

## For Interested Party Review - February 2006 Draft

3745-32-03 401 certification application requirements and procedures.

- (A) The filing of an application for a federal permit or license for which a section 401 water quality certification is required does not constitute an application for such certification with the state of Ohio.
- (1) Application for a section 401 water quality certification must be on forms provided by the director and must include all the items identified in paragraph (B) of this rule.
  - (2) The director may waive the application requirement if, in the judgment of the director, the activity for which a federal permit or license is sought will not result in a discharge to the waters of the state.
- (B) Application requirements.
- (1) Any person requesting authorization for an activity that requires a section 401 water quality certification shall comply with the application procedures set forth in this rule. The director shall prescribe the form of the application for a section 401 water quality certification. Additional information shall be submitted in accordance with the antidegradation requirements in rules 3745-1-54 and 3745-1-56 of the Administrative Code.
  - (2) Any application for a section 401 water quality certification subject to the provisions of this rule and impacting waters of the state shall include:
    - (a) A copy of a letter from the U.S. army corps of engineers documenting its jurisdiction over the wetlands, streams, or other waters of the state that are the subject of the section 401 water quality certification application;
    - (b) If the project involves impacts to a wetland, a wetland characterization analysis consistent with version 5.0 of the Ohio Rapid Assessment Method;
    - (c) If the project involves a stream for which a specific aquatic life use designation has not been made, a use attainability analysis;
    - (d) A specific and detailed mitigation proposal, consistent with the requirements of rule 3745-32-04 of the Administrative Code, including the location and proposed legal mechanism for protecting the property in perpetuity;
    - (e) Applicable fees;
    - (f) Site photographs;

- (g) Adequate documentation confirming that the applicant has requested written comments from both the Ohio department of natural resources and the U.S. fish and wildlife service, regarding threatened and endangered species, including the presence or absence of critical habitat;
  - (h) Descriptions, schematics, and appropriate economic information concerning the applicant's preferred alternative, nondegradation alternative, and minimum degradation alternative for the design and operation of the project;
  - (i) The applicant's investigation report of the waters of the United States, in support of the section 404 permit application for the proposed project;
  - (j) A copy of the U.S. army corps of engineers public notice regarding the section 404 permit application for the proposed project or other notification from the corps that the project will be authorized under a general permit.
- (3) The requirements in parts (B)(2)(a) and (B)(2)(i) of this rule may be satisfied by the U.S. army corps of engineers public notice in the event that no jurisdictional determination is required.
- (4) Use attainability analysis.
- (a) The use attainability analysis required by paragraph (B)(2) of this rule shall consist of the following:
    - (i) A description of the drainage area of each impacted stream or streams, above the most downstream impact proposed in the application;
    - (ii) A determination of the hydrological classification (perennial, intermittent, or ephemeral as defined in section 3745.114 of the Revised Code ) for each stream to be impacted;
    - (iii) Documentation of the qualitative habitat evaluation index (QHEI) assessment or the headwater habitat evaluation index (HHEI) assessment conducted on the impacted streams, as appropriate;
    - (iv) If the QHEI score is greater than forty for a given stream, a representative number of qualitative macroinvertebrate and fish samples for that stream must be provided; and
    - (v) A representative number of qualitative macroinvertebrate, fish, or amphibian samples for a stream may be provided by the applicant to supplement the HHEI or QHEI assessment for that stream.

- (b) All sampling submitted pursuant to paragraphs (B)(3)(a)(iv) and (B)(3)(a)(v) of this rule shall be according to the procedures dictated by rule 3745-1-03 of the Administrative Code.
  - (c) All habitat evaluation indices required in paragraph (B)(3)(a)(iii) of this rule shall be determined according to the following documents:
    - (i) Ohio EPA (2002a). Technical Report: Ohio's primary headwater streams - fish and amphibian assemblages. Ohio EPA Division of Surface Water, Columbus, Ohio. 41 pp.
    - (ii) Ohio EPA (2002b). Technical Report: Ohio's primary headwater streams - macroinvertebrate assemblages. Ohio EPA Division of Surface Water, Columbus, Ohio. 25 pp.
    - (iii) Ohio EPA (2002c). Primary Headwater Habitat Assessment Program Field Evaluation Manual. Ohio EPA Division of Surface Water, Columbus, Ohio. 60 pp.
    - (iv) Rankin, E.T. (1989). The Qualitative Habitat Evaluation Index [QHEI]: Rationale, Methods, and Application. Ohio EPA Division of Water Quality Planning and Assessment, Columbus, Ohio. 54 pp.
  - (d) If multiple streams are proposed to be impacted, the sampling submitted under paragraphs (B)(4)(a)(iii), (B)(4)(a)(iv), and (B)(4)(a)(v) of this rule may be conducted on a representative subset of the streams impacted. Ohio EPA reserves the right to require additional sampling after conducting an inspection of the site.
  - (5) Within fifteen business days after the receipt of an application for an individual 401 certification, the director shall notify the applicant whether the application is complete. If the application is not complete, the director shall include in the notice an itemized list of the information or materials that are necessary to complete the application. No additional review of the application shall take place until complete and accurate information is provided such that the application is deemed complete. As it is used in this rule, "complete application" means an application in which all of the items required by paragraph (B) of this rule have been provided and the items are both complete and accurate.
  - (6) Applicants regulated under rule 1501:13 of the Administrative Code may elect to utilize alternate, consolidated application procedures as approved by the director, the director of natural resources, and the U.S. army corps of engineers.
- (C) Criteria for decision by the director.

- (1) The director shall not issue a section 401 water quality certification unless the applicant has demonstrated to the director's satisfaction that the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the state will not, alone or in conjunction with other conditions:
  - (a) Prevent or interfere with the attainment or maintenance of applicable water quality standards in Chapter 3745-1 of the Administrative Code; or
  - (b) Result in a violation of any applicable provision of the Federal Water Pollution Control Act.
- (2) Notwithstanding an applicant's demonstration of the criteria in paragraph (C)(1) of this rule, the director may deny an application for a section 401 water quality certification if the director concludes that issuing the certification will result in adverse long term or short term impacts on water quality.
- (3) The director may consider whether the applicant is currently in significant noncompliance of the terms and conditions of any previously issued section 401 water quality certification or state isolated wetland permit for another project or activity, and may deny such application based on the existence of any such outstanding significant noncompliance.

(D) Time frames for issuing or denying certification.

- (1) The director shall issue or deny a section 401 water quality certification for an activity in waters of the state within one hundred eighty days of receipt of a complete application pursuant to paragraph (A) of this rule.
- (2) The one hundred eighty day review period may be restarted by the director upon submission of substantial revisions to the application originally submitted to Ohio EPA.
- (3) A section 401 water quality certification shall be issued and may be challenged in accordance with the provisions of the rules of procedure of Ohio EPA, Chapter 3745-47 of the Administrative Code.

(E) Modifications and transfers.

- (1) Before modifying a project or activity authorized in a section 401 water quality certification, the applicant shall notify Ohio EPA in writing, setting forth a description of the proposed modifications and the reasons therefor. The director may approve, approve with conditions, or deny any request for modification, or require the applicant to apply for and obtain a new section 401 water quality certification if the scope of the project is changed beyond that authorized in the original section 401 water quality certification.

- (a) Approvals or approvals with conditions, of the modification, shall be issued as draft actions and subject to the public notice requirements of the Administrative Code.
    - (b) Applications for modification of previously issued section 401 water quality certifications will be subject to all the requirements of rule 3745-1-05 of the Administrative Code.
  - (2) A person authorized to conduct any project or activity pursuant to a section 401 water quality certification may transfer the section 401 water quality certification to a third party provided that the original certification holder submits to the director the following:
    - (a) Advance written notice of the proposed transfer; and
    - (b) A signed and notarized statement by the transferee assuming the obligations of the section 401 water quality certification; and
    - (c) A signed and notarized statement by the original certification holder regarding project status and compliance with the terms of the certification.
  - (3) The person to whom the section 401 water quality certification was originally issued shall continue to be responsible for ensuring that the conditions of the section 401 water quality certification are fulfilled, and shall be liable for any violations thereof, until such time as Ohio EPA receives documentation required by paragraph (E)(2)(b) of this rule and a revised 401 water quality certification is issued identifying the new holder of the certification.
  - (4) The director may modify a section 401 water quality certification, absent any request from the section 401 water quality certification holder, if the director concludes at any time that any applicable laws or rules have been violated as a result of that certification.
- (F) Revocation.
- (1) The director may revoke and subsequently deny a section 401 water quality certification if the director concludes at any time that any applicable laws or rules have been violated, or when the director determines that the section 401 water quality certification approval was based on false or misleading information at the time that the application was originally submitted to Ohio EPA.
  - (2) A section 401 water quality certification shall be revoked and may be challenged in accordance with the provisions of the rules of procedure of Ohio EPA, Chapter 3745-47 of the Administrative Code.

(G) Expiration and renewal.

- (1) A section 401 water quality certification shall expire within five years of the date of issuance or upon the expiration of the applicable federal license or permit, whichever is less.
- (2) A section 401 water quality certification may be renewed for a period not to exceed five years under the following conditions:
  - (a) The section 401 water quality certification has not already expired; and
  - (b) No renewal of the section 401 water quality certification has previously been granted; and
  - (c) No additional water quality impacts beyond those authorized in the original section 401 water quality certification will result from the renewal of that certification.
- (3) Requests for renewal of section 401 water quality certifications must include a notarized statement that the conditions contained in paragraph (G)(2) of this rule have been met.
- (4) Renewals of section 401 water quality certifications shall be issued as draft actions and subject to the public notice requirements of Chapter 3745-47 of the Administrative Code.

(H) Denial.

- (1) Any application that fails to achieve the criteria established in paragraph (C) of this rule may be denied.
- (2) The director shall provide an explanation to an applicant for a section 401 water quality certification of the basis for the proposed denial of the application if applicable.
- (3) A section 401 water quality certification shall be denied and may be challenged in accordance with Chapter 3745-47 of the Administrative Code.

(I) Waiver of certification.

- (1) The director may, pursuant to division (O) of section 6111.03 of Revised Code and section 401 of the Federal Water Pollution Control Act, waive certification of any application submitted.

(J) Conditions of certification.

- (1) The director may impose such terms and conditions as part of a section 401 water quality certification as are appropriate or necessary to ensure compliance with applicable laws

and to ensure adequate protection of water quality and human health.

- (2) Prior to the issuance of a section 401 water quality certification or as a condition of any section 401 water quality certification, the director may require that the applicant perform various environmental quality tests to ensure adequate protection of water quality and human health, including, but not limited to, chemical analyses of water, sediment or fill material, and bioassays and biological monitoring.
- (3) The director may enter into any legally binding agreements, such as mitigation banking agreements or in lieu fee agreements, as he deems appropriate to ensure the protection of Ohio's water resources, within the authorities granted under section 6111.03 of the Revised Code.

(K) Emergency certification.

- (1) If the director issues an administrative order, pursuant to section 6111.06 of the Revised Code, that requires the placement of fill or dredged material into waters of the state, such order will constitute the issuance of a section 401 water quality certification for the purposes of the Federal Water Pollution Control Act.
- (2) Upon the expiration of such order, the applicant shall submit a complete application for a section 401 water quality certification that addresses any additional placement of fill or dredged material into waters of the state, beyond that authorized by the administrative order, as well as any mitigation requirements generated as a result of the activities authorized by the administrative order, pursuant to rules 3745-32-04 and 3745-32-05 of the Administrative Code.

(L) U.S. army corps of engineers general permits.

- (1) The director may certify, deny certification, or waive certification of general permits (including nationwide permits, regional general permits, and letters of permission) issued by the U.S. army corps of engineers under section 404 of the Federal Water Pollution Control Act.
- (2) The director may impose such terms and conditions as part of a general certification as are appropriate or necessary to ensure compliance with applicable laws and to ensure adequate protection of water quality and human health.
- (3) Applicants applying for coverage under the section 404 general permits are not required to comply with the application requirements contained in this rule unless the director determines that an individual section 401 water quality certification is required.

3745-32-03

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Replaces: 3745-32-04, 3745-32-05, 3745-32-06, 3745-32-07

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Certification

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Date

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