

CSI - Ohio

The Common Sense Initiative

Business Regulation Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: Water Quality Standards

Rule Number(s): 3745-1-01 to 3745-1-05, 3745-1-07, 3745-1-31 to 3745-1-43

Date: December 19, 2011

Rule Type:

New

5-Year Review

Amended

Rescinded

Is this rule required to meet a deadline? (Yes or No): Yes

If yes, what is the nature of the deadline and by what date does the rule need to be filed with JCARR to meet the deadline?

ORC 119.032 Five year rule review. For rules 3745-1-01, 3745-1-02, 3745-1-07, 3745-1-32, 3745-1-33, 3745-1-34, 3745-1-35 the five year review date was 12/30/2007. For rule 3745-1-05 the five year review date was 7/1/2008. For rules 3745-1-04, 3745-1-31, 3745-1-36, and 3745-1-37 the five year review date is 3/29/2012. For rules 3745-1-03, 3745-1-38, and 3745-1-39 the five year review date is 10/5/2012.

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

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

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.

This draft rulemaking addresses the water quality standards program rules. Amendments are proposed to ten rules, three rules are being rescinded and filed as new because more than 50% of the rule is being modified and three new rules are being added to the chapter, which will include reorganized content from existing rules. Revisions being proposed include the addition of four new beneficial use designations, revisions to human health criteria, new and/or revised aquatic life criteria for six chemicals, and inclusion of nutrient design effluent limitations for new and expanding sanitary wastewater treatment plants.

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.

Water quality standards serve as the water quality goals for water uses and cleanliness, the benchmarks to measure and report on meeting Clean Water Act goals, and water quality targets to meet when setting wastewater permit limits and total maximum daily loads. These rules contain: surface water beneficial use designations, water quality criteria (numeric levels and narrative statements) protective of the beneficial use designations and an antidegradation rule, which establishes a procedure to determine that a discharge of pollutants is necessary before authorizing it and a way of protecting existing high quality water where it already exists.

Revisions to the rules in OAC Chapter 3745-1 will improve the clarity of certain presently effective requirements of the state's water quality standards through renaming existing rule requirements and using more direct language to explain the requirements of the current rules. These revisions should not add significant cost of compliance with the rules. Rule revisions include:

- The following new beneficial use designations: primary headwater habitat, lake habitat, sport fishing recreation use and base aquatic life use.
- Extension of human health criteria based on drinking water maximum contaminant levels within 500 yards of a public water supply intake statewide, inclusion of updated Ohio River Valley Sanitation Commission Pollution Control Standards for the Ohio River mainstem and new and revised aquatic life criteria for six chemicals.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

- Within the antidegradation rule, new nutrient design effluent limits are included for new and expanding/upgrading sanitary wastewater treatment plants and the rule has been simplified by moving requirements for dredge and fill projects into a new rule in Chapter 3745-32 of the Administrative Code.

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

| Rule Number | Authorizing Statute | Proposed Action |
|-------------|-----------------------|-----------------|
| 3745-1-01 | ORC 6111.041 | Rescind |
| 3745-1-01 | ORC 6111.041 | New |
| 3745-1-02 | ORC 6111.041 | Amend |
| 3745-1-03 | ORC 6111.041 | Amend |
| 3745-1-04 | ORC 6111.041 | Amend |
| 3745-1-05 | ORC 6111.041, 6111.12 | Amend |
| 3745-1-07 | ORC 6111.041 | Rescind |
| 3745-1-07 | ORC 6111.041 | New |
| 3745-1-31 | ORC 6111.041 | Amend |
| 3745-1-32 | ORC 6111.041 | Rescind |
| 3745-1-32 | ORC 6111.041 | New |
| 3745-1-33 | ORC 6111.041 | Rescind |
| 3745-1-34 | ORC 6111.041 | Rescind |
| 3745-1-35 | ORC 6111.041 | Amend |
| 3745-1-36 | ORC 6111.041 | Amend |
| 3745-1-37 | ORC 6111.041 | Amend |
| 3745-1-38 | ORC 6111.041 | Amend |
| 3745-1-39 | ORC 6111.041 | Amend |
| 3745-1-40 | ORC 6111.041 | New |
| 3745-1-41 | ORC 6111.041 | New |
| 3745-1-42 | ORC 6111.041 | New |
| 3745-1-43 | ORC 6111.041 | New |

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 environmental law or to participate in a federal environmental program?

If yes, please briefly explain the source and substance of the federal requirement.

Yes, the regulations implement federal requirements. Under the 1965 Federal Water Pollution Control Act, States were directed to develop water quality standards establishing water quality goals for interstate waters. By the early 1970's, all the States had adopted such water quality standards. In the Federal Water Pollution Control Act Amendments of 1972 (known as the Clean Water Act or CWA), Congress established the National Pollutant Discharge Elimination System (NPDES) whereby each point source discharger to waters of the U.S. is required to obtain a discharge permit. The 1972 Amendments require EPA to establish technology based effluent limitations that are to be incorporated into NPDES permits. In addition, the amendments extended the water quality standards program to intrastate waters and required NPDES permits to be consistent with applicable state water quality standards.

The CWA requires states to review and update their water quality standards at least every three years. U.S. EPA will promulgate standards in states that fail to adopt protective standards. Ohio EPA first adopted water quality standards in 1973. There are no national water quality standards, just recommendations from U.S. EPA. States' water quality standards must be as stringent as the federal recommendation or must provide rationale for alternative water quality standards. U.S. EPA also must approve a States' water quality standards before they can be used in other CWA programs like NPDES or Total Maximum Daily Load reports.

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

The following three provisions within the water quality standards rules are requirements that are not specifically required by U.S. EPA:

- The extension of human health water quality criteria based on drinking water maximum contaminant levels (MCLs) statewide. The Agency has taken the position that industries and sewage treatment plants should treat their wastewater to levels safe for public drinking with conventional drinking water treatment.
- The application of human health water quality criteria for the protection of drinking water consumption to the entire Ohio River. This requirement is based on Ohio River

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

Valley Sanitation Commission's (ORSANCO) requirement that the entire Ohio River be available for safe and satisfactory use as a public water supply after conventional drinking water treatment.

- The establishment of antidegradation categories Superior High Quality Water and Outstanding State Water is a requirement of ORC 6111.12. These categories are Ohio's unique implementation of the federal policy.

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 public purpose of the water quality standards 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. This program ensures that Ohio's streams, rivers and lakes can be used for purposes such as industrial and agricultural production in addition to boating, fishing, swimming and as a public drinking water source.

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

Ohio EPA measures the success of the water quality standards program through biological and chemical sampling and 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>. Water quality has improved dramatically in Ohio since the inception of this program, which has benefitted Ohio's economy and quality of life for all Ohioans.

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 and hard copy interested party notification to the Division of Surface Water's rulemaking interested party list on August 15, 2008. Notification for the Antidegradation rule (OAC 3745-1-05) was sent on October 15, 2008. Electronic notice was

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

also sent to interested parties on December 8, 2010 through the Ohio Business Gateway Regulatory Reform eNotification System.

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

The input provided by the interested parties is summarized in the response to comments available on the Ohio EPA website with these rulemaking documents. Changes were made to the draft rules in response to comments received from interested parties and in response to updated information upon which the rules are based. Examples of revisions made include: revised definitions for streams and lakes, revisions to primary headwater habitat use designation and revisions to nutrient design standards for wastewater treatment plants.

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?

Scientific data used to support this rulemaking include:

- Ohio EPA Primary Headwater Habitat studies
- U.S. EPA water quality aquatic life research
- U.S. EPA drinking water maximum contaminant levels
- USGS water quality aquatic life research on cadmium
- ORSANCO Pollution Control Standards
- U.S. EPA wastewater treatment technology research on nutrients
- Additional support documents are listed in rule OAC 3745-1-03

The data from these sources support the establishment of the beneficial use categories (including the new primary headwater habitat beneficial use) and all the associated criteria that protect the beneficial uses.

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?

In the draft interested party version of the rules released in 2008, the Agency included several other items for consideration. We have determined not to move forward with these items at this time. These items are detailed in the Water Quality Standards summary of comments on

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

items currently on hold. In addition, revisions have been made in response to comments received to numerous provisions within the proposed rules. These revisions are detailed in the Water Quality Standards response to comments. These documents are available for review at: <http://epa.ohio.gov/dsw>.

11. Did the Agency specifically consider a performance-based regulation? Please explain.

Not applicable. As mentioned above, Ohio EPA has been delegated authority from U.S. EPA to implement the water quality standards program in accordance with, at a minimum, federal requirements. The federal rules do not allow performance-based regulation.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing 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, which provides for U.S. EPA's review and approval and gives the Agency time to conduct training on the revised standards, update web pages and update 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.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

- a. These rules impact anyone who discharges pollutants to waters of the state. This includes anyone operating under a National Pollutant Discharge Elimination System (NPDES) permit and/or 401 Water Quality Certification. For example, cities, villages, counties, townships, state agencies, industries, various privately owned wastewater treatment facilities, land development companies, mining industries and agricultural operations.

The rule amendments may impact industries discharging industrial wastewater, land development companies and mining industries.

- b. Most often water quality standards come into play through either an NPDES permit or 401 Water Quality Certification. The cost associated with these permit programs varies widely based on factors such as volume of wastewater treated or extent of streams/wetlands impacted. However, each entity subject to these permit programs will incur costs for permit application and permit renewal, cost of wastewater treatment plant construction and operation, mitigation, monitoring and reporting costs, time for paperwork completions and potentially fines for noncompliance with the permit.

The rule amendments may potentially require a limited number of industries discharging industrial wastewater to provide additional wastewater treatment to meet lower effluent limits if their discharge has a high concentration of cadmium and/or is located upstream of a public drinking water intake. Laboratory monitoring costs for facilities discharging cadmium may increase for those not already utilizing low level detection methods.

The rule amendments may potentially impact land development and mining industries through the cost of additional survey work that would be required to distinguish a class IIIA primary headwater habitat stream from a class IIIB primary headwater habitat stream. However, this additional work is a business decision of whether investment in additional assessment costs is worth the possible outcome of less restrictive permit requirements.

- c. Overall, these proposed rules will have no additional impact on businesses as the rules for the most part incorporate current practice.

As mentioned above, some facilities that discharge cadmium may see an increase in laboratory monitoring costs for the lower level detection method. Ohio EPA's laboratory charges \$21.50 per sample for this analysis. A very limited number of industries may be required to provide additional chemical or physical treatment to reduce cadmium concentrations in their discharge. The cost will vary depending on the volume and strength of wastewater to be treatment and the amount of reduction

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

necessary. Most likely, this reduction would be phased in through a schedule of compliance in a permit.

The additional survey work necessary to distinguish a class IIIA from a class IIIB primary headwater habitat stream is estimated to be about five times the amount of time it takes to complete the basic determination of a class II from a class III primary headwater habitat stream. This is of course an estimate and the actual cost will vary based on number and extent of streams impacted.

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

In regard to the water quality standards program as a whole, the U.S. Congress made the determination that the intent (fishable, swimmable waters) justifies the adverse impact to the regulated business community when they passed the initial and subsequent amendments to the Federal Water Pollution Control Act.

In regard to the current rulemaking, Ohio EPA's water quality standards served the Agency well when addressing the point source pollution problems of the '80s and '90s. However, many smaller streams and rivers are adversely impacted by complex nonpoint source pollution problems. Today's water pollution problems are different in nature and require updated approaches and improved regulations. Revisions are necessary to the current rules to make the structure of the standards and permit programs fit the types of projects and water quality impacts that are occurring today. The revised rules will update chemical criteria based on new scientific information for the better protection of human health and aquatic life, provide reasonable protection for high quality headwater streams and start the implementation of a statewide strategy to reduce nutrients in Ohio's waters.

Regulatory Flexibility

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

Overall, the regulations do not provide exemptions for small businesses. Corresponding federal regulations and Ohio Revised Code does not provide for exemptions or alternative means of compliance for any permittees. Permitting rules in OAC 3745-33 provide options such as variances and schedules of compliance to assist wastewater dischargers of any size in meeting the applicable water quality standards. In the antidegradation rule, the new nutrient design criteria for new sources of sanitary wastewater do not apply to treatment systems servicing less than 0.5 MGD (which would include small businesses).

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117

CSIOhio@governor.ohio.gov

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/Default.aspx?alias=epa.ohio.gov/ocapp>.

Ohio EPA also has a permit assistance web page (http://www.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://www.epa.state.oh.us/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.