



# Common Sense Initiative

Mike DeWine, *Governor*  
Jon Husted, *Lt. Governor*

Joseph Baker, *Director*

## MEMORANDUM

**TO:** Mandi Payton, Ohio Environmental Protection Agency

**FROM:** Caleb White, Business Advocate

**DATE:** March 21, 2024

**RE:** **CSI Review – Section 401 Water Quality Certifications (OAC 3745-32-01 through 3745-32-04)**

On behalf of Lt. Governor Jon Husted, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

### Analysis

This rule package consists of three amended rules and one new rule proposed by the Ohio Environmental Protection Agency (OEPA) as part of the statutory five-year review process. This rule package was submitted to the CSI Office on November 3, 2023, and the public comment period was held open through December 8, 2023. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on November 3, 2023.

The rules in this package establish the definitions, applicability, certification application requirements and procedures related to the Section 401 water quality certification from the OEPA when an activity results in discharge or the placement of fill material into the waters of the state, as required under Section 401 of the Clean Water Act (CWA). This package also includes a new rule to codify the stream mitigation requirements and guidance documents currently used by the OEPA to make Section 401 water quality certification decisions as required under Ohio House Bill 175 of the 134<sup>th</sup> General Assembly (H.B. 175).

Ohio Administrative Code (OAC) 3745-32-01 establishes the definitions used in the chapter and

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incorporates certain materials by reference. This rule is amended to add definitions for “discharge,” “stream,” and “in-kind” and to reorganize the sections which incorporate materials by reference. OAC 3745-32-02 establishes who must obtain either a Section 401 Water Quality certification or exemption from the OEPA. This rule is amended to clarify some activities which discharge material into state waters that are required to obtain a section 401 certification, as well as to update and streamline rule language.

OAC 3745-32-03 establishes the application requirements and procedures surrounding Section 401 water quality certification. This rule is amended to modify two provisions for the submission of materials required for a Section 401 certification application. These provisions contain timelines which are based on whether or not a United States Army Corps of Engineers public notice regarding an application for a Federal Water Pollution Control Act Section 404 permit has been published. The rule allows the director of the OEPA (director) to return an incomplete application for a 401 certification if the applicant has not provided the required materials within sixty days after the director’s receipt of the application and the public notice for the Section 404 permit has not been published. If the application was not complete and the notice regarding the Section 404 permit had been published, the required items were required to be received within 180 days of the public notice date. These provisions were eliminated to remove the condition of the publication of the Section 404 public notice for the return of an application and eliminate the provision if the notice has been published. These provisions are further modified to increase the timeline for the submission of application information from sixty days to ninety days after the director’s receipt of the application, eliminate the director’s authority to return an application, and allow the director to deny an incomplete application after the ninety-day timeline. The OEPA notes that the director does not have the federal authority to return an application and can only certify, certify with conditions, deny, or waive a Section 401 application. In addition to these more substantive changes this rule is also amended to update a website as well as clarify, update, and streamline the rule language.

OAC 3745-32-04 is a new rule which codifies the stream mitigation requirements and guidance documents currently used by the OEPA to make Section 401 water quality certification decisions as required under H.B. 175. This rule establishes a stream mitigation hierarchy which mirrors 33 Code of Federal Regulations 332.8 and ORC 6111.30, as well as refers to the “Guidelines for Stream Mitigation Banking and In-lieu Fee Programs in Ohio” for the relevant performance standards and monitoring requirements, and the “Ohio Stream Assessment Method” for methodology for crediting and debiting stream mitigation.

During early stakeholder outreach, the OEPA sent electronic notification to its Division of Surface Water (DSW) rulemaking interested party list, posted a fact sheet on the DSW website on October 18, 2022, and accepted comments through January 18, 2023. Additionally, the OEPA conducted multiple stakeholder outreach meetings between June 2022 and January 2024. These meetings

included wetland mitigation banking and in-lieu fee sponsors such as The Nature Conservancy and the Stream and Wetlands Foundation, industry groups such as the Ohio Home Builders Association and the Ohio Oil and Gas Association, environmental groups such as the Midwest Biodiversity Institute and Ohio Environmental Council, consulting firms, federal partners, as well as other state agencies. This outreach resulted in the development of the “Ohio Stream Assessment Method,” which is a new stream mitigation model that is based on the Georgia Stream Qualification Tool and modified to incorporate Ohio specific aspects. The OEPA decided to incorporate this new model into the rule and shared this model with stakeholders for their review.

During the CSI public comment period, the OEPA received twenty comments addressing a variety of themes, particularly revolving around the Ohio Stream Assessment Method, the proposed temporal loss multiplier, the proposed mitigation hierarchy, the duration of biological monitoring, and general procedural and technical questions regarding OEPA’s intentions for implementing the rules. In response to comments, the OEPA modified OAC 3745-32-04 to reduce the temporal loss multiplier from 1.5 to 1.1, changed the Ohio Stream Assessment Method to be a function of stream linear footage instead of area following meetings with federal regulatory partners (with a commitment to evaluate an area-based model in the future) added a large woody debris metric to the Ohio Stream Assessment Method, and made other various changes to the Ohio Stream Assessment Method. OEPA also noted its intention to continue working with stakeholders to improve the tool in the future and answered a variety of technical questions. In addition to these changes, the OEPA also updated the version and date of a referenced document in OAC 3745-32-01.

The business community impacted by the rules includes any business, organization, or landowner that intends to relocate a stream or discharge fill materials into state waters and is also required obtain a federal license or permit for this activity. This would commonly include mining operations, energy companies, land development companies, and agricultural operations seeking the construction of improved drainage outlets. The adverse impacts created by the rules include the costs associated with preliminary site evaluation and data collection to determine beneficial uses for rules not already designated, the cost to complete the Section 401 certification application, certification and application review fees, the cost to provide public notice of a pending application, the costs associated with designing and implementing an acceptable compensatory mitigation cost plan, and the costs of compliance monitoring and reporting on the success of compensatory mitigation for projects that require permittee-responsible compensatory mitigation. The OEPA states that the costs to comply with the rules will vary based on the size of the project and the types of water and resources that are impacted but notes that the application, review fees, and responsibility for public notice costs are set in statute. The OEPA also states that these rules as amended will reduce the regulatory impact by making the requirements of the Section 401 water quality certification program clearer and easier to read, which can result in faster certification time and reduce project costs. The OEPA states that the adverse impacts to business are justified to

implement the Section 401 water quality certification program and to protect clean water in Ohio's streams, rivers, and lakes so that it remains suitable for swimming, drinking, and fishing.

### **Recommendations**

Based on the information above, the CSI Office has no recommendations on this rule package.

### **Conclusion**

The CSI Office concludes that the OEPA should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.