

Note: The comment period for these rules has been extended 90 days to June 6, 2011.

Draft Rules – Surface Water Quality Fact Sheet 1 of 3: Questions & Answers OAC Chapters 3745-1 and 3745-32

This fact sheet answers some of the questions people may have with four separate, but inter-related, water quality rule packages:

- 1) Water Quality Standards
- 2) Antidegradation
- 3) Section 401 Water Quality Certifications
- 4) Stream Mitigation

Ohio EPA's water quality standards served the Agency well when addressing the point source pollution problems of the '80s and '90s. Ohio's 23 largest rivers, many of them grossly polluted and devoid of fish only 30 years ago, have been restored to the point that 93% of their combined lengths now meet aquatic life standards. However, many smaller streams and rivers are adversely impacted by complex nonpoint source pollution problems. Today's water pollution problems are different in nature and require updated approaches and improved regulations.

In August to October 2008 Ohio EPA released for public review and comment three water quality rule packages addressing water quality standards, antidegradation, and Section 401 water quality certifications. The comment deadlines on those three packages were extended until 90 days after the release of a fourth rule package, addressing stream mitigation. On December 8, 2010 the stream mitigation package, and updated water quality standards, antidegradation, and Section 401 water quality certifications packages, were released. The comment deadline on all four rule packages is March 8, 2011.

Three fact sheets, *Questions & Answers*, *Key Features* and *Highlighted Issues* summarize the overall scope and likely effects of those rule packages. In addition, each rule package has its own fact sheet with more information about that specific package. Links to the rule packages are posted on the Ohio EPA Division of Surface Water website at www.epa.ohio.gov/dsw/Home.aspx.

What rules are being revised?

See the accompanying *Key Features* fact sheet.

Why so many rule changes all at once?

Federal and state requirements call for periodic rule reviews every three to five years, depending on the program. During a recent review, Ohio EPA found that all of these rules were due for review, and some were past due. Rule revisions are also appropriate now because of some recent court rulings.

Why are these rules needed?

In general, the rules will ensure that water quality is maintained at a level that is protective of public health and the environment. The rules are required by the federal Clean Water Act and Ohio's environmental and water pollution control laws (Chapters 3745 and 6111 of the Revised Code).

Do these rules implement federal laws and regulations?

Yes. Section 303 of the Clean Water Act requires all states to have water quality standards for surface waters (e.g., streams, rivers, lakes, wetlands). Requirements for this program are in federal regulations at 40 CFR Part 131. Section 401 of the Act gives states the authority to certify that federal permitting actions, including dredge and fill permits under Section 404 of the Act, comply with state water quality standards.

Under laws passed by the Ohio General Assembly, Ohio EPA is authorized to administer these and other water quality programs to protect all waters of the state.

What does each rule package cover?

In general terms:

- 1) The Water Quality Standards package contains descriptions and standards for how clean Ohio's various waterways should be.

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- 2) The Antidegradation package contains provisions intended to keep clean waters clean by requiring a review of permit actions that would lower water quality.
- 3) The Section 401 Water Quality Certifications package contains application review criteria and permit review procedures for projects that would cause physical impacts to water bodies (e.g., construction, placing fill, grading, dredging, relocating ditches and diverting streams).
- 4) The Stream Mitigation package establishes a new review protocol applied to all Section 401 projects to establish consistent and appropriate mitigation for those proposed impacts.

See the accompanying fact sheets *Key Features* and *Highlighted Issues* for more information.

The rule packages are large and complicated. Where do I begin?

The *Highlighted Issues* fact sheet was written with specific interest groups and the public in mind. It should help you locate the draft rule changes that are likely to be of most interest to you. This is not a complete list of changes and is provided only as a tool to help interested parties initiate their rule review.

Within the context of the Clean Water Act, there have been recent court rulings about the definition of waters of the United States. What impacts do these rulings have on the rule packages?

The answer depends on the rule package. Based on the Ohio Revised Code mandate to protect all waters of the state, the water quality standards and antidegradation rules are not affected by the definition of “waters of the United States.”

However, the current Section 401 water quality certification rules, as they apply to streams, and the associated stream mitigation protocol rule are used only in situations involving a pending Section 404 permit issued by the U.S. Army Corps of Engineers (Corps). Section 404 permits are required only for waterways that can be defined as waters of the United States.

Because of the two U.S. Supreme Court decisions discussed below, the definition of waters of the United States under the Clean Water Act no longer includes isolated wetlands and streams. These are considered waters of the state under the Ohio Revised Code. The Ohio General Assembly addressed this conflict for isolated wetlands in 2001 by establishing a state isolated wetland permitting program. The new Section 401 Water Quality Certification package addresses this conflict for isolated streams by establishing a state water quality permit.

The Ohio EPA isolated wetland permitting program was created in 2001 in response to a U.S. Supreme Court decision, referred to as the SWANCC decision¹. In its decision, the court ruled that the Corps did not have authority to regulate isolated wetlands under Section 404 of the Clean Water Act. Prior to the ruling, the Corps regulated activities in all streams and wetlands through the issuance of federal Section 404 permits. The Ohio Revised Code defines “waters of the state” very broadly, so this decision left isolated wetlands in Ohio with no legal means to authorize proposed impacts. On July 17, 2001, Ohio House Bill 231 was signed into law. That bill established a permanent permitting process for isolated wetlands.

Isolated streams are in a similar situation. In 2006, the U.S. Supreme Court issued the Rapanos decision², in which the court ruled that the Corps did not have the authority to regulate small isolated streams under Section 404 of the Clean Water Act. That also left those streams with no legal means to authorize proposed impacts. The Section 401 Water Quality Certification package will establish a state water quality permit to cover those “waters of the state” no longer under the jurisdiction of the Corps.

Do the rule packages have overlapping coverage on some topics?

Yes. The Antidegradation rule is part of the Water Quality Standards chapter (OAC 3745-1). The currently effective Antidegradation rule is used in all surface water programs, including the Section 401 program. In the draft rule packages, the parts of the Antidegradation rule (rule 3745-1-05) that apply to the Section 401 program are being moved to a new Section 401 rule (draft rule 3745-32-04). Draft Antidegradation rule 3745-1-05 will apply primarily to wastewater discharges.

The Stream Mitigation rule will also be part of the Water Quality Standards chapter but it will be closely related to the Section 401 Water Quality Certification package (OAC 3745-32). In the Section 401 program, it will be used primarily to regulate physical impacts to water bodies (e.g., construction, placing fill, grading, dredging, relocating ditches and diverting streams).

All four packages address all surface waters of the state. However, several of the revisions in these packages specifically address small isolated streams (e.g., the new primary headwater habitat and drainage use designations in the Water Quality Standards package).

¹ *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers (Corps)* 531 U.S. 159 (January 9, 2001).

² *Rapanos v. United States*, 547 U.S. 715 (June 19, 2006).

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Do these rules include new standards for nutrients?

Yes, but only for inland lakes. Draft rule 3745-1-07 creates a specific beneficial use designation for inland lakes – lake habitat. Draft rule 3745-1-43 establishes lake habitat water quality criteria for phosphorus, nitrogen, secchi disk transparency, chlorophyll a and other parameters. Draft rule 3745-1-05 expands the definition of Best Available Demonstrated Control Technology in the antidegradation rule to include phosphorus and nitrogen. The Agency is working on nutrient standards for streams and rivers in Ohio. Those will be released for review and comment at a later date.

Are these rule revisions more restrictive than the current rules?

Yes and no, depending on the type of permitted activity. See the fact sheet that accompanies each rule package for details.

When were the draft rules released for public comment?

- 1) Water Quality Standards package – August 15, 2008.

- 3) Antidegradation package – October 15, 2008.
- 2) Section 401 Water Quality Certifications package – September 12, 2008.
- 4) Stream Mitigation package – December 8, 2010.

The Water Quality Standards, Antidegradation, and Section 401 Water Quality Certifications packages were updated and re-released with the Stream Mitigation package on December 8, 2010.

How can I comment on the rules?

Each rule package includes a fact sheet that provides instructions for submitting comments. Links to the rule packages are posted on the Ohio EPA Division of Surface Water website at www.epa.ohio.gov/dsw/Home.aspx. **The comment deadline on all four rule packages is March 8, 2011.**

Whom may I contact for more information?

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