



Draft Rules – Section 401 Water Quality Certification Program

OAC Chapters 3745-32 and 3745-45

What is the Section 401 water quality certification program?

The federal Clean Water Act requires anyone discharging dredged or fill material into Ohio waters to obtain a water quality certification from Ohio EPA pursuant to Section 401 and a permit from the U.S. Army Corps of Engineers (USACE) pursuant to Section 404. Ohio EPA's Section 401 water quality certification program reviews projects submitted to the U.S. Army Corps of Engineers to ensure they comply with Ohio's water quality standards, which are located in Chapter 3745-1 of the Ohio Administrative Code (OAC).

Please note: This rulemaking does not include nor hinge upon the federal rulemaking, effective on August 28, 2015, that defined "Waters of the United States". A Section 404 permit and Section 401 water quality certification are required **after** USACE makes the determination that a resource is a water of the United States. This rulemaking does not include aspects of or requirements for the federal jurisdictional determinations.

Which rules are under review at this time?

All of OAC Chapters 3745-32 and 3745-45 are being reviewed. OAC Chapter 3745-32 contains the administrative and technical requirements for submitting a Section 401 water quality certification application to Ohio EPA's Division of Surface Water. Seven rules in the chapter are being combined into three new draft rules: 3745-32-01, 3745-32-02 and 3745-32-03 of the OAC. OAC Chapter 3745-45 consists of one rule, which contains outdated water quality certification fees. This rule will be rescinded.

Why are these rules being amended, what types of changes are being considered?

The rules are being amended as part of the five year rule review requirements in Ohio Revised Code section 106. The Agency has reviewed these rules and has identified necessary changes. The intent of this rulemaking is to clarify historical administrative procedures and move these administrative requirements together into fewer rules.

At this time, the Agency is considering the following revisions:

- Reorganization of rule content – combining content into fewer rules.
- Inclusion of more consistency with USACE's Section 404 regulations and procedures.
- Update of definitions for act, applicant, discharge of dredged material, discharge of fill material, dredged material, fill material, general permit, nationwide permit, person, Rivers and Harbors Act and waters of the state. Addition of definitions for 40 C.F.R., letter of permission and regional permit. Deletion of definitions for director and wetlands.
- Clarification of applicability and application requirements.
- Revising Antidegradation alternatives analysis to be consistent with federal requirements in 40 C.F.R. Part 230 (this will also necessitate a revision in OAC 3745-1-05 to be made in a separate rule package).
- Incorporating the ability of the director to authorize the coverage of a project under a nationwide permit, regional permit or letter of permission based upon a case specific determination.
- Inclusion of requirement for an applicant to submit a Section 401 water quality certification to the Agency within 30 days of USACE's public notice of the Section 404 permit.
- Inclusion of a requirement for a Section 401 water quality certification application to be complete within 180 days of the publication of the USACE's public notice of the Section 404 permit.
- Enhancing administrative procedures to help address historical ambiguities. This includes certification modifications and transfers.
- Requirement that the Section 401 water quality certification will expire contiguous with USACE's Section 404 permit.
- Clarification that the director may deny a Section 401 water quality certification based upon failure of an application to submit an application and failure to submit a complete application.

Draft Rules – Section 401 Water Quality Certification Program

- Inclusion of procedures for emergency certifications.
- Rescission of the out dated fee rule, OAC 3745-45-02.

The following items are not included in this rule package; however these items will be included in a follow up rule package expected to be available for review and comment in 2016:

- Stream existing use determination and corresponding application submittal requirements.
- Stream mitigation requirements.
- Definition of and requirements for temporary impacts.
- Definition of and requirements for restoration vs. compensatory mitigation.

The following item is not included in this rule package; however this will be included in a separate rulemaking in 2016:

- Certified Water Quality Professional program requirements.

Why revise the Antidegradation alternative analysis submittal requirements?

The Division held four regional stakeholder meetings (at locations in Richfield, Reynoldsburg, Bowling Green and Middletown, Ohio) in May and June 2015 to collect input on the existing program rules. At these meetings, stakeholders requested revisions to the current Antidegradation alternatives analysis process to make it more meaningful and productive. Applicants for Section 404 permits from USACE are currently required to conduct an alternatives analysis in accordance with federal regulations in 40 C.F.R. 230. The Agency is considering accepting this alternatives analysis for the State's Antidegradation alternatives analysis for Section 401 water quality certifications. This should reduce the amount of upfront work and cost applicants put into a certification application and should provide the Agency with a more realistic review of project alternatives. Although the Agency is considering using the same alternatives analysis process as USACE, the Agency would still be reviewing the alternatives and making a determination that is based upon and protective of Ohio's water quality standards.

Who will be regulated by these rules?

Anyone who wishes to discharge dredged or fill material into waters of the state is regulated by these rules. This includes local and state governments, federal government, businesses and private property owners. This rulemaking does not change existing requirements and should have no additional impact on stakeholders.

What additional information is the Agency seeking?

The Agency is seeking comments from interested stakeholders (public, local officials, industry sectors, other state agencies, consultants and environmental organizations) who may be impacted by these rule revisions. General comments and specific factual information are welcome.

In addition to the draft rule amendments, Ohio EPA is also seeking comments and feedback on the draft Common Sense Initiative (CSI) Business Regulation Impact Analysis form, which is being released with these draft rules during interested party review.

How are the amendments formatted in the draft rules?

New text is underlined. Rules being rescinded have "To Be Rescinded" at the top of the first page of the rule.

What is the rulemaking schedule?

At this time, the Agency is soliciting input on these draft rule revisions. Ohio EPA is required by section 121.39(D) of the Revised Code to contact potentially affected parties prior to adopting rule changes.

At the close of the draft rule comment period, the Agency will review the comments and make necessary changes to the rules. The Agency will then file proposed rules with the Joint Committee on Agency Rule Review, the Legislative Service Commission and Secretary of State.

At that point, another comment period, including one or more public hearings, will be scheduled. After the close of the comment period, the Agency will review the comments, make any necessary changes and then adopt the final rules.

Ohio EPA expects to file the proposed rules in spring 2016. The final rules could be adopted by summer 2016.

How can I comment on the draft rules?

Please submit your comments in one of the following ways:

Draft Rules – Section 401 Water Quality Certification Program

- By email: dsw_rulecomments@epa.ohio.gov
- By fax: (614) 644-2745
- By postal mail:

Rule Coordinator

Ohio EPA, Division of Surface Water
P.O. Box 1049
Columbus, OH 43216-1049

Comments on the draft rules must be received no later than 5:00 p.m. on February 9, 2016.

How can I get more information?

Copies of this fact sheet, CSI form and the draft rules are on the Division of Surface Water website at www.epa.ohio.gov/dsw/dswrules.aspx.

Federal Section 404 regulations in 40 C.F.R. 230 is available at: www.gpo.gov/fdsys/pkg/CFR-2015-title40-vol25/pdf/CFR-2015-title40-vol25-part230.pdf.

For more information about these draft rules, please contact:

Harry Kallipolitis

(614) 644-2146

harry.kallipolitis@epa.oho.gov