

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: Asset Management 2017

Rule Number(s): 3745 81-02, 3745-87-01, 3745-87-02, 3745-87-03, 3745-87-04, 3745-87-05, 3745-92-02, 3745-92-03, 3745-92-05

Date: 11/13/2017

Rule Type:

New

5-Year Review

Amended

Rescinded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.

Ohio EPA is proposing to create new, amend and rescind several rules in the Ohio Administrative Code (OAC) to incorporate new and amended language effective in sections 6109.02, 6109.08 and 6109.24 of the Ohio Revised Code (ORC). The language establishes requirements for demonstrating technical, managerial, and financial capability.

OAC Rule 3745-81-02: Language is being adjusted in this rule to correspond to changes in ORC § 6109.02. Specifically, the change will give the director discretion in designating consecutive water systems.

OAC Chapter 3745-87: Ohio EPA is proposing to rescind the current effective versions of OAC rules 3745-87-01 and 3745-87-02 and replace them with new versions. In addition, Ohio EPA is proposing to add three new rules (3745-87-03, 3745-87-04 and 3745-87-05) to this chapter. The proposed rules in this chapter will detail the applicability and required content of an asset management plan, as detailed in ORC § 6109.24. Specifically, the changes include the following:

- Adding definitions related to asset management.
- Removing the requirement for applicants for financial assistance from the water supply revolving loan account (WSRLA) and applicants for approval that are new community or nontransient noncommunity public water systems (PWSs) to submit a capability assurance plan.
- Adding a requirement for all PWSs to have an acceptable asset management program by October 1, 2018.
- Specifying the required content of an asset management program.
- Adding a requirement for non-community PWSs to prepare contingency plans.
- Specifying that the director can request a written description of the asset management plan and that the PWS is required to submit it within thirty days of the request.
- Specifying that the director may require the PWS to revise and resubmit the written description of the asset management program if it does not comply with the requirements.
- Adding a requirement for the asset management program to be available for inspection by representatives of the director.
- Adding requirement for PWSs to review and update their asset management program annually.
- Adding requirement for PWSs to establish and measure at least three levels of service goals. Level of service is a utility's stated commitment to deliver service at a specified level of quality and reliability.
- Adding a requirement for PWSs to report specified metrics annually. PWSs are also required to keep the metrics onsite and available for inspection. Metrics are measures that will be reported to determine the progress of the water system to become more sustainable. Many, but not all, will likely be numerical values. Some examples of the required metrics may include operating budget, cost per customer and system pressure.

OAC Rules 3745-92-02, 3745-92-03 and 3745-92-05: Ohio EPA is proposing revisions to OAC rules 3745-92-02, 3745-92-03 and 3745-92-05 that correspond to changes in ORC § 6109.08. Specifically, the change increases the maximum amount of money for which a PWS can provide financial assurance.

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

The draft rules will be adopted under the authority of ORC sections 6109.02, 6109.08 and 6109.24. Ohio Senate Bill 2 (SB 2), signed by Governor Kasich on July 10, 2017, requires the Director of Ohio EPA to adopt rules establishing requirements governing the demonstration of technical, managerial, and financial capability. Additionally, ORC § 6109.04 grants the Director authority to adopt rules governing PWSs in order to protect public health.

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.

There is a direct federal counterpart to OAC rule 3745-81-02 in 40 CFR Part 141.

The basis for the rules in OAC chapter 3745-87 are the 1996 amendments to the Safe Drinking Water Act (SDWA), which included capacity development provisions (referred to as capability assurance in Ohio). In addition to the capacity development provisions, the SDWA authorizes the federal EPA to award capitalization grants to states that have established drinking water state revolving fund programs. States may use this money to address infrastructure needs of PWSs through low interest loans and set aside portions to fund activities which encourage enhanced system management and help prevent contamination through source water protection measures. In order for states to receive all funding available, they must have a capacity development program and implement it in accordance with federal EPA guidelines. Inability to meet such guidelines would result in a twenty percent reduction of such funding.

The rules in OAC chapter 3745-92 do not implement a federal requirement and are not required for Ohio EPA to retain primary enforcement authority from the Federal Government. However, the rules in this chapter are used to enable Ohio EPA to administer objectives of the SDWA.

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

All of the proposed revisions exceed the provisions required by the federal government. OAC rules 3745-81-02, 3745-92-02, 3745-92-03 and 3745-92-05 is being revised to maintain consistency with ORC sections 6109.02 and 6109.08. OAC chapter 3745-87 is being revised because Ohio Senate Bill 2 requires the Director of Ohio EPA to adopt rules

establishing requirements governing the demonstration of technical, managerial, and financial capability.

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 provide a safe, reliable and adequate water supply. The rules in OAC chapter 3745-87 help achieve this purpose by ensuring PWSs have the technical, financial and managerial capability to maintain their water supply.

The rules in OAC chapter 3745-92 help ensure that community public water systems that serve a population of a certain size will be able to fund construction, installation or substantial modification of their water system.

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

The Agency will base success of all rules in this package on public water system compliance rates with the new and revised requirements.

The success of the rules in OAC chapter 3745-87 is based on the PWS' submittal of an acceptable asset management plan.

The success of the rules in OAC chapter 3745-92 is based on the PWS's compliance with the construction, installation or substantial modification of their water system in accordance with the plans approved by the Agency.

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.

Stakeholders include PWS owners and operators, consultants, environmental organizations and the general public. The only measure someone has to take to be notified of DDAGW's potential rule activity is to request to be added to our electronic or hard-copy mailing list.

Stakeholders were notified of DDAGW's plans to revise rules on July 14, 2017 by electronic or regular mail in accordance with their request. In addition, DDAGW will be seeking comment from stakeholders during the division's interested party review period. The interested party review period occurs before the rules are filed with JCARR and is used to address any concerns or questions from staff and our stakeholders.

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

Several comments and questions were received during the Early Stakeholder Outreach period. Most of the suggestions were already considered as part of the draft rules. Stakeholders will have another opportunity to comment during the Interested Party Review period.

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?

The measurable outcomes of these rules are to achieve the public health objectives of the SDWA by ensuring PWSs acquire and maintain the technical, financial and managerial capability necessary.

Ohio EPA obtained statutory authority in section 6109.04 of the Revised Code. OAC rules 3745-92-02, 3745-92-03 and 3745-92-05 amplify section 6109.08 of the Revised Code.

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?

OAC rule 3745-81-02 was adopted to give the Agency administrative code rules that amplify what is in Ohio Statute (section 6109.02 of the Revised Code).

Ohio EPA does not have the option of an alternative regulation for OAC chapter 3745-87 because the development of the capability assurance program to meet U.S. EPA's guidelines was necessary for the Agency to receive federal funding to be redistributed to Ohio PWSs.

OAC rules 3745-92-02, 3745-92-03 and 3745-92-05 were adopted to give the Agency administrative code rules that amplify what is in Ohio Statute (section 6109.08 of the Revised Code).

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.*

OAC rule 3745-81-02 is not performance based but the rules in OAC chapters 3745-87 and 3745-92 are performance based.

The rules in OAC chapter 3745-87 help PWSs and the Agency identify if there are deficiencies in any of the technical, managerial and financial aspects of the system. The outcome is to help the PWS develop both short and long-term planning to address deficiencies.

OAC chapter 3745-92 requires compliance with construction, installation and substantial modification specifications in accordance with plans approved by the Agency.

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

Ohio EPA reviewed current regulations and determined there are no duplications.

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 implementation of this rule includes the following:

- Seeking input from staff on implementation problems and developing solutions.
- Involving staff in developing the rule amendments.
- Developing internal procedures and guidance documents for staff to use in implementing rules.
- Regularly notifying staff of rule changes.
- Giving presentations and webinars on rule updates and new requirements.

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;

- **OAC Rule 3745-81-02:** There is no cost of compliance with this rule.
- **OAC Chapter 3745-87:** The impacted business community includes all PWSs.
- **OAC Rules 3745-92-02, 3745-92-03 and 3745-92-05:** The requirements of these rules apply to community public water systems that serve or will serve fewer than 500 service connections, are not owned or operated by a public entity or are regulated by the public utilities commission.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and

- **OAC Chapter 3745-87:** The cost to comply with the requirements of OAC chapter 3745-87 includes the amount of time it takes to complete an asset management plan multiplied by the cost of man hours. This cost can range depending on whether the PWS is a new or an existing system, and the experience of the personnel.

A new PWS would likely not have the personnel to complete and submit the plan, and may choose to contract for services, which accounts for a higher cost. However, if they do have experienced personnel to complete

and submit the plan, the cost would be significantly lower. Existing PWSs would not necessarily need to do as much information-gathering and the overall cost would be significantly lower if they have knowledgeable staff that can assist in developing or updating the plan.

In addition, OAC rule 3745-87-03 requires non-community PWSs to create a contingency plan that meets some of the requirements of OAC rule 3745-85-01. Therefore, the cost to comply with this rule also includes the costs associated with developing and implementing a contingency plan.

- **OAC Rules 3745-92-02, 3745-92-03 and 3745-92-05:** The cost to the PWS is the amount that is provided in financial assurance.

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.

- **OAC Chapter 3745-87:** The average cost as provided by the Ohio Rural Community Assistance Program (RCAP) for a new or existing PWS with knowledgeable staff to complete the asset management plan could be approximately \$2,500 (average time spent is 50 hours at a pay rate of \$50 per hour). The average cost for a PWS that contracts for assistance with completing the asset management plan may be about \$15,000 (average time spent 120 hours at a pay rate of \$125 per hour). For PWSs with a population of 10,000 or fewer, Ohio RCAP would absorb some of the cost dependent upon the needs of the system (technical assistance, exploring cost efficiency, etc.).

It is estimated that the cost of compliance with OAC rule 3745-85-01 can range from \$68 to \$17,642, depending on the size of the PWS and how detailed they are in their plan. Since the contingency plan requirements for non-community PWSs (per OAC rule 3745-87-03) are less stringent than the requirements for community and wholesale PWSs, the actual cost of creating a contingency plan will be less.

- **OAC Rules 3745-92-02, 3745-92-03 and 3745-92-05:** The cost of compliance could be as much as \$100,000. This cost is established by section 6109.08 of the Revised Code. In addition, rule 3745-92-05 could require the replenishment of the financial assurance to a maximum of

\$100,000 if funds were withdrawn and used to correct deficiencies identified by an order of the Director.

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

The Agency considers the overall cost of complying with these regulations to be minor in comparison with ensuring the public is supplied with a safe and reliable source of drinking water and protected from untreated/poorly managed sewage.

Regulatory Flexibility

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

OAC rule 3745-81-02 does not provide any specific exemption for small businesses.

Ohio EPA small entities and businesses are not exempt from completing an asset management plan. There is assistance available to them through Ohio RCAP. Ohio RCAP will provide help to small entities seeking financial assistance.

OAC rules 3745-92-02, 3745-92-03 and 3745-92-05 do not provide any specific exemptions or 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?

Ohio EPA does not assign fines and penalties for first-time offenders, and prefers to obtain compliance through outreach first and, if needed, written notice of violations prior to any type of formal enforcement.

18. What resources are available to assist small businesses with compliance of the regulation?

For technical assistance, small business PWSs can turn to Ohio EPA's Office of Compliance Assistance and Pollution Prevention (OCAPP), their Ohio EPA District Office Inspector, or Ohio RCAP. OCAPP is a non-regulatory program that can help small businesses comply with regulations. Ohio EPA contracts with RCAP to provide assistance for PWS with a population of 10,000 or less.