

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: Water Quality Standards (WQS)

Rule Number(s): 3745-1-21 Great Miami river drainage basin

Date: August 7, 2013

Rule Type:

<input type="checkbox"/> New	<input type="checkbox"/> 5-Year Review
<input checked="" type="checkbox"/> Amended	<input type="checkbox"/> Rescinded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.

General Background Information

This rulemaking addresses the water quality standards (WQS) program use designation rule for the Great Miami River drainage basin found in Ohio Administrative Code (OAC) 3745-1-21.

Regulatory Intent

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1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

Under the Clean Water Act (CWA) states are required to have water quality standards that protect lakes, rivers, streams or other surface waters from pollution. Ohio's water quality standards are in OAC Chapter 3745-1. The required components of a water quality standards program include: beneficial use designations; narrative and numeric criteria protective of the use designations; and implementation procedures used to evaluate decisions that could result in the lowering of water quality (referred to as the antidegradation policy or rule).

Beneficial use designations are the water quality goals for lakes, rivers, streams and other water bodies. Designations include such uses as aquatic life habitats (warmwater, coldwater, etc.), recreation (bathing waters, primary contact, secondary contact) and water supplies (public, agricultural, industrial). Beneficial use designations are assigned to specific water bodies in OAC Chapter 3745-1. Each of the 23 major drainage basins or watersheds in the state is assigned a rule in the chapter. This rulemaking addresses the use designation rule for the Great Miami River basin in OAC Chapter 3745-1-21.

State law and the CWA require Ohio EPA to periodically update rules to reflect the latest scientific information. The Agency has evaluated information regarding beneficial use designations for the Great Miami River basin. Two broad types of changes are being considered: 1) adding one water body that is currently undesignated to the rule; and 2) verifying existing beneficial use designations for ten water bodies already listed in the rule. The addition and verifications of existing beneficial use designations in the Lower Great Miami River watershed are based on findings from the 2010 biological and water quality survey.

The rule is also being revised to include site-specific aquatic life criteria for copper at two locations, a portion of Indian Creek in Butler County and a portion of Jackson Center Creek in Shelby County. State and federal regulations allow water quality criteria to be modified based on site-specific conditions, provided the criteria are reviewed and approved by U.S. EPA and, as with all water quality criteria, must be based on a sound scientific rationale in order to protect the designated use. The inclusion of the copper site-specific criteria in this rule provides a mechanism for public review and comment, U.S. EPA review and approval, and a formal recording of the criteria to be implemented in other CWA programs such as the National Pollutant Discharge Elimination System (NPDES) permit program.

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

Rule Number	Authorizing Statute	Draft Action
3745-1-21	ORC 6111.041	Amend

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.

Yes, the regulation implements federal requirements in 40 C.F.R. 131. Under 40 C.F.R. 131.10(a), “Each state must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation.”

40 C.F.R. 131.11(b)(1)(ii) grants states authority to establish numeric water quality criteria based on 304(a) guidance modified to reflect site-specific conditions.

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

Not applicable.

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 value of clean water as a public resource is a well-established fact. The public purpose of the WQS program is to protect the public resource values of clean water, which includes economic and quality of life considerations. Ohio is an economically important and diverse state with strong manufacturing and agricultural industries that depend upon abundant and clean water. Ohio’s economy also depends upon the tourism that its waters attract. The program ensures that Ohio’s streams, rivers and lakes can be used for purposes such as industrial and agricultural production, boating, fishing, swimming and as a source of drinking water. The public’s expectations regarding clean water supplies and recreational opportunities would be placed in jeopardy without these standards and the programs that ensure regulated activities are able to meet them.

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

Success can be measured in two ways: 1) tracking various administrative milestones in the programs that implement the WQS; and 2) monitoring the conditions of streams, rivers and lakes over time. The NPDES permit program and the 401 program routinely provide data and annual reports that describe the compliance performance of the regulated community. The Agency sets targets for achieving compliance with permit terms and conditions.

As described in the response to question # 11 the WQS regulations are performance based expectations regarding the quality of Ohio's surface water. Ohio EPA measures the success of the State's overall pollution control efforts through biological and chemical monitoring that determines whether or not a water body is attaining its designated uses. The status or health of Ohio's streams, rivers and lakes is reported every two years in the Integrated Water Quality Monitoring and Assessment Report, which is available on Ohio EPA's website at: <http://epa.ohio.gov/dsw/tmdl/OhioIntegratedReport.aspx>.

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 sent electronic notice to DSW's rulemaking interested party list and posted the Early Stakeholder Outreach fact sheet on DSW's website on January 8, 2013. The comment period deadline was January 29, 2013.

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

Comments were received from the Butler County Water and Sewer Department (supportive) and United States Department of the Interior, Fish and Wildlife Service. Ohio EPA conducted further research on the watersheds in this rulemaking and has addressed Fish and Wildlife Service's concerns with federally listed threatened and endangered species.

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 biologists and water quality staff conducted a comprehensive biological, water quality and stream habitat survey of the lower Great Miami River watershed in 2010. This study forms the scientific basis supporting the updates to the beneficial use designations. The results of this study are published in a report entitled:

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“Biological and Water Quality Study of the Lower Great Miami River and Select Tributaries” and is published on Ohio EPA’s web page.

- Two site-specific copper toxicity studies were conducted to support the site-specific copper criteria under consideration.

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?

The Agency, in consultation with U.S. EPA, evaluated various options for public review and U.S. EPA review and approval of the copper aquatic life site-specific criteria and determined the inclusion of the criteria in the use designation rule was an appropriate mechanism to convey this information.

Ohio EPA is required by federal regulations to review water body use designations and update the rules when new scientific information is available.

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.*

WQS function as a performance-based regulation because for each beneficial use defined in the rules there are measureable water quality criteria for determining if a water body meets its designated beneficial uses. Ohio’s WQS include numeric criteria for many chemical substances to protect human health and aquatic life, bacteria indicators to protect water based recreation and biological criteria used to gauge attainment of certain aquatic life use designations. The inclusion of numeric biological criteria is an especially strong attribute of Ohio’s rules, one that imparts flexibility and common sense into the listing of waters that fail to meet the standards.

The business community is not directly held accountable for these ambient water quality criteria, but any business that discharges pollutants or places fill or dredge materials into waters of the State must comply with permits designed to ensure the ambient standards are met. Businesses and the public have three distinctly different opportunities to comment on the regulations that may affect them: 1) a rule making where revisions are made to the descriptions of beneficial uses and where the ambient water quality criteria are updated based upon new information; 2) a rule making such as this one that assigns beneficial uses to specific water bodies; and 3) a draft permit issued to the business containing a fact sheet explaining if and how the terms of the permit were based upon WQS.

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

Ohio EPA is the delegated state agency for the water quality standards program. Only a review of existing Ohio EPA rules was necessary and no duplication was found.

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.

The Agency will put the effective date of the adopted rules three months out from the date of adoption, which provides for U.S. EPA’s review and approval and gives the Agency time to update web pages and permit writing tools.

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.

The WQS affect the business community indirectly through other regulatory programs that are designed to assure compliance with requirements based on meeting the WQS. These requirements take the form of effluent limits imposed by Ohio EPA through the NPDES permit program and the terms and conditions imposed through the 401 program for any activity that places dredge or fill materials into waters of the state. Though there is no direct cost associated with this WQS rulemaking, the Agency has evaluated potential costs the business community might incur through other CWA programs.

- a. The impacted business community might include those regulated through the NPDES program or Section 401 water quality certification program.
- b. The nature of the adverse impact for those regulated through the NPDES program is the level of wastewater treatment necessary to meet the narrative and numeric criteria associated with the designated beneficial uses listed in the rule. The nature of the adverse impact for those regulated through the Section 401 water quality

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certification program is whether a proposed impact to the stream is approvable, and if approvable, the level of required compensatory mitigation.

c. In regards to those regulated through the NPDES permit program, the overall adverse impact can vary greatly based on stream designated use, as the type and quantity of pollutants discharged, the amount of dilution water available to mix with the discharge, and the amounts of pollutants in the dilution water. A higher level of wastewater treatment may be required of those discharging to a higher quality stream.

In regards to those regulated through the Section 401 water quality certification program, the overall adverse impact can also vary greatly based on stream designated use. A proposed project to impact higher quality streams is less likely to be approved and would require more compensatory mitigation than a project proposing to impact a lower quality stream.

For this rulemaking, there should be no impact as a result of the water body use designation verifications. There should also be no impact from the addition of one new water body warmwater habitat use designation since by rule, the chemical water quality criteria for warmwater habitats applies to unlisted waters. In fact, the addition of the designation for the one stream could save time and money for in potential Section 401 water quality certification project because the applicant would not have to perform a use attainability analysis.

The site-specific copper criteria under consideration would result in less stringent permit conditions for NPDES discharges of copper to the specified water body segments. The two wastewater treatment facilities which initiated the site specific copper studies can expect reduced copper treatment costs and potentially less frequent copper monitoring requirements in their NPDES permits.

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

Clean water is recognized as a valued resource worth protecting. The WQS program and these draft rule revisions are the primary means of ensuring that the quality of water in Ohio's streams, rivers and lakes is improved, maintained and remains suitable for swimming, drinking and fishing. The basic goal of meeting all beneficial uses and criteria established under the CWA is the normal requirement mandated by federal regulations. Deviation from that expectation is allowed in only a handful of extraordinary circumstances, one of which is imposition of widespread social and economic impact. Thus, it is incumbent upon states to establish the proper balance between the water quality goals (beneficial uses and criteria) and the costs to society of attaining those goals. The Agency believes the draft rule is supported by the need to protect water quality and are in the overall public interest.

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Regulatory Flexibility

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

Yes. Flexibility has been built into certain aspects of the WQS program. This flexibility applies to businesses of all sizes. Ohio's system of beneficial uses accounts for environmental and landscape factors in setting the tiered aquatic life use and the associated performance based water quality criteria. In short, the tiered aquatic life uses provide a hierarchy of stream performance measures (biological and chemical water quality criteria) ranging from exceptional quality waters to highly modified waters that cannot fully support the "fishable" goals of the CWA. This system ensures that businesses, through the terms of their NPDES discharge permits, are required to meet limits that most closely match the actual water quality requirements that protect the aquatic environment in their immediate location. In other words, Ohio standards do not impose a one-size fits all mandate. In addition the program provides a process for the determination and implementation of site-specific criteria in lieu of potentially more restrictive statewide criteria in accordance with OAC 3745-1-35.

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?

The first time paperwork violation waiver is not applicable to this rule package. The rules in OAC Chapter 3745-1 contain standards for CWA permitting programs to enforce. No paperwork or permits are required by the standards themselves.

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

- 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://epa.ohio.gov/ocapp/ComplianceAssistanceandPollutionPrevention.aspx>
- Ohio EPA also has a permit assistance web page (http://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 800-329-7518, weekdays from 8:00 a.m. to 5:00 p.m.
 - Ohio EPA, Division of Surface Water's Compliance Assistance Unit provides technical support to small (less than 0.5 million gallons per day) wastewater treatment plants. Additional information is available at: http://epa.ohio.gov/dsw/compl_assist/compasst.aspx
 - 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 800-368-5888.
 - The Division of Surface Water's Water Quality Standards program web page contains background information and direct links to sections of the regulations. Additional information is available at: <http://epa.ohio.gov/dsw/wqs/index.aspx>.
 - U.S. EPA's Water Quality Standards Handbook, Second Edition available at: <http://water.epa.gov/scitech/swguidance/standards/handbook/index.cfm>.
 - U.S. EPA's Policy and Guidance: Reference Library contains an index of EPA documents related to water quality standards, including those referenced in the WQS Handbook. You can sort the index alphabetically, by publication date, or by topic. Available at: <http://water.epa.gov/scitech/swguidance/standards/library/index.cfm>.