

Stakeholder Outreach Forum

401 WQC Rules (OAC 3745-32)



Background and Goals

- The 401 WQC Rules contained within the Ohio Administrative Code (OAC) 3745-32 are up for review.
- Ohio EPA hopes to file draft rules with the Joint Committee on Agency Rule Review (JCARR) by the end of year.
- Ohio EPA is seeking stakeholder input before drafting the rules. Comments, recommendations and discussion are encouraged.

Background and Goals

- The Wetland Antidegradation Rules contained within OAC 3745-1-54 are also up for review.
- We do not plan to discuss the 401 Dredge Rule or the Water Quality Certified Professional (WQCP) Rules at this time, but can answer general questions at the end.

Current Structure of the 401 Rules

Effective 9-15-1982

- 3745-32-01 Definitions
- 3745-32-02 Section 401 water quality certification required
- 3745-32-03 Section 401 water quality certification exemptions
- 3745-32-04 Section 401 water quality certification applications
- 3745-32-05 Criteria for decision by director
- 3745-32-06 Revocation of section 401 water quality
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- 3745-32-07 Procedure for decision by director

Overarching Issues

- What **IS** working?



- What is **NOT** working?
 - Improvement opportunities



CURRENT OAC 3745-32-01 - Definitions

(G) "Fill material" means any pollutant used to create fill to replace an aquatic area with dry land or to change the bottom elevation of a water body for any purpose. "Fill material" does not include the following: (1) Material resulting from normal farming, silviculture, and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fiber, and forest products; (2) Material placed for the purpose of maintenance of existing structures, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures.

CURRENT OAC 3745-32-01 - Definitions

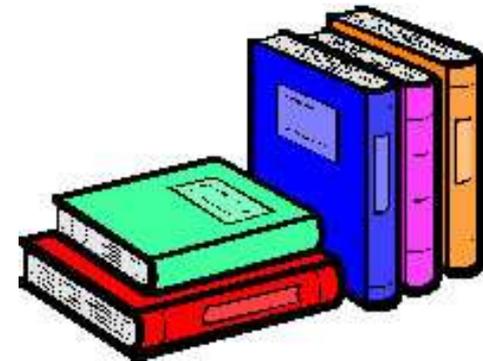
"Waters of the state" means all streams, lakes, ponds, wetlands, watercourses, waterways, wells, springs, irrigation systems, drainage systems and all other bodies or accumulations of water, surface and underground, natural or artificial, which are situated wholly or partly within, or border upon, this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

CURRENT OAC 3745-32-01 - Definitions

“Waters of the State” as defined in **Statute (6111.01)**
(H) "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.

CURRENT OAC 3745-32-01 - Definitions

- Other **current** definitions to discuss?
 - Applicant
 - Director
 - Federal Water Pollution Control Act
 - General Permit
 - Nationwide Permit
 - Ohio EPA
 - Person
 - Section 401 WQC
 - Rivers and Harbors Act
 - Wetlands



Potential OAC 3745-32-01 - Definitions

“Temporary Impacts” – Administration directions is to seek restoration only for temporary impact, with no compensatory mitigation requirements.

Potential OAC 3745-32-01 - Definitions

“**Temporary Impacts**” means temporary fill activities which facilitate the nature of the activity or aid in the access, staging, or development of construction that are short term in nature and which are expected, upon removal of the temporary fill, to result in the surface water returning to its pre-impact condition and biological function with minimal or no human intervention within the next two growing seasons. Examples of temporary impacts include, but are not limited to access roads, work pads, staging areas, and stream crossings with no erosion protection provisions.

Potential OAC 3745-32-01 - Definitions

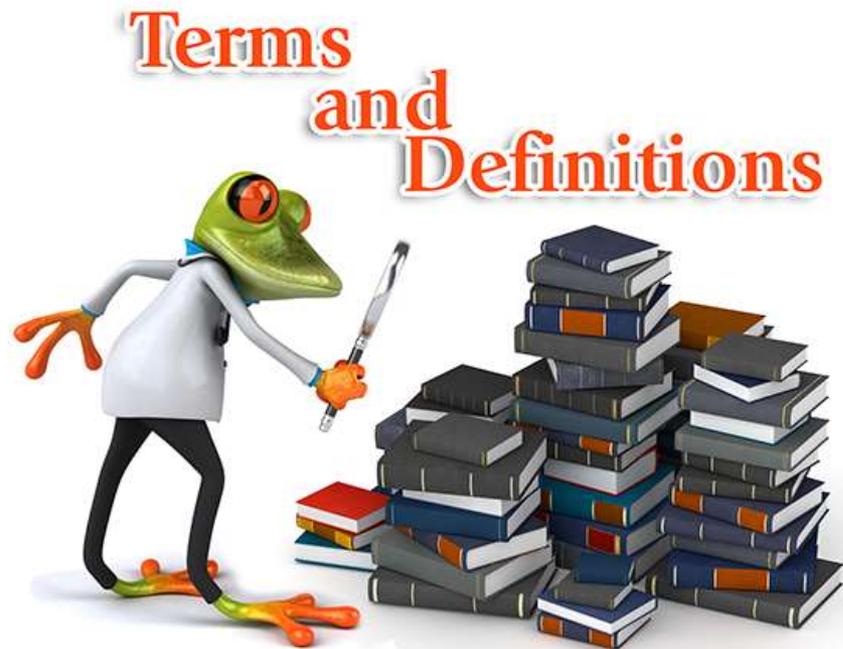
- "Minimal degradation alternative" means an alternative, other than the applicant's preferred alternative, including pollution prevention alternatives, that would result in a lesser lowering of water quality.
- "Non-degradation alternative" means an alternative, other than the applicant's preferred alternative, including pollution prevention alternatives, that would result in the elimination of the need to lower water quality.
- Preferred alternative ?

Potential OAC 3745-32-01 - Definitions

- Define other terms to provide clarity to the program?
 - Stream (defined in fee structure – statute)
 - Lake / Pond
 - Mitigation (compensatory mitigation vs mitigation - corps)
 - Restoration
 - Short term and long term degradation
 - “Existing use” in 401 regulatory structure
 - Stream sampling requirements to determine existing use

Potential OAC 3745-32-01 - Definitions

- Other **potential** definitions to discuss?



CURRENT OAC 3745-32-02 - 401 WQC Required

- (A) A section 401 water quality certification is required to obtain the following: (1) A permit from the army corps of engineers pursuant to section 10 of the Rivers and Harbors Act; (2) A permit from the army corps of engineers pursuant to section 404 of the Federal Water Pollution Control Act; (3) A permit from the army corps of engineers pursuant to both section 10 of the Rivers and Harbors Act and section 404 of the Federal Water Pollution Control Act; and (4) Any other federal permit or license to conduct any activity which may result in any discharge to waters of the state.
- (B) No certification issued pursuant to this chapter shall be effective until all applicable fees have been paid.

CURRENT OAC 3745-32-03 - 401 WQC Required

- No section 401 water quality certification need be obtained if: (A) The secretary of the army has issued a general permit pursuant to section 404(e) of the Federal Water Pollution Control Act; or (B) The discharge of dredged or fill material is part of the construction of a federal project specifically authorized by congress, provided the effects of such discharge are included in an environmental impact statement submitted to congress prior to the actual discharge.

Exemptions Clarification

- Should the list of exemptions under Section 404 be added to the list?



CURRENT OAC 3745-32-04 - 401 WQC Applications

- (A) Filing an application with the army corps of engineers for any permit set forth in paragraphs (A)(1) to (A)(3) of rule 3745-32-02 of the Administrative Code constitutes application for a section 401 water quality certification from the Ohio EPA. If an application, in the judgment of the director, lacks information necessary or desirable to determine whether the applicant has demonstrated the criteria set forth in paragraph (A) of rule 3745-32-05 of the Administrative Code, the director shall inform the applicant in writing that review of the application will not proceed until the applicant has submitted additional information as described by the director
 - This is no longer the process and is superceded by statute.

CURRENT OAC 3745-32-04 - 401 WQC Applications

- (B) Any person filing an application for any other federal permit or license to conduct an activity which may result in a discharge to waters of the state must submit an application to the director for a section 401 water quality certification. If an application, in the judgment of the director, lacks **information necessary or desirable** to determine whether the applicant has demonstrated the criteria set forth in paragraph (A) of rule 3745-32-05 of the Administrative Code, the director shall inform the applicant in writing that review of the application will not proceed until the applicant has submitted additional information as described by the director. The director may waive the application requirement if, in the judgment of the director, the activity for which a federal permit or license is sought will not result in a discharge to the waters of the state.

CURRENT OAC 3745-32-04 - 401 WQC Applications

Table 2: 401 WQC Application Completeness Review CY 2012 to CY 2014

Initial Completeness Review	Count	Percent of Total
Initial Applications Received	236	N/A
• Received Complete	37	15.7%
• Received Incomplete	199	84.3%
Resubmitted Completeness Review		
Resubmitted Applications Received	199	N/A
• Received Complete	133	66.8%
• Received Incomplete	66	33.2%

- Desire to better define expectations and collaborate on what those expectations should be, and solidify in new rules.....

ORC 6111.30 – Further Detail Needed in Rules

- (1) Applications.....shall be submitted on forms provided by the director.....and shall include all information required on those forms as well as the following:
- (2) If the project involves impacts to a wetland, a wetland characterization analysis consistent with the Ohio rapid assessment method;
- (3) If the project involves a stream for which a specific aquatic life use designation has not been made, a **use attainability analysis (existing use – budget bill)**;

ORC 6111.30 – Further Detail Needed in Rules

- (4) A specific and detailed mitigation proposal, including the location and proposed legal mechanism for protecting the property in **perpetuity (long term protection)**;
- ORC 6111.31 – Adoption and review of standards for evaluating mitigation proposals:
 -any mitigation standards, criteria, scientific methods, processes, or other procedures or policies that are used by or approved for use by the director to evaluate, measure, or review under sections 119.03 and 106.03 of the Revised Code **shall not be used as the basis for any certification or permit denial or as a standard applied to mitigation unless the applicant has been notified in advance that additional mitigation standards**, criteria, scientific methods, processes, or procedures will be considered as part of the review process.
 - Mitigation performance standards, timeframes....
 - Stream mitigation requirements – ratios? IRT consistency concerns?

ORC 6111.30 – Further Detail Needed in Rules

- (5) Applicable fees (already in statute – ORC 3745.114);
 - Will propose to rescind OAC 3745-45-02 or simply reference 3745.114
- (6) Site photographs;
- (7) Adequate documentation that the applicant has requested comments fromODNR and F&W regarding threatened and endangered species, including the presence or absence of critical habitat;
 - Response = antidegradation requirement component

ORC 6111.30 – Further Detail Needed in Rules

- (8) Descriptions, schematics, and appropriate economic information concerning the applicant's preferred alternative, nondegradation alternatives, and minimum degradation alternatives for the design and operation of the project;
- (9)report of the waters of the United States....;
- (10)copy of....corps public notice....

ORC 6111.30 – Further Detail Needed in Rules

- (B) Not later than fifteen business days after the receipt of an application for a section 401 water quality certification, the director shall review the application to determine if it is **complete**.....if the director determines that the application is not complete, the director shall include with the written notification an itemized list of the information or materials necessary to complete the application.....
- (G) The director shall issue or deny.....not later than one hundred and eighty days after the complete application..
 - Ohio EPA's other clock starts once Corps issues their public notice = 1 year
 - Considering requirement of 401 WQC application within 60 days after publication of Corps PN

CURRENT OAC 3745-32-05 – Criteria for decision by the Director

- (A) The director shall not issue a section 401 water quality certification unless he determines that the applicant has demonstrated that the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the state will: (1) Not prevent or interfere with the attainment or maintenance of applicable water quality standards; (2) Not result in a violation of any applicable provision of the following sections of the Federal Water Pollution Control Act including: (a) Effluent limitations as described in section 301; (b) Water quality related effluent limitations as described in section 302; (c) Water quality standards and implementation plans as described in section 303; (d) National standards of performance as described in section 306; or (e) Toxic and pretreatment effluent standards as described in section 307.

CURRENT OAC 3745-32-05 – Criteria for decision by the Director

- (B) Dredge material – bioaccumulative chemicals of concern.....
- (C) Notwithstanding an applicant's demonstration of the criteria in paragraph (A) of rule 3745-32- 05 of the Administrative Code, the director may deny an application for a section 401 water quality certification if the director concludes that the discharge of dredged or fill material or obstructions or alterations in waters of the state will result in adverse long or short term impact on water quality.

CURRENT OAC 3745-32-05 – Criteria for decision by the Director

- (D) The director may impose such terms and conditions as part of a section 401 water quality certification as are appropriate or necessary to ensure compliance with the applicable laws and to ensure adequate protection of water quality.
- (E) Prior to the issuance of a section 401 water quality certification or prior to, during, or after the discharge of dredged or fill material to waters of the state or the creation of any obstruction or alteration in waters of the state to ensure adequate protection of water quality, the director may require that the applicant perform various environmental quality tests including, but not limited to, chemical analyses of water, sediment or fill material, and bioassays.

CURRENT OAC 3745-32-06 – **Revocation of a 401 WQC**

- The director may revoke a section 401 water quality certification if he concludes at any time that any applicable laws or regulations have been or are likely to be violated.

CURRENT OAC 3745-32-07 –
Procedure for decision by the Director

- A section 401 water quality certification shall be issued, modified, revoked, or denied and may be challenged in accordance with the provisions of the rules of procedure of the Ohio EPA, Chapter 3745-47 of the Administrative Code
 - changed to 3745-49 once the rules are updated

New concepts to discuss

- WQC modification process
- WQC transfer process
- WQC renewal process
- WQC expiration

Upcoming 401-Related Rule Makings

Wetland Antidegradation Rule (OAC 3745-1-54)

- **Where we are in the process:** Prepping for second interested party review (IPR)
- **Why second interested party review?** Planning to change the proposed mitigation preference order to be consistent with the Corps mitigation preference order in their federal rule
- Current mitigation preference order in the wetland antidegradation rule:
 - Permittee-responsible
 - Onsite
 - Offsite
 - Mitigation Banking
 - No mention of In Lieu Fee

Wetland Water Quality Standards (OAC 3745-1-50 to 1-53)

- **Where we are in the process:** Prepping for early stakeholder outreach
- **Why reviewing:** Rules are currently up for five year review
- **Current Rule Chapter & Titles:** OAC Chapter 3745-1 Water Quality Standards

3745-1-50 Wetland definitions.

3745-1-51 Wetland narrative criteria.

3745-1-52 Numeric chemical criteria for wastewater discharges to wetlands.

3745-1-53 Wetland use designation