

# CSI - Ohio

The Common Sense Initiative

## Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: Water Quality Standards

Rule Number(s): 3745-1-03, 3745-1-31, 3745-1-33, 3745-1-35, 3745-1-36, 3745-1-37,  
and 3745-1-39

Date: June 12, 2015

**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Rescinded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.*

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 Chapter 3745-1 of the Ohio Administrative Code (OAC). 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).

Water quality standards are then used in other CWA programs such as the National Pollutant Discharge Elimination System (NPDES) permits, the Section 404 and Section 401 Water Quality Certification Program and the establishment of Total Maximum Daily Loads (TMDLs). Any impacts to the business community are realized only through the implementation of water quality standards in these other regulatory programs.

The rule making includes the five year review of selected water quality standards rules pertaining to documents referenced in OAC Chapter 3745-1, water quality criteria and methodologies used to develop water quality criteria. Specifically, the Agency is considering revisions to the following five rules. Amendments under consideration include formatting revisions and updates to citations and references.

- 3745-1-03 Analytical methods and availability of documents.
- 3745-1-33 Water quality criteria for the lake Erie drainage basin.
- 3745-1-35 Site-specific modifications to criteria and values.
- 3745-1-37 Methodology for deriving bioaccumulation factors.
- 3745-1-39 Methodology for development of wildlife criteria for the lake Erie drainage basin.

No changes are under consideration for the following two rules.

- 3745-1-31 Lake Erie standards.
- 3745-1-36 Methodologies for development of aquatic life criteria and values.

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

Rule Number	Authorizing Statute
3745-1-03	6111.041
3745-1-31	6111.041, 6111.12
3745-1-33	6111.041
3745-1-35	6111.041
3745-1-36	6111.041
3745-1-37	6111.041
3745-1-39	6111.041

**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 regulations implement federal requirements in the CWA and 40 Code of Federal Regulations (CFR) Parts 131 Water Quality Standards and 132 Water Quality Guidance for the Great Lakes System.

**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 CWA section 303(c)(2)(A) requires that water quality standards protect “public health or welfare, enhance the quality of the water and serve the purposes of [the Act].” The CWA section 101(a)(2) establishes as a national goal “water quality which provides for protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable.”

The value of clean water as a public resource is a well-established fact. 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 water quality standards; 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 water quality standards 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 notification to the Division of Surface Water's rulemaking interested party list and posted the Early Stakeholder Outreach fact sheet on the Division's website on March 12, 2015. The comment period deadline was April 13, 2015.

**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:

- U.S. Environmental Protection Agency (U.S. EPA), Region 5
- Alliance for the Great Lakes, the Great Lakes Environmental Law Center, Freshwater Future, Ohio Environmental Council and American Rivers

In response, the Division of Surface Water has committed to restart the triennial review of water quality standards, which may include U.S. EPA's updated ammonia aquatic life recommendations and updated human health recommendations, which were finalized in June 2015.

The Agency will take into consideration the comments received regarding Lake Erie in future rule reviews. Currently, the Agency is participating in several workgroups concerning the Great Lakes Water Quality Agreement and is waiting for the final recommendations on phosphorus from these groups before the Agency determines what if any rulemakings are necessary.

**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 documents listed in rule OAC 3745-1-03 provide the methods used to measure compliance with the water quality criteria and other measurable outcomes regarding attainment of beneficial uses. In addition, the rules are based upon:

40 C.F.R. Part 131

40 C.F.R. Part 132

**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?**

For the five rules that are being considered for amendment, the Agency reviewed the existing language and determined that minor revisions were necessary to address administrative requirements. For the two rules being considered for no change, the Agency is not aware of new information necessitating revisions to be made to the rules.

**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.***

Water quality standards 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 water quality standards 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. The Agency does not specify the technology that must be used to comply with permits.

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**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. The changes under consideration are all relatively innocuous. The proposed rules cite the most up to date version of federal statutes, rules and guidelines that are already in effect. In many instances the statute, rule or document citation may have a new date, but the subject matter germane to water quality standards program has not changed and thus has been consistently applied for some time. In situations where Ohio EPA has made adjustments to documents cited in the rules the procedures to implement changes are written out and understood by those responsible for the program implementation. For example, Volume III of Biological Criteria for the Protection of Aquatic Life was specifically written with the intent of providing clearer operating instructions to Ohio EPA staff responsible for biological field and laboratory work. This should benefit the regulated entities that conduct their own biological surveys and well as those who rely on the findings of Ohio EPA's stream water quality assessments.

**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 water quality standards affect the business community indirectly through other regulatory programs that are designed to assure compliance with requirements based on meeting the water quality standards. 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

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materials into waters of the state. Though there is no direct cost associated with this water quality standards 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 rules. The nature of the adverse impact for those regulated through the Section 401 water quality 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 already present 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.

The changes under consideration are all relatively innocuous (see response to #13). In large part the changes to the dated references for various statutes, rules and documents is meant to foster the orderly implementation of regulations already on the books. New content found in Ohio EPA's method manuals improves the quality and reliability of the Agency's water quality survey work. Any impact on the regulated community brought about by results of improved scientific investigations is impossible to gauge at the time of rulemaking. Water Quality Standard and NPDES permit regulations have provisions to grant individual variances from meeting the standards if costs of compliance are excessive.

**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 water quality standards program and these draft rule revisions are the primary means of ensuring that the quality of

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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 rules are supported by the need to protect water quality and are in the overall public interest.

### **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 water quality standards 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.

#### **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,

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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](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](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.
- 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>.
- 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>.