

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.***

   Yes, the regulations implement federal requirements in the CWA and Title 40 of the Code of Federal Regulations (CFR) Parts 131 Water Quality Standards and 132 Water Quality Guidance for the Great Lakes System.

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

   Not applicable.

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 CWA section 303(c)(2)(A) requires that water quality standards protect "public health or welfare, enhance the quality of the water and serve the purposes of [the Act]." The CWA section 101(a)(2) establishes as a national goal "water quality which provides for protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable."

   The value of clean water as a public resource is a well-established fact. Ohio is an economically important and diverse state with strong manufacturing and agricultural industries that depend upon abundant and clean water. Ohio's economy also depends upon the tourism that its waters attract. The program ensures that Ohio's streams, rivers and lakes can be used for purposes such as industrial and agricultural production, boating, fishing, swimming and as a source of drinking water. The public's expectations regarding clean water supplies and recreational opportunities would be placed in jeopardy without these standards and the programs that ensure regulated activities are able to meet them.

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

   Success can be measured in two ways: 1) tracking various administrative milestones in the programs that implement the water quality standards; and 2) monitoring the conditions of streams, rivers and lakes over time. The NPDES permit program and the 401 program routinely provide data and annual reports that describe the compliance performance of the regulated community. The Agency sets targets for achieving compliance with permit terms and conditions.

As described in the response to question # 11 the water quality standards regulations are performance based expectations regarding the quality of Ohio's surface water. Ohio EPA measures the success of the State's overall pollution control efforts through biological and chemical monitoring that determines whether or not a water body is attaining its designated uses. The status or health of Ohio's streams, rivers and lakes is reported every two years in the Integrated Water Quality Monitoring and Assessment Report, which is available on Ohio EPA's website at: http://epa.ohio.gov/dsw/tmdl/OhioIntegratedReport.aspx.

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 sent electronic notification to DSW's rulemaking interested party list and posted the Early Stakeholder Outreach fact sheet on DSW's website on July 28, 2016. The comment period deadline was August 26, 2016.

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

   The Agency did not receive comments from stakeholders 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 documents listed in rule OAC 3745-1-03 provide the methods used to measure compliance with the criteria and other measurable outcomes regarding attainment of beneficial uses. Scientific data supporting the establishment of the beneficial use categories and all the associated criteria that protect the beneficial uses include:

   - U.S. EPA water quality aquatic life research
   - Ohio EPA Total Maximum Daily Loads for Duck Creek, 2003
   - Ohio EPA Beneficial Use Support Document Duck Creek Tributaries, 2015
   - Ohio EPA Beneficial Use Support Document Little Muskingum River Basin, 2016
   - Ohio EPA Biological and Water Quality Study of the Sunfish Creek Watershed and Selected Ohio River Tributaries, 2010

- Ohio EPA Use Attainability Analysis of the Opossum Creek Watershed, 2015
- Ohio EPA Biological and Water Quality Study of the Captina Creek Watershed, 2010
- Ohio EPA Biological and Water Quality Study of the McMahon Creek Watershed and Selected Ohio River Tributaries, 2010
- Ohio EPA Biological and Water Quality Study of the Wheeling Creek Watershed, 2015
- Ohio EPA Biological and Water Quality Study of the Short Creek and Selected Ohio River Tributaries, 2014
- Ohio EPA Biological and Water Quality Study of the Cross Creek Basin and Selected Ohio River Watersheds, 2013
- Ohio EPA Carter Run (Yellow Creek) Use Attainability Analysis Assessment of Habitat, Fish and Macroinvertebrate Data, 2015
- Ohio EPA Biological and Water Quality Study of Yellow Creek and Selected Tributaries, 2008

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 Agency reviewed the existing beneficial use designations and determined that revisions were necessary based upon new biological and water quality survey results.

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.*

Water quality standards function as a performance-based regulation because for each beneficial use defined in the rules there are measureable water quality criteria for determining if a water body meets its designated beneficial uses. Ohio's water quality standards include numeric criteria for many chemical substances to protect human health and aquatic life, bacteria indicators to protect water based recreation and biological criteria used to gauge attainment of certain aquatic life use designations. The inclusion of numeric biological criteria is an especially strong attribute of Ohio's rules, one that imparts flexibility and common sense into the listing of waters that fail to meet the standards.

The business community is not directly held accountable for these ambient water quality criteria, but any business that discharges pollutants or places fill or dredge materials into

waters of the State must comply with permits designed to ensure the ambient standards are met. The Agency does not specify the technology that must be used to comply with permits.

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

Ohio EPA is the delegated state agency for the water quality standards program. Only a review of existing Ohio EPA rules was necessary and no duplication was found.

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.

The Agency will put the effective date of the adopted rule three months out from the date of adoption, which provides for U.S. EPA's review and approval and gives the Agency time to update web pages and permit writing tools.

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 water quality standards affect the business community indirectly through other regulatory programs that are designed to assure compliance with requirements based on meeting the water quality standards. These requirements take the form of effluent limits imposed by Ohio EPA through the NPDES permit program and the terms and conditions imposed through the 401 program for any activity that places dredge or fill materials into waters of the state. Though there is no direct cost associated with this water quality standards rulemaking, the Agency has evaluated potential costs the business community might incur through other CWA programs.

a. The impacted business community might include those regulated through the NPDES program or Section 401 water quality certification. Existing NPDES permit dischargers located on the stream segments where the beneficial use designation is being revised have been identified and notified of this rulemaking.

b. The nature of the adverse impact for those regulated through the NPDES program is the level of wastewater treatment necessary to meet the narrative and numeric criteria associated with the designated beneficial uses listed in the rule. The nature of the adverse impact for those regulated through the Section 401 water quality certification program is whether a proposed impact to the stream is approvable, and if approvable, the level of required compensatory mitigation.

c. In regard to those regulated through the NPDES permit program, the overall adverse impact can vary greatly based on stream designated use, as the type and quantity of pollutants discharged, the amount of dilution water available to mix with the discharge, and the amounts of pollutants already present in the dilution water. A higher level of wastewater treatment may be required of those discharging to a higher quality stream.

In regard to those regulated through the Section 401 water quality certification program, the overall adverse impact can also very greatly based on stream designated use. A proposed project to impact higher quality streams is less likely to be approved and would require more compensatory mitigation than a project proposing to impact a lower quality stream.

For this rulemaking, there should be no impact as a result of the water body beneficial use designation verifications. There should also be no impact from the rule revisions on existing NPDES permittees. The Agency identified 26 NPDES permittees that discharge to water bodies in which a revised aquatic life use designation is pending.

One of these 26 permittees discharges to a water body in which the pending aquatic life use carries less stringent chemical criteria compared to the current use designation.

Twenty-five permittees discharge to water bodies where the chemical criteria will become more stringent as a result of the draft rulemaking. For eight permittees, the revision is from limited warmwater habitat to warmwater habitat, so the only chemical criterion affected is total dissolved solids. For 15 permittees the revision affects the chemical criteria for ammonia and dissolved oxygen. For two permittees the revision effects criteria for ammonia, dissolved oxygen, pH, temperature and outside mixing zone average criteria for parameters like metals, chlorine and cyanide. If a revision to a permittee's effluent limitations is necessary upon permit renewal due to the revision in stream use designation, the Agency will include a schedule of compliance in the permit to allow the permittee the time to plan and construct any necessary treatment to be in compliance with the NPDES permit.

The addition of new designations could save time and money for potential Section 401 water quality certification projects because the applicant would not have to perform a use attainability analysis.

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

Clean water is recognized as a valued resource worth protecting. The water quality standards program and these draft rule revisions are the primary means of ensuring that the quality of water in Ohio's streams, rivers and lakes is improved, maintained and remains suitable for swimming, drinking and fishing. The basic goal of meeting all beneficial uses and criteria established under the CWA is the normal requirement mandated by federal regulations. Deviation from that expectation is allowed in only a handful of extraordinary circumstances, one of which is imposition of widespread social and economic impact. Thus, it is incumbent upon states to establish the proper balance between the water quality goals (beneficial uses and criteria) and the costs to society of attaining those goals. The Agency believes the draft rules are supported by the need to protect water quality and are in the overall public interest.

Regulatory Flexibility

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

Yes. Flexibility has been built into certain aspects of the water quality standards program. This flexibility applies to businesses of all sizes. Ohio's system of beneficial uses accounts for environmental and landscape factors in setting the tiered aquatic life use and the associated performance based water quality criteria. In short, the tiered aquatic life uses provide a hierarchy of stream performance measures (biological and chemical water quality criteria) ranging from exceptional quality waters to highly modified waters that cannot fully support the "fishable" goals of the CWA. This system ensures that businesses, through the terms of their NPDES discharge permits, are required to meet limits that most closely match the actual water quality requirements that protect the aquatic environment in their immediate location. In other words, Ohio standards do not impose a one-size fits all mandate.

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 first time paperwork violation waiver is not applicable to this rule package. The rules in OAC Chapter 3745-1 contain standards for CWA permitting programs to enforce. No paperwork or permits are required by the standards themselves.

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

- Ohio EPA Division of Environmental and Financial Assistance'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://epa.ohio.gov/ocapp/ComplianceAssistanceandPollutionPrevention.aspx
- Ohio EPA also has a Customer Support Center web page (https://ohioepa.custhelp.com/app/home/session/L3RpbWUvMTQ0NTg2NTYzNi9zaWQvX1hTRkZWem0%3D) that contains links to several items to help businesses navigate the permit process, including the Permit Wizard, Frequently Asked Questions (FAQ), training and subscription to various program listservs.
- Ohio EPA maintains the Compliance Assistance Hotline 800-329-7518, weekdays from 8:00 a.m. to 5:00 p.m.
- Ohio EPA, Division of Environmental and Financial Assistance's Compliance Assistance Unit provides technical support to small (less than 0.5 million gallons per day) wastewater treatment plants. Additional information is available at: http://epa.ohio.gov/dsw/compl_assist/compasst.aspx
- U.S. 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 800-368-5888.
- U.S. EPA's Water Quality Standards Handbook, Second Edition available at: http://water.epa.gov/scitech/swguidance/standards/handbook/index.cfm.
- U.S. EPA's Policy and Guidance: Reference Library contains an index of EPA documents related to water quality standards, including those referenced in the WQS

Handbook. You can sort the index alphabetically, by publication date, or by topic. Available at: http://water.epa.gov/scitech/swguidance/standards/library/index.cfm.

- The Division of Surface Water's Water Quality Standards program web page contains background information and direct links to sections of the regulations. Additional information is available at: http://epa.ohio.gov/dsw/wqs/index.aspx.