

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio EPA

Regulation/Package Title: OAC 3745-300, Biocriteria Filing

Rule Number(s): OAC Rules 3745-300-05 and 3745-300-09

Date: November 2, 2012

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Rescinded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.

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.

Ohio EPA is proposing modification of the Voluntary Action Program (VAP) biocriteria training and certification requirements within both OAC 3745-300-05 and OAC 3745-300-09. These modifications would require Division of Surface Water (DSW) qualified data collector for level 3 credible data certification instead of a VAP certification for stream habitat assessment, fish community biology, or benthic macroinvertebrate biology performed under the VAP rules.

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

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These rules are authorized under Ohio Revised Code 3746.04 and amplify Ohio Revised Code 3746. The rules in this rulemaking are as follows:

Rule Number	Authorizing Statute	Proposed Action
3745-300-05	3746.04	Amended
3745-300-09	3746.04	Amended

- 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.**

No, the proposed regulation does not implement a federal requirement.

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

These rules do not implement any federal requirements. The proposed rules are intended to simplify and streamline the Division of Environmental Response and Revitalization's (DERR) biocriteria certification process with the DSW's qualified data collector biocriteria certification in DSW's rule 3745-4-03. This rule change is for Ohio EPA's Voluntary Action Program and participation is, as stated in its name, voluntary and depends on the need for civil liability relief for hazardous substance and petroleum cleanup that a person voluntarily performs on a former industrial or commercial property.

- 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 purpose of these regulations is to establish both the criteria for the certification and standards of conduct for certified professionals (CPs) within the Voluntary Action Program and to outline the acceptable variances from generic numerical standards and property specific risk assessment procedures used within the program. Without regulation in these particular areas, sites that enter into the VAP would not be remediated, or cleaned-up, to a standard that guarantees a safe level for both human health and the environment. This rule change is for Ohio EPA's Voluntary Action Program and participation is, as stated in its name, voluntary and depends on the need for civil liability relief for hazardous substance and petroleum cleanup that a person voluntarily performs on a former industrial or commercial property. These changes will help to eliminate duplication of efforts agency-wide through the elimination of a secondary training program within the VAP and by utilizing the current DSW training program.

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

The success of these regulations will be measured by tracking how many VAP Certified Biocriteria evaluators receive certification through the Division of Surface Water's level 3 qualified data collector training program. Ultimately, the proposed changes to these rules hope to avoid duplication of efforts agency-wide by eliminating a training program through the VAP and utilizing the existing training program in DSW.

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 a 14 day early stakeholder comment period and requested comments from potentially affected parties. The comment period ended as of October 31, 2012. Ohio EPA DERR sent notice of our request for comments electronically to the various VAP Certified Professionals, VAP Certified Laboratories, and other members of Ohio EPA's electronic Interested Parties list for DERR rulemaking. DERR also posted the notice on our website.

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

Ohio EPA, DERR, did not receive any comments during the Early Stakeholder Outreach period regarding the proposed rule changes.

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?

Ohio EPA reviewed the two training programs, both DSW's and VAP's, and determined that a duplication of services was being made. To eliminate the duplication, it was determined that the changes to the two VAP rules in this package would be sufficient to allow Ohio EPA to provide one training program within DSW that would meet both the needs of the VAP and DSW, thus reducing costs and allowing training time to be reallocated to more pressing needs.

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?

Ohio EPA considered leaving both rules 3745-300-05 and 3745-300-09 as they were and continuing to provide biocriteria certification for CP's as had been done in the past. However, it was determined that it would be a better use of state resources and less costly overall to train CPs in conjunction with the qualified data collector for level 3 credible data training that is offered by the DSW rather than training the CPs under a separate training program within the VAP itself.

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.*

ORC 3745-300-05 and ORC 3745-300-09 do not outline how to go about obtaining certification as qualified data collectors for level 3 credible data; rather, certified professionals are referred to the DSW training program and rule ORC 3745-4-03 in order to acquire the proper training and biocriteria certification. These rules are therefore considered performance-based regulations, as they do not dictate the process in rule how to achieve certification as a qualified data collector for level 3 credible data. Instead, these rules define the outcome of how to achieve compliance.

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

Currently, there is overlap and duplication within the VAP rules in this rules package and DSW rule 3745-4-03. However, Ohio EPA, DERR is now working in conjunction with the Division of Surface Water to ensure that by revising the VAP rules to allow for biocriteria certification through DSW's program the duplication will be removed.

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 plans to begin implementing the rules as soon as they are adopted and become effective. The Certified Biocriteria evaluators that these rule changes affect will be tracked in order to verify that they are indeed certified via the Division of Surface Water's training program for level 3 qualified data collectors in instances where certification is required. Also, the VAP will no longer be providing biocriteria training. This will ensure the requirements are consistently applied under one division.

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.

Participation in the VAP is voluntary on the part of the participant, i.e., the Certified Biocriteria evaluator to receive the training. The costs and fees for participating in the VAP can vary significantly depending on the size and scope of the cleanup involved. The level 3 qualified training program within DSW is free of charge; therefore, there will not be an adverse impact on certified professionals that choose to take this training to gain certification. Any other cost is well balanced with the VAP’s vested interest that Certified Biocriteria evaluators are qualified to perform certain duties, such as biocriteria training for stream habitat assessment, fish community biology, or benthic macroinvertebrate biology.

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

The Agency does not feel that there is an adverse impact to the regulated business community as the program for which these rules apply is a voluntary program. This coupled with the fact that once a property has received a covenant not to sue within the VAP, the value of the property increases and can be placed back into productive service within the community. This ultimately benefits the community through the remediation of a property that was once an unhealthy eyesore.

Regulatory Flexibility

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

Since this program is a voluntary program, there was no need to provide an alternative means of compliance for small businesses.

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? In the event a Certified Biocriteria evaluator generates data without having the requisite certification, that information will not be used by VAP to show the property meets

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applicable standards and it will negatively impact the Certified Biocriteria evaluator's ability to meet VAP's standards of conduct. Nevertheless, these rules are not subject to fines or penalties.

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 1-800-329-7518, 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 1-800-368-5883.
- Ohio EPA's Division of Environmental Response and Revitalization (DERR) rules coordinator, Emily Patchen, is the primary contact for any rules relating to the division, and is available to answer any questions. She can be reached by calling (614) 728-5441 or by email at Emily.Patchen@epa.state.oh.us.