

A photograph of a forest stream with fallen logs and moss. The water is calm, reflecting the surrounding trees and sky. The scene is serene and natural.

Practical Components of the Process: Statutory Changes, Current and Proposed Program Improvements, Revisions to 401 Certification Rules (Chapter 3745-32)

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Overview of Rule Development Process

- Interested party draft is presented to solicit public comment and input on the suggested rule changes.
- Five public meetings are being held during the 60 day comment period.
- Comment period ends on April 17, 2006.
- At the end of the comment period comments will be reviewed and appropriate changes made.

Rule Process cont.

- After revision of the rule package the proposed rules will be filed with JCARR.
- A second public comment period will take place and a formal public hearing will be held.
- The final rule package will have to be approved by JCARR.
- Final rules will be adopted and effective.

Recent Wetland Program Statutory Changes

- Changes to Wetland Fees
(ORC SECTION 3745.114)
 - ◆ \$200 Application Fee
 - ◆ Review Fee based on the size and type of impact
 - ◆ Fees capped at \$5,000 for municipalities and \$25,000 for all others
 - ◆ Half of the total fee due at time of application

Statutory Changes cont.

- Review Fees - based on project size
 - ◆ \$500 per acre of wetland
 - ◆ \$5 - \$15 per linear foot of stream
 - ◆ \$3 per cubic yard of dredge/fill material

Statutory Changes cont.

- Changes to application process (ORC SECTION 6111.30)
 - ◆ The Clean Water Act allows state certifying agencies one year from the date of the USACE Public Notice to approve or deny 401 Water Quality Certification
 - ◆ Per Ohio Revised Code, the Division of Surface Water must act on an application within 180 days from the date of the complete application

Statutory Changes cont.

- **New Ohio EPA Responsibilities**
 - ◆ 15 Day Completeness Review
 - ◆ A draft of the certification must be provided to the applicant prior to issuance
 - ◆ Public comments must be provided to the applicant within 5 days of receipt

Statutory Changes cont.

- **New Applicant Responsibilities**
 - ◆ The applicant must submit a complete application to start the review process
 - ◆ The applicant must provide the Public Notice for receipt of the application and the public hearing (if applicable)

Statutory Changes cont.

- A complete application package consists of:
 - ◆ Application Forms
 - ◆ USACE Jurisdictional Determination
 - ◆ Wetland Characterization (if applicable)
 - ◆ Use Attainability Analysis (if applicable)
 - ◆ Specific Mitigation Proposal
 - ◆ Applicable Fees

Statutory Changes cont.

- A complete application continued
 - ◆ Site Photographs
 - ◆ Threatened & Endangered Species documentation
 - ◆ Alternative Analysis Information
 - ◆ Investigation of Waters of the US (if applicable)
 - ◆ USACE Public Notice (if applicable)

Statutory Changes cont.

- Applicant's Public Notice Requirements
 - ◆ The Antidegradation Rule requires that the public be provided the opportunity to comment on 401 certifications
 - ◆ Guidance and templates have been provided on the DSW web site
 - ◆ This should be completed within 21 days of an application being considered complete

Recent and Proposed Wetland Program Improvements

- Mitigation Clearinghouse
- District Office 401 Coordinators
 - ◆ NWDO, NEDO
- Mitigation Coordinator Position
- Digitization and update of NWI maps

Proposed Changes to 401 Rules in OAC Chapter 3745

- Administrative Rules for Processing 401 Applications located in OAC 3745-32
 - ◆ Adopted in 1982 and never amended
 - ◆ Updates needed to bring the rules in line with new statute and current science
- Antidegradation Rule located in OAC 3745-1-05

Proposed Changes to 401 Rules in OAC Chapter 3745-1-05

- Various wording changes are proposed to ensure consistency with ORC 6111.30.
- Lake Erie Public Hearings
Part (C)(3)(e) is modified to allow the Director of EPA discretion in holding public hearings on projects that impact Lake Erie and its shoreline.

Proposed Changes to 401 Rules in OAC Chapter 3745 32-01

■ Definitions

- ◆ Several definitions have undergone wording changes but no significant modifications have been proposed.

Proposed Changes to 401 Rules in OAC Chapter 3745-32-02

- **Applicability – two new rule provisions**
 - ◆ Section C allows for the issuance of a 401 certification for any loss of wetlands or impact to water of the state.
 - ◆ Section D provides a specific prohibition on activities requiring a 401 without a certification.

Proposed Changes to 401 Rules in OAC Chapter 3745-32-03

- 401 certification application requirements and procedures
 - ◆ Section B – application requirements are established and explained, consistent with ORC 6111.30
 - ◆ Section C – Criteria for decision by the director – allows the director to consider compliance with previously issued 401 certifications.

Proposed Changes to 401 Rules in OAC Chapter 3745-32-03 cont.

- Section D provides a 180 day time frame for issuance or denial of an application and allows the director to restart the clock if substantial revisions to the application are requested.
- Section E provides a mechanism for modifying and transferring a 401 certification.
- Section F provides the director authority to revoke a 401 certification if the application was based on false or misleading data.

Proposed Changes to 401 Rules in OAC Chapter 3745-32-03 cont.

- Section G sets a five year time limit on 401 certifications and provides a mechanism to extend the action for up to five more years.
- Section I includes language regarding the director's ability to waive a 401 certification.

Proposed Changes to 401 Rules in OAC Chapter 3745-32-03 cont.

- Section J provides the director specific authority to participate in mitigation banking and in lieu fee agreements
- Section K allows the issuance of an administrative order to serve as a 401 certification under emergency situations.
- Section L addresses general permits issued by the US Army Corps of Engineers.

Proposed Changes to 401 Rules in OAC Chapter 3745-32-04

- Plans, design and monitoring for mitigation
 - ◆ Section A – establishes a nine part plan to achieve mitigation goals
 - ◆ Section B – establishes a specific requirement for monitoring mitigation projects

Proposed Changes to 401 Rules in OAC Chapter 3745-32-04 cont.

- Comprehensive Mitigation Plan
 - ◆ Goals and Objectives
 - ◆ Baseline information on impact, mitigation, and reference sites
 - ◆ Mitigation site selection
 - ◆ Mitigation work plan

Proposed Changes to 401 Rules in OAC Chapter 3745-32-04 cont.

- Comprehensive Mitigation Plan cont.
 - ◆ Performance standards
 - ◆ Site protection and maintenance
 - ◆ Monitoring plan
 - ◆ Adaptive management plan
 - ◆ Financial assurances

Proposed Changes to 401 Rules in OAC Chapter 3745-32-04 cont.

- Mitigation Monitoring
 - ◆ Establishes a 5 year monitoring period with the ability to decrease or increase depending on type of and mitigation success
 - ◆ Provides flexibility to ensure the appropriate parameters are being measured