

Hearing Summary

Rule Package: Credible Data Program Rules
November 9, 2017

Original filing date: November 9, 2017

Public comment start date: December 13, 2017

Public comment end date: December 13, 2017

Public hearing date: _____

List of Rules: OAC 3745-4-01 to 3745-4-06

Were there any participants in this public hearing beyond Ohio EPA staff or JCARR staff?

☐ Yes

☒ No

Were there comments received during the public comment period outside of those presented at this hearing?

☒ Yes

☐ No

This hearing summary has been compiled to meet the requirements of Section 119.03 of the Revised Code.

This hearing summary includes this cover sheet and the following attachments:

1. **Attachment A** - A copy of the public notice for this hearing.
2. **Attachment B** - A copy of the sign-in sheet for this hearing.
3. **Attachment C** - A copy of the script read into the record to begin and end the hearing.
4. **Attachment D** - A copy of the response to comments.

Ohio EPA's response to comments document includes the comments received, who commented, the agency response to comments, and a statement of whether or not the rule was changed due to the comments.

Ohio EPA digitally records all public hearings for rules. The digital recordings are available upon request in a WAVE (.wav) file format. These recordings may be sent out for transcription if necessary.

**BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY**

**Public Notice
Proposed Rulemaking Governing
Credible Data Program**

Notice is hereby given that the Director of Environmental Protection, under the authority of Section 6111.51 of the Ohio Revised Code and in accordance with Chapter 119, proposes to original file the following rules of the Ohio Administrative Code (OAC):

Rule #	Rule Title
3745-4-01	Purpose and applicability.
3745-4-02	Definitions.
3745-4-03	Qualified data collectors.
3745-4-04	Level 1 data requirements and reporting.
3745-4-05	Level 2 data requirements and reporting.
3745-4-06	Level 3 data requirements and reporting.

OAC Chapter 3745-4 contains the Credible Data program regulations. This rulemaking includes the review and update of six rules in the chapter. Rule 3745-4-03 is being rescinded and filed as new due to revisions to more than fifty percent of the rule. The purpose of this rulemaking is to complete the five-year review of the rules. The Agency is considering a number of revisions to improve the quality of data and the administrative aspects of the program, including the retention of previously removed language in response to interested party comments, and changes in the requirements for qualified data collectors and trainers of qualified data collectors.

The public comment period will run until **December 13, 2017**. A public hearing on this proposed rule making will be held to consider public comments in accordance with Section 119.03 of the Ohio Revised Code. This hearing will be held at **Conference Room A at the Ohio EPA Central Office, 50 West Town Street, Suite 700, Columbus, Ohio at 10:30 a.m. on December 13, 2017**. All visitors to Ohio EPA must register at the Security desk in the lobby upon arrival. Please bring photo identification (such as a valid driver's license). For security reasons, visitors are required to wear their badge at all times while in the building. Please arrive early to complete these procedures.

To facilitate the scheduling of oral presentations, persons intending to give testimony at the hearing should notify the Ohio EPA Public Interest Center, P.O. Box 1049, Columbus, Ohio 43216-1049, (614) 644-2160. Prior registration will ensure that registrants are heard ahead of those individuals who register at the hearing. Oral testimony may be limited to five minutes, depending on the number of persons testifying. All interested persons are entitled to attend or be represented and to present oral and/or written comments concerning the proposed rule making.

Written testimony should be sent to the attention of Emily DeLay at the Division of Surface Water, P.O. Box 1049, Columbus Ohio 43216-1049. Written comments may also be submitted to the Hearing Officer at the public hearing. Written testimony will receive the same consideration as oral testimony. All testimony received at the hearing or by close of business on **December 13, 2017**, will be considered by Ohio EPA prior to final action on this rulemaking proposal. Written comments submitted after this date may be considered as time and circumstances permit.

Questions regarding this rule package should be directed to Jeff Reynolds, at the Division of Surface Water, at (614) 705-1011.

The proposed rules and a fact sheet explaining the rule revisions are posted on the Ohio EPA website at www.epa.ohio.gov/dsw/dswrules.aspx. The proposed rules are also available on the Register of Ohio website at www.registerofohio.state.oh.us.



SIGN-IN SHEET

Subject: Credible Data Rules - NSW Rules
County: Statewide **Date:** 12/13/17

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT** **PLEASE PRINT**

NAME: _____ E-MAIL: _____

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DSW Credible Data Rules Hearing

12/13/17

My name is Mary McCarron. I am with the Public Interest Center. I will be presiding over today's public hearing.

The purpose of the hearing today is to obtain comments from any interested person regarding Ohio EPA's proposed rules.

Ohio EPA Division of Surface Water is proposing to amend the following rules of the Ohio Administrative Code chapter 3745-4-01 through 06. These rules address requirements of the credible data program.

These rules have been filed with the Joint Committee on Agency Rule Review. Copies of the rules are available for public review.

All interested persons are entitled to attend or be represented, and to present oral and/or written comments concerning the proposed rules. All written and oral comments received as part of the official record will be considered by the director of Ohio EPA.

To be included in the official record, written comments must be received by Ohio EPA by the close of business, today, December 13, 2017.

At this time, there is no one present wishing to provide testimony, so we will go off the record until 11.

The time is now 11 a.m. No one arrived to provide testimony, so this hearing is adjourned.



Division of Surface Water Response to Comments

Rules: Water Quality Standards Credible Data Program Rules, OAC Chapter 3745-4:
OAC 3745-4-01: Purpose and applicability.
OAC 3745-4-02: Definitions.
OAC 3745-4-03: Qualified data collectors.
OAC 3745-4-04: Level 1 data requirements and reporting.
OAC 3745-4-05: Level 2 data requirements and reporting.
OAC 3745-4-06: Level 3 data requirements and reporting.

Agency Contact for this Package:

Division Contact: Audrey Rush
Division of Surface Water
614-644-2035
audrey.rush@epa.ohio.gov

Ohio EPA held a public hearing and a proposed comment period from November 9, 2017 to December 13, 2017 regarding six Credible Data Program rules. This document summarizes the comments and questions received during the associated comment period.

Ohio EPA reviewed and considered all comments received during the public comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health.

In an effort to help you review this document, the questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

Summarized Comments for Level 2 and Level 3 Habitat Evaluation and Aquatic Life Use

Four comments on the proposed credible data rules raised concerns about the training and data requirements for the determination of the existing aquatic life use, specifically the role stream habitat measurements (Qualitative Habitat Evaluation Index, QHEI and Headwater Habitat Evaluation Index, HHEI) play in taking regulatory actions. Commenters noted that the Section 401 water quality certification program relies on habitat measurements in issuing 401s even though Level 2 and Level 3 QHEI qualified data collectors may lack adequate training in the full breadth of knowledge needed to assign aquatic life use designations.

Response: The Agency has decided to retain the “stand alone” QHEI certifications for the following reasons. The authorizing statute [ORC 6111.50 to 6111.56] prevents the use of level 2 data for regulatory purposes. The concerns about the adequacy of data for aquatic life use determinations in the

401 program are being addressed in the draft rules for the Water Quality Certified Profession program. To coincide with those rules, Ohio EPA intends to initiate a second rulemaking for selected Credible Data program rules. The objective is a compatible set of professional qualifications, training requirements and testing that will provide the CP and the 401 program with sufficient data to determine the existing aquatic life use in both large and small stream environments. The goal is to have both rule packages available for comment in early 2018.

General Comments:

Comment 1: (Level 3 QHEI) We are restating that a Level 3 QHEI certification should only be granted with a Level 3 Fish or Macroinvertebrate QDC certification and not be granted as a standalone certification. Additionally, providing QHEI data alone should never be used in determining aquatic life uses without biological data collected under the rules of the Credible Data Program and consistent with the Ohio WQS. While we recognize that agency personnel can in some circumstance make a valid determination, relying on external QDCs to do the same is unlikely as there are simply too many incentives to “cut corners”.

This is made even more problematic by the Ohio EPA responses to comments 11, 12, 20, 24, 45, 46 as follows:

“These methods stipulate that QHEI data are sufficient to conclude that a stream likely meets a Clean Water Act goal use (Warmwater Habitat), but only under prescribed set of circumstances that are evaluated on a case by case basis. While some permitting decisions can proceed using only QHEI data, the Level 3 QDC is trained and entrusted with the responsibility to know the circumstances when biological sampling is necessary.”

First, a level 3 QHEI applicant does not receive sufficient training to make this judgement. Second, we seriously doubt that many Level 3 fish or macroinvertebrate QDCs could do this each and every time with OHEI data alone. Leaving this to a case-by-case basis is insufficient assurance that it will be properly addressed with biological data, especially for 401 program applications. That program has not been diligent enough in assuring that the needed data is used to make use designation decisions. Our strong recommendation is to have only Level 3 fish and macroinvertebrate QDCs who have been trained in this recognition, which is something that is currently part of the Level 3 training that we offer. Still, this seems like too much discretion especially when there are many incentives to not collect the proper data. (Midwest Biodiversity Institute, MBI)

Comment 2: “The applicant shall satisfy the requirements of stream habitat assessment in paragraph (A)(3)(a) of this rule.”

The Conservancy supports this requirement, but emphasizes that QHEI should not be the sole criterion for use designations. Ohio EPA addressed this point on Page 4 of 6 in the Response to Comments. We recommend that only those with Level 3 fish or macroinvertebrate certification should be allowed to provide QHEI scores for Level 3, at

least in certain situations (e.g., NWP, UAA, NPDES permit compliance). Level 3 Fish or Macroinvertebrate Certification should be required whenever there is a determination of aquatic life use. QHEI alone is not adequate for the purpose of determining an aquatic life use. (TNC)

Response 1&2: As stated in the response to comments received during the interested party review, all data to be considered in matters regarding compliance with state water quality standards, regardless of origin, must be collected and analyzed following the methods and Ohio EPA procedures referenced in OAC rule 3745-1-03. These methods stipulate that QHEI data are sufficient to conclude that a stream likely meets a Clean Water Act goal use (Warmwater Habitat), but only under prescribed set of circumstances that are evaluated on a case-by-case basis. Any beneficial use designation less than goal use must be evaluated through a use attainability analysis and is subject to rulemaking.

Please see the response to summarized comments above; The Agency intends to implement a “Phase 2” of Credible Data rule revisions in 2018 to coordinate with the rules for the new Water Quality Certified Professional program. We expect that the rules of the two programs will dovetail and both include specific requirements and trainings to address concerns related to QHEI and stream performance. Phase 2 will recommend that QHEI remain as a standalone certification specialty for Level 2. We are recommending that Level 3 becomes a stream habitat assessment specialty with required training on water quality standards and the biological criteria manuals, along with training and testing in QHEI and headwater habitats.

Comment 3: From Ohio EPA’s “Response to Comments” of November 2017:

Page 3 -

“The Agency will be releasing draft WQCP rules soon and we anticipate that a second credible data program rulemaking will be done concurrently to implement these changes.”

Page 5 -

“The Agency will be releasing draft WQCP rules soon and we anticipate that a second credible data program rulemaking will be done concurrently with the WQCP rules to implement the appropriate connections.”

As we stated in our attached March 17, 2017, comments on the proposed rules, “if a CWQP provides information leading to the establishment of a designated use, or “the existing aquatic life use,” then it appears the supporting data would require Level 3 data collected by level 3 Qualified Data Collector.” We support consistency of the QDC and CWQP rules when they are requiring rigorous standards for the determination of use designations, 401 certification and mitigation, Nationwide permit and NPDES permit application or compliance support, etc. CWQP participants should be QDC-qualified. We reiterate this point because of its importance to the consistency of the application to Ohio Water Quality Standards and attainment of Clean Water Act goals, including antidegradation. (The Nature Conservancy, TNC)

Response 3: We appreciate TNC's comment and are coordinating the requirements for both the credible data and water quality certified professional (WQCP) programs, aligning as many components of the two programs as possible. We are evaluating the appropriate cross-connections and believe TNC's concerns will be addressed via the required training and testing for WQCPs.

OAC 3745-4-01:

Comment 4: (A) "All data submitted under the credible data program that meet the specified requirements, shall be stored and made accessible to both the public and other state agencies in a computerized data base."

The Conservancy encourages this availability. In further support of public use, we also strongly encourage that the complete Ohio EPA data record be made available in the same way. (TNC)

Response 4: The Agency agrees with the observations. In the meantime, the best option for obtaining data is to contact the program and make a request. An inventory of the data collected can be accessed using the interactive GIS study plan map on the credible data webpage: <https://oeqa.maps.arcgis.com/apps/webappviewer/index.html?id=976a7dc9384b428093aa8e2c26af9154>.

OAC 3745-4-02:

Comment 5: (I) and (L) The deletion of PHWH and HHEI from 3745-4-02 (Definitions) leaves much to interpretation regarding the assessment and designation of small headwater streams. There needs to be some type of equivalent replacement language so that it is clear what methods, data, and most importantly what credentials are required to assess such streams. With the widely employed use of what we consider inaccurate and inappropriate rules-of-thumb to screen small streams for applicability under either site-specific or Nationwide 401 certifications, this raises real concerns that such streams will be improperly assessed, if at all. We only need to point to Ohio EPA assessments that have already designated numerous streams as WWH, EWH, and CWH that would fall under streams with catchment and maximum pool depths that are well within or even less than these currently used rules-of-thumb. While this may seem outside the scope of the Credible Data rules, it is relevant to the Level 3 certification and training requirements and what future CWQPs will need to know and demonstrate prior to determining existing stream use designations. (MBI)

Response 5: Please see the response to summarized comments above; These definitions were considered for removal at the interested party review stage but were reinstated in the proposed rules with only minor revisions due to comments received.

OAC 3745-4-03:

Comment 6: (A)(3) In §3745-4-03(A)(3), which describes the different categories of Level 3 Qualified Data Collector ("QDC") status, no mention is made in the section for Benthic macroinvertebrate biology of the different types of status (i.e. Sample Collection, Identification & Data Evaluation; Collection & Data Evaluation Only; Identification Only) currently allowed by the program. NEORSR requests that this section be revised to be consistent with current practice and the current application form to become a Level 3 QDC.

NEORSR commented on this issue in 2006 when these rules were under review then. NEORSR previously commented on what was then §3745-4-03(A)(4)(c), Benthic macroinvertebrate biology: level 3 of the original rules, that "[t]his section specifies a set of qualifications for this certification. However, we have found it practical and economic to contract for identification and enumeration services with a lab specializing in this field. This section should be revised to account for this procedure." Ohio EPA responded that "[i]n the Voluntary Action Program (VAP) biocertification process individuals and labs have been allowed to specialize in evaluating macroinvertebrate samples at Level 3, leaving the sample collection and postevaluation analysis combination to a different certified specialist. We will allow such specialization for macroinvertebrates in this program as well. QDC applications will reflect this option." Since the QDC applications continue to reflect this option, NEORSR again requests that Ohio EPA amend the rules to reflect this option as well. (Northeast Ohio Regional Sewer District, NEORSR and Association of Ohio Metropolitan Wastewater Agency, AOMWA)

Response 6: Macroinvertebrate and fish specialties have not been explicitly detailed within the rules from the beginning, and the Agency has been flexible in adapting to how samplers collect and process data. Listing specific sub-specialties adds confusion to the rule without benefit. Specifications for training requirements is listed on the credible data webpage (http://epa.ohio.gov/dsw/credibledata/requirements_for_participation.aspx) and is also available upon request from either Ohio EPA or an approved training provider.

Comment 7: (A)(3)(a) Page 4 of 6 in the Response to Comments:

Ohio EPA stated: *"These methods stipulate that QHEI data are sufficient to conclude that a stream likely meets a Clean Water Act goal use (Warmwater Habitat), but only under prescribed set of circumstances that are evaluated on a case by case basis. While some permitting decisions can proceed using only QHEI data, the Level 3 QDC is trained and entrusted with the responsibility to know the circumstances when biological sampling is necessary."*

While we appreciate that "the Level 3 QDC is trained and entrusted with the responsibility to know the circumstances when biological sampling is necessary," we encourage that the Agency establish a clear requirement for what this is supposed to be, instead of relying on a more vague description ("responsibility to know the circumstances when biological sampling is necessary"), which might not be consistently followed.

Page 4 of 6 in the Response to Comments:

"The Agency is evaluating the need for additional rule language on this issue in the context of developing the water quality certified professional program."

We encourage the Agency to continue to develop such additional rule language in order to develop more clarity.

TNC stated in our March 17, 2017 comments:

“QHEI: In contrast, meeting Level 2 requirements for QHEI by just completing a QHEI course (now only two days for the time commitment) does not seem adequate, especially when the applicant might then apply this status to issues such as that of the equivalent of 401 certifications (see comments below for more on this issue). They could be collecting data and recommending WQS use designations for streams, largely based on the QHEI. In these cases, the QHEI is being substituted for a properly conducted biological assessment, which should be performed by a Level 3 Qualified Data Collector. Otherwise, relying on the QHEI only could easily result in inaccurate outcomes and decisions as to use designations. For example, a mine drainage-affected stream could have very good habitat, and the QHEI would be misleading. Level 3 Fish or Macroinvertebrate Certification also should be required whenever there is a determination of aquatic life use. QHEI alone is not adequate for this purpose.

We do not support allowing Level 2 QHEI to qualify for use in any regulatory uses, such as any related to 401 certifications, or Certified Water Quality Managers actions leading to use attainment analysis. i.e., again, issues related to regulatory decisions. These are inadequate levels of familiarity with stream habitat and fish habitat requirements. They should only be done by those also qualified as Level 3 Qualified Data Collector for fish or macroinvertebrates.” (TNC)

Response 7: Please see the response to summarized comments above; The credible data authorizing statute [ORC 6111.50 to 6111.56] prevents the use of level 2 data for regulatory purposes. Level 2 data is intended for evaluation of trends, with watershed groups in mind, and would always be confirmed using level 3 data before any regulatory changes would be made.

Comment 8: (A)(3)(f) “In lieu of the training set forth in paragraph (A)(3) of this rule, an applicant may serve a six-month apprenticeship...”

A total of six months of apprenticeship should be suitable. For example, this could be gained in two three-month apprenticeships. Suggested language: “... an applicant may serve as an apprentice for six months.” (TNC)

Response 8: The six-month continuous apprenticeship program is designed to mimic what new agency biologists experience upon being hired. This training alternative has not been utilized to date by any prospective QDC. The Agency does not anticipate making this change.

Comment 9: (C) Proposed 3745-4-03[C] is problematic with renewing a QDC. For example, a three-year renewal that started on May 31, 2015 will expire on May 31, 2018. If during that time the QDC turns in data sampled on August 21, 2016, it would result in the next 3-year renewal expiring on August 21, 2019, just one year after the original May 31, 2018 renewal date.

In effect, a 3-year renewal does not last 3 years for the QDC to sample in that time frame. If the data had been from 2015 then the new renewal date would be just a few months before it expires again, at least that is how we read the proposed rule language. The renewal date should start from the date the old renewal ends. (MBI)

Response 9: We oppose having a renewal date starting from the date the old renewal ends (unless the renewal happens exactly on that date). Skills associated with these specialties must be maintained through regular use of the methods. If status was renewed soon after the 8/21/16 example and certification extended three years from 5/31/18, the QDC could be certified for four and a half years with no guarantee of participation during that time. Participants that annually submit data to the credible data program will continually have rolling three-year automatic approvals and do not need to submit any renewal applications. This makes it easier on participants while assuring us that methods are implemented by QDCs at least every three years.

<http://epa.ohio.gov/portals/35/credibledata/CurrentQDCs.pdf>

Comment 10: (E)(2)(a)(ii) In its Response to Comments on Page 3 of 6, Ohio EPA noted that the "term 'full time' was dropped in regard to the nature of the years of experience ... " NEORSD has reviewed the Proposed Rule and notes that the term "full time" is still present in §3745-4-03(E)(2)(a)(ii). NEORSD requests that Ohio EPA update the Proposed Rules to reflect this change and its Response to Comments. (NEORSD and AOMWA)

Response 10: This was an oversight on our part. The words "full time" will be removed from the final rule.

OAC 3745-4-06:

Comment 11: (C)(5) NEORSD appreciates that Ohio EPA has removed the restriction that only data collected by Ohio EPA, Ohio EPA contractors, federal agencies or other state environmental agencies can be used for chemical contaminants in fish tissue. However, in §3745-4-06(C)(5) of the Proposed Rules, the references to publications that provide acceptable level 3 test methods for fish tissue collection and contaminant testing have been deleted. Since Ohio EPA removed the restriction in §3745-4-01, NEORSD believes that removal of the References for fish tissue collection and contaminant testing from the Proposed Rules was an unintentional oversight. NEORSD requests that this language be reinstated in §3745-4-06(C)(5) to allow for the collection of this type of data under the Credible Data Program. (NEORSD and AOMWA)

Response 11: The removal of the methods for fish tissue collection and contaminant testing from the rule references was an oversight. The two updated references will be inserted back into rule.