



## Ohio Contractors Association

May 23, 2006

Mr. Randy Bournique  
Ohio EPA, Division of Surface Water  
Lazarus Government Center  
P.O. Box 1049  
Columbus, OH 43216-1049

Dear Mr. Bournique:

Thank you for the opportunity to comment on the draft rule package on stream mitigation and wetland rules and Section 401 water quality certifications. The Ohio Contractors Association is a statewide trade association representing over 500 companies involved in heavy/highway construction and related fields.

We noted with interest in the agency's Fact Sheet on the proposed rules that the stated goals are to "improve the quality of and ability to evaluate mitigated wetlands and streams; ensure greater clarity and predictability regarding Ohio EPA's requirements; make the project review process more efficient, saving time; and bring Ohio's rules in line with current scientific knowledge." We do not believe these proposed rules will accomplish those goals, in fact, we think they will unnecessarily complicate and cloud the issues, making the process more costly and time-consuming. We also question whether or not these changes are based on accurate scientific facts and will add enhanced quality to mitigated wetlands and streams.

The definitions section causes concern. Specifically, the lack of a definition for "stream" leaves a great deal of uncertainty for the regulated community, and could work to the benefit of the Agency when determining which projects fall under these new rules. Also, the new definition of "public need" that excludes consideration of local gains is of great concern, as it does not consider the importance of local needs to the state as a whole, and the effects that compounded local needs have throughout the state. It gives the Agency too much leeway in defining what activities are worthy of the definition of "in the public need."



One of the areas of most concern to OCA is the requirement that mitigated wetlands must function at the same level as existing undisturbed wetlands of the same type. This stringent new standard seems to be based on anecdotal evidence of existing mitigation projects in Ohio – what science is it based on? It is unrealistic to expect wetland creation or enhancement to meet the same standard as natural, undisturbed wetlands. The state has been successful at pursuing its “no net loss” policy, but to establish a system in which newly created wetlands are expected to be able to function at the same exact level of natural wetlands is impractical.

Two more concerns are the requirement that the mitigation project be protected in perpetuity, and that if the mitigation does not perform as expected, a plan for adaptive management must be implemented. Property rights concerns come into play, as the perpetuity requirement could be perceived as a taking and therefore in violation of the U.S. and Ohio constitutions. It could also have the negative impact of stopping any kind of economic growth, as many years later a different use is desired for the site but the wetlands are locked in a perpetual state of limbo.

Also, the requirement in rule 3745-1-56 that stream anti-degradation and mitigation be based upon the Compensatory Mitigation Requirements for Stream Impacts in the State of Ohio is a concern, as that document has not gone through the public notice and comment procedures. We have the same concerns regarding habitat evaluations, as that process would now be limited by the use of four OEPA documents identified in the rules.

In closing, while we appreciate the opportunity to comment on these proposed rules, we have serious concerns about many of them and don't feel the rules meet the stated purposes for developing them. Implementation of these new rules will be costly and time-consuming, as many of them are unrealistic and could have a negative impact on our economy. The construction industry is one of the few economic forces that is currently driving this economy, and we urge you not to handicap the strength of the construction industry and the many jobs it brings to Ohio's economy.

Sincerely,



C. Clark Street,  
President