

For Interested Party Review – September 2008 Draft

3745-32-01 Definitions.

~~For the purposes of this chapter the following definitions shall apply: In addition to the definitions in rules 3745-1-02, 3745-1-05, and 3745-1-50 of the Administrative Code, the following definitions apply to this chapter.~~

- (A) "Applicant" means any person required to obtain a ~~section 401 water quality certification state water quality permit~~ from the Ohio EPA.
- (B) "Director" means the director of ~~the~~ Ohio EPA or his duly authorized representative.
- (C) "Discharge of dredged material" means any addition of dredged material, ~~in excess of one cubic yard when used in a single or incidental operation,~~ into waters of the state, including redeposit of dredged material other than incidental fallback. The term includes, ~~without limitation~~ but is not limited to, the addition of dredged material to a specified ~~disposal discharge site which is~~ located in waters of the state, ~~or and~~ the runoff or overflow of dredged material from a contained land or water disposal area ~~which enters the waters of the state~~. ~~Discharges of pollutants into waters of the state resulting from the subsequent onshore processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to section 402 of the Federal Water Pollution Control Act, even though the extraction of such material may require a permit from the army corps of engineers under section 10 of the Rivers and Harbors Act.~~
- (D) "Discharge of fill material" means the addition of fill material into waters of the state for the purpose of creating fastlands uplands, elevations, changing the elevation of land beneath waters of the state, ~~or for creating~~ impoundments of water. The term includes, but is not limited to, the placement of the following in waters of the state: fill that is necessary to the construction of any structure; structures or impoundments requiring rock, sand, dirt, or other pollutants for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection or reclamation devices such as riprap, groins, seawalls, breakwalls, bulkheads and fills; beach nourishment; levees; sanitary landfills; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants, and subaqueous utility lines; or artificial reefs.
- (E) "Dredged material" means material that is excavated or dredged from waters of the state. The term does not include material resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for production of food, fiber, and forest products.
- (F) "Federal Water Pollution Control Act" means the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 886 (commonly referred to as the Clean Water Act), 33 U.S.C. 1251 et seq., as amended through July 1, 2008.

- (G) "Fill material" means any pollutant material used to fill an aquatic area, create fill to replace an aquatic area with dry land or to change the bottom elevation of a water body for any purpose, and that consists of suitable material that is free from toxic contaminants in other than trace quantities. "Fill material" does not include either of the following:
- (1) Material resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fiber, and forest products; or
 - (2) Material placed for the purpose of maintenance of existing structures, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures.
- (H) "General permit" means a department of the army authorization that is issued for a category or categories of discharges of dredged or fill material that are substantially similar in nature and that cause only minimal individual and ~~cummulative~~ cumulative adverse environmental impact.
- (I) "Nationwide permit" means a department of the army authorization that has been issued for certain specified activities nationwide.
- (J) "Non federally protected waters" means a water of the state, other than isolated wetlands regulated pursuant to sections 6111.02 to 6111.029 of the Revised Code, that is determined by the United States army corps of engineers to be a water outside of the jurisdiction of the Federal Water Pollution Control Act.
- ~~(K)~~(K) "Ohio EPA" means the Ohio environmental protection agency or its director, as the context or other law or regulations may require.
- ~~(K)~~(L) "Person" means ~~the state, any municipal corporation, political subdivision of the state, person as defined in section 1.59 of the Revised Code, interstate body created by compact, or the federal government or any department, agency, or instrumentality thereof~~ the same as defined in section 6111.01 of the Revised Code.
- ~~(L)~~(M) ~~"Section 401 water quality certification~~ State water quality permit" means either:
- (1) ~~certification~~ Certification from Ohio EPA, pursuant to section 401 of the Federal Water Pollution Control Act, Chapter 6111. of the Revised Code and Chapter 3745-32 of the Administrative Code, that any discharge, as set forth in section 401 of the Federal Water Pollution Control Act, will comply with sections 301, 302, 303, 306 and 307 of the Federal Water Pollution Control Act; or

(2) A permit from Ohio EPA, pursuant to Chapter 6111. of the Revised Code and Chapter 3745-32 of the Administrative Code for discharges to non federally protected waters.

~~(M)~~(N) "The Rivers and Harbors Act" means the Rivers and Harbors Act of 1899, 30 Stat. 1151, 33 U.S.C. 401, as amended through July 1, 2008.

~~(N)~~(O) "Waters of the state" means ~~all streams, lakes, ponds, wetlands, watercourses, waterways, wells, springs, irrigation systems, drainage systems and all other bodies or accumulations of water, surface and underground, natural or artificial, which are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters which do not combine or effect a junction with natural surface or underground waters, including those waters that are presently used, have been used or are susceptible to use to transport interstate commerce up to the head of navigation~~ the same as defined in section 6111.01 of the Revised Code.

~~(O)~~(P) "Wetlands" ~~are areas where the water table is at, near, or above the land surface long enough each year to support the growth of water dependent vegetation and to result in the formation of characteristic wet soil types. These include marshes, swamps, bogs and similar areas~~ are defined in rule 3745-1-02 of the Administrative Code.

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3745-32-02 **Applicability.**

- (A) Every applicant for a permit from the United States army corps of engineers pursuant to section 404 of the Federal Water Pollution Control Act that authorizes any activity that may result in a discharge of dredged or fill material into waters of the state shall apply for and obtain a state water quality permit from the director.

- (B) Every applicant for a permit from the United States army corps of engineers pursuant to both section 404 of the Federal Water Pollution Control Act and section 10 of the Rivers and Harbors Act that authorizes any activity that may result in a discharge of dredged or fill material into waters of the state shall apply for and obtain a state water quality permit from the director.

- (C) Every applicant for a permit from the United States army corps of engineers pursuant to section 10 of the Rivers and Harbors Act shall apply for and obtain a state water quality permit from the director.

- (D) Every applicant that proposes to discharge dredged or fill material into non federally protected waters shall apply for and obtain a state water quality permit from the director.

- (E) No person shall engage in an activity requiring a state water quality permit prior to obtaining that permit from the director.

- (F) Exemptions. No state water quality permit need be obtained for:
 - (1) The discharge of dredged or fill material that is part of the construction of a federal project specifically authorized by congress, provided the effects of such discharge are included in an environmental impact statement submitted to congress prior to the actual discharge;

 - (2) The discharge of dredged material that is incidental fallback;

 - (3) The discharge of material resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for production of food, fiber, and forest products;

 - (4) Material placed for the purpose of maintenance of existing structures, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures; or

 - (5) Material placed for the purpose of maintenance and repair of drainage improvements authorized pursuant to Chapter 1515., 6131., 6133., or 6137. of the Revised Code, provided:

- (a) Placement of the material is for maintenance work performed by, or under contract to, the soil and water conservation district or county engineer's office administering the maintenance fund established for the drainage improvement project (i.e., petition);
- (b) Placement of the material is to keep the drainage improvements in working condition as they were designed under the authorizing petition; and
- (c) The material is for minor maintenance such as rip rap placement to control bank slippage and erosion, tile outlet repair and tile main headwall repair.

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3745-32-03 Individual state water quality permit application requirements and procedures.

(A) The filing of an application for a federal permit or license for which a state water quality permit is required does not constitute an application for such permit with the state of Ohio.

(1) Application for a state water quality permit must be submitted on forms provided by the director and must include all the items identified in paragraph (B) of this rule.

(2) The director may waive the application requirement if, in the judgment of the director, the activity for which a federal permit or license is sought will not result in a discharge to the waters of the state.

(B) Application requirements.

(1) Any person requesting authorization for an activity that requires a state water quality permit shall comply with the application procedures set forth in this rule. The director shall prescribe the form of the application for a state water quality permit. Additional information shall be submitted in accordance with the antidegradation requirements in rules 3745-1-05 and 3745-1-54 of the Administrative Code. The director may request additional information if, in the judgment of the director, additional information is necessary to determine whether the applicant meets the approval criteria in paragraph (C) of this rule.

(2) Any application for a state water quality permit subject to the provisions of this rule and impacting waters of the state shall include:

(a) A copy of a letter from the United States army corps of engineers documenting the jurisdictional status of the water;

(b) If the project involves impacts to a wetland, a wetland characterization analysis consistent with "Ohio Rapid Assessment Method for Wetlands v. 5.0, User's Manual and Scoring Forms, Ohio EPA, Division of Surface Water, February 1, 2001." This document is available on the internet at <http://www.epa.state.oh.us/dsw/401/index.html>;

(c) If the project involves impacts to a stream for which a specific aquatic life use designation found in rules 3745-1-08 to 3745-1-32 of the Administrative Code has not been made, a use attainability analysis;

(d) A specific and detailed mitigation proposal including the location and proposed legal mechanism for protecting the property in perpetuity;

(e) Applicable fees;

- (f) Site photographs for each water of the state and adjacent buffers;
 - (g) Adequate documentation confirming that the applicant has requested written comments from both the Ohio department of natural resources and the United States fish and wildlife service, regarding threatened and endangered species, including the presence or absence of critical habitat;
 - (h) Descriptions, schematics, and appropriate economic information concerning the applicant's preferred alternative, nondegradation alternative, and minimal degradation alternative for the design and operation of the project;
 - (i) The applicant's investigation report of the waters of the United States, in support of the section 404 permit application for the proposed project if applicable; and
 - (j) A copy of the United States army corps of engineers public notice regarding the section 404 permit application for the proposed project or other notification from the corps that the project will be authorized under a general permit if applicable.
- (3) The requirements in paragraphs (B)(2)(a) and (B)(2)(i) of this rule may be satisfied by the U.S. army corps of engineers public notice in the event that no jurisdictional determination is required.
- (4) Use attainability analysis.
- (a) The use attainability analysis required by paragraph (B)(2)(c) of this rule shall consist of the following:
 - (i) The drainage area of each impacted stream or streams, above the most downstream impact proposed in the application;
 - (ii) A determination of the hydrological classification (perennial, intermittent, or ephemeral as defined in section 3745.114 of the Revised Code) for each stream to be impacted;
 - (iii) The qualitative habitat evaluation index (QHEI) assessment, the headwater habitat evaluation index (HHEI) assessment or another assessment procedure acceptable to the director conducted on the impacted streams;
 - (iv) If the QHEI score is greater than forty for a given stream, a representative number of qualitative macroinvertebrate and fish samples for that stream must be provided; and

- (v) A representative number of qualitative macroinvertebrate, fish, or amphibian samples for a stream may be provided by the applicant to supplement the HHEI or QHEI assessment for that stream.
- (b) All sampling submitted pursuant to paragraphs (B)(4)(a)(iv) and (B)(4)(a)(v) of this rule shall be according to the procedures dictated by rule 3745-1-03 of the Administrative Code.
- (c) All habitat evaluation indices required in paragraph (B)(4)(a)(iii) of this rule shall be determined according to the following documents.
- (i) "Technical Report: Ohio's Primary Headwater Streams - Fish and Amphibian Assemblages, Ohio EPA, Division of Surface Water, September 2002." This document is available on the internet at <http://www.epa.state.oh.us/dsw/wqs/headwaters/index.html>.
- (ii) "Technical Report: Ohio's Primary Headwater Streams - Macroinvertebrate Assemblages, Ohio EPA, Division of Surface Water, September 2002." This document is available on the internet at <http://www.epa.state.oh.us/dsw/wqs/headwaters/index.html>.
- (iii) "Field Evaluation Manual for Ohio's Primary Headwater Habitat Streams, Ohio EPA, Division of Surface Water, September 2002." This document is available on the internet at <http://www.epa.state.oh.us/dsw/wqs/headwaters/index.html>.
- (iv) "The Qualitative Habitat Evaluation Index [QHEI]: Rationale, Methods, and Application, Ohio EPA, Ecological Assessment Section, Division of Water Quality Planning & Assessment, November 6, 1989." This document is available on the internet at <http://www.epa.state.oh.us/dsw/bioassess/BioCriteriaProtAqLife.html>.
- (d) With the prior approval of Ohio EPA, applicants that are proposing to impact numerous streams on a single large project site may propose to conduct the sampling required under paragraphs (B)(4)(a)(iii), (B)(4)(a)(iv), and (B)(4)(a)(v) of this rule on a representative subset of the streams proposed for impacts. Ohio EPA reserves the right to require additional sampling of any of the streams on the project site.
- (5) Within fifteen business days after the receipt of an application for an individual state water quality permit, the director shall notify the applicant whether the application is complete. If the application is not complete, the director shall include in the notice an itemized list of the information or materials that are necessary to complete the application. No further processing of the application shall take place until the

itemized list of information or materials requested by the director is received and determined to be complete. As it is used in this rule, "complete application" means an application in which all of the items required by paragraph (B) of this rule have been provided and the items are both complete and accurate. A complete application does not equate to an approval project.

- (6) Applicants regulated under Chapter 1501:13 of the Administrative Code may elect to utilize alternate, consolidated application procedures as approved by the director, the director of natural resources, and the United States army corps of engineers.

(C) Criteria for decision by the director.

- (1) The director shall not issue a state water quality permit unless the applicant has demonstrated to the director's satisfaction that 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 will not, alone or in conjunction with other conditions:
- (a) Prevent or interfere with the attainment or maintenance of applicable water quality standards in Chapter 3745-1 of the Administrative Code; or
- (b) Result in a violation of any applicable provision of the Federal Water Pollution Control Act.
- (2) Notwithstanding an applicant's demonstration of the criteria in paragraph (C)(1) of this rule, the director may deny an application for a state water quality permit if the director concludes that issuing the state water quality permit will result in adverse long term or short term impacts on water quality.
- (3) The director may consider whether the applicant is currently in significant noncompliance of the terms and conditions of any previously issued state water quality permit or state isolated wetland permit for another project or activity, and may deny such application based on the existence of any such outstanding significant noncompliance.

(D) Time frames for issuing or denying a state water quality permit.

- (1) The director shall issue or deny a state water quality permit for an activity in waters of the state within one hundred eighty days of receipt of a complete application pursuant to paragraph (A) of this rule. For purposes of calculating the one hundred eighty day time frame, days incurred beyond the fifteen day response time for applicants to respond to written comments or deficiencies required by division (F) of section 6111.30 of the Revised Code are not included.

- (2) Within the one hundred eighty day review period, an applicant may request, in writing, that review of their application cease temporarily until such time as additional information needed to review and process the application is afforded.
- (3) A state water quality permit shall be issued and may be challenged in accordance with the provisions of the rules of procedure of Ohio EPA, Chapter 3745-47 of the Administrative Code.

(E) Modifications and transfers.

- (1) Before modifying water quality impacts associated with a project or activity authorized in a state water quality permit, the applicant shall notify Ohio EPA in writing, setting forth a description of the proposed modifications and the reasons therefor. The director may approve, approve with conditions, or deny any request for modification, or require the applicant to apply for and obtain a new state water quality permit if the scope or purpose of the project is changed beyond that authorized in the original section 401 water quality certification or state water quality permit.
 - (a) Approvals or approvals with conditions, of the modification, shall be issued as draft actions and subject to the public notice requirements of the Administrative Code.
 - (b) Applications for modification of previously issued state water quality permits will be subject to all the requirements of rule 3745-1-05 of the Administrative Code, and rule 3745-1-54 of the Administrative Code if applicable.
- (2) A person authorized to conduct any project or activity pursuant to a state water quality permit may transfer the state water quality permit to a third party provided that the original permit holder submits to the director the following:
 - (a) Advance written notice of the proposed transfer;
 - (b) A signed and notarized statement by the transferee assuming the obligations of the state water quality permit; and
 - (c) A signed and notarized statement by the original permit holder regarding project status and compliance with the terms of the permit.
- (3) The person to whom the state water quality permit was originally issued shall continue to be responsible for ensuring that the conditions of the state water quality permit are fulfilled, and shall be liable for any violations thereof, until such time as Ohio EPA receives documentation required by paragraph (E)(2)(b) of this rule and a revised state water quality permit is issued identifying the new holder of the state water quality permit.

- (4) The director may modify a state water quality permit, absent any request from the state water quality permit holder, if the director concludes at any time that any applicable laws or rules have been violated as a result of that permit. A state water quality permit shall be modified and may be challenged in accordance with Chapter 3745-47 of the Administrative Code.

(F) Revocation.

- (1) The director may revoke a state water quality permit if the director concludes at any time that any applicable laws or rules have been violated, or when the director determines that the state water quality permit approval was based on false or misleading information at the time that the application was originally submitted to Ohio EPA.
- (2) A state water quality permit shall be revoked and may be challenged in accordance with Chapter 3745-47 of the Administrative Code.

(G) Expiration and renewal.

- (1) A state water quality permit shall expire within five years of the date of issuance or upon the expiration of the applicable federal license or permit, whichever is less.
- (2) A state water quality permit may be renewed for a period not to exceed five years under the following conditions:
- (a) The state water quality permit has not already expired;
 - (b) No renewal of the state water quality permit has previously been granted; and
 - (c) No additional water quality impacts beyond those authorized in the original state water quality permit will result from the renewal of that permit.
- (3) Requests for renewal of state water quality permits must include a notarized statement that the conditions contained in paragraph (G)(2) of this rule have been met and must be submitted at least one hundred eighty days prior to the expiration of the state water quality permit.
- (4) Renewals of state water quality permits shall be issued as draft actions and subject to the public notice requirements of Chapter 3745-47 of the Administrative Code.

(H) Denial.

- (1) Any application that fails to achieve the criteria established in paragraph (C) of this rule may be denied.
- (2) The director shall provide an explanation to an applicant for a state water quality permit of the basis for the proposed denial of the application, if applicable.
- (3) A state water quality permit shall be denied and may be challenged in accordance with Chapter 3745-47 of the Administrative Code.

(I) Waiver.

- (1) The director may, pursuant to division (O) of section 6111.03 of Revised Code and section 401 of the Federal Water Pollution Control Act, waive action on any state water quality permit application submitted.
- (2) A state water quality permit shall be waived in accordance with Chapter 3745-47 of the Administrative Code.

(J) Conditions of permit.

- (1) The director may impose such terms and conditions as part of a state water quality permit as are appropriate or necessary to ensure compliance with applicable laws and to ensure adequate protection of water quality and human health.
- (2) Prior to the issuance of a state water quality permit or as a condition of any state water quality permit, the director may require that the applicant perform various environmental quality tests to ensure adequate protection of water quality and human health, including, but not limited to, chemical analyses of water, sediment or fill material, and bioassays and biological monitoring.
- (3) The director may enter into any legally binding agreements, such as mitigation banking agreements or in lieu fee agreements, as he deems appropriate to ensure the protection of Ohio's water resources, within the authorities granted under section 6111.03 of the Revised Code.

(K) Emergency permit.

- (1) If the director issues an administrative order, pursuant to section 6111.06 of the Revised Code, that requires the placement of fill or dredged material into waters of the state to protect public health or welfare, such order will constitute the issuance of a state water quality permit for the purposes of the Federal Water Pollution Control Act and Chapter 6111. of the Revised Code.

- (2) Upon the expiration of such order, the applicant shall submit a complete application for a state water quality permit that addresses any additional placement of fill or dredged material into waters of the state, beyond that authorized by the administrative order, as well as any mitigation requirements generated as a result of the activities authorized by the administrative order.

(L) United States army corps of engineers general permits.

- (1) The director may issue, deny or waive action on any state water quality permit for general permits (including nationwide permits, regional general permits, and letters of permission) issued by the United States army corps of engineers under section 404 of the Federal Water Pollution Control Act.
- (2) The director may impose such terms and conditions as part of a general state water quality permit as are appropriate or necessary to ensure compliance with applicable laws and to ensure adequate protection of water quality and human health.
- (3) Applicants applying for coverage under the section 404 general permits are not required to comply with the application requirements contained in this rule unless the director determines that an individual state water quality permit is required.

(M) General permits for isolated wetlands. The director may issue general permits for impacts to isolated wetlands and include such terms and conditions as are appropriate or necessary to ensure compliance with applicable laws and to ensure adequate protection of water quality and human health.

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