

Proposed Rules – Surface Water Quality Section 401 Water Quality Certifications (OAC 3745-32 and 3745-45)

Note: Draft revisions to the 401 water quality certification rules in OAC Chapter 3745-32 and Chapter 3745-45 were available for interested party review from September 12, 2008 through June 6, 2011. This proposed rulemaking includes a subset of the draft revisions released for review. A separate proposed rule package, also being released in December 2011, contains the proposed water quality standards rules.

What is the Section 401 water quality certification program?

The federal Clean Water Act requires anyone discharging dredged or fill material into Ohio waters to obtain a water quality certification from Ohio EPA pursuant to Section 401 water quality certification and a permit from the U.S. Army Corps of Engineers pursuant to Section 404. Ohio EPA's review is to ensure that the projects comply with Ohio's water quality standards.

Which rules are under review at this time?

All of OAC Chapters 3745-32 and 3745-45 are being reviewed. Chapter 3745-32 contains the administrative and technical requirements for submitting a Section 401 water quality certification application to Ohio EPA's Division of Surface Water. Seven rules in Chapter 3745-32 are being combined into three new rules, 3745-32-01, 3745-32-02 and 3745-32-03. New rule 3745-32-04 contains antidegradation requirements moved from rule 3745-1-05.

Chapter 3745-45 consists of one rule, which contains outdated water quality certification fees. That rule will be rescinded.

Why are the rules being reviewed?

Section 119.032 of the Ohio Revised Code (ORC) requires Ohio EPA to review its rules every five years to determine whether they should be changed. The Agency has reviewed these rules and has identified needed changes.

The Section 401 water quality certification rules have not been updated since 1982. The intent of this

rulemaking is to clarify historical procedures, move these procedures together into one convenient location, and combine all into a State Water Quality Permit to end regulatory confusion.

What changes are being proposed?

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. Section 404 permits are required only for waterways that can be defined as waters of the United States.

The definition of waters of the United States under the Clean Water Act no longer includes isolated wetlands, streams and lakes. However, these are considered waters of the state under the Ohio Revised Code. No permit mechanism was in place to allow impacts to these waters. The Ohio General Assembly addressed this conflict for isolated wetlands in 2001 by establishing a state isolated wetland permitting program. This rule package addresses this conflict for isolated streams and lakes by establishing a state water quality permit.

New rule 3745-32-04 contains antidegradation requirements for the state water quality permit program and limited components of the isolated wetlands permit program. The antidegradation requirements are being moved from rule 3745-1-05 in an effort to clarify the requirements that apply to these programs. Rule 3745-1-05 will continue to apply to other programs, such as the NPDES permit program.

Other draft revisions in Chapter 3745-32 combine and enhance procedural rules that help address some historical procedural ambiguities within the program.

Proposed Rules – Surface Water Quality

Section 401 Water Quality Certifications (OAC Chapters 3745-32 and 45)

Rule 3745-45-02 is being rescinded because certification fees are now incorporated into state law (ORC section 3745.114).

Are there changes from the draft rule revisions?

Yes. The Agency has made changes to the rules to clarify which waters are covered under the state water quality permit and revised the antidegradation requirements in OAC 3745-32-04 to remove links to the stream mitigation rule since we are not moving forward with a stream mitigation rule at this time.

As in the past, applicants wishing to fill jurisdictional streams and wetlands will still need a permit, now called a state water quality permit. Also, applicants wishing to fill streams now determined by the federal government to be non-jurisdictional are still required to obtain a permit. Some examples of waters covered under the state water quality permit include streams, natural lakes, reservoirs (stream impoundments and upland water supply reservoirs), borrow pits and quarries on public property with public access, and jurisdictional wetlands.

Impacts to the remaining waters of the state not considered federally jurisdictional will be pre-approved by a new mechanism, a state permit-by-rule. The intent of this mechanism is to clarify that Ohio EPA is not seeking to require individual permits and mitigation for impacts to these waters. Some examples of waters covered under the permit-by-rule are borrow pits and quarries on private land, ponds excavated in upland areas, roadside ditches, swales and grass waterways, temporary rills or channels created by water erosion, and other waters of the state that are not streams, lakes or wetlands. Settling ponds, waste treatment ponds, etc. will not be regulated under this permit.

Who will be regulated by these rules?

Anyone who wishes to discharge dredged or fill material into waters of the state will be regulated by these rules. This includes local and state governments, the federal government, businesses and private property owners.

What additional information is the Agency seeking?

The Agency wants to hear from interested stakeholders who may be impacted by these rule revisions. General comments and specific factual information are welcome.

How are the amendments formatted in the proposed rules?

Text proposed for deletion is struck through; new text is underlined. Rules being rescinded have "To Be Rescinded" at the top of the first page of the rule.

What is the rulemaking schedule?

A public hearing on these proposed rules will be held to consider public comments in accordance with Section 119.03 of the Ohio Revised Code. This hearing will be held at the **Ohio EPA Conference Center, Room A, 50 West Town Street, Suite 700, in Columbus, Ohio at 3:00 p.m. on February 1, 2012.** The purpose of the public hearing is to give interested persons the opportunity to present oral or written comments on the proposed rules.

At the close of the public comment period, the Agency will review the comments, make any necessary changes to the rules, and then adopt the rules. This is roughly a two-month process from the close of the comment period. A responsiveness summary will be prepared and sent to everyone who comments on the proposed rules. Final rules could be adopted in the spring of 2012.

How can I comment on the proposed rules?

Please submit your comments in one of the following ways:

By email: dsw_rulecomments@epa.state.oh.us

By fax: (614) 644-2745

By postal mail:

Rule Coordinator

Ohio EPA, Division of Surface Water

P.O. Box 1049

Columbus, OH 43216-1049

Comments on the draft rules must be received no later than 5:00 p.m. on February 24, 2012.

How can I get more information?

Copies of this fact sheet and the proposed rules are on the Division of Surface Water website at www.epa.ohio.gov/dsw/Home.aspx.

For more information about the proposed rules, please contact:

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