



# Common Sense Initiative

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## Business Impact Analysis

Agency, Board, or Commission Name: Ohio Environmental Protection Agency

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Regulation/Package Title (a general description of the rules' substantive content):

Section 401 Water Quality Certifications rules

Rule Number(s): 3745-32-01, 3745-32-02, 3745-32-03, 3745-32-04

Date of Submission for CSI Review: November 2, 2023

Public Comment Period End Date: December 8, 2023

**Rule Type/Number of Rules:**

New/ 1 rules

No Change/      rules (FYR?     )

Amended/ 3 rules (FYR? Yes )

Rescinded/      rules (FYR?     )

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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### **Reason for Submission**

1. **R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

**Which adverse impact(s) to businesses has the agency determined the rule(s) create?**

**The rule(s):**

- a. ☒ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**
- b. ☒ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**
- c. ☒ **Requires specific expenditures or the report of information as a condition of compliance.**
- d. ☒ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

### **Regulatory Intent**

2. **Please briefly describe the draft regulation in plain language.**

***Please include the key provisions of the regulation as well as any proposed amendments.***

The rules in OAC Chapter 3745-32 provide the mechanism to grant businesses, other organizations and private landowners the permission they need under federal and state law to discharge or place fill material in streams, lakes, wetlands, or other waters of the state.

The fundamental purpose of the program is to ensure that water quality is protected whenever a discharge of dredged or fill activity occurs. The state's water quality standards serve as a benchmark to protect water quality. The existing rules provide definitions for key terms used in the program along with specific criteria for application requirements and decisions on the issuance of Section 401 water quality certifications. The proposal also includes a new rule that will codify stream mitigation requirements and guidance documents that are currently used by the agency in Section 401 water quality certification decisions.

Changes being considered for each rule are detailed below:

#### **3745-32-01 Definitions.**

- Minor language changes to make the rule more concise and user-friendly and to reduce regulatory restriction language.
- Added definitions for "stream", "in-kind", "discharge."

#### **3745-32-02 Applicability.**

- Minor language changes to make the rule more explicit and to reduce regulatory restriction language.



- Language changes to clarify that a 401 water quality certification may be required for any instances in which there may be a discharge to waters when a federal permit is required, including Section 10 permits.

**3745-32-03 Section 401 water quality certification application requirements and procedures.**

- Minor language changes to make the rule more concise and user-friendly and to reduce regulatory restriction language.
- Language that removes submittal timelines based on the 404 public notice and clarifies submittal timelines are based on a state complete application as defined in the rule. The state does not have the federal authority to return an application but only certify, certify with conditions, deny or waive.

**3745-32-04 Mitigation for impacts to streams.**

- New rule that was drafted to comply with the requirements of House Bill 175 that outlines stream mitigation requirements. It establishes the stream mitigation hierarchy, which mimics the federal mitigation rule, ORC 6111.30, and the wetland mitigation rules. The new rule also references the stream mitigation banking and in-lieu fee guidance document for performance standards and monitoring requirements and the new Ohio Stream Assessment Method is referenced for crediting and debiting stream mitigation.

**3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

The rules in OAC Chapter 3745-32 are authorized by Ohio Revised Code 6111.03 and 6111.31, and amplify 6111.03, 6111.30, and 6111.31.

**4. 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.*

Yes, the regulations implement federal requirements. The rules in OAC Chapter 3745-32 describe how Ohio administers requirements under Section 401 of the Clean Water Act (CWA). States are given authority under Section 401 to review and certify that any permit or license issued by a federal agency complies with all applicable state water quality standards. Most Section 401 water quality certifications involve Section 404 permits issued by the U.S. Army Corps of Engineers for the placement of dredged or fill material in waters of the U.S.

**5. If the regulation implements a federal requirement, but includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

The provisions in paragraphs I(2) and I(3) of rule OAC 3745-32-03, relating to deposition of dredged material in Lake Erie, are not specifically required by U.S. EPA or the CWA, however, the rule amendments are consistent with Section 101(a)(2) of the act, which established as a national goal “water quality which provides for protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, wherever attainable.” The State determined that the placement of sediments in Lake Erie that would lead to an increase



in bioaccumulative chemicals of concern (BCCs) is unacceptable and requirements are necessary to protect Lake Erie, its aquatic life and fishing industry.

**6. 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 objective of the Section 401 water quality certification program is to protect water quality through assuring the State's water quality standards are maintained. Water quality standards provide the appropriate and balanced set of beneficial use and criteria that protect those uses. The Section 401 water quality certification program rules ensure that activities that could interfere with attainment of those uses and criteria are properly regulated and mitigated.

**7. 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: <https://epa.ohio.gov/divisions-and-offices/surface-water/reports-data/ohio-integrated-water-quality-monitoring-and-assessment-report>.

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 waters. Ohio EPA will implement the requirements of the federal CWA and the No Net Loss policy through these rules.

**8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

*If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.*

No.

**Development of the Regulation**

**9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

The program conducted extensive outreach, including multiple meetings for individual stakeholders and stakeholder groups, from June 2022 through January 2024. Participating stakeholders included the U.S. Army Corps of Engineers, wetland mitigation banking and in-lieu fee sponsors (e.g. Stream + Wetlands Foundation, The Nature Conservancy, Resource Environmental Solutions, Environmental Investment Partners, Water and Land Solutions, and more), other state agencies (e.g. Ohio Department of Transportation and the Ohio Department of Natural Resources), industry groups (e.g. Ohio Home Builders Association,



Ohio Oil and Gas Association, Ohio Coal Association, NAIOP), and environmental groups (e.g. Midwest Biodiversity Institute, the Ohio Environmental Council, and Ohio Wetlands Association).

*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 fact sheet on DSW's website on October 18, 2022. The comment period deadline was January 18, 2023. Approximately 2,600 interested parties were contacted via email; a list of recipients is available upon request.

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

During the Early Stakeholder Outreach and Interested Party Review comment periods, the Agency received comments from industry groups, mitigation banking and in-lieu fee sponsors, consulting firms, and state and federal partners.

As a result of Early Stakeholder Outreach, one of the stakeholders (Stream + Wetlands Foundation) developed and presented a new stream mitigation model, the Ohio Stream Assessment Method (OSAM). The model is heavily based upon the Georgia version of the Stream Quantification Tool (SQT). They modified the Georgia version to incorporate some Ohio specific metrics and reference curves and created an accompanying excel worksheet to calculate debits and credit for stream mitigation. They presented the new model to the agency during several meetings. The agency solicited, received, and considered comments on the model during the Interested Party Review (IPR). Upon the review and consideration of the comments received, the agency has decided to incorporate the OSAM into this rulemaking with noteworthy revisions to the original tool proposed during IPR.

**11. 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?**

Most of the Section 401 water quality certification rules are procedural in nature and not based on scientific data. The new stream mitigation rule incorporates a functional assessment tool for calculating debits and credits that was adopted from the Georgia version of the SQT and, therefore, considers the scientific data collected therein. Habitat and biological metrics within the tool use existing scientific data that has been collected by Ohio EPA's Division of Surface Water and is used for evaluating water quality standards. The requirements regarding deposition of dredged material in Lake Erie consider data collected by Ohio Department of Natural Resources and assessed by Ohio EPA.

**12. 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? *Alternative regulations may include performance-based regulations, which define the required outcome, but do not dictate the process the regulated stakeholders must use to comply.***

The program explored the implementation of a previous rule package for stream mitigation



that was unsuccessful in 2010 as well as the guidelines for stream mitigation that is currently being implemented for stream impacts and mitigation projects. Additionally, the program explored the use of the Stream Quantification Tool that has been adopted by several states across the nation and was highly recommended by the US EPA and the US Army Corps of Engineers. After close coordination with integral stakeholders, the program is pursuing a stream functional assessment tool that has been proposed and developed by the Stream and Wetlands Foundation and further refined by Ohio EPA, the Ohio Department of Transportation, the Ohio Coal Association, US EPA, and the US Army Corps of Engineers.

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

Ohio EPA is the agency charged with administering the Section 401 water quality certification program. Only a review of existing Ohio EPA rules was necessary, and no duplication was found.

**14. 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 30 days out from the date of adoption, which gives the Agency time to update web pages. Additionally, the agency will provide training on the new stream tool and its metrics to standardize data collection and provide predictability.

**Adverse Impact to Business**

**15. Provide a summary of the estimated cost of compliance with the rule(s). Specifically, please do the following:**

- a. Identify the scope of the impacted business community, and
- b. Quantify and identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance, etc.).

*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. The impacted business community might include a business, organization or landowner who intends to relocate a stream or discharge fill materials in any waters of the State and are required to obtain a federal license or permit for the activity. The draft rules do not include any revisions to applicability requirements, only clarifications. Examples of businesses most frequently affected by the program include mining operations, energy companies, land development companies, and agricultural operations that petition for the construction of improved drainage outlets.
- b. The types of adverse impacts on the business community include:
  - Preliminary site evaluation and data collection to determine beneficial uses for streams not already designated in the water quality standards rules and categorization of wetland resources.



- Cost to complete (and possibly revise) the certification application.
- Certification application and review fees.
- Cost of providing public notice regarding the pending application.
- Cost of designing and implementing a suitable compensatory mitigation plan.
- For projects that include permittee-responsible compensatory mitigation, cost of compliance monitoring and reporting to ensure that compensatory mitigation is successful.

The costs incurred by a business to comply with Section 401 water quality certification rules varies widely based on the size of the project and the types of water resources that are proposed to be impacted. Application and review fees and the responsibility for public noticing costs are established in Sections 3745.114 and 6111.30 of the Ohio Revised Code and will not change as a result of this rulemaking. 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.

The draft rules are intended to make the Section 401 water quality certification program more transparent and predictable for the business community. The applicant will have more specifics about what information needs to be submitted at the time of application. Faster certification processing should result in applicants submitting all required information with the initial submission, which could reduce overall project costs.

**16. Are there any proposed changes to the rules that will reduce a regulatory burden imposed on the business community? Please identify. (*Reductions in regulatory burden may include streamlining reporting processes, simplifying rules to improve readability, eliminating requirements, reducing compliance time or fees, or other related factors*).**

We have attempted to improve the readability of the rules by making language clearer and more concise.

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

Clean water is recognized as a valued resource worth protecting. The Section 401 water quality certification program rules and the State's water quality standards are primary means of ensuring that the quality of water in Ohio's streams, rivers and lakes is improved and remains suitable for swimming, drinking, and fishing. The basic goal of meeting all beneficial uses and criteria established under the CWA is the normal requirement mandated by federal regulations. Deviation from that expectation is allowed in only a handful of extraordinary circumstances, one of which is imposition of widespread social and economic impact. Thus, it is incumbent upon states to establish the proper balance between the water quality goals (beneficial uses and criteria) and the costs to society of attaining those goals.



The Agency believes the draft rules are supported by the need to protect water quality and are in the overall public interest.

### **Regulatory Flexibility**

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

Yes. Flexibility has been built into certain aspects of the Section 401 water quality certification program that benefit businesses of any size. Ohio's system of beneficial uses accounts for environmental and landscape factors in setting the tiered aquatic life use and the associated performance-based water quality criteria. In short, the tiered aquatic life uses provide a hierarchy of stream performance measures (biological and chemical water quality criteria) ranging from exceptional quality waters to highly modified waters that cannot fully support the "fishable" goals of the CWA. This system ensures that businesses, through the terms of a Section 401 water quality certification, are mitigating for the quality of resource that is being impacted in the proposed project. Additionally, if any applicant is unable to comply with their permit conditions, such as mitigation requirements, they can seek alternate mitigation options with agency approval.

**19. 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 a Section 401 water quality certification program, the failure to obtain a certification under OAC Chapter 3745-32 is not considered a 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.

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

Ohio EPA Division of Environmental and Financial Assistance'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: [epa.ohio.gov/divisions-and-offices/environmental-financial-assistance/about-defa/office-of-compliance-assistance-and-pollution-prevention](http://epa.ohio.gov/divisions-and-offices/environmental-financial-assistance/about-defa/office-of-compliance-assistance-and-pollution-prevention).

- Ohio EPA also has a Customer Support Center web page ([ohioepa.custhelp.com/](http://ohioepa.custhelp.com/)) that contains links to several items to help businesses navigate the permit process, including the Permit Wizard, Frequently Asked Questions (FAQ), training and subscription to various program listservs.



- 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 Environmental and Financial Assistance'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: [epa.ohio.gov/divisions-and-offices/environmental-financial-assistance/compliance-assistance/compliance-assistance](http://epa.ohio.gov/divisions-and-offices/environmental-financial-assistance/compliance-assistance/compliance-assistance).
- U.S. EPA Small Business Gateway also has information on environmental regulations for small businesses available at: [epa.gov/smallbusiness/](http://epa.gov/smallbusiness/) and a Small Business Ombudsman Hotline 800-368-5888.
- U.S. EPA's Water Quality Standards Handbook, Second Edition available at: <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>.
- U.S. EPA's Policy and Guidance: Reference Library contains an index of EPA documents related to water quality standards, including those referenced in the WQS Handbook. You can sort the index alphabetically, by publication date, or by topic. Available at: <https://www.epa.gov/wqs-tech/water-quality-standards-handbook>.
- The Division of Surface Water's Water Quality Standards program web page contains background information and direct links to sections of the regulations. Additional information is available at: [epa.ohio.gov/divisions-and-offices/surface-water/reports-data/water-quality-standards-program](http://epa.ohio.gov/divisions-and-offices/surface-water/reports-data/water-quality-standards-program).