



## Division of Surface Water Response to Comments

**Rule:** Section 401 Water Quality Certification Rules OAC Chapter 3745-32 and 3745-45

### Agency Contact for this Package

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Ohio EPA held an interested party comment period from January 8, 2016 to February 9, 2016 regarding Section 401 Water Quality Certification 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.

### General Comments

**Comment 1:** The majority of the draft revisions are “housekeeping” changes with no substantive changes to the rule language, such as rearranging the rules, putting procedural rules together, rescinding rules where they have moved and restating language from Chapter 6111.32 of the Ohio Revised Code relating to permit processing and time deadlines. Seven rules are being combined into 3 rules. In addition, the Agency is adding some definitions from the federal section 404 program that were not in the previous Ohio EPA rules. These changes are a good idea, and the Association supports them. (Ohio Oil and Gas Association)

**Response 1:** No response necessary.

**Comment 2:** As an overarching comment on the Draft Rules, Ohio Coal appreciates Ohio EPA's attempts to eliminate ambiguity in the 401 permitting process and to make the process more consistent with the Army Corps' 404 procedures, but

elements of the Draft Rules do not accomplish this laudable goal, and instead increase permitting costs without any concomitant environmental benefit. Ohio Coal is concerned that Ohio EPA is making unnecessary or confusing changes in the Draft Rules. For example, in the document on Ohio EPA's Division of Surface Water website entitled "Summary of Revisions"<sup>1</sup>, many of the changes identified as "existing language from" or "taken from . . ." are not in fact exact duplicates of the cited rule language. This makes it more difficult for the public to identify what is changing in the Draft Rules and to make appropriate comments. Specifically, Draft Rules Ohio Adm. Code 3745-32-03(B)(2) and 3745-32-03(K)(2) purport to be either "taken from" or "existing language from" other regulations or statutes, but are not exact facsimiles. Ohio EPA should review the Draft Rules to ensure that there are not other examples of this error. (Ohio Coal Association)

**Response 2:** Ohio EPA is mindful of any unnecessary increase to permitting costs. Several changes have been made to the draft rule that may address some of these concerns. Please see below for changes that are being made to the photograph requirements and comments received from the Ohio Department of Natural Resources and the United State Fish and Wildlife Service. In response to the second part of the comment, because this rule making involves the rescission of several rules and reorganizing of the current content, the draft rules all appear underlined as though they are new rules. In order to help the public identify which portions of the draft rule language are currently in rule, the agency created an additional document. This document was included with the public notice materials and included references to where the language is currently located. This was only created as an additional aide for the public, but not a requirement of the rulemaking process. Commenters could take the existing rules and compare those to the draft rules.

**Comment 3:** Similarly, AOMWA's members regularly apply for and utilize 401 Water Quality Certifications for projects that do not qualify for a Nationwide Permit and expect to continue to do so in the future. Any changes to Ohio EPA's Section 401 Water Quality Certification Program that increase the time and cost associated with such projects threatens to significantly impact AOMWA and its members. Again, we support the general comments and sentiment reflected in the letter submitted by NEORSRD on this issue. Consistent with NEORSRD's comments, AOMWA requests that Ohio EPA consider making revisions and clarifications to these draft rules to improve the process for 401 Water Quality Certifications and ensure that this program remains workable for Ohio's public wastewater agencies. (Association of Ohio Metropolitan Wastewater Agencies (AOMWA))

**Response 3:** Please see the responses below to NEORSRD's comments numbered 22, 50, 53, 56, 62 and 70.

#### **OAC 3745-32-01**

**Comment 4:** (F) Ohio EPA should consider revising the definition of "discharge of dredged material" to include "[a]ny addition, including redeposit other than incidental

fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation.” (U.S. EPA, Region 5)

**Comment 5:** (F) OEPA should consider including language consistent with the definitions of “discharge of dredged material” in 40 C.F.R. 230.2(1)(iii) and (2)(ii). (U.S. EPA, Region 5)

**Responses 4 and 5:** The definition has been changed to be consistent with the definition of discharge of dredged material in 40 CFR 232.2.

**Comment 6:** (G) Ohio EPA should consider revising the definition of “discharge of fill material” to provide examples consistent with the federal definition. (U.S. EPA, Region 5)

**Comment 7:** (G) Recommend deleting the phrase “for the purpose of creating uplands, changing the elevation of land beneath waters of the state, or creating impoundments of water” as the purpose of the fill does not change the activity described however, permit exemptions are created for those discharges which are exempt from federal regulation as provided in the Clean Water Act.

Additionally, the federal definition includes “structures or infrastructure” and also “any structure, infrastructure, or impoundment”. For consistency, Ohio EPA should consider this addition.

There are some difference in the examples of discharge of fill material between the definitions as between the state and federal definitions. As the Section 401 certifications is based on the federal permit, it is recommend that Ohio EPA revise the list of examples in its definition for what is considered “discharge of fill material.” (U.S. EPA, Region 5)

**Responses 6 and 7:** The definition has been changed to be consistent with the definition of discharge of fill material in 40 CFR 232.2.

**Comment 8:** (I) The federal definition includes examples. OEPA may want to consider either including the examples in the federal definition or a regulatory citation to the Corps regulations. (U.S. EPA, Region 5)

**Response 8:** Ohio EPA has considered including the examples of fill material included in the federal definition and determined the definition as written without examples to be better suited for the state program.

**Comment 9:** (J) OEPA may want to consider either including the provisions in the federal definition or regulatory citation to the Corps regulations. (U.S. EPA, Region 5)

**Response 9:** Ohio EPA maintains that the definition of general permit in the newly drafted rule is better suited to the state program than the federal definition.

**Comment 10:** (K) Ohio EPA proposes to include a definition of Letter of Permission (LOP) in addition to maintaining its existing definition of Regional General Permit. The Corps Districts in Ohio do not presently utilize LOPs or Regional General Permits. However, if these were to be used they would require a Section 401 Water Quality Certification before issuance. EPA understands that letters of permission are not currently used in Ohio, however, if they are adopted then 401 certification would need to be public noticed to be in compliance with the requirement that all Section 404 permits have a Section 401 Certification that includes procedures for public notice (33 US Code § 1341). Also 33 CFR 325(3)(1) specifically requires a 401 Water Quality Certification from the State for LOPs. (U.S. EPA, Region 5)

**Response 10:** Ohio EPA acknowledges that all Section 404 permits require a Section 401 water quality certification (WQC). In accordance with Ohio rules and laws, all applications for a Section 401 WQC are public noticed. Letters of permission and regional general permits are currently used in Ohio. The Buffalo Corps district has general letters of permission for specific Lake Erie projects and the Huntington Corps district has a regional general permit for specific Ohio Department of Transportation projects. Ohio EPA has issued a 401 WQC for those permits.

**Comment 11:** (L) OEPA may want to consider either adopting the federal definition of the Corps Nationwide permits or include a regulatory citation to the Corps regulations. (U.S. EPA, Region 5)

**Response 11:** The definition has been changed to be consistent with the definition of nationwide permit in 33 CFR 330.2(b).

**Comment 12:** (N) and (Q) both cite section 6111.01 of the Revised Code for the definition, but it would be helpful to also have the actual definition included here. (Ohio Department of Transportation (ODOT))

**Response 12:** Ohio EPA has considered this request, but has decided not to include the entire definition for (N) "Person" and (Q) "Waters of the state" as stated in ORC 6111.01 in order to maintain consistency among the definitions in the law and rule. Additionally, the definition of a wetland was removed from the public noticed version of draft rule, but the term is used within the draft rule. Therefore, the definition of wetland was added back into the draft with a citation to the definition in ORC 6111.02.

**Comment 13:** (O) There is no federal requirement for an application to identify a "preferred alternative." A permit issued under the CWA Section 404 by the Corps must be determined to be the Least Environmental Damaging Practicable Alternative and comply with the remainder of 404(b)(1) Guidelines in 40 CFR 230. (U.S. EPA, Region 5)

**Response 13:** The definition of preferred alternative has been removed from the draft rule because it is no longer used in 3745-32-02 or 3745-32-03.

**Comment 14:** (P) OEPA may want to consider including a regulatory citation to the Corps regulations. (U.S. EPA, Region 5)

**Response 14:** Ohio EPA maintains that the definition of regional permit in the draft rule is better suited to the state program than the federal definition.

**OAC 3745-32-02**

**Comment 15:** (A) Does this statement imply that even NWP and RGP activities that are certified would have to apply for a 401 certification or Director's Authorization (DA)? If so, we would like this language modified so that non-notifying or PCN-only projects that meet OEPA certifications, do not require additional coordination efforts with Ohio EPA since they are pre-certified activities. (ODOT)

**Response 15:** If a project meets the conditions in a 401 water quality certification issued for a general permit, then no further application to Ohio EPA is necessary. Please see 3745-32-03(A)(2) which further explains this requirement.

**Comment 16:** (D)(3) ODOT suggests that Ohio EPA reference the CFR that defines activities that are 404 exempt. (ODOT)

**Response 16:** In response to this comment, 3745-32-02(D) has been revised to include a reference to 33 CFR 323.4 which lists those activities that are exempt from 404 permitting. Sections (D)(3) and (D)(4) that were included in the draft rule have been removed because this language is included in the federal regulation.

**OAC 3745-32-03**

**Comment 17:** (A) EPA understands that neither letters of permission or regional permits are not currently used in Ohio, however, if they are adopted then 401 certification would need to be public noticed to be in compliance with the requirements in the CWA covering certification of Section 404 permits (33 US Code § 1341). Also the requirements in 33 CFR 325(3)(1) require a 401 Water Quality Certification or waiver from the State. (U.S. EPA, Region 5)

**Response 17:** Ohio EPA acknowledges that all Section 404 permits require a 401 WQC. In accordance with Ohio rules and laws, all applications for a 401 WQC are public noticed. Letters of permission and regional general permits are currently used in Ohio. The Buffalo Corps District has general letters of permission for specific Lake Erie projects and the Huntington Corps District has a regional general permit for specific Ohio Department of Transportation projects. Ohio EPA has issued a 401 WQC for those permits.

**Comment 18:** (A) While we understand this requirement, the language is confusing. ODOT suggests "401 application" in lieu of "application for such certification". (ODOT)

**Response 18:** The language 3745-32-03(A) has been revised as follows: “The filing of an application for a federal permit or license for which a 401 certification is required does not constitute an application for a 401 certification with the state of Ohio.”

**Comment 19:** (A)(1) Does this statement refer to Section 9 and 10 activities when there are no fill activities? (ODOT)

**Response 19:** This provision could apply to Section 9 and 10 permits, but it could also apply to any other federal permit or license where the federal entity requires a 401 WQC before issuance of the federal permit or license, such as licenses or permits issued by the Federal Energy Regulatory Commission or National Pollutant Discharge Elimination System permits. If the director determines that the activity will not result in a discharge to waters of the state, then the director has the authority to waive the application requirements under 3745-32-03.

**Comment 20:** (A)(2) New language proposed for OAC 3745-32-03(A)(2) would ratify the unlawful and unreasonable “Director’s Authorization” process that OEPA is presently using and presently contemplating in its proposed Modification of the 401 Certification for the Nationwide Permits. The Director’s Authorization process violates the public participation and intergovernmental coordination requirements of Ohio’s antidegradation rules and the Clean Water Act. This newly proposed ratifying language should therefore be removed from OEPA’s proposal.

Specifically, the language proposed here provides that applicants need not submit further application to OEPA even where their projects fail to meet the terms and conditions of an OEPA general certification where “the director has authorized the project to proceed under the terms of the general certification based on a case specific determination of the environmental impacts of the project.” Ohio Supreme Court precedent has made it abundantly clear that degradation of high quality waters is permissible “only after compliance with the public hearing requirement of the rule[.]” *Columbus & Franklin Cty. Metro. Park Dist. v. Shank*, 65 Ohio St.3d 86, 110-111 (1992). The Director’s Authorization thwarts that requirement because it allows the agency to exceed the individual review impact thresholds that were subject to formal public consideration. The resulting level of degradation authorized by the agency under this process unlawfully escapes public review. OEPA should therefore remove this offending language from its proposed amendments to OAC Chapter 3745-32. (Ohio Environmental Council, Sierra Club Ohio Chapter, Ohio Wetlands Association (OEC et. al.))

**Response 20:** The rule clarifies a point of confusion that has arisen regarding the use of Director’s Authorization under the NWP. This provision memorializes, in rule, the director’s ability to authorize impacts to proceed under a specific general certification to the NWP notwithstanding eligibility criteria that would not otherwise be met. As this process is spelled out in Ohio’s certification to the NWP, and as it has proceeded through the antidegradation process, it is a

legitimate and legally appropriate way to authorize projects that fall within the permissible impacts under the NWP. In response to these comments and comments received regarding the proposed modification of the 401 WQC for the NWP, the director has decided to build in a public comment component to the director's authorization process whereby applications will be posted on the agency's web page for fifteen days and the director will accept and review comments before deciding whether to approve or deny such a request.

**Comment 21:** 3745-32-03(A)(2) "director has authorized the project" In our 1/19/16 comments, we note that concerning a "Director's Authorization;" that criteria for allowing Director's Authorizations are not specified, compliance with Antidegradation Rules in OAC 3745-1-05 and OAC 3745-1-54 is not assured, and this option lacks intergovernmental coordination and an opportunity for public involvement. What have been, or might be, the criteria applied for eligibility for a Director's Authorization? (The Nature Conservancy (TNC))

**Response 21:** Please see Response 20.

**Comment 22:** Section 3745-32-03(B)(2) of the Draft Rules states that an Application shall be submitted on forms provided by the director and completed in accordance with the corresponding application instructions. NEORSR requests that Ohio EPA provide a copy of these application forms prior to finalizing the Draft Rules so that interested parties have the opportunity to review and comment. The substance of the forms and procedures required to fill them out may have a significant impact on how the 401 water quality certification program affects interested parties. (Northeast Ohio Regional Sewer District (NEORSR))

**Response 22:** The application forms are currently available on the Ohio EPA Division of Surface Water website. The current forms have been in use for a couple of years, and Ohio EPA welcomes any suggestions for improvements to the application forms. If the application forms are revised in the future, stakeholders will be notified of upcoming changes and will be given an opportunity to review and comment on the revisions.

**Comment 23:** (B)(1) OEPA prescribes specific procedures for the assessment of wetlands proposed for impact in this regulation. It is important to note the federal permitting authority (Corps) would still need to consider those factors listed in 40 CFR 230.11 for all impacted aquatic resources.

Further, it is an important distinction that the 401 Water Quality Certification is reviewing the potential impact on water quality and not the remainder of the factors that the federal permitting agency must follow in reviewing a 404 permit. It is possible that a state/tribe could grant a 401 certification for a project that the federal permitting authority may deny based on the larger scope of their review in compliance with the 404(b)(1) Guidelines (40 CFR 230). For example, the Corps should consider the quality of headwater streams and should consider appropriate methods which could include Ohio EPA's Headwater Habitat Evaluation Index, Qualitative Habitat Evaluation Index, or

other appropriate methods such as EPA's Rapid Bioassessment Protocols within their review of a permit application. (U.S. EPA, Region 5)

- Response 23:** Ohio EPA acknowledges U.S. EPA's overview of the larger process. As part of a future rulemaking, with stakeholder outreach to begin this summer, Ohio EPA intends to further address stream assessment procedures which will be subject to an elaborate public process. In the interim, Ohio EPA's current practice with regard to evaluating streams proposed for impact as part of a 401 application is to evaluate each project on a case by case basis when making permitting decisions. Dependent upon the resources proposed for impact, this process includes the evaluation of habitat, biological, and chemical data submitted by applicants or collected by the Agency.
- Comment 24:** (B)(2) It is not always prudent for the applicant to be restricted to submitting an individual 401 WQC application 30 days following a Corps 404 public notice. There are occasional circumstances when a project could go from only requiring a 404 NWP/RGP from the USACE to requiring an individual 401 WQC later, which would likely be well past the 30 days. ODOT request that provisions be added to this condition for circumstances like this to occur. (ODOT)
- Response 24:** In response to this comment the deadline to submit an individual 401 WQC application after the Corps 404 public notice will be changed to 45 days. As most applicants prepare the 404 and 401 application simultaneously, this should allow applicants ample time to prepare the 401 application if there any changes to the scope of the project or how it will be permitted.
- Comment 25:** (B)(2)(b) We request the addition of the following language "... or other appropriate wetland evaluation methodology acceptable to the director per OAC 3745-1-54." (ODOT)
- Response 25:** The language in the draft rule is intended to reflect the language in ORC 6111.30(A)(2). Ohio EPA maintains that the draft rule and ORC 6111.30(A)(2) allows the director some discretion to consider other methods of wetland evaluation as long as they are consistent with the Ohio Rapid Assessment Method. Therefore, to maintain consistency between the law and draft rule, it is not deemed necessary to include the language from OAC 3745-1-54.
- Comment 26:** (B)(2)(b) says that "...a wetland characterization analysis is required that is consistent with the Ohio Rapid Assessment Method..." And then it says that "Complete and accurate 10 page forms shall be completed and submitted in accordance with the procedures..." As we understand, this rule first says that a wetland characterization analysis is needed but it does not have to be the ORAM method. But then the rule requires submittal of the ORAM 10-page form. This needs clarified so that only if the ORAM is used, the 10-page forms need submitted. (Davey Resource Group)
- Response 26:** In response to this comment, 3745-32-03(B)(2)(b) has been changed to:

“For each wetland within a project boundary, a wetland characterization analysis consistent with "Ohio Rapid Assessment Method for Wetlands v. 5.0, February 1, 2001.” The Ohio Rapid Assessment Method protocol is available on the Ohio EPA website at <http://www.epa.ohio.gov/dsw/401/ecology.aspx>. The Ohio Rapid Assessment Method shall include complete and accurate forms, including the background information, scoring boundary worksheet, narrative rating, quantitative rating, and wetland categorization worksheets completed and submitted in accordance with the procedures outlined in the Ohio Rapid Assessment Method manual.”

**Comment 27:** (B)(2)(b) This is an incomplete sentence, but more importantly, the revised requirement states that the 10 page “long form” be completed... I brought this up during the stakeholder meetings last summer, in that what is the point of having and using the ORAM scoring method, if you (OEPA) are requesting the long form to be used. Doesn’t make sense to me; the point of having the ORAM is to quickly assess and score out the resource, and that the long form is used when a wetland scores in a “gray zone.” In preparing both the ORAM and long form for the same resource, the differences between the two scores usually falls into a standard deviation of error; which is commonly acceptable. (Buckeye Mineral Services, Inc.)

**Response 27:** The “long form” is not used when a wetland scores in a gray zone. The ORAM manual states that users should assume the higher category if the score falls into a scoring gray zone or perform a nonrapid functional and/or biological assessment of the wetland. The ORAM form includes the background information, scoring boundary worksheet, narrative rating, quantitative rating, and wetland categorization worksheets. The ORAM manual states that failure to properly complete all questions may result in the incorrect categorization of the wetland. Therefore, all sections must be completed and submitted. This was mandated by the decision in Oxford Mining Company, LLC v Nally, 27 N.E. 3d, 920 (Court of App. Tenth District, Jan. 22, 2015). The long form and ORAM form are one in the same; therefore there is no difference between the two scores. The language in 3745-32-03(B)(2)(b) has been changed to “...complete and accurate forms, including the background information, scoring boundary worksheet, narrative rating, quantitative rating, and wetland categorization worksheets, shall be completed...” to be consistent with the ORAM manual.

**Comment 28:** (B)(2)(c) Ohio EPA’s requirement for assessments of impacted wetland and streams may not meet the factual determination requirements in 40 C.F.R. 230.11 especially for headwater streams. (U.S. EPA, Region 5)

**Response 28:** Please see Response 23.

**Comment 29:** 3745-32-03(B)(2)(c) "data sufficient to determine the existing aquatic life use"  
We are providing comments that emphasize the need to accept data only from qualified data collectors, such as established under the Credible Data Program (ORC 6111.50-6111.56). (TNC)

- Comment 30:** (B)(2)(c) What data will be sufficient to determine the existing aquatic life use? Will the public be privy to data collected that could alter the ALU? How will unpublished data which is not reflected in rule be distributed to the public and applicants in the future? (ODOT)
- Comment 31:** (B)(2)(c) – Oxford objects to this rule as it is unclear as to what the “sufficient data” is that will be required. Also, this rule is objected to because in most instances Aquatic Life Use Determinations are too timely and costly to perform putting a significant burden on the company. (Westmoreland Coal Company and Oxford Mining Company, LLC (Oxford))
- Comment 32:** (B)(2)(c) Ohio EPA should take this opportunity to clarify what constitutes "sufficient data." Leaving this term vague grants unfettered discretion to Ohio EPA employees to require different amounts and types of data from applicants, leading to inconsistent requirements and potentially inconsistent permitting determinations. (Ohio Coal Association)
- Comment 33:** (B)(2)(c) In regards to the requirement of submitting data "sufficient" to determine existing aquatic life use, Williams respectfully recommends that the agency provide clarification on what type of data would be considered sufficient. This would be best achieved by either defining it within the language or referencing a prior clarification or definition within an Ohio Administrative Code. (Williams Companies, Inc.)
- Comment 34:** Regarding 3745-32-03 B(2)(c) and the requirement to provide “data sufficient to determine the existing aquatic life use”: Can it be further clarified through a reference or citation what data will be considered “sufficient”? (Civil & Environmental Consultants, Inc.)
- Comment 35:** (B)(2)(c) OEPA should remove its proposed amendment language in 3745-32-03(B)(2)(c) that would require submission of “data sufficient to determine the existing aquatic life use” for streams that lack aquatic life use designations. This proposed language is inappropriately ambiguous and, in practice, could allow applicants to submit virtually anything. There is no indication here as to the quality and quantity of data required. Instead, OEPA should require that applicants employ a Use Attainability Analysis (UAA) and submit the resulting data. We strongly recommend that Ohio EPA continue to rely on biological criteria for defining existing uses of streams. These points are critically important. Regulated parties should not be presented with the moral hazard entailed by the opportunity to themselves effectively define data submission requirements for aquatic life use determinations. (OEC et. al.)
- Responses 29-35:** The language in the draft rule is the same language contained in ORC 6111.30. Ohio EPA will be refining the data sufficient to determine the existing aquatic life in a subsequent rulemaking, with stakeholder outreach to begin this summer, regarding stream existing use and stream mitigation. In the interim, Ohio EPA’s current practice with regard to evaluating streams proposed for impact as part of a 401 application is to evaluate each project on a case by case

basis when making permitting decisions. Dependent upon the resources proposed for impact, this process includes the evaluation of habitat, biological, and chemical data submitted by applicants or collected by the Agency.

- Comment 36:** (B)(2)(d) Long term protection is not always attainable for all mitigation projects. We suggest that language be added to allow for concessions for specific projects on a case-by-case basis. These allowances are critical in securing mitigation that may be more ecologically beneficial. If options are ruled out based solely on the long-term protection requirement, which is not always a guarantee of protection 100% of the time, there could be situations where the most suitable and practicable mitigation project is discounted. (ODOT)
- Response 36:** The language as written does allow for review and approval of long term protection on a case-by-case basis as it no longer requires perpetuity and allows for real estate instruments or other available mechanisms to protect the mitigation site long term in accordance with the federal statute.
- Comment 37:** (B)(2)(d) Oxford objects to the proposed legal mechanism part of this rule as it is burdensome to provide a legal mechanism when only long term protection is required. Oxford suggests that the Clean Water Act affords any mitigated resource the same protection as a natural resource and therefore should be considered long term protection. (Oxford)
- Response 37:** The reference to the “legal mechanism” has been removed and the language has been revised to be consistent with the language in ORC 6111.30(A)(4) which requires a “...real estate instrument or other available mechanism for protecting the property long term.”
- Comment 38:** (B)(2)(d) R.C. 6111.30(A)(4) requires that a Section 401 Application include: “[a] specific and detailed mitigation proposal, including the location and proposed real estate instrument or other available mechanism for protecting the property long term .... ” Ohio Coal is unsure why Ohio EPA has changed this requirement to include a “legal mechanism.” This section of the Draft Rules should be changed to mirror R.C. 6111.30(A)(4). (Ohio Coal Association)
- Response 38:** The reference to the “legal mechanism” has been removed and the language has been revised to be consistent with the language in ORC 6111.30(A)(4) which requires a “...real estate instrument or other available mechanism for protecting the property long term.”
- Comment 39:** OEPA must require the perpetual protection of mitigation property in order to comply with the clear intent and spirit of the federal mitigation rule. To that end, OEPA should eliminate the phrase “long term” from proposed 3745-32-03(B)(2)(d) and replace with the phrase “in perpetuity.” In the notes accompanying promulgation of the final federal wetland mitigation rule (40 CFR 230.97), the Army Corps and USEPA made clear that, “The goal of the rule is to ensure permanent protection of all compensatory mitigation project sites.”

Federal Register, Vol. 73, No. 70, April 10, 2008, pp. 19645-46. The agencies noted that, despite the rule's goal of permanent protection, they chose the "long-term protection" language for the rule because "in some states perpetual protection cannot be required, because the real estate or legal instruments may be in effect for a limited number of years." *Id.* Ohio's property laws do not prohibit perpetual protection. Consequently, perpetual protection for mitigation parcels should always be required by OEPA. When a high-quality wetland or stream is destroyed, it is gone forever; the protection of mitigation parcels should be just as permanent. (OEC et. al.)

**Response 39:** The language in the rule is mirroring the language in ORC 6111.30(A)(4) which was changed in 2015 to more closely align with the federal requirements. While the notes of the federal mitigation rule contend that the goal is to ensure permanent protection, the notes also indicate that mitigation located on public lands may require alternative mechanisms for site protection. The federal mitigation rule allows for flexibility in long term protection, and this rulemaking intends to allow the same flexibility at the state level.

**Comment 40:** 3745-32-03(B)(2)(d) "protecting the property long term" We note that both in-lieu fee programs and mitigation banks are required to provide protection of restoration projects in perpetuity. The rule change would appear to be designed to allow permittee-responsible mitigation to occur at sites where it is possible that the off-set in ecological function could eventually be lost. It could be argued that the proposed change also creates two standards of ecological offset. We therefore oppose this wording change. (TNC)

**Response 40:** In-lieu fee programs and mitigation banks are approved and regulated by the Interagency Review Team in accordance with the federal regulations in 40 CFR 230 and 33 CFR 332.8. Mitigation Banks and In-lieu fee programs are required to provide real estate instruments, management plans, or other long-term mechanisms to ensure long term protection of the mitigation site. This is the same standard that permittee-responsible mitigation sites are held to under the federal regulation and the draft rule.

**Comment 41:** (B)(2)(e) ORC 6111.30 only says "site photographs". Restricting photographs to the dates of May 1<sup>st</sup> – September 30<sup>th</sup> is not likely going to be feasible in all situations. Project schedules may not allow for field work to be conducted during this time frame. The USACE regional supplements allow for wetland delineations to be conducted any time of year as long as there has not been significant snowfall. PHWH methodologies can be conducted any time of year as long as the streams are not frozen. Since these are the methods that will often be used to provide the information to Ohio EPA in the 401 application, then why is Ohio EPA restricting photographs to the dates of May 1<sup>st</sup> – September 30<sup>th</sup>? The application should be as accommodating as possible within the confines of the methods used to collect the necessary data on aquatic resources. This will help to reduce project schedule and implementation conflicts. ODOT proposes removing "from May 1<sup>st</sup> – September 30<sup>th</sup>." (ODOT)

- Comment 42:** Regarding 3745-32-03 B(2)(e) that “High resolution digital site photographs for each water of the state and adjacent buffers taken while facing each of the four cardinal directions from May 1st - September 30th”: If restricting the time of year is necessary, we recommend extending the window at least into April and October. Wetland assessments are routinely performed during these months and photos taken of riparian buffer areas in peak of the growing season are often obscured by vegetation. Also, requiring four photos for each stream or wetland seems excessive if one or two well representative photos are taken. It seems more reasonable to make this a recommendation rather than a requirement, allowing the reviewer of the application to determine whether the data provided is adequate. Also, it should be clarified what photographic documentation of “adjacent buffers” means, i.e. that the photographs provided are taken from a representative vantage point that depicts the water and the buffer to the broadest extent practical, or that four photographs each of the water and the buffer are required. (Civil and Environmental Consultants, Inc.)
- Comment 43:** (B)(2)(e) Oxford objects to this rule as it is unreasonable, timely, and costly. Pictures of resources are taken during a delineation in accordance with Corps delineation and regional supplemental manuals. It is unclear as to what these extra pictures will provide to Ohio EPA as sometimes these resources are so small that the pictures are very unclear as to what one is even looking at. Therefore, this would simply be a costly and timely extra exercise that further burdens Oxford. OEPA is welcome to take as many photos as they would like during a site review. (Oxford)
- Comment 44:** (B)(2)(e) Ohio Coal objects to the inclusion of this provision as overly burdensome and duplicative. Pictures of waters of the state on a site are already taken in accordance with Army Corps procedures during the delineation process. Additional photographs have little to no value and instead serve to add costs to the applicant. Ohio EPA already conducts site visits during the application process to many (if not all) of Ohio Coal's members. Nothing prevents Ohio EPA from taking the exact photographs required at that time. (Ohio Coal Association)
- Comment 45:** This email serves to provide comment regarding the Agency’s proposed revision of OAC 3745-32-03. Specifically, EMH&T wishes to comment on 3745-32-03 (B)(2)(e), which requires as part of the 401 application submittal of “High resolution digital site photographs for each water of the state and adjacent buffers taken while facing each of the four cardinal directions from May 1st-September 30th.”

It is our recommendation that taking photographs from “each of the four cardinal directions” not be made an absolute requirement. Often the features in question are very small and requiring four photographs for each one would only serve to increase the level of effort associated with the photograph log, without providing additional useful information.

Additionally, we strongly recommend that the requirement that the photographs be taken between May 1st and September 30th be removed. Depending on weather conditions, the growing season during which wetland delineations can be conducted (when the photographs are collected) may begin as early as March/April and extend through October/November. Requiring photographs to be taken between May and September could result in significant project delays. For instance, if we conduct a delineation on October 1, this requirement could postpone a 401 submittal by 6 months or more, simply to obtain photographs. (EMH&T)

- Comment 46:** (B)(2)(e) Four photographs are not needed for all wetlands, facing each of the four cardinal directions. Many wetlands are fairly small so that this quantity of photos is unnecessary and redundant in many cases. In other cases, this may not capture all characteristics of the wetland. We would suggest that a photograph should be taken for each plant community within a wetland. (Davey Resource Group)
- Comment 47:** (B)(2)(e) Photographs are being required to be taken between May 1st and September 30th. There is no precedent for this, nor are these limitations identified in the ORAM manual. This photograph timeframe doesn't even extend through the growing season. This seasonal restriction will delay projects and will add cost to most projects, as an additional site visit will be needed if the original fieldwork is done in the other seven months of the year. Further, this will cause a delay for most projects, waiting for the five month photograph window. Other than snow cover, there should be no limitations for when photographs are taken. (Davey Resource Group)
- Comment 48:** (B)(2)(e) Weather permitting, an opportunity may arise that would allow for photos to be taken throughout the entire calendar year that would meet Ohio EPA requirements. Williams respectfully requests that Ohio EPA allow year-round photographs to be submitted for each wetland proposed for impact. However, if restricting the time of year is necessary, we recommend extending the window beginning in April and extending through October. Wetland assessments are routinely performed during these months and photos taken of riparian buffer areas in the peak of the growing season are often obscured by vegetation. Williams also requests that Ohio EPA consider allowing the reviewer of the application to determine whether the provided photographic data is adequate, instead of requiring four photos of the area, when one or two would sufficiently meet the intent of the requirements.
- Williams also recommends Ohio EPA provide clarification on the photographic requirements of documenting "adjacent buffers" in order for the applicant to effectively meet the requirement and provide the agency with the documentation requested. (Williams Companies, Inc.)
- Comment 49:** (B)(2)(e) This item states that any application for a 401 certification shall include site photographs for each water and adjacent buffer taken from May 1<sup>st</sup> - September 30<sup>th</sup>. This timeframe is not consistent with the timeframe for

conducting stream and wetland assessments, which according to the relevant field manuals is much broader. The small window for taking photographs creates a burden on the regulated public by significantly restricting the timeframe for conducting delineations and field assessment or requiring a second site visit to take photographs from May 1<sup>st</sup> - September 30<sup>th</sup>. (Coldwater Consulting, LLC)

**Comment 50:** (B)(2)(e) NEORSD is most concerned with the addition of section 3745-32-03(B)(2)(e), which requires that high resolution digital photographs of the area be taken between May 1st and September 30th and submitted with the application for 401 water quality certification ("Application"). NEORSD believes that requiring an applicant to submit photographs from such a limited timeframe is unduly restrictive and not in line with current state or federal policy.

The purpose of the Section 401 water quality certification program is to require anyone discharging dredged or fill material into Ohio waters to obtain a section 401 water quality certification from Ohio EPA, in addition to a section 404 permit from U.S. Army Corps of Engineers ("Army Corps"). The 401 certification ensures that projects meet Ohio's water quality standards, in addition to meeting the Army Corps' standards. For projects that involve wetlands, an applicant must submit information documenting the status and characterization of the wetland. Such analysis must be done consistent with Ohio EPA's Ohio Rapid Assessment Method for Wetlands v. 5.0 ("ORAM"). Presumably, submission of the ORAM-style analysis will provide Ohio EPA enough information about the quality of the wetland to allow Ohio EPA to ensure that the 401 water quality certification, if granted, will be protective of Ohio's waters.

The Draft Rule proposes to add a photograph requirement and require that these photographs be taken from May 1st - September 30th. This timing restriction is not found in the ORAM manual or Army Corps wetland delineation guidance. NEORSD acknowledges the importance of performing wetland delineations during the growing season (typically April through October); however, NEORSD does not understand the rationale for imposing such a limited timing restriction on the photograph requirement, especially since other rules and guidance on wetland and stream delineation do not contain this timing restriction.

While the ORAM manual states that the time of year when a wetland rapid assessment is performed may affect a wetland's ultimate categorization, the ORAM manual does not mandate that assessments be performed during certain months. The ORAM manual states that wetland assessments obtained during the growing season are most reliable, but provides the growing season as a suggested timeline for conducting an ORAM assessment; it is by no means mandated. This suggested timeframe is longer than that proposed in the Draft Rules. Even the 1987 United States Army Corps of Engineers Wetland

Delineation Manual ("Army Corps Manual") does not require wetland delineation to occur only during the months of May - September. <sup>1</sup>

In the information sheet prepared in conjunction with the Draft Rules, Ohio EPA states that it is proposing the revisions in the Draft Rules so that Ohio's rules will be more consistent with Army Corps' Section 404 regulations and procedures. However, addition of the May 1<sup>st</sup> - September 30<sup>th</sup> time limitation for photographs would make Ohio EPA's 401 program inconsistent with Army Corps' Section 404 regulations and procedures. The Army Corps Section 404 regulations and procedures do not require submission of high resolution digital photographs taken from May 1<sup>st</sup> - September 30<sup>th</sup>.

With respect to requiring photographs of a stream from May 1<sup>st</sup> - September 30<sup>th</sup>, this is unnecessarily restrictive because the time of year has no bearing on the results of a stream delineation. Neither the Ohio Qualitative Habitat Evaluation Index ("QHEI") nor the Headwater Habitat Evaluation Index ("HHEI") mandates performing evaluations during a particular time of year. Likewise, there is no reason that photographs for 401 certifications affecting a stream must be taken from May 1<sup>st</sup> - September 30<sup>th</sup>. There should be no time restriction for when these photographs must be taken.

NEORSD is concerned that requiring photographs from the May 1<sup>st</sup> - September 30<sup>th</sup> timeframe could cause significant delays to projects that would result in additional costs to ratepayers or risks to infrastructure without any attendant environmental benefit. As such, NEORSD suggests that the May 1<sup>st</sup> - September 30<sup>th</sup> photograph timeframe be specified as a preferred timeframe for a 401 certification application when a wetland is involved, but not a regulatory requirement. NEORSD also suggests that there be no time restriction for photographs when the 401 certification is proposed for a stream or other water of the state. The director can, in his or her discretion, require additional photographs if necessary to review and approve the Application. (NEORSD)

**Comment 51:** (B)(2)(f) Oxford objects to this rule as this could create a rather extensive time constraint for completeness of an application. Noted from past experience while submitting a request for written comment to ODNR and USFWS that both agencies are very understaffed and it takes a very long time to receive any type of comment if any. Also note that Threatened and Endangered species are also covered under the Section 404 review as well as during the SMCRA review process; therefore, further duplication is unnecessary. However, Oxford is willing to contact these agencies for written comment and provide comments to OEPA during the technical review process if any are received as has always been done in the past. (Oxford)

**Responses 41-51:** As a result of the comments received the language in 3745-32-03(B)(2)(e) will be changed to "A minimum of four high resolution color photographs taken while facing each of the four cardinal directions of each wetland proposed for impact. A minimum of three high resolution color photographs taken while facing upstream of the proposed impact area, downstream of the proposed

impact area, and one close up which clearly depicts the substrate composition and size for each stream proposed for impact. A minimum of three high resolution color photographs for all other waters of the state proposed for impact. Photographs must accurately depict the quality of the water of the state and may not include a majority of dying or dead vegetation and excessive cover due to seasonal conditions that vegetation and substrates cannot be observed, such as leaf litter, snow, or ice. Photographs deemed to be insufficient of representing the water of the state will be required to be retaken once seasonal conditions are appropriate. Photographs shall be clearly labeled with the name, direction, and date."

**Comment 52:** (B)(2)(f) Ohio EPA's small change to this section of the Draft Rules would significantly impact applicants. RC. 6111.30(A)(7) requires that a 401 applicant submit documentation confirming that it has "requested comments from [ODNR] and [USFWS] ...." (emphasis added). Ohio EPA's proposed Draft Rules require that these written comments actually be submitted along with the application.

Ohio Coal's members have no control over how long and whether ODNR and/or USFWS elect to comment on a 401 Application. Requiring the submitting of the actual comments puts applicants in the impossible position of waiting indefinitely for comments that may or may not arrive at all, much less in a timely fashion that allows for the timely submittal of an application. This section of the Draft Rules should be changed to match R.C. 6111.30(A)(7). (Ohio Coal Association)

**Response 52:** In response to this comment, the language in 3745-32-03(B)(2)(f) has been changed to mirror the language in ORC 6111.30(A)(7) which requires adequate documentation that comments have been requested by the applicant from ODNR and USFWS.

**Comment 53:** Section 3745-32-03(B)(2)(h) refers to an "applicant's investigation report of the waters of the United States in support of a federal license or permit application concerning the project." NEORS D has not been able to locate the definition of "investigation report" in the Draft Rules and requests that Ohio EPA specify what an "investigation report" is and what it includes. (NEORS D)

**Response 53:** An investigation report is the delineation report that an applicant prepares in accordance with Corps 1987 Wetland Delineation Manual and appropriate regional supplement. The report is submitted to the Corps in order to receive a jurisdictional determination from the Corps in accordance with 33 CFR 325 and 331.

**Comment 54:** (B)(2)(i) Is email an acceptable form of notification from the USACE that a project will be authorized under a general permit? (ODOT)

**Response 54:** The communication from the Corps needs to explicitly state that the project will be authorized under a general permit to allow Ohio EPA to make its permitting decision. In some cases an email will be sufficient.

**Comment 55:** OEPA proposes to allow coal mining operations (“Applicants regulated under Chapter 1501:13 of the Administrative Code”) to submit alternate, consolidated application procedures. See proposed 3745-32-03(B)(4). In and of itself, a consolidated application system could be perfectly acceptable. However, OEPA must specify in rule that any alternate, consolidated application procedures must require coal applicants to submit all information that would otherwise be required under a normal 401 application process, including UAAs for undesignated streams. Without this requirement specified in rule, applicants and regulators would be confronted with a moral hazard whereby important 401-related information could be eliminated from the consolidated process. (OEC et. al.)

**Response 55:** The intention of this language is to recognize that there is significant overlap in the issues reviewed by Ohio EPA and ODNR in the context of proposed mining activities. This will enable Ohio EPA and ODNR to develop consolidated applications that will allow both agencies to gain efficiencies in reviewing information that would be pertinent to both regulators. The intention is not to create different permitting criteria or evaluation processes for proposed impacts. All required information for current 401 applications will be required in any subsequent consolidated applications. Therefore, this provision will remain as written.

**Comment 56:** Section 3745-32-03(C)(1) requires the director to notify an applicant, within 15 days of when the application is received, whether the application is complete. NEORS D supports the addition of this language to the Draft Rules and appreciates Ohio EPA's commitment to timely notification of the applicant of the status of its Application. (NEORS D)

**Response 56:** No response necessary.

**Comment 57:** (C)(1)(a) Has it been standard practice to stop review of an application because one item was omitted? We disagree with this method and while we understand that all components must be submitted to review a complete application, review should continue in the interim. (ODOT)

**Response 57:** The draft rule states that no further *processing* of the application shall take place. The processing of an application is not equivalent to the review of an application. If Ohio EPA has an incomplete application, the application may still be reviewed by the 401 coordinator, but the director cannot make a decision and take an action on the application until it is deemed complete.

**Comment 58:** (C)(1)(b) Sixty days to provide additional information is possible in most cases, however, for large, complex transportation projects we may need more time to provide additional information that may require a change to the scope of work

and authorizing additional funds. Concessions should be made for these instances where work will take longer than 60 days. (ODOT)

- Response 58:** The language in the draft rule says the director *may* return the incomplete application. This does not mean that that director *will* return all incomplete applications after 60 days. If an application remains incomplete for longer than 60 days, the facts will be presented to the director to make a case specific determination to return the application or retain the application. If applicants need to extend this deadline, they should submit to the agency an extension request which explains the deficiencies and reasons why the extension is necessary.
- Comment 59:** Regarding 3745-32-03 C(1)(b) that “If the applicant fails to provide the information within sixty days after the director's receipt of the application and a Corps public notice regarding the application for a 404 permit has not been published for the project, the director may return the incomplete application and take no further action on the application”: Can it be clarified that an extension can be granted to this sixty day deadline? (Civil and Environmental Consultants, Inc.)
- Response 59:** Please see Response 58.
- Comment 60:** (C)(1)(b) Williams respectfully request that Ohio EPA modify the language of this subsection and include a provision that allows an applicant to request a sixty (60) day extension to submit required information to the agency. This will ensure that the agency is not burdened with repeating application review steps on an application that has already been submitted once before. Allowing an applicant the opportunity to extend the timeframe for submittal will not only streamline the process but will also give an applicant the opportunity to fix an application issue that may have been accidentally or inadvertently overlooked. (Williams Companies, Inc.)
- Response 60:** Please see Response 58.
- Comment 61:** (D)(4) Short-term impacts are possible and reasonable from construction activities and should be removed from this requirement. (ODOT)
- Response 61:** Ohio EPA understands that short term impacts to water quality may result during construction activities. This provision states that the director *may* deny an application based on any impact which results in adverse impacts to water quality. These impacts may result from adverse short term impacts such as excessive sedimentation from poor sediment and erosion control implementation concurrent with construction and/or long term impacts such as excessive loss of habitat. It does not say that the director *will* deny an application. It gives the director the authority to make a discretionary call on projects that may adversely impact water quality. Generally, short term impacts related to construction activities are often temporary and would rarely result in an adverse impact.

- Comment 62:** NEORSRD also supports Ohio EPA's commitment to take action on an Application within 180 days of receipt of a complete Application, as stated in section 3745-32-03(E)(1) of the Draft Rules. In fact, NEORSRD recommends that this language also be added to section 3745-32-03(F) (Modification) so that the language reads as follows (note that suggested language is underlined):  
"An applicant seeking to modify a 401 water quality certification shall notify Ohio EPA in writing, setting forth a description of the proposed modifications and the reasons therefore. The director shall take action on a request for a 401 water quality certification modification request within one hundred eighty days of receipt of a modification request. The director may approve, approve with conditions, or deny any request for modification, or require the applicant to apply for and obtain a new 401 certification if the scope or purpose of the project is changed beyond that authorized in the original certification."  
(NEORSRD)
- Response 62:** Currently, Ohio EPA takes an action on most 401 modification requests within less than 180 days from receiving the request. However, in other instances, the complexity of the issue or lack of necessary information from the applicant to make a timely decision may necessitate more than 180 days to process. Ohio EPA will continue to evaluate whether the modification process requires further refinement. At this time, Ohio EPA needs some flexibility when making permitting decisions.
- Comment 63:** (E)(1) Oxford suggests that the following be added to this rule "If the director does not take action within one hundred eighty days of receipt of a complete application, the applicant is automatically issued a 401 Certification for their preferred alternative". (Oxford)
- Comment 64:** (E)(1) Ohio Coal supports this addition in the Draft Rules. However, Ohio Coal believes that should Ohio EPA not take action within 180 days, the applicant should automatically be issued a 401 Certification for the preferred alternative. This gives Ohio EPA an actual incentive to abide by the 180 day requirement. (Ohio Coal Association)
- Responses 63 and 64:** The language in 3745-32-03(E)(1) is taken directly from ORC 6111.30(G). Allowing automatic issuance of a 401 WQC after the 180 day deadline would not be in accordance with ORC 6111.30, OAC 3745-1-05, and OAC 3745-1-54. Under the federal statute, Ohio EPA has 365 days from the date of the Corps public notice to take an action on a 401 WQC. If Ohio EPA does not take an action within 365 days, the 401 WQC is considered waived by the Corps.
- Comment 65:** (F)(2) If the director decides to modify a 401 certification absent the request of the 401 certification holder because they conclude laws and rules have been violated, what is the process that the certificate holder will be made aware of this prior to their permit being modified and/or revoked? Will there be steps taken by the Ohio EPA in advance to allow the certificate holder to modify their actions first? (ODOT)

- Response 65:** In response to this comment and potential legislative changes to ORC 6111.03(P), this provision has been removed from the draft rule.
- Comment 66:** (G)(2) Oxford objects to this rule as it is unclear because there is no paragraph (E)(2)(b) of this rule. With that being said Oxford does suggest that the original applicant be responsible for the 401 certification until such time that OEPA receives the proper request from both parties. This would better fit the company and industry time frames instead of waiting until a revised 401 could be written and produced by OEPA. (Oxford)
- Response 66:** The incorrect cross-reference mentioned in the above comment has been changed to (G)(1). A transfer of a 401 WQC does not require a revised 401 WQC to be issued. The original 401 WQC and corresponding terms and conditions are still valid when the certification is transferred. As a result of the comments received, the language in 3745-32-03 (G)(2) will be changed to "...and an official notification of transfer is issued identifying the new holder of the certification."
- Comment 67:** This subsection, as currently drafted, is ambiguous and also leaves too much responsibility in the hands of the 401 Certification transferor. First, this subsection references new Ohio Adm. Code 3745-32-03(E)(2)(b), which does not exist in either current regulation or the Draft Rules. Second, transfer of responsibility should happen when Ohio EPA receives a notification about the transfer from both parties, not when a new 401 Certification is issued by Ohio EPA. This is more in line with the NPDES and Air PTIO transfer provisions, neither of which require the issuance of a revised permit before responsibility is transferred. See Ohio Adm. Code 3745-33-04(E); 3745-31-07(E). (Ohio Coal Association)
- Response 67:** Please see Response 66.
- Comment 68:** There is one provision in the draft Ohio EPA rules that we believe should be changed, however. The Association is concerned with the draft language for the Director's authority to revoke an approved WQC under Ohio Admin. Code § 3745-32-03(H)(1) based on "false or misleading information at the time the application was originally submitted to Ohio EPA." The terms in this authority are vague and confusing. Sometimes wrong or false information is submitted inadvertently, such as wrong latitude and longitude coordinates or the acreage for a project could be off. The word "misleading" is vague and subject to many interpretations.
- We suggest the wording be changed to the following:
- (H) Revocation.  
(1) The director may revoke a 401 certification if the director concludes that any applicable laws or rules have been violated, or he determines the 401 certification approval was based on information submitted by the applicant to

intentionally misrepresent relevant information at the time the application was originally submitted to Ohio EPA.

In addition, the current rule seems to imply the director's revocation could occur "at any time" even after many years have gone by and/or mitigation has been completed and accepted. The director's authority to revoke an approved certification should be subject to the applicable statute of limitations period under R.C. § 3745.31, and the WQC rule should not conflict with or supplant those provisions. We request the "at any time" text be removed, or add a sentence to the end of (H) (1) that the director's authority to revoke an issued 401 certification is subject to the applicable statute of limitations. (Ohio Oil and Gas Association)

**Response 68:** For those instances, in which the director chose to officially move to revoke a certification, the revocation would be issued as a proposed action and the certification holder would be afforded an adjudication hearing before any final action of the director would be issued. Tying the timeframe to act to the statute of limitations for civil penalties set forth in ORC 3745.31 would not be appropriate as that very authority is limited to civil penalty issues and recognizes that the need of the Agency to deal with injunctive relief should not be limited in order to ensure that public health and the environment is adequately protected.

**Comment 69:** (I)(2) Under the extension process, can an applicant/certificate holder apply for both an extension and modification at the same time? It appears that a modification can be granted per section (F) Modification, with no restrictions on the potential increase in impacts, but in Section (I) Expiration and Extension, the only time a permit can be extended is if there are no additional impacts. Does the applicant have to file a separate modification before asking for an extension? (ODOT)

**Response 69:** In response to this comment the statement "...or a 401 modification in accordance with the criteria established in paragraph (F) of this rule" will be added to the final sentence in 3745-32-03(I)(2).

**Comment 70:** With respect to the language in section 3745-32-03(I)(2) regarding the 401 water quality certification remaining valid as long as the federal license or permit is extended, so long as no additional water quality impacts beyond those authorized in the original 401 water quality certification will result, NEORSR suggests that this language be revised to clarify that the original 401 water quality certification also includes the original as modified 401 water quality certification. NEORSR suggests the following language: "A 401 certification shall remain valid if the applicable federal license or permit is extended so long as no additional water quality impacts beyond those authorized in the original or approved modified 401 certification. If additional water quality impacts beyond those authorized in the original or approved modified 401 certification are proposed, the applicant must apply for a new 401 certification in accordance with the criteria established in paragraph (B) of this rule." (NEORSR)

**Response 70:** In response to this comment, the language referenced in the above comment in 3745-32-03(I)(2) has been changed to include "...original or modified 401 certification..."

**Comment 71:** Regarding 3745-32-03 K "Conditions of certification": Can it be clarified that the conditions be proffered to the applicant for review prior to issuance of the final permit, so that the applicant may comment on terms, conditions, and tests imposed? (Civil and Environmental Consultants, Inc.)

**Response 71:** It is Ohio EPA's practice to send a draft 401 WQC to all applicants for review prior to the issuance of the certification. During this review, applicants may comment on the terms and conditions of the draft certification.

**Comment 72:** (K)(2) Oxford objects to this rule as this could place a costly burden as well as an extensive time constraint on the company especially with the performance of bioassays and biological monitoring. Oxford already performs extensive chemical analysis as well as habitat assessments on each site and is more than willing to provide this information to OEPA. Also it is unclear as to why the 401 Certification Rules are concerned with the protection of Human Health. Although, this should be a concern, it shouldn't be one of a program that is designed for the regulation of the placement of dredged or fill material below an ordinary high water mark. This concern seems better fitted in another section of the rules that deals with these issues. (Oxford)

**Comment 73:** This provision gives the director the authority to require environmental quality testing for the purpose of protecting human health. While Ohio Coal does not dispute that protection of human health is of paramount importance, it is also inappropriate for consideration under the 401 Certification program. This subsection also continues to grant the director unfettered discretion to require that an applicant perform costly bioassays and/or biological monitoring. Ohio Coal believes that these requirements are unnecessary and overly costly, and that chemical monitoring to ensure compliance with Ohio's water quality standards will be protective of aquatic life in the waters of the state that could be impacted by the activities of Ohio Coal's members. (Ohio Coal Association)

**Responses 72 and 73:** OAC 3745-1-05(C)(5)(c) gives the director the authority to consider the anticipated impact of the proposed lowering of water quality on human health. This provision currently exists in OAC 3745-32-05(F). Therefore, Ohio EPA maintains that the director has the authority to require environmental quality tests to ensure that the project does not result in degradation to water quality that could affect human health.

**Comment 74:** (M)(1) It is unclear when this situation would/could be applicable. If a proposed activity/project meets the existing 401 certifications for USACE general permits, then why would Ohio EPA ever deny or waive an action? Additionally, if a project meets the existing 401 certifications, then Ohio EPA would not review the project since there would not be an application. (ODOT)

**Response 74:** This provision is intended to apply to the issuance of a general 401 WQC for a general permit issued by the Corps. The general permits are up for review every five years and Ohio EPA must make a decision on a new 401 WQC during the renewal period. This provision gives the director the authority to issue, deny, or waive action on a 401 WQC for a general permit during the renewal period and at any time during the effective period for the general permit.

**Comment 75:** (N) Please define “General certification”. Is this different from the 401 certifications on the Nationwide Permits or any regional permit? (ODOT)

**Response 75:** The 401 WQC for the Nationwide Permits is a type of general certification. The inclusion of general certifications in this rule is meant to explicitly give the director the authority to issue a general certification such as those which certify the Nationwide Permits, Regional General Permits, and Letters of Permission for Lake Erie.

#### **3745-32-05**

**Comment 76:** OEPA proposes to rescind existing OAC 3745-32-05, “Criteria for decision by director,” and to replace with similar and in some cases identical language in proposed 3745-32-03(D). As a general matter, we see no problem with consolidating rule language in this manner. However, some important provisions appear to have been lost in translation. In addition, some incorrect internal references have resulted. OEPA should restore the missing provisions and correct the now inaccurate internal references.

Specifically, the language in existing 3745-32-05(E) is now missing from the OAC per the proposed rescissions and amendments: “The director may impose such terms and conditions as part of a section 401 water quality certification as are appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of water quality.” This language helps to convey and clarify important authority on the part of the agency to protect Ohio’s water quality. This language should therefore be restored. Similarly, existing 3745-32-05(F) is missing from the proposed version and should be restored:

Prior to the issuance of a section 401 water quality certification or prior to, during, or after the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the state to ensure adequate protection of water quality, the director may require that the applicant perform various environmental quality tests including, but not limited to, chemical analyses of water, sediment or fill material, and bioassays.

Lastly, proposed 3745-32-03(D)(2), (3), and (4) include inaccurate cross-references to existing paragraph labels, e.g. “(C)(2),” rather than to paragraphs as they have been renumbered in this proposed version. (OEC et. al.)

**Response 76:** The cross-references mentioned in the above comment have been changed in 3745-32-03(D)(2),(3), and (4) to D(3), D(2), and D(1) and D(2), respectively. The language referenced in the above comment from the existing 3745-32-05(E) and (F) is contained in 3745-32-03(K)(1) and (2) in the draft rule.

**Comment 77:** 3745-32-05 "Criteria for decision by director" is to be rescinded, but there appear to be errors or missing information for the criteria proposed to be used in their place. For example, it appears that language in the existing 3745-32-05(E) is now missing from the proposed rule. (TNC)

**Response 77:** The language referenced in the above comment from the existing 3745-32-05(E) and (F) is contained in 3745-32-03(K)(1) and (2) in the draft rule.

**End of Response to Comments**