3745-32-03 **Section 401 water quality certification application requirements and procedures.**

[Comment: For dates of non-regulatory government publications, publications of recognized organizations and associations, federal rules and federal statutory provisions referenced in this rule, see rule 3745-32-01 of the Administrative Code.]

(A) The filing of an application for a federal permit or license for which a 401 certification is required does not constitute an application for a 401 certification with the state of Ohio.

(1) 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.

(2) If the federal permit sought is a nationwide permit, a regional permit, or a letter of permission issued by the Corps and Ohio EPA has issued a certification for the federal permit, no further application is required to be submitted to Ohio EPA under this chapter provided that the project meets all of the terms and conditions for coverage under the certification or the director has authorized the project to proceed under the terms of the general certification based on a case specific determination of the environmental impacts of the project.

(B) Application requirements.

(1) Any person requesting authorization for an activity that requires a 401 certification shall comply with the application procedures set forth in this rule. The director shall prescribe the form and required content of the application for a 401 certification. Additional information shall be submitted in accordance with the antidegradation requirements in rules 3745-1-05 and 3745-1-54 of the Administrative Code. The director may request additional information if, in the judgment of the director, additional information is necessary to determine whether the applicant meets the approval criteria in paragraph (C) of this rule.

(2) Any application for a 401 certification subject to the provisions of this rule shall be submitted on forms provided by the director and completed in accordance with the corresponding application instructions. The application shall be submitted no later than forty-five days after the publication of the Corps 404 public notice, if applicable, and shall include the following:

(a) Current and unexpired correspondence from the Corps documenting the jurisdictional status of the waters located within the project area.

(b) For each wetland within a project boundary, a wetland characterization

analysis consistent with "Ohio Rapid Assessment Method for Wetlands v. 5.0, February 1, 2001." The Ohio Rapid Assessment Method protocol is available on the Ohio EPA website at http://www.epa.ohio.gov/dsw/401/ecology.aspx. The Ohio Rapid Assessment Method shall include complete and accurate forms, including the background information, scoring boundary worksheet, narrative rating, quantitative rating, and wetland categorization worksheets completed and submitted in accordance with the procedures outlined in the Ohio Rapid Assessment Method manual.

(c) If the project involves a stream for which a specific aquatic life use designation found in Chapter 3745-1 of the Administrative Code has not been made, data sufficient to determine the existing aquatic life use.

(d) A specific and detailed mitigation plan prepared in accordance with the requirements in 33 C.F.R. Part 332 and rule 3745-1-54 of the Administrative Code including the location and proposed real estate instrument or other available mechanism for protecting the property long term.

(e) A minimum of four high resolution color photographs taken while facing each of the four cardinal directions of each wetland proposed for impact. A minimum of three high resolution color photographs taken while facing upstream of the proposed impact area, downstream of the proposed impact area, and one close up which clearly depicts the substrate composition and size for each stream proposed for impact. A minimum of three high resolution color photographs for all other waters of the state proposed for impact. Photographs must accurately depict the quality of the water of the state and may not include a majority of dying or dead vegetation and excessive cover due to seasonal conditions that vegetation and substrates cannot be observed, such as leaf litter, snow, or ice. Photographs deemed to be insufficient of representing the water of the state will be required to be retaken once seasonal conditions are appropriate. Photographs shall be clearly labeled with the name, direction, and date.

(f) Adequate documentation confirming that the applicant has requested comments from the Ohio department of natural resources and the United States fish and wildlife service regarding threatened and endangered species, including the presence or absence of critical habitat.

(g) Descriptions, schematics, and appropriate economic information concerning the applicant's alternatives analysis prepared in accordance with 40 C.F.R. Part 230 and required by rules 3745-1-05 and 3745-1-54 of the Administrative Code.

(h) The applicant's investigation report of the waters of the United States in support of a federal license or permit application concerning the project.

(i) In the case of jurisdictional waters, a copy of the Corps public notice regarding the application for a permit under section 404 of the act for the proposed project or other notification from the Corps that the project will be authorized under a general permit or letter of permission if applicable.

(3) Applicable fees. A person that applies for a 401 certification under Section 6111 of the Revised Code and this chapter shall pay fees in accordance with Chapter 3745.114 of the Revised Code.

(4) Applicants regulated under Chapter 1501:13 of the Administrative Code may elect to utilize alternate, consolidated application procedures as approved by the director, the director of Ohio department of natural resources, and the Corps.

(C) Application processing

(1) Not later than 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.

(a) 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 further processing of the application shall take place until the itemized list of information or materials requested by the director is received and determined to be complete.

(b) If the applicant fails to provide the information within sixty days after the director's receipt of the application and a Corps public notice regarding the application for a 404 permit has not been published for the project, the director may return the incomplete application and take no further action on the application.

(c) If the application is not complete, and a Corps public notice regarding the application for a 404 permit has been published, all the items required by paragraph (B) of this rule must be received within one hundred eighty days of the Corps public notice date.

(2) If the director fails to notify the applicant within fifteen business days regarding the completeness of the application, the application is considered complete.

(3) 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 complete. A complete application does not equate to an approvable project.

(D) Criteria for decision by the director.

(1) The director shall not issue a 401 certification unless the director determines that the applicant has demonstrated 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 do any of the following:

(a) Violate the antidegradation requirements in rules 3745-1-05 and 3745-1-54 of the Administrative Code.

(b) Prevent or interfere with the attainment or maintenance of applicable water quality standards in Chapter 3745-1 of the Administrative Code.

(c) Result in a violation of any applicable provision of the act.

(2) Except as provided in paragraph (D)(3) of this rule, the director shall not issue a 401 certification for any harbor or navigation maintenance activities proposing to deposit dredged material in any part of lake Erie that is within the territorial boundaries of this state or in the direct tributaries of lake Erie within this state unless the director has determined the following:

(a) The dredged material will not result in a modeled increase in "bioaccumulation" of a "bioaccumulative chemical of concern" as those terms are defined in rule 3745-1-02 of the Administrative Code. Dredged material found to be unsuitable for the deposit of dredged material pursuant to this paragraph shall be placed in a confined disposal facility or an upland location determined to be protective of public health and the environment.

(b) The placement of the dredged material will not violate any international treaties or interstate compacts regarding any bioaccumulative chemical of concern as defined under those treaties or compacts.

(3) The preclusions set forth in paragraph (D)(2) of this rule shall not apply to placing the material into a confined disposal facility that is located in lake Erie or the direct tributaries or the discharge of de minimus dredged material associated with dewatering operations necessary to facilitate placement of the dredged material in a confined disposal facility or upland location.

(4) Notwithstanding an applicant's demonstration of the criteria in paragraphs (D)(1) and (D)(2) of this rule, the director may deny an application for a 401 certification if the director concludes 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 result in adverse long term or short term impacts on

water quality.

(E) Time frames for taking an action on a 401 certification.

(1) The director shall take an action on a 401 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) An action on a 401 certification shall be taken and may be challenged in accordance with Chapters 3745-47 and 3745-49 of the Administrative Code.

(F) Modification.

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

(a) Approvals or approvals with conditions, of the modification, shall be issued as final actions and subject to the public notice requirements of Chapter 3745-49 of the Administrative Code.

(b) Applications for modification of previously issued 401 certifications will be subject to all the requirements of rules 3745-1-05 and 3745-1-54 of the Administrative Code if applicable.

(2) A 401 certification shall be modified and may be challenged in accordance with Chapters 3745-47 and 3745-49 of the Administrative Code.

(G) Transfer.

(1) A 401 certification may be transfered to a third party provided that the original certification holder submits to the director all of the following:

(a) Advance written notice of the proposed transfer.

(b) A signed and notarized statement by the transferee assuming the obligations of the 401 certification.

(c) A signed and notarized statement by the original certification holder regarding project status and compliance with the terms of the 401 certification.

(2) The person to whom the 401 certification was originally issued shall continue to be responsible for ensuring that the conditions of the 401 certification are

fulfilled, and shall be liable for any violations thereof, until such time as Ohio EPA receives documentation required by paragraph (G)(1) of this rule and an official notification of transfer is issued identifying the new holder of the certification.

(H) Revocation.

(1) The director may revoke a 401 certification if the director concludes at any time that any applicable laws or rules have been violated, or when the director determines that the 401 certification approval was based on false or misleading information at the time that the application was originally submitted to Ohio EPA.

(2) A 401 certification shall be revoked and may be challenged in accordance with Chapters 3745-47 and 3745-49 of the Administrative Code.

(I) Expiration and extension.

(1) A 401 certification shall expire upon the expiration of the applicable federal license or permit.

(2) A 401 certification shall remain valid if the applicable federal license or permit is extended so long as no additional water quality impacts beyond those authorized in the original or modified 401 certification will result from the renewal of that certification. If additional water quality impacts beyond those authorized in the original or modified 401 certification are proposed, the applicant must apply for a new 401 certification in accordance with the criteria established in paragraph (B) of this rule or a 401 modification in accordance with the criteria established in paragraph (F) of this rule.

(J) Denial.

(1) Any application that fails to achieve the criteria established in paragraph (B) or (C) of this rule may be denied.

(2) The director shall provide a written explanation to an applicant for a 401 certification of the basis for the proposed denial of the application, if applicable.

(3) A 401 certification shall be denied and may be challenged in accordance with Chapters 3745-47 and 3745-49 of the Administrative Code.

(K) Conditions of certification.

(1) The director may impose such terms and conditions as part of a 401 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 401 certification or as a condition of any 401 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.

(L) Emergency certification.

(1) If the Corps determines an emergency exists as defined under in 33 C.F.R. 325.2(e)(4) and seeks to process a 404 application in accordance with procedures under that rule, the director may issue an emergency certification authorizing the placement of fill or dredged material into waters of the state if the director concurs with the existence of an emergency. To the extent that the time frames for certification do not allow the application to be processed in accordance with normal procedures, the director shall issue the certification as a final action and then require and process a complete application in accordance with paragraph (L)(2).

(2) Upon the expiration of the emergency, the director shall require the applicant to submit a complete application for a 401 certification that addresses the emergency fill and any additional placement of fill or dredged material into waters of the state, beyond that authorized by the emergency certification.

(M) Corps general permits and letters of permission.

(1) The director may issue, deny or waive action on any 401 certification for general permits and letters of permission issued by the Corps under section 404 of the act.

(2) The director may impose such terms and conditions as part of a general 401 certification as are appropriate or necessary to ensure compliance with applicable laws and to ensure adequate protection of water quality and human health.

(N) General certifications. The director may issue general certifications and include such terms and conditions as are appropriate or necessary to ensure compliance with applicable laws and to ensure adequate protection of water quality and human health.

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

Effective:

Five Year Review (FYR) Dates:

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Certification

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Date

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