

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: Section 401 Water Quality Certifications

Rule Number(s): 3745-32-01 to 3745-32-07 and 3745-45-02

Date: December 4, 2015

Rule Type:

New

Amended

5-Year Review

Rescinded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 Section 401 water quality certification program rules. All seven rules in Ohio Administrative Code (OAC) Chapter 3745-32 are being rescinded and three new draft rules in the chapter are being considered. Rule OAC 3745-45-02 is being rescinded because it is outdated and the fees for the program are in statute. The new rules reorganize and enhance existing procedural rules to clarify requirements of the certification program.

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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 Chapters 3745-32 and 3745-45 provide the mechanism to grant businesses, other organizations and private landowners the permission they need under federal and state law to discharge or place fill material in streams, lakes, wetlands or other waters of the state.

The fundamental purpose of the program is to ensure that water quality is protected whenever a discharge of dredged or fill activity occurs. The state's water quality standards serve as a benchmark to protect water quality. The current regulations provide the Director broad authority to administer the program but lack specifics on many administrative and technical aspects of processing certifications. The existing rules provide definitions for key terms used in the program along with broadly written criteria for decisions on the issuance of Section 401 water quality certifications. There are also very short statements governing applicability, application requirements, exemptions and revocation procedures.

This is the five year review of these regulations. The draft amendments consolidate seven rules into three. Definitions have been updated and expanded based upon program needs and comments from the business community and other stakeholders. Administrative procedures have been clarified, detailing which items are required to be in an application, application processing timelines and application approval or denial steps. This should add more predictability to the application process and reduce application processing time since Agency expectations will be known ahead of time.

The Agency is also considering revision to the Antidegradation alternatives analysis to mirror current federal requirements that applicants for Section 404 permits are required to comply with. This will allow applicants to prepare one alternatives analysis to satisfy federal and state requirements when applying for a Section 404 permit and Section 401 water quality certification, even though the criteria with which each agency uses to review the analysis may differ.

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

The rules in OAC Chapters 3745-32 and 3745-45 are authorized by Ohio Revised Code 6111.03.

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. The rules in OAC Chapter 3745-32 describe how Ohio administers requirements under Section 401 of the Clean Water Act (CWA). States are given authority under Section 401 to review and certify that any permit or license issued by a federal agency complies with all applicable state water quality standards. Most Section 401 water quality certifications involve Section 404 permits issued by the U.S. Army Corps of Engineers for the placement of dredged or fill material in waters of the U.S.

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

The provisions in paragraphs (C)(2) and (C)(3) of rule OAC 3745-32-03, relating to deposition of dredged material in Lake Erie, are not specifically required by U.S. EPA or the CWA, however, the rule amendments are consistent with Section 101(a)(2) of the act, which established 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 State determined that the placement of sediments in Lake Erie that would lead to an increase in bioaccumulative chemicals of concern (BCCs) is unacceptable and the draft amendments are necessary to protect Lake Erie, its aquatic life and fishing industry.

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 objective of the Section 401 water quality certification program is to protect water quality through assuring the State’s water quality standards are maintained. Water quality standards provide the appropriate and balanced set of beneficial use and criteria that protect those uses. The Section 401 water quality certification program rules ensure that activities that could interfere with attainment of those uses and criteria are properly regulated.

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

Ohio EPA measures the success of the surface water programs through biological and chemical sampling and 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>.

In addition, Ohio EPA tracks the acreage of authorized wetlands impacts and acres of compensatory wetland mitigation required to offset those impacts. Ohio's wetland permitting programs adheres to the "No Net Loss of Wetlands" policy implemented in 1989 by President George H.W. Bush and adopted by each successive administration. From the mid-1600s to present, more than 90% of Ohio's natural wetlands were lost to unregulated filling and draining activities, dramatically affecting the water quality and fishable/swimmable status of Ohio's surface waters. Ohio EPA will implement the requirements of the federal CWA and the No Net Loss policy through these rules.

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 the Division of Surface Water's rulemaking interested party list and posted the Early Stakeholder Outreach fact sheet on the Division's website on February 9, 2015. The comment period deadline was March 11, 2015. The Agency also held four regional stakeholder meetings in May and June 2015 to present rule revisions under consideration and gain additional stakeholder input. These meetings were held in Richfield, Reynoldsburg, Bowling Green and Middletown. Approximately 70 stakeholders attended the meetings, including consultants, government entities, environmental organizations and the regulated community.

In addition to the regional stakeholder meetings, the Agency held two focus group meetings in July 2015 regarding stream existing use determination and stream mitigation. Approximately 48 participants attended each focus group, representing consulting firms, government entities, environmental organizations and the regulated community.

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

During the initial Early Stakeholder Outreach comment period, the Agency received comments from:

- The Ohio Environmental Council
- Ohio Department of Transportation
- Ohio Utility Group

The Agency also received feedback during the four regional stakeholder meetings. Overall the Agency received input from stakeholders on where the current Section 401 water quality

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certification program is running smoothly and where issues need to be addressed. Agency received requests for clarification of: definitions, applicability of the program, antidegradation alternatives analysis, temporary vs. permanent impacts and the regulatory requirements for each, use of the Director's authorization, stream mitigation ratios, determination of stream existing use, administrative processing issues and coordination with USACE, and protection of primary headwater habitats. The Agency considered this input in the drafting of the revised rules.

Participants of the two focus groups provided the Agency with valuable input that will be considered in drafting requirements for the determination of stream existing use and stream mitigation ratios in a separate rule package.

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 Section 401 water quality certification rules are procedural in nature and not based on scientific data.

The requirements regarding deposition of dredged material in Lake Erie consider data collected by Ohio Department of Natural Resources and assessed by Ohio EPA.

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?

As mentioned above, the Agency considered including determination of stream existing use and stream mitigation requirements as part of this rulemaking. The Agency determined these topics need additional vetting and will proceed on a separate yet congruent rulemaking path.

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 rules in these two chapters are more procedural or administrative in nature, addressing the functions of the certification program. However, the intent of the Section 401 water quality certification is to certify that an application for a federal permit protects the State's water quality standards, which are performance-based. The Section 401 water quality certification typically includes mitigation requirements for impacts to waters of the state which are also performance-based.

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

Ohio EPA is the agency charged with administering the Section 401 water quality certification 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 rules three months out, which gives the Agency time to conduct training on the revised rules and update permit application and review 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.

a. The impacted business community might include a business, organization or landowner who intends to relocate a stream or discharge fill materials in any waters of the State and are required to obtain a federal license or permit for the activity. The draft rules do not include any revisions to applicability requirements, only clarifications. Examples of businesses most frequently affected by the program include mining operations, energy companies, land development companies, and agricultural operations that petition for the construction of improved drainage outlets.

b. The types of adverse impacts on the business community include:

- Preliminary site evaluation and data collection to determine beneficial uses for streams not already designated in the water quality standards rules and categorization of wetland resources.
- Cost to complete (and possible revise) the certification application.

- Certification application and review fees.
- Cost of providing public notice regarding the pending application.
- Cost of designing and implementing a suitable compensatory mitigation plan.
- For projects that include permittee-responsible compensatory mitigation, cost of compliance monitoring and reporting to ensure that compensatory mitigation is successful.

c. The costs incurred by a business to comply with Section 401 water quality certification rules varies widely based on the size of the project and the types of water resources that are proposed to be impacted. Application and review fees and the responsibility for public noticing costs are established in Sections 3745.114 and 6111.30 of the Ohio Revised Code, and will not change as a result of this rulemaking. Application fees are based on the linear footage of stream and acreage of wetland proposed to be impacted, and cubic yardage of dredged or fill material to be placed into a lake.

The draft rules are intended to make the Section 401 water quality certification program more transparent and predictable for the business community. The applicant will have more specifics about what information needs to be submitted at the time of application. Faster certification processing should result through applicants submitting all required information with initial submission, which could reduce overall project costs. The Agency is also considering adopting the Section 404 permit alternatives analysis procedure to satisfy the Antidegradation alternative analysis required for Section 401 water quality certification applications. This should reduce application preparation time and cost.

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 Section 401 water quality certification program rules and the State’s water quality standards are primary means of ensuring that the quality of water in Ohio’s streams, rivers and lakes is improved 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 Section 401 water quality certification program that benefit businesses of any size. 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 a Section 401 water quality certification, are mitigating for the quality of resource that is being impacted in the proposed project.

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?

Under a Section 401 water quality certification program, the failure to obtain a certification under OAC Chapter 3745-32 is not considered a paper work violation and would not fall under the scope of ORC 119.14. However, submittal of compliance reports may be within the scope of the section and first-time violations would be waived.

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/L3RpbWUvMTQ0NTg2NTYzNi9za>

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- [WQvX1hTRkZWem0%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.
 - 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.
 - Ohio EPA's Section 401 Water Quality Certification Program has a voluntary pre-application meeting process to assist permit applicants with program requirements. Additional information is available at: <http://epa.ohio.gov/dsw/401/permitting.aspx>.
 - Ohio EPA's Section 401 Water Quality Certification Program web page contains information on application forms, guidance documents, contact information for Agency staff and updates on recent program activities. Additional information is available at: <http://epa.ohio.gov/dsw/401/index.aspx>