

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Environmental Protection Agency

Regulation/Package Title: Water Quality Certified Professional Program

Rule Number(s): OAC 3745-6-01 to 3745-6-09

Date: January 11, 2019

Rule Type:

New

5-Year Review

Amended

Rescinded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.

In July 2017, Governor Kasich signed Senate Bill 2 of the 132nd General Assembly into law. This legislation requires Ohio EPA to develop a program to certify water quality professionals to collect data in order for the Agency to assess streams and categorize wetlands in support of applications for Section 401 Water Quality Certifications and Isolated Wetland Permits. The legislation also requires the Director to establish a multi-sector work group to assist in the development of rules adopted under this statute and lays out minimum requirements for such rules. The rules adopted under Ohio Revised Code (ORC) 6111.30 are required to:

- Authorize the Director to require applicants for the program to submit information considered necessary by the Director to assess a WQCP's experience;
- Authorize the Director to establish experience requirements and to test WQCP applicants to determine the applicant's competency;
- Authorize the Director to approve or deny applicants to the WQCP program;
- Require the Director to revoke a professional's certification if the Director finds that the professional falsified information on their application to become a WQCP;
- Require periodic renewal of a WQCP's certification and establish continuing education requirements for the purposes of that renewal;
- Establish an annual fee to be paid by WQCPs certified under the rules adopted under ORC 6111.30 (J)(1) in an amount to defray the cost incurred by Ohio EPA for reviewing applications for WQCPs and for issuing those certifications;
- Authorize the Director to suspend or revoke a professional's certification if the Director finds that the professional's performance has resulted in submission of documentation that is inconsistent with the technical standards established in the rules;
- Require a WQCP to submit any documentation developed in support of an application for a Section 401 water quality certification or an isolated wetland permit upon request of the Director;
- Authorize audits by the Director of documentation developed or submitted by a WQCP to ensure compliance with technical standards in rule;
- Establish technical standards to be used by WQCPs in conducting stream assessments and wetlands categorizations; and
- Authorize the Director to require public disclosure, including publication on Ohio EPA's website of: the names of certified professionals, qualifications and credentials, status of the professional's certifications, documents and reports submitted by the

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

CSIOhio@governor.ohio.gov

professional, the documentation and results of Agency audits of the professional's work, and any final disciplinary action related to the professional's performance for all WQCPs certified through Ohio EPA.

As stated clearly in ORC 6111.30 (K), "*nothing in this section requires an applicant for a section 401 water quality certification or a permit for impacts to an isolated wetland under this chapter to use the services of a certified water quality professional*", meaning that this program is a voluntary program. Those applying for a Section 401 Water Quality Certification (WQC) may use the services of a WQCP and will receive the benefit of an expedited permit application review of ninety days, instead of one hundred eighty days, provided that a public hearing is not required or necessary.

Ohio Administrative Code Chapter 3745-6 establishes the necessary training and experience requirements to submit quality data in support of section 401 WQC applications and isolated wetland permits and describes field methods to ensure that data collection and interpretation are reproducible, scientifically defensible, and free from pre-conceived bias. The Agency believes this program will improve the quality of data submitted in support of section 401 applications and isolated wetland permits, while also expediting the permit issuance process as a benefit to people participating in this program.

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

Ohio Revised Code 6111.30.

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.

No, the Water Quality Certified Professional Program is not a federal requirement, it is a voluntary program.

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

There is no federal requirement for these regulations. The Water Quality Certified Professional Program rules in OAC Chapter 3745-6 are consistent with requirements in state statute, ORC 6111.30(J).

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 this regulation is for Ohio EPA to establish standard methodologies, as well as training and experience requirements to set the bar for data collection from streams and wetlands in support of specific permitting applications. This will allow external personnel to understand Ohio EPA's standards for determining wetland and stream quality and developing appropriate mitigation to offset the impacts to a stream or wetland.

These rules should also aid in correctly categorizing wetlands to ensure there is no net loss of wetland acreage or function. According to the results of the Ohio Department of Natural Resources' Wetlands Inventory, there are 704,032 acres of wetlands in the state of Ohio. Wetlands constitute 2.6% of the total land area of the State. It is estimated that Ohio had about seven million acres of wetlands before European settlement, which translates to a loss of about 90% of the original wetlands in the State.

Wetlands are economically valuable to society due to the priceless functions they provide. These economic values include flood minimization, groundwater recharge, nutrient and contaminant removal, wildlife and plant habitat, and opportunities for hunting, fishing and other recreation. It is extremely difficult to attach the appropriate dollar values to these important functions. However, these functions benefit the wetland landowners directly as well as benefitting adjacent landowners and, importantly, society at large.

This program will also support the protection of public health and the environment, and the Agency's goal of fishable, swimmable waters, by ensuring that streams are correctly categorized and maintained based on the stream's performance.

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

The measure of success will be based upon the participation in the program, and the quality of the data submitted by WQCPs in support of Section 401 Water Quality Certifications and isolated wetland permits. The Agency will also conduct random and discretionary audits of work completed and submitted by certified professionals in support of 401 WQC or isolated wetland permit applications to ensure that the data collection and analysis is accurate and on par with what the Agency would do. Good audit results would also be a measure of success for this regulation.

Development of the Regulation

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

CSIOhio@governor.ohio.gov

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 DSW's rulemaking interested party list and posted the Early Stakeholder Outreach (ESO) fact sheet on DSW's website on April 27, 2017. The comment period deadline was June 1, 2017. A list of interested parties is available upon request.

In addition to ESO comments, OEPA also relied on the responses submitted to a 2015 WQCP Program survey. The questionnaire was distributed to stakeholders and staff, generating around 300 responses, which were considered or used as guidelines during this rulemaking process.

Lastly, as required in Senate Bill 2 which authorized the creation of this program, a multi-sector workgroup was established by the Division of Surface Water, and meetings were held on April 20, 2017 and October 4, 2017 to discuss what each stakeholder would like to see come out of the program, as well as how to establish rules and implement the program. A list of participants is available upon request.

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

Information was provided by all different types of stakeholders for the WQCP survey in 2015, during the ESO comment period, and during the multi-sector workgroup meetings.

The WQCP survey contained forty questions about specific parts of the program, and implementation of the program. Questions included: How should WQCPs be certified? What stream or wetland courses should be required? Should continuing education be required? When should audits be conducted? etc. This survey was the basis for the rough outline which considered in detail what information should be included in the program rules. All responses were reviewed and considered.

At the first external workgroup meeting in April 2017, stakeholders were provided with the draft outline, which was created mainly from the WQCP survey results. Stakeholders in attendance include: Hull Inc., Burgess & Niple Inc., The Nature Conservancy, Stream + Wetlands Foundation, Ohio State University, ODOT, Midwest Biodiversity Institute, Ohio Environmental Council, Ohio Homebuilder's Association, and Davey. Input was given verbally at the meeting, and in writing after the meeting. The language in the draft rules is based on or at least takes into consideration the stakeholders' suggestions, within reason.

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

CSIOhio@governor.ohio.gov

Examples of this include narrowing education requirements down to applicable fields with a specific minimum number of college level credits, providing separate stream and wetlands tracks, with the flexibility to become certified in both, certified professional participation requirements, and adding the option for certified professionals to field supervise an assistant who is collecting samples with the professional.

Ohio EPA received formal comments during the Early Stakeholder Outreach comment period (from April 27, 2017 to June 1, 2017) from five stakeholder groups: Hamilton County Soil and Water Conservation District, Ohio Environmental Council (OEC), The Nature Conservancy (TNC), Ohio State University, and Burgess and Niple Inc. All of the comments received were considered with equal weight and helped structure and fill in the rules that the Agency is statutorily required to establish.

The Agency held a second external workgroup meeting in October 2017 where agency staff presented a more cohesive outline of ten rules with a general concept of what the division wanted to put in each rule, as well as other concepts being considered that the division specifically wanted stakeholder feedback on. Those in attendance include representatives from: Burgess & Niple Inc., Westmoreland/ Oxford Coal, Midwest Biodiversity Institute (MBI), Hull & Associates, Civil and Environmental Consultants (CEC), ODOT, and Stream + Wetlands Foundation. Some of the meeting comments were fully or partially incorporated into the draft language. All stakeholder comments were considered with equal weight. Revisions to draft language in response to stakeholder comments include: providing the option to substitute up to two years of education for experience with the completion of a master's degree in a related field of study, keeping the ORAM and VIBI/AmphIBI wetland certifications separate, adding an option for voluntary withdrawal of certification if an individual no longer wants to be involved in the program, and adding a 30-day grace period with notice of late fee instead of automatic suspension.

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?

These rules are administrative in nature and are not specifically based on scientific data. However, the rules include scientific methods and procedures for the collection of water quality, habitat and biological data. See rule OAC 3745-6-05 for a list of references.

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?

The Agency considered several different ideas for most of the provisions in these draft regulations. One example that the Agency ultimately decided not to incorporate is the creation of separate certifications for separate indices or metrics (i.e. certifications for different assessment methods like, ORAM [for wetland categorization], ICI [for macroinvertebrate assessment], IBI [for fish assessment], etc.). This would have allowed for more specialized skill sets to be used but may not have been practical when the Agency would like to see well rounded scientists trained in the necessary information and assessments come out of this program. The Agency instead has created two separate tracks for certification – streams and wetlands, but allows for an advanced certification for wetlands, and the use of qualified data collectors (QDCs) from OEPA’s Credible Data Program to fill in the blanks where a certified professional may need added expertise in collecting and analyzing biological data, and thus allow the certified professionals to submit high quality data that the Agency knows can be trusted. This two-track system will also likely cost less for the stakeholders and small businesses in need of a certified professional because the small businesses would only pay one individual to assess their site, as opposed to multiple individuals who would conduct different tests on a single site.

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.*

The Water Quality Certified Professional Program is voluntary, and the regulations are administrative in nature. These rules are not performance-based, however mitigation projects, if any, would be performance based under the 401 program. These rules dictate the process that the regulated stakeholders should use but cannot define the outcome as it depends on the stream or wetland being assessed.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

The Agency was granted statutory authority to create and oversee the Water Quality Certified Professional 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.

77 SOUTH HIGH STREET | 30TH FLOOR | COLUMBUS, OHIO 43215-6117
CSIOhio@governor.ohio.gov

The Agency plans to put the effective date of the adopted rules several months out from the date of adoption, which provides the Agency time to build all of the tools that run the program, such as the creation of programmatic forms and documents, establishing training and testing, and creating a database to track certified professional status.

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. None. The Water Quality Certified Professional Program is a voluntary program. If individuals choose to participate, impacted businesses might include environmental consulting firms, entities regulated under the 401 program, or others who choose to be certified as a WQCP.

b. None. The Water Quality Certified Professional Program is a voluntary program. However, if a person or business chooses to participate in the program, they will have to: attend training and pass a test, conduct sampling in accordance with approved methods and submit the results of the sampling to the Agency through a Section 401 WQC application or isolated wetland permit application, and be subject to an annual fee of \$1,000 as well as certification renewal and continuing education requirements within the timeframes specified in rule.

c. The Water Quality Professional Program is a voluntary program, however those who choose to participate shall be subject to an annual fee of \$1,000, which is the cost the Agency has calculated that will defray a portion of the cost of the program. The Agency has estimated that the program will cost the Agency around \$210,470 annually, which considers payroll, contractual obligations, supplies, etc. The Agency expects between 50 and 100 people to participate in the program, which would generate \$50,000 - \$100,000 yearly in fees, however since the Agency is unsure of what the participation numbers will be, the annual fee was kept lower so as to not exceed the cost of the program, but to defray it, as specified in statute.

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

CSIOhio@governor.ohio.gov

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

The Water Quality Certified Professional Program is a voluntary program that Ohio EPA is statutorily required to develop and implement. As such, Ohio EPA believes that the benefit of a 90-day permit issuance will outweigh the cost associated with holding a WQCP certification for a significant number of stakeholders in the business community who choose to use the services of a certified professional.

Regulatory Flexibility

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

Not applicable. The Water Quality Certified Professional Program is voluntary, so the alternative means would be to proceed normally through the section 401 program application process.

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 Water Quality Certified Professional Program is a voluntary program. To the extent that a small business was to have a first-time paperwork violation under these rules, Ohio EPA would waive administrative fines or civil penalties on that small business for the violation unless the violation were to fall within the exceptions listed in section 119.14(C).

18. What resources are available to assist small businesses with compliance of the regulation?

The Division of Surface Water's Water Quality Certified Professional Program web page will provide information about the program and citations for additional reference documents, located here: <http://epa.ohio.gov/dsw/401/wqcp.aspx>. Any questions which can't be answered by the available resources can be directed to Jeff Boyles at: Jeffrey.Boyles@epa.ohio.gov or (614) 644-2494.