



Note: The comment period for this rule has been extended 90 days to June 6, 2011.

Draft Rule – Surface Water Quality Stream Mitigation (OAC Rule 3745-1-56)

Note: This rule package is the last of four interrelated surface water quality rule packages. The first three rule packages were released for interested party review in the fall of 2008 and address the water quality standards triennial review, antidegradation, and Section 401 water quality certifications. Additional revisions have been made to those draft rule packages and are described in fact sheets for those rule packages. The release of the stream mitigation rule package starts a 90-day interested party review comment period for all four rule packages. A link to each rule package is on the Division of Surface Water website at www.epa.ohio.gov/dsw/Home.aspx.

What is the stream mitigation rule?

The stream mitigation rule, 3745-1-56, is a new rule in the water quality standards chapter of the Ohio Administrative Code (OAC). It establishes a tiered stream mitigation review process and provides detailed stream mitigation procedures.

Once adopted, the stream mitigation rule will apply whenever someone requests authorization to discharge dredged or fill material to a stream.

The procedures for requesting authorization to discharge dredged or fill material are in OAC Chapter 3745-32. The identification of stream use designations and high quality water status for streams are in other rules of OAC Chapter 3745-1, including the antidegradation rule 3745-1-05.

Who will be regulated by this rule?

Anyone who wishes to discharge dredged or fill material into streams will be regulated by this rule. This includes local and state governments, the federal government, businesses and private property owners.

Why is this rule being created?

The stream mitigation rule is needed to establish consistent project review guidelines and to assure protective mitigation design approvals for dredge and fill impacts on streams.

Currently, without any rule in place, each project is reviewed on an individual basis applying a minimum of broadly stated objectives on maintaining water quality. This approach has a number of inherent weaknesses including longer review times, differences in reviewer expectations and variation regarding the capacity of the final mitigation design to adequately protect water quality

and stream integrity.

Was this draft rule made available in the past?

Yes. In 2006 Ohio EPA released a prior version of this stream mitigation rule along with draft changes to OAC Chapter 3745-32 rules and the existing wetland mitigation rule, 3745-1-54. Ohio EPA created two external advisory groups (EAGs) in 2007 to assist in re-working the wetland mitigation rule and the stream mitigation rule. No significant changes in the wetland mitigation rule are under consideration at this time.

Comments on the draft stream mitigation rule and the EAG process led to the conclusion that the proposed credit/debit system for scoring project impacts and mitigation designs, while conceptually appropriate in some situations, could be simplified for small stream channels with comparatively lower water resource value. A tiered stream mitigation process was incorporated that provides best management practice approaches for these streams.

What specific rule provisions are being considered?

Four stream mitigation categories are established in the rule based upon a stream's assigned aquatic life use and other related factors. The categories provide a hierarchy with respect to water resource functions and integrity. Mitigation efforts and review time for two categories of relatively low resource value streams are appropriately targeted for the aquatic life use and water quality functions of the stream setting. If specific on-site mitigation design specifications are met, then projects impacting category 1 and category 2 streams are exempted from certain application and antidegradation review requirements.

The document "Compensatory Mitigation Requirements

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for Stream Impacts in the State of Ohio (Revision 5.0)" will be incorporated into the OAC by reference. This document provides the scientific basis and specific equations for calculating credits and debits. The overall methodology allows stream impacts to be fairly assessed and ensures consistent and appropriate mitigation is performed.

Were specific changes made in response to EAG comments?

Yes. The draft rules include a number of provisions that address specific comments made by the EAG.

- The draft rule provides tiered application and mitigation requirements that vary based on project size and type of impact.
- The rule includes exemptions and other provisions to reduce reviews of projects that impact only low resource value waters.
- The rule applies a mitigation ratio of 1:1 in appropriate situations.
- The rule allows applicants to apply alternative mitigation approaches and fosters common solutions for similar impacts (such as surface mining, linear transportation projects, etc.).
- The rule includes a definition for "stream."
- The rule has new and simpler approaches for "upland buffers" and "riparian protection."

What other changes were made from the prior version and why?

The methodology of the credit/debit model has been re-structured so it separately accounts for impacts and mitigation to aquatic life habitats and to water quality functions of the flood prone area. Standardized equations are included to calculate impact debits and mitigation credits using units of area (acres of aquatic habitat and acres of flood prone area) in place of linear distances of impacts and mitigation. These improvements are supported by scientific literature and provide a more objective method for developing sound mitigation plans that protect the water resource on-site and in downstream waters.

How will the rule affect the regulated community?

The draft rule for stream mitigation analysis has tangible advantages, such as providing standardization of the process and predictability of the requirements. This

will significantly reduce delays caused by uncertainties and vagueness in the current procedures. In addition, the rule will allow better comparisons of proposed mitigation approaches for different projects.

The rule will facilitate better communication between the regulated community and the Agency. Currently, both the Agency and the regulated community spend considerable resources negotiating mitigation projects after an application has been submitted. The implementation of the stream mitigation rule will require more of this effort before the application is submitted rather than after.

The tiered stream mitigation approach should provide applicants an opportunity to reduce resources expended on projects impacting category 1 and 2 streams. The Agency is interested in feedback on this point from affected parties. We are also seeking comments on how the credit/debit model will affect project design work including cost and time estimates.

What additional information is the Agency seeking?

The Agency specifically seeks comments on the scientific basis for credit and debit equations and the decision to separately account for how projects impact and mitigate the water quality functions of flood prone areas. Other general comments and specific factual information are welcome.

What is the rulemaking schedule?

At this time, the Agency is soliciting initial input on this draft rule. Ohio EPA is required by section 121.39(D) of the Revised Code to contact potentially affected parties prior to adopting rule changes.

At the close of the draft rule comment period, the Agency will review the comments and make necessary changes to the rule. The Agency will then file the proposed rule with the Joint Committee on Agency Rule Review (JCARR), the Legislative Service Commission and the Secretary of State.

At that point, a second comment period, including one or more public hearings, will be scheduled. After the close of the second comment period, the Agency will review the comments, make any necessary changes and then adopt the final rule.

Ohio EPA expects to file the proposed rule in the summer of 2011. The final rule could be adopted by the end of 2011.

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How can I comment on the draft rule?

Please submit your comments in one of the following ways:

By email: dsw_rulecomments@epa.state.oh.us

By fax: (614) 644-2745

By postal mail:

Rule Coordinator

Ohio EPA, Division of Surface Water

P.O. Box 1049

Columbus, Ohio 43216-1049

Comments on the draft rule must be received no later than March 8, 2011.

How can I get more information?

Copies of this fact sheet and the draft rule are on the Division of Surface Water website at www.epa.ohio.gov/dsw/Home.aspx.

For more information about the draft rules, please contact:

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