



Division of Surface Water Response to Comments

Rule: Section 401 Water Quality Certification Rules OAC Chapter 3745-32 and 3745-45

Agency Contact for this Package

Division Contact: Harry Kallipolitis
Division of Surface Water
614-644-2146
harry.kallipolitis@epa.ohio.gov

Ohio EPA held an interested party comment period from July 14, 2016 to August 31, 2016 regarding the Water Quality Standards program beneficial use designation rules. This document summarizes the comments and questions received during the associated comment period.

Ohio EPA reviewed and considered all comments received during the public comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health.

In an effort to help you review this document, the questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

General Comments

Comment 1: The majority of the proposed changes to the WQC rules involve rearranging the rules, placing procedural rules together, rescinding rules where they have moved, and restating language from Chapter 6111.32 of the Ohio Revised Code relating to WQC processing and time deadlines. Seven rules are being combined into 3 rules. In addition, Ohio EPA is adding some definitions from the federal CW A Section 404 permitting program that were not in the previous Ohio EPA WQC rules. These changes are a good idea, and the Association supports them. (Ohio Oil and Gas Association)

Response 1: Comment acknowledged.

Comment 2: The Association urges Ohio EPA to make the WQC program as simple as

possible and keep in mind that the Corps section 404 permitting program can be very time-consuming. Additional layers of requirements tacked onto the federal program with different forms, analyses and review, add time and expense to the federal process. The Ohio WQC program should not be viewed as a separate state discharge permit-type program. The program involves a certification from Ohio EPA that the applicant's proposed activity which will result in a discharge to a navigable water if authorized by the Corps, will comply with applicable Ohio water quality requirements. OOGA encourages Ohio EPA to continue fine tuning the Ohio WQC program to simplify it and shorten processing time while still assuring water quality requirements will be met. (Ohio Oil and Gas Association)

Response 2: Ohio EPA is continually working to improve the 401 water quality certification (WQC) program while ensuring that the state water quality standards are upheld. Currently, Ohio EPA is developing a certified professional program for wetland and stream assessments in support of 401 applications. This program will provide further efficiencies to the 401 WQC process and will be developed in a coordinated effort with all stakeholders.

OAC 3745-32-03

Comment 3: As presently employed by OEPA, Director's Authorizations allow dredge and fill projects to receive state certification under Ohio's 401 certification of the Nationwide Permits even though said projects do not satisfy the terms of the certification. As we have noted in past comments, this process is problematic for a number of reasons, including the fact that it appears to circumvent the intergovernmental coordination and public participation requirements found in both federal and state law.

We continue to oppose the Director's Authorization process as inappropriate. However, we note that the public participation and intergovernmental coordination processes for Director's Authorizations should at least be enumerated in rule before OEPA ratifies the Director's Authorization process itself in rule (see proposed OAC § 3745-32-03(A)(2)). Response to Comments # 20 purports to state OEPA's intention to establish a Director's Authorization-related public comment process:

In response to these comments and comments received regarding the proposed modification of the 401 WQC for the NWP's, the director has decided to build in a public comment component to the director's authorization process whereby applications will be posted on the agency's web page for fifteen days and the director will accept and

review comments before deciding whether to approve or deny such a request. (emphasis in original).

The public comment process mentioned above is not proposed in this rulemaking, however. We respectfully request that OEPA enumerate in rule the public participation process it here only mentions in supporting documentation. (Ohio Environmental Council)

Response 3: The above comment and subsequent response reference the proposed modification of the 401 WQC for the Nationwide Permits (NWP) and the public notification provision that was proposed to be included in that modification for a Director's Authorization. The agency has been attempting to modify the existing 401 WQC for the NWP that was issued in 2012. The modification was intended to provide clarification for certain conditions and reduce redundancies between the 401 WQC and the NWP conditions. The modification would also require the U.S. Army Corps of Engineers (Corps) to modify the existing regional conditions for the NWP. The agency officially requested that the Corps modify the NWP and incorporate the modified 401 WQC on March 14, 2016, and the Corps issued a public notice regarding the modification on June 16, 2016. To date, there is no final decision as to the outcome of this request.

The certification to the NWP is the appropriate place to include the process for providing this additional notification to the public for projects that are potentially eligible for a Director's Authorization. This goes above and beyond what is legally required. Formal comment and intergovernmental coordination is conducted as part of the antidegradation process when the certification is proposed.

Comment 4: OEPA should remove its proposed amendment language in proposed OAC § 3745-32-03(B)(2)(c). This new provision would require submission of "data sufficient to determine the existing aquatic life use" for streams that lack aquatic life use designations. This proposed language is unreasonably ambiguous and, in practice, could allow applicants to submit virtually anything. There is no indication here as to the quality and quantity of data required. Instead, and per decades of its own practice, OEPA should require the performance of Use Attainability Analyses (UAAs).

In Response to Comments # 29-35, OEPA admits that that it "will be refining the data sufficient to determine the existing aquatic life in a subsequent rulemaking." OEPA should instead specify in this proposed

rule that UAAs (rather than merely “data sufficient”) are required for existing use determinations.

USEPA has established a “rebuttable presumption of attainability” of CWA, § 101(a)(2) uses, meaning that all use designations must satisfy the CWA Section 101(a)(2) goals absent the performance of a UAA showing those goals are unattainable. A necessary implication of this federal presumption of attainability is that all existing use determinations below the CWA goals must also be subject to UAAs. See *Idaho Mining Association v. Browner*, 90 F. Supp. 2d 1078, at 1088, 1097–98 (D. Idaho 2000); See also *Water Quality Standards Regulatory Revisions; Final Rule*, 80 FR 162, at 51024. Consequently, if OEPA insists on maintaining its new “data sufficient” language for existing use determinations (which often amount to de facto use designations), it must at least specify in rule that UAAs are required components of “data sufficient” where existing uses are ultimately determined to be below the CWA 101(a)(2) goals.

The proposed rule’s flawed approach to determining existing use is compounded by the fact that Ohio regulation unlawfully limits existing uses to the designated use categories specified in the state’s water quality standards. As OEPA knows, federal law provides that existing uses exist whether or not they appear in the designated uses: “Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.” 40 CFR § 131.1(e) (emphasis added). Ohio law conflicts with this provision, however, because it provides that existing uses are limited to the categories of designated uses enumerated in the state’s WQSs: “Existing uses [...] are determined using the use designations defined in rule 3745-1-07 of the Administrative Code.” OAC § 3745-1-05(C)(1).

A further complicating factor is that Ohio’s designated use categories are too narrowly drawn to account for all high quality existing ALUs in the state. An illustration of this problem lies in the fact that Ohio’s designated use categories (as presently interpreted by the agency) do not include any ALUs that would protect high quality coldwater headwater streams where fish assemblages are absent. See OAC § 3745-1-07(B)(1)(a)-(g). In practice, small (though high quality) headwater streams are therefore often inappropriately pigeonholed into sub-CWA 101(a)(2) categories such as “Limited Resource Water.” In short, Ohio’s WQSs fail to recognize, let alone adequately protect, many existing uses – particularly the ALUs supported by the state’s small headwater streams. In Ohio, this gap would be nicely filled by the Primary Headwater Habitat Use, the methodology of which is already published and available on the Ohio EPA website and which addresses this very issue.

OEPA must submit its present rulemaking to USEPA for review, including the “data sufficient” existing use provision found at proposed OAC § 3745-32-03(B)(2)(c). This specific provision is an implementation process for antidegradation that “[could] be implemented in such a way as to circumvent the intent and purpose of [Ohio's] antidegradation policy.” USEPA, Water Quality Standards Handbook, Chapter 4.3 (noting that “EPA may disapprove and federally promulgate all or part of an implementation process for antidegradation if, in the judgment of the Administrator, the State's process (or certain provisions thereof) can be implemented in such a way as to circumvent the intent and purpose of the antidegradation policy.”). There should be little doubt that the “data sufficient” provision as written could be used to circumvent the requirements of the Clean Water Act and Ohio’s antidegradation policy. This nebulous and undefined language would serve to replace Ohio’s longstanding requirement (which was until very recently found in state statute, ORC § 6111.30) that UAAs be performed to determine the existing uses of undesignated streams. (Ohio Environmental Council)

Response 4: The language in the proposed rule is the same language contained in ORC 6111.30. Ohio EPA will be refining the data sufficient to determine the existing aquatic life in a subsequent rulemaking regarding stream existing use and stream mitigation. In the interim, Ohio EPA’s current practice with regard to evaluating streams proposed for impact as part of a 401 application is to evaluate each project on a case by case basis when making permitting decisions. Dependent upon the resources proposed for impact, this process includes the evaluation of habitat, biological, and chemical data submitted by applicants or collected by the agency.

These rules are not themselves water quality standards. Likewise, the issues raised by these comments squarely invoke the antidegradation provisions which are water quality standards that US EPA would review and approve but those provisions are contained in separate rules that are not part of this current rulemaking.

Comment 5: The proposed WQC rule at Ohio Admin. Code § 3745-32-03(H) (1) addressing revocation of a WQC is vague. We believe the rule should be changed. The language that a WQC may be revoked based on “false or misleading information” when the application was originally submitted to Ohio EPA is vague and potentially covers unintentional errors in submitted permit related documents. Sometimes wrong or false information is submitted inadvertently, such as wrong latitude and longitude coordinates or the acreage for a project could be off. The word “misleading” is vague and subject to many interpretations.

We suggest the wording be changed to the following:

(H) Revocation.

(1) The director may revoke a 401 certification if the Director concludes at any time that any applicable laws or rules have been violated, or when the Director determines the 401 certification approval was based on information submitted by the applicant to intentionally misrepresent relevant information at the time the application was originally submitted to Ohio EPA. (Ohio Oil and Gas Association)

Response 5: The ability to revoke for violations of applicable law has been in the current rules for over three decades and has, to the best of our knowledge, not been used. If this authority were to be used, the revocation would be issued as a proposed action, in accordance with OAC 3745-49, and the certification holder would be afforded an adjudication hearing before any final action of the director would be issued. For false and misleading information, the agency's concern would be those inaccuracies that would materially affect the outcome of the certification review and issuance.

Comment 6: Also, the language allowing a revocation if the "Director concludes at any time that any applicable laws or rules have been violated" is confusing and open ended. Clarification from the Agency is requested. Could an approved WQC be revoked if the site/facility violates an air pollution permit emission limit? Or, a local land use zoning law is violated?

Construction sites appear to be vulnerable given the many types of permits and other laws being applicable besides Section 404/401 of the Clean Water Act. We understand that this type of language appears elsewhere in Ohio EPA rules, but a clarification on how the Agency intends to interpret the provision in the WQC rules is requested. (Ohio Oil and Gas Association)

Response 6: The agency interprets "applicable laws and rules" as used in these rules to only include those laws and rules which were subject to the initial review and approval of the 401 water quality certification. Air pollution limits and local land use zoning laws are not subject to review during the 401 WQC process. The applicable laws and rules for the 401 WQC process are ORC 6111 (Water Pollution Control), OAC 3745-32 (Section 401 Water Quality Certifications) and 3745-1 (Water Quality Standards).

End of Response to Comments