Ohio Environmental Protection Agency

Division of Surface Water

Response to Comments

December 2011

Rule: OAC 3745-32 (Section 401 water quality certification rules)
OAC 3745-45 (Section 401 water quality certification fees)

Agency Contact for this Package

Ric Queen
Division of Surface Water
(614) 644-2872
ric.queen@epa.state.oh.us

Ohio EPA made available for review and comment draft changes to the Section 401 water quality certification rules in OAC 3745-32 in September 2008. The comment period ended on June 6, 2011. This document identifies the comments and questions received on the draft rules.

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 comments and questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

General Comments

State Water Quality Permit

Comment 1: We support the establishment of a state water quality permit for the discharge of dredged or fill material into non-federally protected streams. Many non-federally protected streams are ephemeral or intermittent headwaters. The importance of headwater streams on downstream systems is well documented, and we believe a state water quality permit for these resources will help address the streams left unprotected by the current practice of determining Federal jurisdiction over surface waters. (U.S. FWS)

Response 1: Ohio EPA identified the need to create a permitting mechanism to address proposed impacts to waters of the state that are no longer federally protected so that impacts to these resources could lawfully occur. Without

an appropriate permitting mechanism, the broad prohibition against discharges to waters of the state in Ohio Revised Code (ORC) 6111.04 would hinder quick and timely permitting of these situations, which do in fact occur. We have made revisions to the rules based on comments to clarify when a permit would be required and when the impact would be covered by rule without having to obtain a permit. Permits will be required for impacts to non federally protected streams and lakes. All other non federally protected waters, with the exception of isolated wetlands, will be covered by permit by rule provisions. Isolated wetlands will continue to be regulated exclusively by the statutory provisions of ORC Chapter 6111.

Comment 2: The relationship between a 401 Water Quality Certification (WQC), State Water Quality Permit (SWQP), and Isolated Wetlands Permit remains unclear. ODOT is unsure whether OEPA intends the SWQP as a new type of permit or as a general term including 401 WQCs and/or Isolated Wetlands Permits. Currently, ODOT interprets the SWQP to be a general term including all 401 WQCs and Isolated Wetlands, and proposes to include non-federally protected waters (i.e., isolated streams, ditches, puddles, etc). ODOT requests that the OEPA provide a clear definition of the proposed SWQP and what resources will be under this permit. (ODOT)

Response 2: The new State Water Quality Permit (SWQP) will cover jurisdictional streams and wetlands previously handled by a 401 Water Quality Certification (WQC), as well as non-jurisdictional streams and lakes previously covered under a 401 WQC, and for which there is no current permitting mechanism. Ohio EPA has narrowed and clarified the scope of these non-jurisdictional waters as to not broaden the scope beyond what was previously regulated. Isolated wetland impacts will continue to be regulated under ORC Chapter 6111 and will not be part of the SWQP. This is not an expansion of authority, but merely a clarification and simplification of historical permitting activities.

Comment 3: OEPA's change to the term 'State Water Quality Permit' appears to be an attempt to include a varied number of permits with a varied number of purposes under one all-inclusive permit for a varied number of vaguely defined resources. Although combining a myriad of actions under one permit may at appear to be streamlining, this change will create complicating ramifications throughout the regulated and regulatory communities. The term 401 Water Quality Certification is standardized throughout the country and used in regulations and permits issued by the U.S. Army Corps of Engineers, the U.S. EPA, and the U.S. Coast Guard. It is highly unlikely that federal agencies will change rules to accommodate a single state. Changing OEPA's actions under the term "State Water Quality Permit" will provide for more and difficult interpretation of the various regulations within the Clean Water Act and expanding OEPA jurisdiction to numerous resources not currently regulated, again increasing regulatory burden with unproven benefit for water quality. (ODOT)

Response 3: The new SWQP will act as a surrogate for the old 401 WQC, both for individual and Nationwide permits, and will simplify and clarify permitting for waters of the state.

Comment 4: ODOT strongly disagrees with the proposal of a 'State Water Quality Permit' and the inclusion of additional poorly defined resources under OEPA jurisdiction. The development of the 'State Water Quality Permit' will slow down application and project approval, breed confusion among the regulated community, and ultimately cost the state more money with limited benefit to the environment. Should OEPA wish to rename and re-function the 401 Water Quality Certification program, ODOT suggests coordination with all the federal agencies to better facilitate regulatory cohesiveness prior to enacting the 'State Water Quality Permit'. (ODOT)

Response 4: This coordination has been done.

Comment 5: In these proposed WQ Rules, Ohio EPA creates a new state water quality certification ("WQC") program that appears to include Section 401 certifications, Section 10 permits, isolated wetlands, and isolated streams (The confusion created by Ohio EPA's definitions is discussed below). With the purpose of bringing isolated streams under its permitting purview, the WQC program establishes a new, broad permit that will be required for any discharge or fill into any water in the State (i.e. non-jurisdictional waters).

Procedurally, Ohio EPA issued an earlier version of the WQC Rules, which were made available for public comment in 2008 and for which Ohio EPA received several comments. Of the 26 comments received since 2008, Ohio EPA only responded to one comment and the other 25 "remain under consideration." See December 2010 Ohio EPA Interim Response to Comments at Comments 1-5, 7-26. Given that Ohio EPA has had these comments for a significant period of time, the agency should respond to these comments prior to the close of the current comment period to afford industry with fair notice of Ohio EPA's actual position prior to commenting on the new version of the WQC Rules. Rather than restate the comments already submitted, the Trade Association Coalition incorporates, by reference, all of the comments submitted in response to Ohio EPA's 2008 draft WQC Rules into these comments.

As an overarching point, The Trade Association Coalition is puzzled by Ohio EPA's intention to be one of the only states pioneering a permitting program for isolated streams without any apparent need to do so and without seeking the approval of the General Assembly. Ohio EPA has not explained what is different or unique about Ohio's isolated streams that would justify more stringent, economy-killing regulations that are not being proposed in other states. Ohio EPA's position is even more troubling given that Ohio's General Assembly has not opted to establish an isolated streams permitting program in State law similar to that for isolated

wetlands, nor are we aware of any attempt by Ohio EPA to even propose legislative review of this expansion of Ohio EPA's permitting programs. As such, Ohio EPA appears to be intentionally avoiding the input of the General Assembly on this important jurisdictional issue and is acting to regulate isolated streams without any legislative authorization to do so. Additionally, it is important to note that the U.S. Army Corps and U.S. EPA have recently issued draft guidance on identifying waters protected by the Clean Water Act. Since the federal agencies have not finalized any interpretive guidance at this point, Ohio's efforts are certainly, at best, premature. See 76 Fed. Reg. 24479.

Ohio EPA should not impermissibly expand its regulatory reach without articulating a clear and justifiable reason to do so and only with the approval and authorization of the General Assembly. To date, Ohio EPA has not offer any legitimate reasons for its actions. As such, the Trade Association Coalition opposes Ohio EPA's proposed changes and provisions encompassing the WQC Rules and urges Ohio EPA to retain its current water quality rules and permitting programs. In addition to these general comments, the Trade Association Coalition has the following rule-specific comments and concerns about Ohio EPA's WQC Rules. (Trade Association Coalition)

Response 5: The question of whether the state should regulate beyond what federal law requires is a question of policy. We believe we have the authority to do so. Ohio's water pollution control provisions have historically been broader than federal law. The isolated wetland provisions are an example of this approach as is the definition of waters of the state. Prior to the adoption of the isolated wetland statute, the agency adopted emergency rules to fill this void. The General Assembly later enacted a statute to exclusively address the issue by statute.

The new SWQP will not expand Ohio EPA's regulatory reach beyond was has historically been regulated under a 401 WQC. However, its implementation will bring much-needed regulatory clarity and common sense to the permitting process.

Comment 6: ODOT effects the environment, especially aquatic resources, very differently than other developers. Most often the maintenance and improvement of Ohio roadways impacts relatively minimal areas of streams and wetlands acutely within in any given watershed. Streams and wetlands, that in the vast majority of instances have been impacted or created by the original construction of infrastructure, have ecologically recovered in the intervening years providing viable habitat for fish, mussels, and macro invertebrates. Furthermore, these very streams and wetlands will be impacted again at some time in the future from unavoidable required maintenance. For example, most bridges built in Ohio today have an expected life span of between 30 and 50 years. After that time ODOT will

again remove and replace the bridge, thus impacting the stream and by permit re-mitigating the impacts. In other words, ODOT is being required to mitigate impacts to the same resource repeatedly. (ODOT)

Response 6: Ohio EPA will continue to follow the lead of the USACE when determining when mitigation is required. Since each subsequent bridge replacement will result in new water quality impacts, the USACE and Ohio EPA will require mitigation to offset these new damages. However, many ODOT maintenance projects continue to be covered by some form of USACE/Ohio EPA general permits.

Comment 7: ODOT, unlike the vast majority of applicants to OEPA, is required by federal law to evaluate each project through a rigorous environmental review and approval process as prescribed by the National Environmental Policy Act (NEPA). Identifying and studying alternatives for a project is key to the NEPA process' objective of finding transportation solutions that help preserve and protect the value of environmental and community resources. The overall expectation of ODOT's NEPA alternative analysis process is to provide the least environmentally damaging alternative through improved decision making, stakeholder and public involvement, and collaboration with various resources agencies. ODOT consistently develops, as required by NEPA, the least overall environmentally damaging alternative. The further development of alternatives for the State Water Quality Permit Application (Preferred, Minimal Degradation, Non-Degradation, and the Mitigative Technique Alternatives) is often redundant, and unnecessarily expensive and time consuming. ODOT respectfully suggests that OEPA consider abbreviated State Water Quality Permit Application requirements for projects, such as ODOT's, that are evaluated through NEPA; specifically, limiting the amount of required alternatives studies. (ODOT)

Response 7: The NEPA alternatives analysis and the 404/SWQP analysis are similar, yet there are marked differences. Therefore, the two processes cannot be used interchangeably. Ohio EPA would welcome discussions regarding possibilities of front-loading the alternatives analysis required for a SWQP to better coincide with the NEPA review, as long as the data required for the SWQP can be provided prior to such determinations. The USACE should also be part of these discussions.

Comment 8: Two key gaps of this section include: (1) types/levels of the State water quality permit (i.e., nationwide and individual) and their thresholds, and (2) It is not clear when and which waters of the State will this new rule apply to. (ODOT)

Response 8: Please see responses to comments 1, 2 and 3 above.

Isolated Streams

Comment 9: The changes to the 401 water quality certification rules will bring isolated streams under Ohio EPA's permitting purview. The rules establish a new, broad permit that will be required for any discharge or fill into any water in the state (i.e. non-jurisdictional waters). It is the understanding of the Ohio Chamber that Ohio would be one of the first states to develop a permitting program for isolated streams. Ohio EPA has not explained what is different or unique about Ohio's isolated streams that would justify more stringent regulations. (Ohio Chamber of Commerce)

Response 9: Please see response to comment 1 above.

Comment 10: 3745-32-02. The OEC commends the OEPA for formally recognizing in these rules their authority and obligation to protect the water quality in all waters of the state. While, the practices of the OEPA will not drastically change with the inclusion of this particular rule package, these rules bring clarity and transparency to the 401 regulatory processes. The US Supreme Court, the USEPA and the US Army Corps of Engineers ("USACE") have created confusion in the determination of jurisdictional waters and non-jurisdictional waters which has resulted in uncertainty for the regulated community as to when permits are required. The definition of "waters of the United States" under the Clean Water Act no longer includes isolated wetlands and streams; however, these wetlands and streams are considered "waters of the state" under Ohio law. The addition of a state water quality permit, not only for watercourses the USEPA or USACE consider waters of the US, but also for non-federally protected waters of Ohio, precisely implements the mandate stated in O.R.C. 6111.03 to prevent, control and abate new and existing pollution of the waters of the state. O.R.C. 6111.03 requires adherence to the Federal Water Pollution Control Act (The Clean Water Act), but most importantly, the code tasks the Agency to prevent pollution into waters of the state and not blindly follow minimum standards of the CWA. Federal law has created a system where the waters are not protected and the regulated community lacks clarity of their obligations.

The OEC wholly supports the development of the state water quality permit to protect all waters of the state of Ohio. We believe that these protections are long overdue. (Ohio Environmental Council)

Response 10: No response necessary.

Antidegradation

Comment 11: Throughout the Draft Antidegradation rules, as well as the Draft 401 Water Quality Certification and the Draft Water Quality Standards, issues related to Public Safety are not listed as a potential cause/reason for the lowering

of water quality. The construction and continual maintenance of Ohio's transportation system, in light of maintaining and improving public safety, should be considered when allowing the possible degradation to waters of the State. (Timothy M. Hill, ODOT)

Response 11: Public safety considerations have been included in our proposed rule language.

Definitions

Comment 12: The draft rule packages include numerous new terms referenced, such as State Water Quality Permit, water conveyance, and upland drainage to name a few. Throughout these comments we have pointed out those terms that are not adequately defined in the draft rules and of specific significance to all applicants; there is no cross reference of commonality with like terms in USACE rules. We would suggest that OEPA coordinate the development of the draft rules and new terms with the USACE. (Timothy M. Hill, ODOT)

Response 12: This coordination has been done.

Style

Comment 13: For consistency capitalize US Army Corps of Engineers (USACE) and Section 404 throughout the document. (Timothy M. Hill, ODOT)

Response 13: Ohio's Legislative Service Commission has requirements on how text in the Ohio Administrative Code must be presented. Among the requirements is that very few terms are allowed to be capitalized. The requirements are in their Rule Drafting Manual, which is on the Web at www.lsc.state.oh.us/rules/index.html.

Rule 3745-32-01 Definitions.

Comment 14: 3745-32-01 - Comment: Several of the terms listed in 3745-32-01 are identical repeats of the terms from 3745-1-05. These terms include 12-digit hydrologic unit watershed, loss of use, minimal degradation alternative, nondegradation alternative, and preferred alternative. Some of these carried over definitions do not match the intent of 3745-32 to review fill permitting vs. chemical loading permitting. Further refinement is needed. (ODOT)

Response 14: The definition for "loss of use" has been moved to 3745-1-02. The alternatives analyses definitions have been reworded. The 12-digit hydrologic unit definition has utility within OAC 3745-32, and therefore has not been changed.

Comment 15: 3745-32-01(C) - Comment: The term “Director” is a repeat to the term used in 3745-1-05, but is not identical. ODOT recommends that OEPA make the term consistent and only include it in one location. (ODOT)

Response 15: The definition of the term “director” has been revised in OAC 3745-1-02 to match the definition in OAC 3745-32-01. The definition of “director” in OAC 3745-1-05 includes the director of Ohio Department of Agriculture (ODA) in addition to the director of Ohio EPA because the director of ODA will also implement OAC 3745-1-05 upon receipt of delegation authority from U.S. EPA to issue National Pollutant Discharge Elimination System (NPDES) permits to Concentrated Animal Feeding Operations (CAFOs).

Comment 16: ***(C) "Discharge of dredge material" means any addition of dredged material into waters of the state including redeposit of dredged material other than incidental fallback. The term includes but is not limited to the addition of dredged material to a specified discharge site located in waters of the state and the runoff or overflow from a contained land or water disposal area.***

Comment #1: The words "of dredge material" struck from the 5th and 6th line in reference to "runoff or overflow from a contained land or waste disposal area" implies that other materials other than dredge can be included as a discharge within this definition. It should be made clear that the materials referenced which may run off or over flow from the contained land or waste disposal area are specifically dredge materials. Replace the phrase "of dredge materials".

Comment #2: The phase "Discharge of pollutants into Waters of the State resulting from the subsequent onshore processing of dredge material that is extracted from 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" has been struck from the definitions. This phrase specifically states that pollutants subject to Section 402 are not subject to Section 404/Section 401. This phrase is included within the federal definition of "discharge of dredge material" and should be included within this definition. It should be perfectly clear that pollutants regulated under Section 402 are not regulated under Section 404 and Section 401. This has been and continues to be a point of confusion between the regulating community and the regulated community. (B & N Coal, Inc.)

Response 16: We made some minor edits to the definition of “discharge of dredged material” that we believe make it more clear that runoff or overflow from a contained land or waste disposal area" is within the definition of “discharge of dredged material”. We also reinserted the language from the original rule that clarifies when discharges of pollutants are excluded from this definition and addressed in Section 402 of the Clean Water Act.

Comment 17: 3745-32-01(D) - Comment: The term “Discharge of dredged material” includes runoff and overflow of dredged material in a disposal area. The inclusion of this type of discharge appears out of place and is an over-reaching and broadening of the definition. (ODOT)

Response 17: This definition refers to the runoff of dredged or fill material from a contained area. Such runoff is considered fill material if it enters a water of the state. This is consistent with the federal definition.

Comment 18: Ohio Adm.Code 3745-32-01 Definitions. Ohio EPA has revised Ohio Adm. Code 3745-32-01(D) to read as follows:

> "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.

(emphasis added). The Utilities believe that Ohio EPA should not delete the phrase "in excess of one cubic yard when used in a single or incidental operation." The inclusion of this phrase provides a quantifiable determination of when a State permit is required. Deletion of this phrase expands this definition, thereby requiring a State permit even when there is an insignificant "discharge of dredged material." If Ohio EPA believes this revision is necessary, it should explain why this change is necessary and appropriate. (Ohio Utility Group)

Response 18: We attempted to make our definition consistent with the federal definition, which does not contain the one cubic yard language. We believe the issue is better addressed by the clarification that some incidental redeposit is covered by the “incidental fallback” language.

Comment 19: (D): Ohio EPA's revised definition of "Discharge of dredged material" appears to include within its purview runoff or overflow from a contained land or water disposal area that is not dredged material. Ohio EPA should revise the definition to clarify that such lands or areas are not discharges of dredged material. (Trade Association Coalition)

Response 19: Please see the response to comment 16 above.

Comment 20: ***(G) "'Fill material' means any pollutant material used to fill an aquatic area to replace an aquatic area with dry land or to ..."***
Comment: OEPA should provide a definition of "aquatic area" that includes how this term relates to waters of the U.S. and waters of the State. (Timothy M. Hill, ODOT)

Response 20: We have changed “aquatic area” to “surface water of the state.”

Comment 21: (H): Ohio EPA's revised definition of "Fill material" is more expansive than the Federal definition and includes the filling of an aquatic area "for any purpose". Ohio EPA should remove this purpose language. Additionally, Ohio EPA should either remove or provide definitions for "aquatic area" and "trace quantities" in order to promote regulatory certainty and transparency. (Trade Association Coalition)

Response 21: For "aquatic area" comment, please see the response to comment 21 above. The "trace quantities" definition is attempting to make it clear that fill should be clean and generally not contain pollutants that are harmful, but we also recognize that there is virtually no fill that would be completely free from some pollutants.

Comment 22: 3745-32-01(H) "'Fill material' means any pollutant material used to fill an aquatic area to replace an aquatic area with dry land or to…"
Comment: OEPA should provide a definition of "aquatic area" that includes how this term relates to waters of the U.S. and waters of the State. (ODOT)

Response 22: Please see the response to comment 20 above.

Comment 23: 3745-32-01(H)(2)
Comment: A majority of ODOT's maintenance activities appear to be exempt from the definition of "fill material". Does this include the placement of RCP, culvert extensions, and culvert lining? Is the maintenance of roadway slopes, embankments, and slip failures included in this the exemption? (ODOT)

Response 23: We struck out the exclusions contained in the definition of "fill material" as the permit exclusions provisions found in OAC Rule 3745-32-02(F) already make it clear that no permitting is required for those activities. Having the terms excluded from the definition and excluded in the permitting provisions created confusion. Thus, the commenter should look to the exclusions in OAC Rule 3745-32-02(E) to see whether the subject activities are covered.

Comment 24: 3745-32-01(J) "…and other features affecting the zoogeographical distribution of aquatic species."
Comment: This should read, "…affecting the zoogeography of aquatic species." Zoogeography is the science of animal distribution, thus "zoogeographical distribution" is redundant. (ODOT)

Response 24: This change has been made in the proposed rule.

Comment 25: ***(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 USACE to be a***

water outside of the jurisdiction of the Federal Water Pollution Control Act. "

Comment: This extends the states jurisdiction beyond federal authority and could include about any feature that would result from flowing water. Delete this definition. (B & N Coal, Inc.)

Response 25: The scope of these waters has been clarified. Please see the response to comments 1, 2 and 3 above.

Comment 26: (J): Ohio EPA's new definition of "Local drainage pattern" should define "alternative watershed boundary" and should clarify that other hydrologic unit watershed boundaries may be used. The definition also ties the local drainage pattern determination from perennial and intermittent streams to natural resource conservation service soil surveys, but does not specify which surveys or the frequency at which such surveys will be published or consulted to determine local drainage patterns. Ohio EPA should clarify the source and frequency of such surveys. In addition, the definition allows alteration of the watershed boundary delineated by the l2-digit hydrologic unit to be expanded or reduced based on "regionally important factors" and "other features affecting the zoogeographical distribution of aquatic species." Ohio EPA should further define these factors and features to promote regulatory certainty and transparency. (Trade Association Coalition)

Response 26: The proposed definition has been modified in ways that address this comment. The language now calls our first through third order streams as the “local drainage network” with a reference to an established nomenclature used in hydrology (Horton-Stahler). The web site referenced in the definition directs the user to a specific published map. In most situations the HUC-12 watershed boundaries will serve our purposes, but the Agency believes there needs to be flexibility to deviate based upon “features affecting zoogeographical distribution of aquatic species.” These factors are case specific.

Comment 27: 3745-32-01(J) – The definition of "Local drainage pattern" states that the “local drainage pattern shall be determined from the perennial and intermittent streams depicted on soil survey maps published by the natural resources conservation service. These maps are available on the internet at http://soils.usda.gov/survey/online_surveys/ohio/.” Maps are not readily available from this link, and Web Soil Surveys generally do not depict the streams mapped on the soil survey maps published by the Natural Resources Conservation Service. Printed copies of the soil survey maps are not readily available for all counties; what other tools may be used to determine local drainage pattern? (USACE)

Response 27: Please see the response to comment 26 above. The web page referenced in the rule provides access to the Ohio Online Soil Survey Manuscripts that include the information needed to identify the local drainage network.

Comment 28: (L): Ohio EPA's new definitions of "Minimal degradation alternative" and "preferred alternative" and definition of "non-degradation alternative" do not appear in Federal law. Ohio EPA should not introduce new concepts or requirements into Ohio's water quality rules that differ or are more stringent than Federal law without legitimate justification to do so and a complete assessment of the costs of such rules. (Trade Association Coalition)

Response 28: Alternative analysis is a component of the state's antidegradation provisions which is a part of the state's water quality standards. States develop water quality standards and as such it is not something that one would expect to necessarily have a federal equivalent. It should also be noted that the terms "minimal degradation alternative" and "preferred alternative" and "non-degradation alternative" are specifically mentioned in statute and thus these rules are not inventing something that does not already have a basis in statute.

Comment 29: 3745-32-01(L) "Minimal degradation alternative ... may include … best management practices, alternative manufacturing techniques, and alternative treatment methods."
Comment: This definition, in this section, should be defined by alternatives appropriate to fill permits versus carrying over non-applicable language associated with waste water treatment. ODOT's standard practices include pollution prevention techniques and best management practices on all projects in regards to limiting impacts to natural resources in the project vicinity. Consequently ODOT's selection of a 401 alternative is difficult in that as defined, our Preferred Alternative meets the definition of the Minimal Degradation Alternative. (ODOT)

Response 29: The definitions for the three alternatives analyses have been changed to better reflect activities referenced in this rule.

Comment 30: Furthermore, under that same rule, Ohio EPA's new definitions of "minimal degradation alternative" and "preferred alternative" and definition of "non-degradation alternative" do not appear in federal water law. The Ohio Chamber wonders why Ohio EPA is introducing new concepts or requirements that differ or are more stringent than federal law. (Ohio Chamber of Commerce)

Response 30: Please see the response to comment 28 above.

Comment 31: ***(M) State water quality permit means either: 2) A permit from OEPA pursuant to 6111 of the Revised Code and Chapter 3745-32 of the Administrative Code for discharges to non-federally protected waters.***

Comment: This extends the state permitting authority beyond federal permitting authority and should be deleted. (B & N Coal, Inc.)

Response 31: This is necessary to allow the placement of fill in non-federally protected waters of the state.

Comment 32: 3745-32-01(N) "Non degradation alternative"
Comment: If the intent is to separate out the two distinct activities (chemical loading vs. fill permits) this definition needs to be revised. Instead of wastewater treatment type projects, development type projects (i.e., dredge and fill) need to be included as examples to clarify the NDA, particularly because wastewater treatment anti-degradation is now covered exclusively in 3745-1-05. (ODOT)

Response 32: Please see the response to comment 29 above.

Comment 33: 3745-32-01(O) "Non federally protected waters".
Comment: This definition defers determination of waters of the state to the federal government. By this definition, OEPA has deferred that responsibility limiting OEPA's role in taking jurisdiction to any resource beyond that identified by the USACE. (ODOT)

Response 33: This term was removed from the proposed rules. It should be noted that as a practical matter, jurisdictional determinations are made by the US Army Corps as an initial part of the regulatory process and that practice will continue notwithstanding these rules.

Comment 34: ***(O) "Waters of the State" means the same as defined in section 6111.01 of the revised code. This definition states waters of the state means all streams lakes ponds marshes watercourses waterways wells springs irrigation systems drainage systems and other bodies or accumulations of water surface and underground, natural or artificial regardless of the depth of the strata in which underground water is located that are situated wholly or partly within or border upon this state or are within its jurisdiction except those private waters that do not combine or effect a junction with natural surface or underground waters.***

Comment #1: The phrase *"except those private waters that do not combine or effect a junction with natural surface or underground waters"* has historically been very confusing. I have asked several individuals with the OEPA to explain to exactly what is excepted and have never receive a consistent or satisfactory response. The opportunity should be taken to clarify this statement. If it is in fact referencing "isolated waters" on private properties then this should be stated clearly. And if it does mean anything else other than that, then this should be specifically stated.

Comment #2: Provide a definition for private waters (i.e. waters that originate on private property and exist within the boundaries of that property). (B & N Coal, Inc.)

Response 34: The proposed rule language refers to the definition given in the Statute. Modifications to the definition in rule would not be appropriate. Interpretation of the phase cited in the comment has traditionally been quite broad based on the logic that connection between surface and underground waters is always assumed in a natural setting. Isolated waters as that term has come into the regulatory vernacular are considered waters of the State. A pond on private property with an impervious liner and no overland stream outlet is one example of a body of water that is not a water of the State.

Comment 35: (O): Ohio EPA's definition of "non-federally protected waters" is an example of Ohio EPA's attempt to extend its regulatory reach beyond Federal law. The Agency's definition is not only extremely broad and could include any feature that would result from flowing water, it promises to render nearly impossible a permitting process which is already slow and complicated. Fundamentally, the Trade Association Coalition believes Ohio EPA should not be regulating non-federally protected waters. However, to the extent Ohio EPA is attempting to regulate any waters of the State that are beyond the jurisdiction of the Federal Water Pollution Control Act, Ohio EPA should seek specific authorization from the General Assembly prior to proposing any rules regulating these waters. (Trade Association Coalition)

Response 35: The scope of non-federally protected waters has been clarified to include only a narrow subset of waters previously jurisdictional. Please see the response to comments 1, 2 and 3 above.

Comment 36: 3745-32-01(S) ”Preferred alternative’ means an alternative preferred or proposed by the applicant to control the discharge of pollutants that will lower water quality.”
Comment: This definition, in this section, needs to be revised or expanded to cover the otherwise legal placement of permanent clean non-erodible non-polluting fill. ODOT’s Preferred Alternative always contains mitigative techniques to lessen impacts , both construction and post-construction best management practices, and compensatory mitigation for streams and wetland. For ODOT projects subject to NEPA alternative analysis, the development of alternatives specifically for the 401 WQC application is difficult and overly burdensome. (ODOT)

Response 36: Please see the response to comment 29 above.

Comment 37: (T): Ohio EPA's definition of "State water quality permit" includes Federal Section 401 certifications, Ohio EPA R. C. 6111 permits, or those issued for discharges to nonfederally protected waters. This proposal represents a

significant expansion of existing permitting programs and Ohio EPA's authority. Moreover, the new regulatory program creates permitting uncertainty and will likely result in a significant administrative bottlenecks. Finally, it is unclear whether these expansions of authority will result in new procedures for existing Section 401 certifications and whether existing permitting requirements for Section 401 certifications will change because of the consolidation into a statewide permitting process that regulates both Federal jurisdictional and nonjurisdictional waters. (Trade Association Coalition)

Response 37: Please see the response to comments 1, 2 and 3 above.

Comment 38: 3745-32-01 (T)(2)
Comment: ODOT strongly disagrees with Ohio EPA's attempt to require a State water quality permit for discharges in to "non federally" protected waters beyond isolated wetlands. It is still unclear what form this State Water Quality Permit will take, how and when exactly it will apply (impact thresholds per types of resources, etc), and to what non federally protected waters will be subject to this permitting process. (ODOT)

Response 38: Please see the response to comments 1, 2 and 3 above.

Comment 39: Ohio EPA's WQC Rules cite to R.C. 6111.01's definition of "waters of the state." Despite Ohio EPA's attempted extrapolation in the WQC Rules to include isolated streams (i.e. waters not subject to Federal regulation) in this definition, there is no indication that the General Assembly intended isolated streams to be regulated in a manner similar to Federally regulated waters by Ohio EPA. Notably, no currently existing State environmental statute or rule defines "stream." It is therefore not clear that the General Assembly intended to grant to Ohio EPA the authority to create a regulatory program that mirrors the program established by the Federal Water Pollution Control Act for these purely State regulated waters. It is highly unlikely that the General Assembly intended such a result, and as such, any such proposal violates R.C. 119.03(1).

In addition, Ohio EPA has failed to consider and give effect to the langue in R.C. 6111.01's definition of "waters of the state" that excludes from all regulation "those waters that do not combine or affect a junction with natural surface or underground waters". As such, the Trade Association Coalition encourages the Ohio EPA to propose revisions to Ohio's statutory programs for the regulation of waters of the State to the General Assembly rather than through rulemaking under unclear regulatory authority. (Trade Association Coalition)

Response 39: The question of whether the state should regulate beyond what federal law requires is a question of policy. We believe we have the authority to do so. Ohio's water pollution control provisions have historically been broader

than federal law. The isolated wetland provisions are an example of this approach as is the definition of waters of the state. Prior to the adoption of the isolated wetland statute, the agency adopted emergency rules to fill this void. The General Assembly later enacted a statute to exclusively address the issue by statute.

Comment 40: Ohio Adm.Code 3745-32-01(V) Waters of the State. The Utilities believe that the definition of "waters of the state" is too broad for application of the proposed rules as discussed below in the Utilities comments on Ohio Adm.Code 3745-32-02(D). Thus, the Utilities suggest the following revision to this definition:

> (V) "Waters of the state" means the same as defined in section 6111.01 of the Revised Code. Waters of the state do not include sewer systems, treatment works, disposal systems, or stormwater drainage features created in uplands. (Ohio Utility Group)

Response 40: The Agency has decided to make no changes to the definition of waters of the state. Ohio EPA has made efforts to address the underlying concern expressed in this comment through revisions to the Section 401 program rules (OAC Chapter 3745-32) and linking the permitting actions under this program to waters that meet revised definitions of “stream” and “lake.”

Rule 3745-32-02 Applicability.

Comment 41: As noted above, the WQC Rules are a significant expansion of Ohio EPA authority which not only complicates Ohio's permitting programs but portends potential disinvestment or lost economic growth opportunities in the State. As drafted, the applicability provisions do not clearly indicate whether the Section 401 and isolated wetland permitting programs are part of the WQC program or if the WQC is a new, completely separate permit. Either way, the Trade Association Coalition continues to oppose this proposed permit program as an illegal expansion of Ohio EPA's regulatory authority. If Ohio EPA persists in this ill-conceived rulemaking; however, Ohio EPA should clarify the applicability provisions. (Trade Association Coalition)

Response 41: Please see the response to comment 1 above.

Comment 42: 3745-32-02(A) “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 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.”
Comment: ODOT recommends that this section be modified so that only projects requiring Individual 404 permits, or those projects that meet the RGP or the NWPs but do not meet the Ohio State Certification General

Limitations (of the NWP) would require a state water quality permit. (ODOT)

Response 42: The USACE is the applicant in circumstances of Nationwide permits, and therefore must receive a SWQP form Ohio EPA.

Comment 43: Ohio Adm.Code 3745-32-02 Applicability. Ohio Adm.Code 3745-32-02(A)-(C) are redundant. Further, Section 10 Permits are required to prohibit the obstruction or alteration of navigable waters. Thus, for example, Ohio Adm. Code 3745-32-02(C) would require State notification for aerial crossings of utility lines. Since installation of an aerial crossing on a Section 10 water is a navigation issue, it should only be covered by the U.S. Army Corps of Engineers and U.S. Coast Guard. The Utilities recommend that Ohio EPA remove subsections (B) and (C) from the applicability section and only require a state permit for "applicants 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." (Ohio Utility Group)

Response 43: We have modified 3745-32-02 to cover permit applicability based on a federal permit or license into one paragraph. See 3745-32-02(A). In doing so, we make clear that the federal permit or activity is one that is tied to a discharge.

Comment 44: 3745-32-02(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.”
Comment: ODOT often has roadway projects impacting Section 10 Rivers authorized with Nationwide Permits or with the Regional General Permit through a Pre-Construction Notification. ODOT recommends that this section be modified so that only projects requiring Individual 404 permits, or those projects that meet NWPs but do not meet the Ohio State Certification General Limitations would require a state water quality permit. (ODOT)

Response 44: Ohio EPA added language to 3745-32-03(A)(3) to clarify that if the federal permit sought is a nationwide permit or a regional general permit issued by the United States Army Corps of Engineers and Ohio EPA has issued a certification or state water quality permit for the federal permit, no further application is required to be submitted to Ohio EPA under this chapter. This is also addressed in 3745-32-04(L)(3).

Comment 45: ***(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."*** **Comment:** Under Section 10 of the Rivers and Harbors Act all work performed in or over navigable waters of U.S. must be authorized by the USACE. By USACE definitions, examples of work requiring authorization under Section 10 include overhead utility lines, submarine utility crossings, navigational lighting installation; that is work which in no way affects water quality. The Rivers and Harbors Act primary function is to protect navigation. ODOT suggests that the paragraph be deleted. Any authorized project under Section 10 and impacting water quality is covered under 3745-32-02(B). (ODOT)

Response 45: Please see the response to comment 43 above.

Comment 46: 3745-32-02(C) – This section states “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” however 3745-32-03(A)(2) indicates that the director may waive the application requirement if “the activity for which a federal permit or license is sought will not result in a discharge to the waters of the state.” 3745-32-02(B) states that “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.” Would it be more appropriate to only require applications for activities that will result in a discharge of dredged or fill material? (USACE)

Response 46: Please see the response to comment 43 above.

Comment 47: Ohio Adm. Code 3745-32-02(D) requires a state water quality permit for discharge of dredge or fill into non-federally protected waters. In Ohio Adm.Code 3745-32-01(O), "nonfederally protected waters" is defined as "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." Ohio Adm.Code 3745-32-01 (V) defines waters of the state as "the same as defined in Section 6111.01 of the Revised Code." As noted above, R.C. §6111.01 defines waters of the state as:

> all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is

located, that are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters.

Under the proposed rules, Ohio EPA would require state water quality permits for discharge or dredging of waste treatment ponds and stormwater features such as sediment ponds and traps constructed wholly in uplands as well as isolated waste streams that convey wastewater from one waste pond to another. This language would also require a state water quality permit for grouting a well. Requiring state water quality permits for dredge or fill in these types of waters would be detrimental to operations and maintenance activities. This definition should be deleted from the rule. In the alternative, the Agency should include language that would exempt these activities from the state permitting process. Otherwise, from a permitting perspective, there would be an excessive burden on businesses operating and maintaining waste ponds and stormwater features. There would also be a burden on Agency resources in permitting these discharges at a time when Ohio EPA is trying to streamline permitting, reduce staffing, and compete with other states in attracting industries and creating jobs. (Ohio Utility Group)

Response 47: Please see the response to comment 42 above.

Comment 48: 3745-32-02(D) discharge into non federally protected waters
The Conservancy strongly supports the requirement to obtain a state water quality permit for any discharge dredged or fill material into non federally protected waters. We support this rule, together with others including proposed OAC 3745-1-07 (F)(9) to establish primary headwater habitat. Because of the ecological value and functions of headwater streams, such as on downstream uses, and including those described elsewhere in these comments related to PHWH, this rule is essential to protecting stream quality throughout Ohio. (The Nature Conservancy)

Response 48: No response necessary.

Comment 49: ***(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.***
Comment: This expands the authority of the OEPA beyond federal authority. Delete this provision. (B & N Coal, Inc.)

Response 49: Please see the response to comment 1 above.

Comment 50: ***(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."***

Comment: Resources that are often identified during field investigations by an applicant are sometimes determined to be not under federal jurisdiction by the USACE. What is and what is not under the USACE jurisdiction has been under substantial discussion/modification in the last few years. Typically the USACE JD letter is limited to identifying only jurisdictional streams, jurisdictional wetlands, jurisdictional ditches, and isolated wetlands. The term "waters" used in this rule has been described as being synonymous with "waters of the state". The ORC definition of "waters of the state" includes features that would not be included in the USACE JD. For example, in the JD letter, the USACE does not routinely identify resources as non federally protected isolated streams, non federally protected isolated lakes, non federally protected isolated ponds, non federally protected Isolated upland drainages, non federally protected isolated water conveyances, non federally protected isolated water bodies, non federally protected Isolated waterways, non federally protected isolated wells, non federally protected isolated drainage systems, non federally protected isolated irrigation systems, non federally protected isolated water courses, non federally protected isolated springs, non federally protected isolated other bodies of water, or non federally protected isolated accumulations of water. There is no certainty as to what resources beyond what the USACE determined to be federally jurisdiction or "isolated wetland" the OEPA would be concerned with under the definition of "waters of the state" (as defined in ORC 6111.01) within the application for a State Water Quality Permit (SWQP). The definition given in 3745-32-01 (J) of "non-federally protected waters" defines those waters that fall outside of those resources considered waters of the U.S. (and isolated wetlands which are already covered by ORC 6111) as determined by the USACE. If the identification and delineation of, and avoidance, minimization and/or mitigation of these unknown isolated resources is to be mandated by rule, then from ODOT's perspective, the planning and scoping of consultants or ODOT staff to perform such actions within project development, planning, and included within the SWQP application, would need to be made known prior to the review by the OEPA of the submitted SWQP. Based on the definition of waters of the state provided in ORC 6111.01, it remains highly uncertain where the jurisdiction of the OEPA begins and ends and therefore the applicability of the SWQP. (ODOT)

Response 50: Please see the response to comments 1, 2 and 3 above.

Comment 51: ***(F) Exemptions. No state water quality permit need be obtained for:***
Comment: Add a section for Industrial categories with established limitations and standards for specified waste streams as promulgated under Sections 304 and 306 of the CWA and incorporated within Section 402 permits as issued by the Ohio EPA. Pollutants such as total suspended solids and settleable solids although having an associated effect over time of raising the bottom elevation of water due to settling of water borne pollutants are not considered fill materials. And that

discharges subject to effluent limitations guidelines and standards are to be regulated under Section 402 of the CWA. This distinction was clearly outlined within the preamble to the rule making for the definitions of fill material promulgated on May 9, 2002 (FR: Vol. 67; No. 90; Section II (B)(f); pg. 31135). *See attachment titled Federal Register Vol. 67, No. 90 sub part f. Effluent Guideline Limitations and 402 Permits.* (B & N Coal, Inc.)

Response 51: There is no intent to combine the 401 and 402 programs within these rules. Existing Section 402 language is clear as written. Therefore, we feel adding a component referring to the Section 402 program in these rules would be confusing.

Comment 52: 3745-32-02(F) Exemptions from state water quality permit
We agree that this work should only be performed by local government engineers or soil and water conservation districts. Many drainage "improvements" are now being conducted by private individuals without oversight or environmentally-friendly designs.

Also, we ask that the State of Ohio interpret these exemptions as applying only to current "petitioned" ditches that re "historically channelized," and not to new drainage projects.

However, this rule (or others) should clearly indicate when and how the designs would be reviewed at the state and local levels so that there is assurance that more environmentally-friendly designs would be implemented by local governments.

OAC 3745-33-03 (B)(2), concerning application for a state water quality permit, requires a UAA. If drainage projects are exempted from state water quality permits, the Conservancy believes that a UAA still must be performed to determine if a use higher than the drainage or base use is attainable. How will the drainage "improvements" protect downstream uses, especially since drainage is known to lower habitat quality and increase downstream flashiness and habitat instability? (The Nature Conservancy)

Response 52: The exemptions do apply only to petitioned ditches authorized pursuant to Chapter 1515, 6131, 6133, or 6137 of the Revised Code. Additional points made in the comment regarding specific drainage design options and the collection of Use Attainability Analysis data on existing petition ditches, while appropriate for further public debate, are outside the scope of the present rule making effort.

Comment 53: 3745-32-02(F)(2). While the OEC does not dispute the inclusion of "incidental fallback" as an exception to the definition of "dredged material", we recommend the term "incidental fallback" be defined within the regulations to deter any confusion or misinterpretation. To our knowledge, "incidental fallback" is not defined in state or federal law, and the series of

guidance and case law attempting to define this term is plentiful and complex.

While staff and attorneys for the Agency know the current law and interpretations of "incidental fallback" under federal case law, the OEC feels it is necessary to fully explain the complexity of this issue in some detail.

The CWA defines discharge to mean "any addition of any pollutant" to those waters. 33 U.S.C. § 1362(12)(A). The ambiguous nature of the term "addition" has led to some confusion in the context of dredging and excavation work.

Relying on the requirement that there be an "addition", the Army Corps of Engineers determined early-on that it would not require permitting for excavation work that would result in only a de minimis redeposit of dredged material, recognizing that no dredging operation could be conducted that would not result in at least some incidental fallback of such material. The Corps concluded that Congress had not intended to give it authority to regulate strictly excavation activities and that to include incidental fallback within the definition of discharge would be to circumvent that restriction. This was viewed by some as a legal loophole, which would allow polluters to escape the permitting process. In 1993, this issue came to a head, when environmental groups challenged the agency's failure to require a developer to obtain a permit prior to developing 700 acres of wetland in eastern North Carolina. *North Carolina Wildlife Federation v. Tulloch*, Civ. No. C90-713-CIV-5-BO (E.D. N.C. 1992). As part of a settlement of that lawsuit, the agency agreed to revise its interpretation of § 404 of the Clean Water Act to reach more excavation activities.

The *Tulloch* rule, as it was called, broadened the definition of addition to include "any redeposit of dredged material," even if such redeposit is merely incidental to excavation activities. This rule was also challenged – this time by industry groups, who argued that the new rule exceeded the authority granted by Congress under the Clean Water Act. The District Court agreed, enjoining the Corps from enforcing the new rule. *American Min. Congress v. U.S. Army Corps of Engineers*, 951 F.Supp. 267 (D.D.C. 1997). On appeal, the Court of Appeals held that incidental fallback cannot constitute a discharge, since it results from the net withdrawal of material and not the net addition of material. *National Min. Ass'n v. U.S. Army Corps of Engine*ers, 145 F.3d 1399 (D.C. Cir. 1998). That court did, however, acknowledge that some forms of redeposit are within the ambit of the Clean Water Act – only those forms of redeposit that consist strictly of incidental fallback were excluded.

In response to the *National Mining Association* decision, the Corps attempted to define "incidental fallback" as the redeposit of "small volumes of dredged material that … falls back to substantially the same place as the

initial removal [occurred].” The Corps also tried to create a presumption that any excavation activity involving the use of earth-moving equipment would result in a discharge of dredged material, unless there was site-specific evidence that the activity would result in nothing more than incidental fallback. This rule similarly was overturned – which leads us to our status today.

There is no concrete definition of what constitutes incidental fallback. The closest attempt to define the term is the two-part test articulated by Judge Silberman in his concurring opinion to the *National Mining Association* decision, which has been adopted by some courts. That test distinguished incidental fallback from regulable redeposit by a consideration of two factors: (1) the time the material is held before being dropped to earth; and (2) the distance between the place where the material is collected and the place where it is dropped. In addition, an examination of the relevant case law is useful in determining what is and is not incidental fallback.

Activities that result in a redistribution of excavated soil from one place to another are examples of regulable redeposit. *See Green Acres Enters. v. United States*, 418 F.3d 852 (8th Cir. 2005). Likewise, activities that entail the “side-casting” of dredged materials also constitute regulable redeposit under the current state of the law. *See United States v. Deaton*, 209 F.3d 331 (4th Cir. 2002). Side-casting is the process of piling excavated material on either side of an excavated ditch and later redepositing that material back into the excavated ditch. Side-casting occurs frequently during the installation of underground infrastructure, such as drainage pipes or sewer lines, and drainage channelization.

In *United States v. Deaton*, 209 F.3d 331 (4th Cir.2000), a property owner alleged that the Corps could not regulate “side-casting.” The property owner argued that the process of side-casting did not result in a net increase in the amount of material present in the wetland and therefore nothing was “added” to the wetland that was not previously present. Under the property owners' theory, “no pollutant is discharged unless there is an „introduction of new material into the area, or an increase in the amount of a type of material which is already present.’ ” The Fourth Circuit rejected this argument stating:

> Contrary to what the Deatons suggest, the statute does not prohibit the addition of material; it prohibits the „addition of any pollutant.“ The idea that there could be an addition of a pollutant without an addition of material seems to us entirely unremarkable, at least when an activity transforms some material from a nonpollutant into a pollutant, as occurred here. In the course of digging a ditch across the Deaton property, the contractor removed earth and vegetable matter from the wetland. Once it was removed, that material became „dredged spoil,“ a statutory pollutant and a type of material that up until then was not

> present on the Deaton property. It is of no consequence that what is now dredged spoil was previously present on the same property in the less threatening form of dirt and vegetation in an undisturbed state. What is important is that once that material was excavated from the wetland, its redeposit in that same wetland added a pollutant where none had been before. *United States v. Deaton*, 209 F.3d at 335.

Activities that involve "deep ripping" of wetlands have also been held to be a regulable redeposit of dredged material. *See Borden Ranch P'ship v. U.S. Army Corps of Eng*., 261 F.3d 810 (9th Cir. 2002). Deep ripping is the process of penetrating the restrictive layer of farmed wetlands, which is accomplished by dragging four to seven-foot-long metal prongs through the soil behind a bulldozer or tractor.

As the above cases make clear, the incidental fallback exception has generally been narrowly construed by federal courts. However, the mere mention of the term in these proposed Ohio rules can leave the opportunity for the definition to be interpreted by Ohio courts in a completely different fashion. Therefore, the OEC urges the Agency to avoid legal pitfalls that could result in definitions of the term not intended by the Agency. We recommend one of the following: clearly define incidental fallback in its narrowest construct, reference how its definition under the Clean Water Act or completely remove that term. (Ohio Environmental Council)

Response 53: We have added clarification in the rule to make it clear that we will construe and interpret the term incidental feedback in accordance with federal law. This will allow us to, at the very least, be consistent with the US Army Corps.

Comment 54: 3745-32-02 (F)(4) - Comment: A majority of ODOT's maintenance activities appear to be exempt. Does this include the placement of RCP, culvert extensions and culvert lining? Is the maintenance of roadway slopes, embankments, and slip failures included in this the exemption? Is it the intention of OEPA to include certification of certain nationwide permits (in this case NWP #14) into rule? (ODOT)

Response 54: We were attempting to mirror federal language with this provision. We have added additional language to clarify that the initial determination is made by the USACE as to whether a permit is needed for these activities. If no permit is required by the USACE, Ohio EPA with not require a permit. In cases regarding federally non jurisdiction waters, Ohio EPA will determine permit need case-by-case.

Comment 55: 3745-32-02(F)(5). While many of the proposed exemptions follow exemptions similar to those in the Clean Water Act, the OEC cautions including blanket exemptions to ditch maintenance activities for a state water quality permit. By implementing the exemptions in (F)(5), the Agency

is effectively exempting these activities from the antidegradation review process. The goals of the state water quality permit and Ohio's antidegradation review cannot be met by exempting ditch maintenance practices as a whole, especially if these practices are maintaining resource damaging practices, resulting from drainage ditch construction, which did not incorporate water quality protection. If maintenance is exempt from these rules, how will protective best management practices (e.g., those being developed by the ODNR-DSWC Rural Drainage Advisory Committee) be encouraged and successful? How will downstream impacts be protected?

The OEC requests clarifying text added to these rules stating that construction of "drainage improvements" are not exempt from the state water quality permitting. (Ohio Environmental Council)

Response 55: Please see the response to comment 52. The exemption applies only to work carried out on an existing petition ditch that is required by law to be under active maintenance. The emphasis of BMP ditch designs put forth in the Rural Drainage Manual produced by the committee is placed on historically channelized water ways that have are not been subject to active county sponsored maintenance.

Comment 56: 3745-32-02(F)(5) - Comment: ODOT routinely maintains ditches to maintain safe and efficient passage on Ohio's roadways. At times these ditches include resources identified as "captured streams". ODOT requests exemption to maintain the ditch network, originally constructed and/or modified (prior to the Clean Water Act) as stormwater conveyances, without the need for extensive permitting. Maintaining appropriate roadway drainage is absolutely necessary to quickly and efficiently ensure the safety of the travelling public. Additionally, please see our comment on 3745-1-02 (B) and 3745-1-07 regarding historically channelized watercourses. (ODOT)

Response 56: Ohio EPA appreciates the importance of roadway drainage maintenance. The language cited in the comment applies only to petition ditch work. However, proposed language at 3745-32-02(F)(3) should be sufficient to addresses this point.

"Exemptions. No state water quality permit need be obtained for:

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;"

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

Comment 57: 3745-32 - Comment: This rule is referred to in 3745-32-04(A)(3). Does this suggest that before OEPA will confer state water quality certification (currently referred to as 401 water quality certification) on the USACE NWPs the OEPA will conduct and anti-degradation analysis on those NWPs as a whole or is this suggesting that the applicant would need to perform antidegradation analysis on an activity before a NWP can be used? This obviously would have incredible consequences if the latter is true and therefore we recommend that this section be clarified. (ODOT)

Response 57: Ohio EPA would perform an antidegradation analysis on the NWPs under a SWQP. Applicants would not need to do this review when seeking coverage under a NWP.

Comment 58: (A): Adding to the confusion and administrative complexity of the WQC Rules, Ohio EPA appears to require applicants for Federal permits or licenses to submit a separate WQC. Ohio EPA should streamline WQC requirements consistent with Federal licensing and permit requirements so that permit application timelines are not significantly increased. In doing so, Ohio EPA should make it clear that activities subject to federal permitting, including SMCRA permitting, are not subject to the WQC Rules. (Trade Association Coalition)

Response 58: Ohio EPA would continue to issue WQC for SMCRA activities under the proposed SWQP.

Comment 59: 3745-32-03(B) .. and impacting waters of … : It appears in context that any impacting requires a permit. So if a property owner wishes to use storm or waste water to create a wetland on one property so to raise quality of water to limited resource water or/and lower the temperature entering, such would require a permit? The term ‘negative impact’ should be used so not to inhibit the creation of wetlands on non-hydric soil. Also would the State be required to follow this procedure as Attorney General has demanded that a wetland so formed be turned back into farmland, his interpretation, it is against code to use fill to create a wetland? (Joe Helms)

Response 59: There are no regulations or restrictions regarding creating a wetland in an upland area on non-hydric soil where no wetland currently exists.

Comment 60: (B)(2)(a): Ohio EPA requires that WQC applications include correspondence from the U.S. Army Corps of Engineers ("ACOE") regarding the jurisdictional status of the waters. However, the ACOE, in issuing jurisdictional determinations ("JDs"), does not require identification of features which Ohio EPA may deem to fall under "waters of the state." As such, the JDs will not be especially useful in this regard. Ohio EPA

should clearly specify how such features are identified and determined and should clarify that JDs may not be required or applicable in some circumstances. (Trade Association Coalition)

Response 60: Once a jurisdictional determination has been made, and waters are deemed non-jurisdictional, the further delineation of those waters is the responsibility of Ohio EPA.

Comment 61: ***(B)(2)(a-j) "The applicants investigation report of the waters of the United States, in support of the section 404 permit application for the proposed project if applicable;"***
Comment: A majority of the features described in the ORC definition of "waters of the state" are not currently under the jurisdiction of the USAGE, and therefore would not be included in the investigation report submitted to the USAGE. If it is the intention of the OEPA to regulate waters not routinely taken under the jurisdiction of the USACE, then guidance must be provided on how these resources are identified, delineated, assessed and reported to the OEPA when these are the very resources when impacted, necessitate the submittal of a SWQP application. Again, clarification of when the SWQP is necessary when impacts are proposed to resources other than wetlands and streams must be provided to the regulated community. OEPA should plainly explain in rule when a SWQP is necessary versus when a 401 WQC is needed and how these terms/permits are related. (ODOT)

Response 61: The USACE will determine if a water is no longer under their authority. It will be Ohio EPA's responsibility to further determine their extent and quality of these waters for purposes of the SWQP.

Comment 62: (B)(2)(c): In streams with specific aquatic life use designations, Ohio EPA requires a use attainability analysis. As explained in the comments above, this requirement adds cost and complexity to the permitting process, and applicants are tasked to do Ohio EPA's job for the agency. As such, this requirement should be removed. (Trade Association Coalition)

Response 62: Ohio EPA is not requiring a UAA. If an applicant accepts the initial designation and/or approved determination, no additional sampling is needed. If an applicant wishes to dispute the initial determination, they may choose to do so with additional associated costs as a business decision.

Comment 63: 3745-32-03(B)(2)(c). The OEC recommends adding a requirement that all Use Attainability Analyses under this provision are conducted by Tier 3 Qualified Data Collectors (QDCs) as defined in O.A.C. 3745-4-03. (Ohio Environmental Council)

Response 63: There are currently few Tier 3 data collectors available to do this work, and little money for training/certification. Until such time as there is a sufficient pool of Tier 3 data collectors, Ohio EPA has little choice but to review data presented by applicants' consultants on a case-by-case basis.

Comment 64: ***(B) Application requirements.***
(2) Any application for a state water quality permit subject to the provision of this rule and impacting waters of the state shall include:
(d) A specific and detailed mitigation proposal including the location and proposed legal mechanism for protecting the property in perpetuity;
Comment #1: The term "perpetuity" was introduced into the Ohio Revised Code for Section 401 Certifications under House Bill 66 effective date September 29, 2005 but the term perpetuity was not defined and thus the meaning of the term is not clear. The reference to perpetuity can mean a perpetual condition: the state of continuing for a long time vs. eternity or the rest of time. Although these definitions vary only slightly the difference can be considerable when dealing with real estate instruments or other forms of protection. The federal rule effective in June 2008 recognizes this and references protection as "long term" and based on the Corps comments published in Vol. 73, No. 70 on April 10, 2008 defines long term protection as measures taken to sustain and preserve the compensatory mitigation project after performance standards are met and monitoring requirements have been fulfilled. Revise the current OEPA language to exclude the term perpetuity and replace with **"long term protection".**
Comment #2: The Ohio EPA rule states a "legal mechanism" as the form of protection. The Corps new rule effective June 9, 2008 states "The aquatic habitats, riparian areas, buffers and uplands that comprise the overall compensatory mitigation project must be provide long term protection though real estate instruments or other available mechanisms as appropriate" (Vol. 73, No. 70. 230.97(a)(1)). This rule also defines protection based on a real estate instruments but goes further to include other available mechanisms as appropriate. The Corps comments in this rule making that "due to the variability in legal instruments and real estate laws specific terms for real estate instruments cannot be required. Thus terms for conservation easements, restrictive covenants, and other mechanisms are more appropriately addressed by district engineers on a case by case basis". Based on this dialoged, the Corps leaves the length of the protection and the type of protection at the discretion of the DE based on project need. Revise the current OEPA language to exclude legal mechanism and replace with: **"real estate instruments or other available mechanisms, as appropriate" and provide a statement giving the director the discretion to base the final decision for mitigation site protection on project needs.** (B & N Coal, Inc.)

Response 64: The term perpetuity is contained in ORC 6111.30, and follows the standard and accepted definition. However, this requirement only applies to

mitigation properties. If mitigation cannot be performed on site due to leasing issues, off site mitigation and subsequent protection in perpetuity must be located and submitted.

Comment 65: (B)(2)(d): Ohio EPA requires an application contain a specific and detailed mitigation proposal which includes the "legal mechanism" for protection in "perpetuity." This requirement is flawed in several respects. First, this regulation is more stringent than Federal law, which requires "long-term" protection, not perpetual protection. Second, although R.C. 6111.30 contains the "perpetuity" language, such term is not defined. Ohio EPA should define this term only consistent with Federal law. Third, as communicated to the Ohio EPA on several occasions, this perpetuity requirement is completely untenable for Ohio's businesses, some of whom lease, rather than own, affected lands or features. This perpetuity requirement promises to detrimentally impact or prevent many projects in the State. Finally, Ohio EPA does not define legal mechanism; however, such reference clearly differs from Federal regulation requiring long-term protection through real-estate instruments or "other available mechanism as appropriate." Importantly, the Federal language gives the ACOE discretion on the terms of such mechanisms to address case-by-case project needs; Ohio regulation should contain this similar discretion. (Trade Association Coalition)

Response 65: The term perpetuity is contained in ORC 6111.30, and follows the standard and accepted definition. However, this requirement only applies to mitigation properties. If mitigation cannot be performed on site due to leasing issues, off site mitigation and subsequent protection in perpetuity must be located and submitted.

Comment 66: ***(B)(2)(e) Applicable fees:***
Comment: Section 3745-45-02 Certification Fees has been rescinded. Reference the applicable section for certification fees section 3745.114. (B & N Coal, Inc.)

Response 66: Fees are now addressed more specifically in OAC 3745-32-03(B)(3).

Comment 67: 3745-32-03(B)(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.” Comment: It is ODOT’s understanding that any permit action by the USACE will require a jurisdictional determination. A JD is required for any 404 action. It is unclear what this new section of rule is accomplishing. (ODOT)

Response 67: This has been removed.

Comment 68: (B)(4): As stated in (B)(2)(c), the Trade Association Coalition objects to the use attainability analysis requirement. Likewise, we object to Ohio EPA's unreasonable requirements for such analysis. Specifically, in the situation where the qualitative habitat evaluation index ("QHEI") score is greater than 40 for a stream, Ohio EPA requires that a representative number of qualitative macro-invertebrates and fish samples for that stream be provided. This regulation is an example of confusing and contradictory agency regulation and interpretation as well as unnecessary regulation in contradiction of the CSI program. As noted in past comments, such requirement contradicts Ohio EPA's own documentation that streams with QHEI scores less than 45 generally cannot support a warmwater assemblage consistent with the warmwater habitat biological criteria. Additionally, although the regulation says "qualitative macro-invertebrates", it also says such sampling must be done consistent with quantitative sampling procedures in O.A.C. 3745-1-03 which, for biological sampling, includes quantitative sampling methods. Quantitative sampling methods can be extremely costly and could result in project delays. Ohio EPA should revise this provision consistent with its historic interpretation and QHEI documentation. (Trade Association Coalition)

Response 68: All references to QHEI scores have been removed.

Comment 69: ***(B)(4) Use attainability analysis.***
(a) The use attainability analysis required by paragraph (B)(2)(c) of this rule shall consist of the following:
(iv) If the QHEI score is greater than forty for a given stream, a representative number of qualitative macro-invertebrate and fish samples for that stream must be provide;
Comment : At <45 streams generally fall either into the use designation of limited resource water or modified warm water habitat and at >60 streams can typically be designated as either warm water or exceptional warm water habitat. At these two extremes of the scoring scale, the Ohio EPA has determined that streams can be fairly confidently designated. The range in between, 45 to 60, is less predictable based on the degree of stream impacts (modifications). Streams within this range can either be designated as warm water or modified warm water habitat. The more modifications impacting the steam the less likely it can achieve a warm water habitat designation. To aid in evaluating the streams response to modification the Ohio EPA has compiled a list of habitat characteristics and the influence those particular characteristics have on determining use attainment. Thus a designated use of warm water habitat is less likely as streams compile greater numbers of the negative characteristics. Based on this information as provided by the Ohio EPA document *titled "The Qualitative Habitat Evaluation Index (QHEI): Rationale, Methods and Application"* the general habitat designation can be fairly confidently predicted and the need to provide expensive fish and macro-invertebrate surveys avoided. This was specifically the Ohio EPAs intent in the

development of the QHEI. See attachment, section from the above reference document titled *"Using the QHEI in the Use Designation Process" (pg 40 through pg 42)*. (B & N Coal, Inc.)

Response 69: Please see the response to comment 68 above.

Comment 70: ***(B)(4)(a)(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;"***
Comment: OOOT believes that requiring aquatic life sampling on streams that are unlikely to support a warmwater assemblage of aquatic organisms will be costly and time consuming and provide little additional value in assessing streams that would have likely been adequately assessed using the QHEI alone. OEPA's own documentation indicates that, "QHEI scores from hundreds of segments around the state have indicated that values greater than 60 are generally conducive to the existence of warmwater faunas whereas scores less than 45 generally cannot support a warmwater assemblage consistent with the WWH biological criteria." At a minimum, the QHEI score threshold for requiring aquatic sampling should be raised to 45, if not higher. In addition, no biological sampling should be required on streams with obvious chemical impairments (such as low pH in AMD streams) that would, without question, limit the aquatic life potential of a stream regardless of habitat quality. OEPA should clarify whether they intend to require qualitative sampling for the use attainability analysis (as stated in (B)(4)(a)(iv) and (v) or quantitative sampling as described in the methods cited in 3745-32-03(B)(4)(b) as 3745-1-03. The procedures and methods in 3745-1-03 for biological sampling only include quantitative sampling methods for calculating the IBI, Miwb, and ICI however the language in iv and v explicitly states “qualitative”. Conducting this type of quantitative sampling would be extremely time consuming and costly for ODOT (especially for aquatic macroinvertebrate sampling). Requiring quantitative sampling would likely result in project delays (biological sampling could only occur between mid-June and late September), and may cost ODOT as much as $40,000 per stream assessment (based on a consultant prepared cost proposal for conducting one IBI and one ICI on Big Darby Creek).

If qualitative sampling is to be required, ODOT requests that OEPA elaborate on the sampling methods they would like used and the taxonomic level (specifically for aquatic macroinvertebrates) that the organisms should be identified to. ODOT would not be opposed to the use of a qualitative aquatic macroinvertebrate assessment that could be conducted in the field with little additional cost and time delay (such as the current HMFEI used for PHWH streams), but would be extremely opposed to being asked to use the costly and time consuming quantitative methods associated with the ICI (sample equipment needs to remain in the stream for a period of 6 weeks,

and aquatic macroinvertebrates need to be identified to the lowest taxonomic level in the laboratory).

ODOT typically impacts streams at a very specific location, often only minimal distances above and below a stream crossing. To conduct this extensive level of analysis for a short acute impact is not cost effective. (ODOT)

Response 70: Please see the response to comment 68 above.

Comment 71: ***(B)(4)(a)(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."***
Comment: Is this rule relying on the applicant to determine when a qualitative sample should or should not be provided to OEPA or is this at OEPA's discretion? Regardless of who determines the necessity to provide said sample, criteria that must be met in order for a sample to be required to be submitted should be published for comment or at least provided. (ODOT)

Response 71: This is meant to suggest that applicants may want to collect and submit additional data regarding stream quality along with required application materials if they feel their initial scoring has classified the stream higher than expected for avoidance and mitigation purposes. Ohio EPA may still require this data on a case-by-case basis.

Comment 72: 3745-32-03(B)(4)(c)(iii)
Comment: the Field Manual for Ohio's PHWH Streams has been updated. This statement should cite V 2.3 dated October 2009. (ODOT)

Response 72: The proposed rule has been revised to include the most recent version of the field manual.

Comment 73: (C): Ohio EPA sets forth very broad criteria for WQC decisions which go well beyond the scope of a specific application or project. Specifically, the regulations prohibit the Director from issuing a permit unless an applicant demonstrates that discharge or fill will not prevent or interfere with attainment of water quality standards or result in the violation of the Federal Water Pollution Control Act. The Director can also consider whether the applicant is currently significantly noncompliant with any other state water quality or isolated wetland permits (including those for another project or activity), and if issuing the permit will result in short or long-term impacts to water quality. Finally, the Director may impose terms and conditions as are appropriate or necessary to ensure compliance with laws and to ensure "adequate protection of water quality and human health." These criteria have significant potential for regulatory abuse. Moreover, several terms,

such as "significant noncompliance" with respect to other projects or activities and "adequate protection of water quality and human health" are subject to multiple interpretations. This provision should be streamlined and the decision making criteria objective and based only on requirements of Ohio law. (Trade Association Coalition)

Response 73: All but one of the considerations or criteria mention in the comment have been a part of the approval criteria/authority since 1982. We believe these authorities have been appropriately employed in evaluating permits and establishing appropriate permit conditions. The rules do include a new provision that allows the director to consider an applicant's current compliant status and may deny a permit if the noncompliance is significant. This is discretionary on the part of the Director, and it does not compel a denial. We believe this provision furthers the Director's goal of obtaining compliance with environmental laws.

Comment 74: 3745-32-04(C)(1)(b). The OEC encourages the Agency to redraft the exemption from avoidance and minimization of Mitigation category 2 streams. Without a criteria to determine how the applicant is to demonstrate that downstream waters are protected, it is not clear which category 2 streams will receive such a broad (and potentially water quality devastating) exclusion. As explained below, as proposed, Class II primary headwater habitat streams are regarded as category 2 mitigation streams. This is the case even though those streams possess potential for limited and diverse aquatic life.

The OEC therefore urges the agency to only apply this exclusion to limited warm water and modified warm water habitat streams, and require demonstration of avoidance and minimization for Class II headwaters. If Class II headwaters are included, OEC recommends the demonstration of downstream protection to include flood protection, habitat and aquatic life protection as well. (Ohio Environmental Council)

Response 74: The stream mitigation rule will not go forward at this time.

Comment 75: 3745-32-04(D) Protection of water body uses.
This sections states "(1) Beneficial uses, including existing uses and designated uses, and the water quality and aquatic habitat necessary to protect those uses shall be maintained and protected."

The Conservancy encourages the Agency to ensure that drainage uses meet this standard, including channel designs allowed under proposed establishment of drainage use designations in OAC 3745-1-07(G). (The Nature Conservancy)

Response 75: The drainage uses have been removed from the proposed WQS rule package.

Comment 76: 3745-32-03(E)(1)(a). Modifications and Transfers. Under this rule, all permit modifications are subject to the public notice requirements of the Administrative Code. DEO requests that OEPA consider amending the draft rules to specifically state that permit modification are not subject to the public notice requirements if the requested modification results in a reduction of impacts. Additionally, OEPA should consider the establishment of an impact threshold to trigger the public notice requirement such that projects with an insignificant or minor increase in impacts would be exempt from the public notice requirements. This provision will prevent significant delays in implementing projects already determined to be of important social or economic value to the State of Ohio. (Dominion East Ohio)

Response 76: A modified permit is considered a final action of the Director and as such, it is subject to the public notice requirements found in OAC Rule 3745-47-07.

Comment 77: 3745-32-03(G) This section states that state water quality permits shall expire within five years of the date of issuance. This is problematic for projects that will span longer than the five-year permit term. Needing to obtain a new state water quality permit during the course of a project could change the protection or mitigation activities required at a site, after these activities have already begun. (NEORSD)

Response 77: We have changed the proposed language to reflect SWQP duration to be ten years plus one 5 year renewal before expiration, unless the federal permit expires first.

Comment 78: ***(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.
Comment #1: Expiration of the Section 401 certification should be tied to the expiration of the federal permit.
Comment #2: Add the statement for Isolated Wetland Permits. A State Isolated Wetland permit shall expire 5 years after the date of issuance. (B & N Coal, Inc.)

Response 78: We have changed the language to allow for SWQPs to expire within ten years, plus an additional 5 year renewal, or when the federal permit expires, whichever is less.

Comment 79: 3745-32-03(G)(1) – This section states "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" and 3745-32-03(G)(2) limits renewal to five additional years. Is there any flexibility for large projects with a lengthier construction timeframe that have federal permits valid for greater than ten years? (USACE)

Response 79: Unless in the case of an impact increase, we have allowed for up to ten years for a SWQP plus one five year extension.

Comment 80: 3745-32-03(G)(1)
Comment: ODOT project development and construction routinely extends beyond 5 years. Given the nature of our work, development of public works serving the greater good of the public, ODOT should be afforded longer timeframes on permits. A minimum of 10 years is requested. All federally funded major transportation projects that have passed through an extensive NEPA review process should be given special consideration and afforded extended permit deadlines. (ODOT)

Response 80: This change has been made.

Comment 81: 3745-32-03(G)(2)
Comment: Permits for federally funded major transportation projects should be able to be extended more than two times for the reasons stated above. (ODOT)

Response 81: The proposed language allows for a maximum of up to a 15 year permit duration, which is equivalent to one initial ten year permit, and one five-year renewal.

Comment 82: (G)(2): Ohio EPA provides that WQCs can be renewed for 1 period of up to 5 years. Such renewals will be subject to public notice despite the regulation's requirement that the permittee certify there will be no additional water quality impacts beyond those authorized in the original State permit. This provision exposes permits to another round of opposition and creates business instability in contravention of the CSI program. Ohio EPA should not require additional public notice for such renewals. Additionally, Ohio EPA should recognize that on larger sites, 10 years may be an insufficient permitting timeframe, and Ohio EPA should amend the provision to allow for additional renewals as needed. (Trade Association Coalition)

Response 82: We have changed provisions in this rule to state that permits shall extend to 10 years. There is also the potential to ask for a five year renewal. We believe this should adequately address the universe of projects that we have seen in Ohio. The permit renewal is a final action of the Director and thus is subject to public noticing requirements once it is final.

Comment 83: ***(G)(3) "Request for renewal of state water quality permits must include a notarized statement that the conditions contained in paragraph (G)(2) of this rule ..."***
Comment: Renewal requires a "notarized statement". For State of Ohio projects, who notarizes? Is this requirement needed? (ODOT)

Response 83: The statement would be made by one with authority to submit/sign the permit application on behalf of ODOT and the statement would be notarized by a notary. Having a notarized statement regarding the conditions specified in the rule provides the agency a high degree of confidence that things have not changed and would thus allow a more efficient/timely processing of the renewal.

Comment 84: ***(G)(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."***
Comment: This section states that a renewal (or extension) of an existing 401 WQC will require public notice procedures be met. Why is this required if the applicant certifies nothing has changed with their proposal and the related impacts? ODOT's large linear transportation projects often take longer than five years to construct. ODOT recommends not requiring the additional public notice requirement. Also, ODOT suggest that a major transportation project be granted a 10 year certification timeframe, up front, on the first certification. (ODOT)

Response 84: The language has been changed to reflect that renewals will be issued as finals actions. The language for expiration of the initial SWQP will be ten years.

Comment 85: (J): The regulations permit the Director to require a WQC applicant to perform environmental quality tests, including chemical analyses, sediment or fill material, bioassays, and biological monitoring. Ohio EPA has started requiring unnecessary and expensive biological sampling regardless of any unique project features. In addition, stream sampling locations established by Ohio EPA have historically been arbitrary and without scientific, technical or factual support. Ohio EPA should remove this provision, or, at a minimum, require that such sampling and sampling locations be scientifically, technically and factually supported. (Trade Association Coalition)

Response 85: This is not a requirement, but allows the Director to ask for this information only if deemed necessary.

Comment 86: 3745-32-03(J) “Conditions of permit”
Comment: This rule suggests chemical sampling of fill material prior to permitting or placement. This would obviously be a tremendous hindrance to efficient delivery of large construction projects involving multiple stream crossings and large amount of fill material. (ODOT)

Response 86: Please see the response to comment 85 above.

Comment 87: ***(L)(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."
Comment: This rule appears to contradict rule 3745-32-02(A). Perhaps 3745-32-02(A) should read, "Every applicant for an individual permit from the United States Army Corps of Engineers pursuant to section 404 of the Federal...". The USACE makes the determination on an application of whether or not an Individual 401, or now apparently named an "individual state water quality permit" is needed or not the director of OEPA. Please clarify. (ODOT)

Response 87: This statement clarifies that compliance with individual SWQP application requirements are unnecessary, as those conditions are built into the SWQP issued for that general permit by Ohio EPA. Only in cases where the SWQP conditions for that general permit cannot be met, are individual applications for and individual SWQP conditions necessary.

Comment 88: 3745-32-03(M) "General permits for isolated wetlands."
Comment: The need for this rule is unclear. OEPA already has the capacity to regulate isolated wetland through previous rule making. This section is titled specifically for isolated wetlands however the remaining text includes not the term "isolated wetland" but "waters of the state." If the intent here is to create the authority for the director of OEPA to establish general permits for impacts to waters of the state, then the use of the term isolated wetland should be removed. Again the need and intent of this rule is unclear. (ODOT)

Response 88: The words "isolated wetlands" have been removed from this provision.

<u>Rule 3745-32-04</u>

Comment 89: 3745-32-04 - Comment: As mentioned in the above comments under 3745-1-05, 3745-32-04 appears to be an attempt by OEPA to separate antidegradation requirements for wastewater construction and discharge versus permits dredge and fill permits. ODOT welcomes OEPA's attempt to clarify current rules in this manner and hopes this is a result of our earlier collaboration with OEPA on this rulemaking. However, it appears that an incomplete and at times contradictory separation of these two concepts has occurred. To improve clarity, we recommend these additional changes:

i. The titles of these rules should explicitly differentiate between these two separate activities and the resulting antidegradation review processes. Perhaps titling both "Antidegradation" followed by the appropriate impact type (chemical loading vs.fill) and applicable resource types (wetlands and streams).

ii. Is this section only applicable to isolated wetlands and streams and not to the other waters of the state (such as irrigation systems and puddles)? 3745-32-02(D) suggests that activities within all non-

federally protected waters would be subject to SWQP permitting requirements. This apparent contradiction should be clarified. (ODOT)

Response 89: Please see the response to comment 30 above.

Comment 90: The Trade Association Coalition disagrees with the entire concept of a full antidegradation review for a state-only permitting program. Although the waters subject to these requirements are biologically insignificant, Ohio EPA has introduced the same regulatory structure associated with impacts to significant jurisdictional waters. Ohio EPA has not justified the need for this comprehensive antidegradation rule, and it should be removed. (Trade Association Coalition)

Response 90: Non-jurisdictional waters remain waters of the state, and can sometimes be of significant size or quality. Therefore, requiring an antidegradation review for these waters is consistent with past practices.

Comment 91: Ohio EPA establishes a new rule which was not available for comment in 2008 and which moves antidegradation review requirements applicable to the WQC program and isolated wetland permit program. Confusingly, Ohio EPA also requires that projects impacting wetlands also meet the specific wetland anti degradation rule, O.A.C. 3745-1-54. Likewise, in several places, the agency states that some provisions apply to streams and wetlands, some refer to other rules for wetlands and still others specify that antidegradation review provisions apply for both streams and wetlands (e.g., avoidance/minimization, impact evaluations, and mitigation). Thus, rather than simplifying permitting procedures, Ohio EPA has significantly complicated them by creating rules which cross-reference each other and obscure any clear understanding of the regulatory requirements associated with an antidegradation review. Ohio EPA should reevaluate the purpose and language of this rule. (Trade Association Coalition)

Response 91: Ohio EPA is proposing to locate all stream review and antidegradation requirements, as well as certain isolated wetland review requirements, under Chapter 32 as an initial step. Eventually, all activities associated with State Water Quality Permitting, including wetlands under 3745-1-50 through 54 and the isolated wetland permitting rules will be located there.

Comment 92: 3745-32-04(A)(1) - Comment: “Individual water quality permit” and (3) “general state water quality permit” suggests that OEPA has or is developing an extensive, all inclusive permitting process that includes both a “general” and an “individual” level of permit. Please clarify what will constitute a general permit versus another level of permit? What are the thresholds that distinguish between these two (or more) levels of permits? (ODOT)

Response 92: This language is a placeholder to allow for future general permits as needed.

Comment 93: 3745-32-04(A)(3) "The issuance of general state water quality permits by the director of…"
Comment: What defines a general SWQP versus an individual SWQP? (ODOT)

Response 93: Please see the response to comment 92 above.

Comment 94: (B): Ohio EPA requires that extensive information be submitted to Ohio EPA in addition to the application information submitted for a permit. The requirements in this rule add significant cost and time to the permitting process without legitimate reason. Ohio EPA should streamline review requirements and should, at a minimum, limit information requirements to project-specific, impact-specific, technically justified factors. (Trade Association Coalition)

Response 94: This is a requirement of the Clean Water Act, and has been required by Ohio EPA for years.

Comment 95: 3745-32-04(C)(1) – This section details projects that are exempt from the requirements to address avoidance and minimization, if the applicant meets mitigation requirements. This is not consistent with federal requirements regarding avoidance, minimization, and then compensation for unavoidable impacts. In evaluating a project area containing waters of the United States, consideration must be given to avoiding impacts on these sites. If waters of the United States cannot be avoided, impacts must be minimized. 33 CFR Part 332.1(c)(2) states that an individual section 404 permit will be issued "only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines." Additionally, 33 CFR Part 332.2 defines compensatory mitigation as "the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved." (USACE)

Response 95: This language has been removed.

Comment 96: 3745-32-04(D)(1)(a) - Comment: OEPA routinely currently allows the net loss of streams. Every Nationwide Permit that extends a culvert or installs a new culvert, and that does not require mitigation, essentially results in a loss of stream "use". To say that mitigation is required for the mistaken concept of "no net loss of streams" is misguided and uninformed. (ODOT)

Response 96: This refers to wholesale loss of larger streams segments or their functions, from a cumulative standpoint, not small specific impact locations.

Comment 97: (D)(2): The concept of this provision is incorrect because it is not possible for an isolated stream to have a cumulative impact. In addition, the requirements are onerous, costly and largely infeasible for truly isolated streams. This provision should be removed. (Trade Association Coalition)

Response 97: The provision is not limited to isolated streams. The scientific evidence supporting cumulative impacts of headwater stream loss is sound. Some modifications in wording of the language have been made to make it clear this applies in the context of first through third order streams.

Comment 98: 3745-32-04 (D)(2)(a)-(b) Contexts of impact.
Comment: Items (a) and (b) should be brought in-line with the federal definition (33 CFR Part 330) of "single and complete crossing". Transportation projects should be exempt from this level of evaluation based on the federal definition recently developed. (ODOT)

Response 98: Although we did not mirror the federal language, we have changed this language to better allow for linear project review.

Comment 99: 3745-32-04(D)(2)(a)-(b)
Comment: The term "tributary" should be defined in part -01 of this rule. (ODOT)

Response 99: No change in the rule was made; the meaning and application of the term can be properly inferred using the generally accepted definition of the word.

Comment 100: 3745-32-04(D)(2)(a)-(b)
Comment: Would gathering of data regarding beneficial uses in both local and regional drainage patterns be the responsibility of the applicant? Or, would OEPA take their own existing data into account when an applicant is submitted that is undergoing the antidegradation review? The access to that regional and local data would be a major hindrance for applicants preparing their project for review. (ODOT)

Response 100: The proposed language has been revised. It states that evaluation of cumulative impacts is optional at the discretion of the Director. Existing data would be used where it is available. Situations requiring additional

information to gauge cumulative impacts are most appropriately made on a case by case basis.

Comment 101: 3745-32-04 (D)(2)(d)
Comment: Any use of the term "surface water of the state", as in this section, extends extensive evaluation, delineation, and assessment of a variety of surface waters that do not have mitigation categories, do not have assessment tools, and are not routinely identified on the landscape during USACE jurisdictional determinations (i.e. puddles, irrigation systems, etc). This apparent oversight will drastically increase regulatory uncertainty, delays compared to the established process to determine jurisdiction, and add confusion to the regulatory process. (ODOT)

Response 101: This comment was addressed by inserting the phase "regulated under Chapter 32 of the Ohio Administrative code" after surface water of the state.

Comment 102: 3745-32-04(E) "surface waters of the state"
Comment: Again, does OEPA intend for applicants to provide minimization and avoidance of puddles, irrigation systems and other accumulations of water? Please provide guidance on how to delineate these resources if that is the intent. If not, wording in these rules should be focused on those resources legally regulated under the Clean Water Act. (ODOT)

Response 102: Please see the response to comments 1 and 2 above.

Comment 103: 3745-32-04 (E) Avoidance and minimization of impacts
We support the Agency"s proposed rule to ensure that avoidance and minimization of impacts is addressed. However, we also ask that Class II PHWH streams be included, especially when there is the potential for stormwater flow and temperature impacts.

As we have stated in our comments on 3745-1-07(F), we want to emphasize the need to protect PHWH stream functions adequately. Class I and Class II streams should not be replaced by stormwater control Best Management Practices unless the BMPs: (1) include flow regimes that match natural conditions; and (2) match temperature regimes, avoiding temperature increases from stormwater BMPs. Review of impacts to PHWH streams should ensure avoidance of these impacts. (The Nature Conservancy)

Response 103: The Agency considered this and other comments in revising the proposed rule language on avoidance and minimization of impacts. Applicants are required to take steps to avoid impacts on all categories of streams where practicable. Appropriate mitigation for the types of impacts cited in the comments would normally be required.

Comment 104: 3745-32-04 Exemptions for mitigation categories

The Conservancy has two concerns where the Agency is proposing to exempt Mitigation Categories 1 and 2 from the water quality permit.

First, we are concerned about the lack of an established protocol to "demonstrate that downstream waters are protected." The Agency should clearly establish and publish a protocol.

Second, the Conservancy is concerned that Ohio EPA and ODNR have not sufficiently determined the effectiveness of channel designs such as the overwide channel, especially how they protect biological diversity, uses and downstream quality. We are concerned that some designs will not replace habitat features of streams, including PHWH (especially Class II and III), and result in a loss of use. It should be demonstrated these design options are effective at achieving aquatic life use attainment and protecting rare and sensitive species. (The Nature Conservancy)

Response 104: The stream mitigation rule and the exemptions mentioned in the comment have been removed from the proposed rule.

Comment 105: (E)(2): Ohio EPA provides that the minimization and avoidance of impacts can be demonstrated by an applicant's nondegradation alternatives and minimal degradation alternative. "Minimal degradation alternative" is defined in proposed O.A.C. 3745-32-01 to include pollution prevention alternatives, best management practices, alternative manufacturing techniques, alternative treatment methods. In addition it includes proposals to discharge a lower loading of pollutants than the preferred alternative treatment technology is capable of achieving. Taken together, applicants may be required to demonstrate minimization and avoidance using not only extremely costly alternatives, but also technically infeasible alternatives. The provision should be removed or, at a minimum, Ohio EP A should consider realistic, reasonable demonstrations of minimization and avoidance of impacts so that realistic alternatives can be presented. (Trade Association Coalition)

Response 105: Please see the response to comment 29 above.

Comment 106: (E)(3)(a): Ohio EPA requires applicants to take appropriate/practicable steps to avoid all or some impacts to the water body system. This requirement is more stringent than Federal regulation, and, as such, Ohio EPA should remove this provision. (Trade Association Coalition)

Response 106: This is very similar to the federal requirement for avoidance.

Comment 107: (E)(3)(b): For Category 4 streams, applicants are required to show "compelling reasons" why all impacts cannot be avoided. Given the inherent discretionary interpretation of "compelling reasons," Ohio EPA

should provide demonstrative and reasonable examples of what the agency deems to be a sufficiently compelling reason. In addition, there is no objective mechanism to determine public need. This provision, to the extent necessary, should be revised and restructured. (Trade Association Coalition)

Response 107: This refers to the stream mitigation, which will not be proposed at this time.

Comment 108: 3745-32-04(F) Mitigation:
Comment: Based on this section, is mitigation only required for streams and wetlands? Does this mean that mitigation is not needed for other waters of the state such as ditches? Or, is it that guidance for mitigating other surface waters of the state (other than streams and wetlands) currently does not exist however these waters will still need to be mitigated on a case by case basis? (ODOT)

Response 108: This has been clarified.

Comment 109: 3745-32-04(H)"Public Involvement"
Comment: OEPA should consider limiting public hearings to projects that have a significant impact to aquatic resources and public interest. It has been ODOT's experience that many public hearing held by OEPA for ODOT projects do not generate public interest and often times no one from the public attends the hearings.

In these difficult financial times for all state agencies a procedure similar to that utilized by the USACE could eliminate the requirement for Public Hearings on projects without significant impacts or public interest. The Corps policy (33CFR Part 325) states " A statement that any person may request, in writing, within the comment period specified in the notice, that a Public Hearing be held to consider the Application. Request for Public Hearings shall state with particularity the reasons for holding a Public Hearing." Therefore, the Public Hearing process is reserved for those projects of real ecological and public interest. (ODOT)

Response 109: Ohio EPA will continue to resolve issues by discussing public concerns individually with commenters in an effort to reduce the number of hearings held. Also, we have eliminated the automatic need for required public hearings for projects on Lake Erie.

Comment 110: (H): With respect to public involvement, it is not the obligation of the Applicant to respond to public comments. To the extent the Director is unable or unwilling to respond to public comments, the Director may request the technical assistance of the applicant, but it is inappropriate to attempt to shift the burden to the applicant of responding to public comments, particularly in situation where the extent of public comment far

exceeds the scope of the project or the legal requirements for public participation. Ohio EPA should only require applicants to respond to comments involving concerns of the agency or public comments for which the agency specifically requests an applicant response. (Trade Association Coalition)

Response 110: As in the past, Ohio will only request applicants to respond to comments pertinent to the project and Ohio EPA's authority. All other comments, general or unrelated, will continue to be addressed by Ohio EPA.

Comment 111: (I): The regulations require the Director to notify other governmental agencies, including ODNR, U.S. Fish and Wildlife Service, U.S. EPA, and any local agencies of all proposed activities that may lower water quality. The purpose of this provision is unclear, particularly where it would appear to require coordination regardless of whether a particular agency has jurisdiction over, or an interest in, the activity (i.e. this rule is developed for state-only waters). Ohio EPA should revise this provision to provide that coordination is required only where applicable laws require such coordination. (Trade Association Coalition)

Response 111: This is a Clean Water Act requirement, and cannot be removed.

Comment 112: 3745-32-04(I) "'The director shall notify the Ohio department of natural resources, the United States fish and wildlife service,…"
Comment: OEPA notification to ODNR, USFWS, USEPA, and local planning agencies of any project that may require lowering of water quality is redundant; ODOT notifies all agencies through NEPA coordination. We suggest adding the following to the end of the first sentence "…all proposed activities that may lower water quality unless proof is provided in the permit application that all applicable agencies have been coordinated with and agree with the project or is federally funded developed in full compliance with the National Environmental Policy Act." (ODOT)

Response 112: This allows for agency to coordination later in the permitting process when more specific and detailed information is available.

Comment 113: 3745-32-04(J)(2)(f) The phrase "are unique or rare within the locality or state" is too arbitrary to be used as a decision making tool in the state water quality permitting process. If this language is to be used in the regulation, clarification as to what constitutes "unique or rare" needs to be included. (NEORSD)

Response 113: This affords the Agency with flexibility to allow impacts when a resource is not unique or rare within the locality or state.

End of Response to Comments