

CSI - Ohio

The Common Sense Initiative

Business Regulation Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: 401 Water Quality Certification

Rule Number(s): 3745-32-01 to 3745-32-07 and 3745-45-02

Date: December 16, 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Rescinded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 3745-32-01 through 3745-32-07 and 3745-45-02 the five year review date was 9/30/2005.

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.

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This draft rulemaking addresses the 401 water quality certification program rules. All seven rules in OAC Chapter 3745-32 are being rescinded and four new rules in the chapter are proposed. Rule OAC 3745-45-02 is being rescinded because the fees for the program are now in statute. The new rules create the state water quality permit, which covers the discharge of dredge and fill material to all surface waters of the state except isolated wetlands, and reorganizes and enhances existing procedural rules to clarify requirements of the permit program.

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 Section 401 of the Federal Water Pollution Control Act (or Clean Water Act (CWA)), a federal agency cannot issue a permit or license for an activity that may result in a discharge to waters of the U.S. until a state has certified, under section 401 of the CWA, that the activity meets that state's water quality requirements. Ohio EPA makes decisions to deny, certify, or condition permits or licenses as required under section 401 of the CWA based in part on the proposed project's compliance with Ohio's water quality standards (OAC Chapter 3745-1). The rules in OAC Chapter 3745-32 contain the administrative and technical requirements for implementing the section 401 water quality certification program.

Several recent U.S. Supreme Court decisions have impacted how the U.S. Army Corps of Engineers (Corps) determines which waters are subject to jurisdiction under section 404 of the CWA, in turn placing the federal jurisdiction at odds with Ohio's 401 water quality certification program. Ohio EPA is proposing revisions to rules in OAC Chapter 3745-32 to address the programmatic impacts resulting from these court decisions. The current section 401 water quality certification rules, as they pertain to streams and lakes, apply only in situations involving a pending federal permit, usually a section 404 permit issued by the U.S. Army Corps of Engineers. Section 404 permits are required only for water bodies that can be defined as waters of the U.S.

The definition of waters of the U.S. under the CWA no longer includes isolated waters (wetlands, streams and lakes). However, these water bodies are still considered waters of the state under the Ohio Revised Code. The result is that there is no permit mechanism to approve the discharge of dredge and fill activities in these isolated water bodies. In response to the 2001 U.S. Supreme Court ruling in the Solid Waste Authority of Cook County (SWACC) decision, the Ohio General Assembly enacted legislation establishing a state isolated wetland permitting program. This rule package addresses the conflict created by the

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June 9, 2006 Rapanos decision for isolated streams and lakes by establishing a state water quality permit.

In addition to the creation of the state water quality permit, this rulemaking will incorporate antidegradation requirements from rule OAC 3745-1-05 that pertain to the discharge of dredge and fill material in streams, lakes and isolated wetlands. This will place program requirements in one chapter, thereby simplifying the permitting process.

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

Rule Number	Authorizing Statute	Proposed Action
3745-32-01	ORC 6111.03	Rescind
3745-32-01	ORC 6111.03	New
3745-32-02	ORC 6111.03	Rescind
3745-32-02	ORC 6111.03	New
3745-32-03	ORC 6111.03	Rescind
3745-32-03	ORC 6111.03	New
3745-32-04	ORC 6111.03	Rescind
3745-32-04	ORC 6111.03, 6111.12	New
3745-32-05	ORC 6111.03	Rescind
3745-32-06	ORC 6111.03	Rescind
3745-32-07	ORC 6111.03	Rescind
3745-45-02	ORC 6111.03	Rescind

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. As mentioned above, section 401 of the CWA requires applicants for permits or license that would allow a discharge into waters of the U.S. to obtain certification from the state in which the discharge is to occur. Ohio

EPA implements the program in Ohio. The proposed rule revisions will update and clarify program requirements.

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

Although not more stringent than federal rules, the rule revisions will be more stringent than recent federal “practices” when regulating a small subset of waters termed isolated streams and lakes. Until the Rapanos decision of June 9, 2006, and subsequent guidance released to U.S. Army Corps of Engineers on January 28, 2008, waters of the state and waters of the U.S. both included isolated streams and lakes under their respective jurisdictions. Following implementation of the Rapanos decision and associated guidance, isolated streams and lakes were no longer considered a water of the U.S. However, state statute (ORC 6111.01) still includes these waters under Ohio’s purview. Therefore, under the changes proposed under OAC Chapter 3745-32, a state water quality permit will also include this small subset of waters of the state as required in ORC 6111.01, providing an efficient permitting mechanism for proposed impacts to isolated streams and lakes.

Without creation of the state water quality permit, dredge and fill impacts to isolated streams and lakes would not be permissible under ORC 6111.04 or would require the establishment of a separate permitting process specifically for these types of water bodies. Ohio EPA does not believe it would be reasonable to prohibit all dredge and fill impacts to isolated waters. The state water quality permit would establish an umbrella permit enabling proposed impacts federally jurisdictional waters and isolated streams and lakes to be reviewed under a single permit application.

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 requires that a state may not grant water quality certification for an activity that will result in a violation of state water quality standards. Establishment of a state water quality permit will provide the framework to review proposed impacts to isolated streams and lakes to ensure compliance with state water quality standards. In addition, Ohio EPA has documented instances wherein isolated streams exhibit high quality riparian and in-stream habitat and support diverse assemblages of biological species.

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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 surface water programs 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>. The number of Ohio water bodies meeting water quality goals has dramatically increased since the inception of surface water programs.

In addition, Ohio EPA tracks the acreage of authorized wetlands impacts and acres of compensatory wetland mitigation required to offset those impacts. Ohio's wetland permitting programs adheres to the "No Net Loss of Wetlands" policy implemented in 1989 by President George H.W. Bush and adopted by each successive administration. From the mid-1600s to present, more than 90% of Ohio's natural wetlands were lost to unregulated filling and draining activities, dramatically affecting the water quality and fishable/swimmable status of Ohio's surface water waters. Ohio EPA will implement the requirements of the federal CWA, and the No Net Loss policy through the state water quality permit.

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 September 12, 2008. Electronic notice was 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. Examples of

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revisions made include: state water quality permit -by-rule for specified waters, increase in state water quality permit expiration to ten years, and revision of antidegradation requirements to remove connection with stream mitigation since the draft rule is not moving forward with this rulemaking.

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?

Since 1999, Ohio EPA has conducted a robust evaluation of primary headwater habitat streams, defined as water bodies with drainage areas less than one square mile. The culmination of this work is provided in several Ohio EPA technical publications that form the basis for proposed changes to Ohio's water quality standards rules (OAC Chapter 3745-1) to include use designations for primary headwater habitat streams.

In addition, established, long standing, protocols for assessing the physical, chemical and biological quality of streams with drainage areas greater than one square mile, and wetlands will be used when evaluating applications submitted under the proposed state water quality permit.

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?

Ohio EPA's water quality certification rules have not been revised since they were adopted in 1982. The Agency has considered several alternatives in this process. The option to not update the rules was considered, but is no longer reasonable due to the significant federal changes during the last 30 years since our rules were adopted.

Also, the option to not create a permitting mechanism to authorize impacts to isolated waters was considered. However, this would also be unrealistic. At some point, impacts to these waters will have to occur to allow for economic development. Under the proposed rule revisions, these impacts will once again be possible.

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 certification program in accordance with federal requirements. State 401

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water quality certification programs cannot be less stringent than federal requirements, which are the baseline for all states. However, states may expand protections above federal baseline requirements to specifically address state-specific water quality considerations. 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 401 water quality certification 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 gives the Agency time to conduct training on the revised rules and update permit application and review 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.

- a. These rules apply broadly to projects for which authorization is necessary to discharge dredged or fill material in waters of the state. No new businesses or industries not already regulated under the existing rules will be subject to proposed rules. It should be noted that the proposed water quality permit will eliminate the need for applicants to obtain a separate authorization for isolated streams and lakes, thereby reducing permitting costs associated with the preparation of duplicate applications and associated fees.

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- b. Application fees and requirements under the proposed rules are established in Chapter 6111.30 of the Ohio Revised Code, and will not change as a result of this rule-making. Application fees are based on the linear footage of stream, and acreage of wetland proposed to be impacted, and cubic yardage of dredged or fill material to be placed into a lake.
- c. Except as provided in the response to paragraph 14. C, below, the proposed rules clarify information regarding streams that has been historically required, but will now be codified in rule, including the submission of data for primary headwater habitat streams. Costs associated with fines or compliance remains unchanged for the current rules.

The rule amendments may potentially impact land development and mining industries through the cost of additional sampling work that would be necessary when applicants wish to distinguish a class IIIA primary headwater habitat stream from a class IIIB primary headwater habitat stream. However, this additional work is voluntary, and could result in the ability of applicants to impact additional streams that would otherwise require avoidance.

- d. Overall, these proposed rules will have no additional impact on businesses as the rules for the most part incorporate current practice. The proposed rule included a provision that would allow applicants the opportunity to conduct additional sampling of high quality primary headwater habitat streams referred to in the rule as Class IIIA and Class IIIB. In order to distinguish between the two classes, applicants will need to conduct biological sampling, estimated to be cost five times the typical sampling associated for assessing primary headwater habitat streams.

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.

For this rulemaking, the Agency determined that the additional survey work necessary to determine if a Class III primary headwater habitat stream could be impacted is justifiable based on the high quality and rarity of Class IIIB primary headwater habitat streams in Ohio. These streams are state treasures that cannot be easily replicated due to the interconnection with ground water therefore any direct impacts should be avoided.

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.

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?

Under the state water quality permit program, the failure to get a permit under OAC Chapter 3745-32 is not considered paperwork violation and would not fall under the scope of ORC 119.14. However, submittal of compliance reports may be within the scope of the section and first-time violations would be waived.

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

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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.

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.

Ohio EPA's 401 Water Quality Certification Program has a voluntary pre-application meeting process to assist permit applicants with program requirements. Additional information is available at: <http://epa.ohio.gov/portals/35/401/PreappGuide.pdf>.