SUMMARY OF WETLAND COMMENTS
PART I
General Comments Regarding Approach Taken in Wetland Rules

Explanation of the how the comments were summarized

Comments were summarized in three sections. Section I includes general comments, comments of a broader conceptual nature, and comments that usually did not reference a specific rule number or paragraph. Section II includes comments that specifically addressed Ohio EPA technical reports. Finally Section III includes comments that specifically cited a current or draft rule provision and discussed this provision or provided suggested changes to the rule language. In some instances, comments were quoted verbatim but more often comments were liberally paraphrased and shortened. Where the same comment was made multiple times, only one was usually quoted or paraphrased, so the summary below was not intended to reflect the number of times the same comment was made.

Watershed Approaches and Mitigation Location

❒ Mitigation in 8 or 14 digit HUCs should be required even for Category 1 impacts. Mitigation should not be exported outside of the 14 digit HUC. The Corps district boundary should not be used for Category 1 impacts in degraded watersheds. We strongly support the use of the 14-digit HUC as more scientifically-defensible basis for determining mitigation location than the current, poorly-worded "on-site" equals 1 mile definition.
❒ Clear guidance should be developed for determining when a viable alternative exists in the 14 or 8 digit HUC prior to allowing mitigation to occur at a bank.
❒ The State of Ohio should establish a statewide mitigation program similar to the North Carolina Ecosystem Enhancement Program that provides for delegation to local governments and non-profit conservation groups and incorporates private mitigation banks and certification of consultants and contractors.
❒ The rules need to better support watershed protection by more stringently requiring avoidance and minimization and explicitly addressing cumulative impacts in order to advance and complement the TMDL process, watershed action plans and Stormwater Phase II planning.
❒ Permit review and approval should be contingent on an evaluation of losses in value and function to the 14 digit HUC. Mitigation outside of 14 digit HUC is not founded on science or common sense. In no case must mitigation go beyond the 8 digit HUC and applications which propose this should be denied. Current and proposed rules do not come close to considering this and result in multiple effects to local communities and governments including lost recreational opportunities, reduction in aesthetics and property values, restrictions on economic development, negative impacts on watershed planning efforts, lost restoration opportunities and revenue, increased flooding, increased cost of stormwater management.
❒ Strengthen linkages to the 319 program and watershed plans and consider them in making 401 decisions.
❒ The mitigation progression should be 14, 11, and then 8 digit HUCs. Mitigation within the 11 digit HUC should be evaluated before jumping to the larger 8 digit unit.
❒ Why have the definitions for on-site and off-site been eliminated? Fundamental fairness requires that the state's rules have the same meaning in both the federal and state programs.

❒ The 14-digit HUC is not appropriate and is a drastic change from Ohio EPA's and Corps' practice of using 8-digit HUCs. It will be terribly expensive and time consuming and is directly inconsistent with the Corps's and USEPA's mitigation policy which focuses on maximizing restoration of ecologically meaningful resources rather than small, individual efforts.
❒ Applicant's who undertake the more difficult and expensive mitigation within the 14 digit HUC where the impact occurred should get some type of incentive or "reward" which could come in the form of lower mitigation ratios, reduced monitoring requirements, or other incentives.
❒ Urban wetlands are valuable even if they are degraded and urban wetland functions should be more highly protected.
❒ A system for tracking cumulative impacts to wetlands and measuring the net gain or loss of functions should be developed and the results communicated to local governments.
❒ The practice of "out-sourcing" mitigation from urbanizing watersheds should cease because it does not reflect the true cost of mitigation or the loss of functions to those urbanizing watersheds.
❒ The rules should give effect to endorsed Watershed Action Plans and require compliance with those plans as well as completed TMDLs and Remedial Action Plans for Areas of Concern (AOCs).
❒ To reduce "out-of-watershed" mitigation, the cost per acre for mitigation should equal the cost where the impact occurred (e.g. the land value that was impacted in the Cuyahoga River watershed should be applied to mitigation costs outside of the watershed). Ohio EPA needs to address the present situation where developers are incentivized to find the cheapest land possible with which to conduct their mitigation. Often this land exists in rural areas outside of watershed where the impact occurred.
❒ Mitigation of Category 1 wetlands anywhere in the Corps district is helpful and is supported. Ohio EPA should provide some flexibility to go outside of the Corps district for these impacts especially where the impact site is near a Corps district boundary.
❒ We call for a strong preference in the rules for in-watershed mitigation for all wetlands including low quality Category 1 wetlands. Current rules allow for Category 1 mitigation to be located anywhere in the Corps district. This allows urban wetlands to be mitigated up to several counties away and usually out of watershed resulting in a loss of function and value for urbanizing watersheds that need to retain it the most.
❒ While management on a watershed basis may well be prudent, the proposed rules (esp. 3745-32-04(A)) place too much of a burden on permit applicants to evaluate how mitigation sites will contribute to watershed and regional objectives. It is far too onerous to impose upon applicants the burden of understanding watershed and regional concerns and developing mitigation plans that address those concerns. The agency is the entity that will have the "big picture." Accordingly, the agency should review mitigation plans from a watershed and regional standpoint and comment on such plans accordingly. Applicants can thereafter revise their plans in order to address agency comments on ensuring regional and watershed goals are met. It is unreasonable and inappropriate to ask applicants to evaluate watershed and regional issues.
❒ De-emphasize "in-kind" and "no net loss of area" requirements and clearly state that alternative approaches are acceptable and will be given equal consideration to traditional approaches to compensatory mitigation. Mitigation requirements should be based on current conditions in the watershed and projects should be selected based on their effectiveness in contributing to the protection of water quality.

Monitoring, Assessment and Performance

❒ Increased monitoring and monitoring requirements are needed to ensure permit conditions are met or exceeded especially for mitigation banks.
❒ Strongly support the development of standardized mitigation monitoring and performance standards provided they are consistent with federal rules and subject to an unbiased review prior to adoption, particularly the wetland IBIs.
❒ The requirement that mitigated wetlands function at the same level as existing undisturbed wetlands is of serious concern. This stringent new standard seems to be based on anecdotal evidence of existing mitigation projects in Ohio. What science is this based on? It is unrealistic to expect wetland creation or enhancement to meet the same standard as natural, undisturbed wetlands.
❒ The draft federal rules have a definition of "performance standard" and the state's rules should also, especially give the amount of emphasis on monitoring and performance in the draft rules.
❒ Develop an avian index since early mitigation success is likely to be more readily assessed by evaluating wetland dependent bird species.
❒ Mitigation monitoring should be for a minimum of 10 years and applicant's should have to demonstrate how long-term management will be performed.
❒ The rules seek to require a severe mitigation standard that is not practical. Specifically, the rules require mitigations to functional exactly as the natural wetlands with the same characteristics. While this standard should be goal, it is not practical and should not be the appropriate baseline.
❒ The draft rules seek to require mitigation at a level which guarantees ecological function to a model standard for natural hydrologic features of the same type and quantity as the impacted wetland. While there may be some anecdotal evidence of specific failing mitigation projects, there is not information sufficient to warrant such a stringent new mitigation standard. Ohio EPA wants all wetlands to be restored to levels of function consistent with or better than natural undisturbed wetlands, however it lacks the scientific basis, using existing mitigation in Ohio as the baseline, to require such stringent mitigation. Ohio EPA has no scientific proof to demonstrate that the proposed requirements will result in future mitigation successes. In addition to unclear science, Ohio EPA also failed to consider the practical impossibilities of returning every wetland to pristine conditions.
❒ We support the proposed wetland mitigation performance standards. The proposed rules include positive steps in addressing the poor performance of many mitigation projects built in Ohio. The science of evaluating mitigated wetlands has greatly improved over the years and we support the sound science behind the proposed wetland mitigation monitoring. If a wetland is destroyed it is only fair and reasonable that a mitigated wetland be held to a performance standard that addresses the values and ecological functions of the original wetland.
❒ Ohio EPA is proposing a draconian and costly new regulatory program that is vastly more restrictive, costly and complex than the neighboring states that will make Ohio. These ambiguous and burdensome rules will make Ohio the least competitive state in the region for mining.
❒ Ohio EPA needs to have better quality control of ORAM assessments to ensure an "appropriate wetland evaluation" was performed.
❒ If it is Ohio EPA's intent to require IBIs (or similar intensive measures) as mitigation performance measures, this should be clearly stated in the rules.

❒ Clearly indicate how long mitigation wetlands would need to be monitored, especially with regard to forest mitigations where 20-40 years might be needed before a forest canopy develops.
❒ Ohio EPA has not demonstrated that the draft rules will improve the quality or quantity of mitigated wetlands in Ohio. The existing program is working and Ohio EPA should not be pushing the edges of proven science.
❒ The proposed rules should provide for tiered level of data collection and site evaluation based on the project's size, scope and the nature of the impact.
❒ We call for tough performance standards for wetland mitigation projects to insure that such projects truly make up for the impaired resources they replace, rather than serving as inadequate substitutes.
❒ The Ohio EPA should not proceed with formal rule revisions absent a completion of a study which shows that the present rules and methodologies are yielding inadequate results. Ohio EPA's own press release states that there has been no net loss of wetland acreage from individual mitigation projects.
❒ Generally speaking, we object to a permitting and mitigation system based on the hydrogeomorphic class. The current permitting system bases decisions on standard wetland classifications commonly recognized by the Corps.
❒ The indices developed by Ohio EPA measure the quality of certain wetland types (and highly value those types) but other functions like flood storage capacity, water quality improvement, mammal and bird habitat are not equally valued and measured. The issues of what functions and values the rules are protecting should be thoroughly debated before changes to the rules go into effect.

<u>Mitigation Type (in-kind, out-of-kind)</u>

❒ The "like-for-like" approach implies that the habitat type, quantity and quality in a watershed are satisfactory when in fact in degraded watersheds streams are in non-attainment and wetlands are scarce and of low quality. More focus needs to be on establishing a "net gain" in improved wetland and stream functionality.
❒ Recent inventories of urban watersheds indicate wetlands are scarce and often small and therefore shouldering more of the burden of providing wetland functions to the watershed. An a unit per unit basis, these wetlands should have a higher value.
❒ In-kind mitigation should be required from projects that impact connected wetlands or streams within non-attaining watersheds.
❒ The federal and state approaches to mitigation diverge from the start since the state approach includes an automatic preference for on-site and in-kind mitigation regardless of what a watershed analysis would show or that the mitigation meets the most pressing needs of the watershed.
❒ The Ohio EPA makes no attempt to reference watershed planning documents in its draft regulations and this rule appears to conflict with other agency approaches (e.g. the 208 planning process or the water quality trading process). The wetland and stream mitigation programs put millions of dollars into the marketplace and Ohio EPA has the opportunity to maximize the value of those dollars by integrating water quality trading principles and compensatory mitigation.
❒ The draft federal rules recognize that one wetland function lost because of project A could be replaced on-site and another wetland function lost could be replaced off-site: "...it may be environmentally preferable to replace hydrologic and water quality functions at the impact site

with a mitigation project that performs these functions, and to replace habitat functions at an off-site location, such as a mitigation bank..." (71 FR 15523). The state rules do not provide anything like this kind of flexibility.

❒ The draft federal rules state that a watershed approach to mitigation would ideally be based on a watershed plan. When a plan is not available the following factors should be considered: current trends in habitat loss, cumulative impacts, development trends, presence of sensitive species, conditions that influence mitigation success, chronic flooding, poor water quality, local watershed goals and priorities. The draft rules are not consistent with this approach since they prefer in-kind replacement as the most preferred option.

❒ The draft federal rules define functions as "physical chemical and biological processes that occur in aquatic resources," and the primary purpose of mitigation is to replace lost aquatic functions at the impact site which has then been translated into a requirement for no net loss of acreage and of functions. The draft state rules drop the functional analysis and address acres only. An applicant might be able to replace functions with a fewer number of acres than were impacted, but the draft rules do not allow for this possibility. Ohio EPA's present assessment tools do not identify the functions being lost or replace. ORAM is not a functional assessment method even though Ohio EPA assumes there is a direct relationship between condition and function. For example, depressional wooded wetlands is a description of a "type" of wetland not a list of "functions" it is providing.

Mitigation - Ratios

❒ Given the state of the science on mitigation success, do not lower the ratios to 2:1 and 3:1 and require only 1:1 replacement. The quality of mitigations is not to the point where the ratios should be lowered. When studies show high percentage of mitigations are successful, that will be the time to lower the ratios.

❒ Mitigation ratios should be doubled for after-the-fact permits and after-the-fact mitigation to achieve Category 3 quality.

❒ The use of a 2:1 ratio for Category 1 wetlands is excessive and unwarranted.

❒ Allow for upland buffer and preservation to satisfy part of the ratio.

❒ Lower the ratio to 1:1 since higher performance standards will remove the need for higher ratios.

❒ Ohio EPA should set a goal of a net gain in wetland functions (not just acreage) by monitoring performance and clearly tracking gains.

❒ The simplified mitigation ratios seem to be a beneficial change, but the overall mitigation requirements are rather complicated and may lead to frustration on the part of permit applicants.

❒ The rules should allow impacts from small projects to aggregate and fund larger projects especially in non-attaining watersheds or AOCs.

❒ A ratio of 3:1 should be applied for Category 1 and 2 wetlands and 4:1 for Category 3 wetlands.

❒ Why should Category 1 wetlands be replaced at a 2:1 ratio with a higher value wetland? Replacement with a higher quality wetland should be done at 1:1 or with an equivalent value wetland.

Mitigation Banking

❒ Do not allow mitigation at banks or the export of wetland impacts to far away banks.
❒ Include banks in Paragraphs (C)(2)(a) and (C)(2)(b) of 3745-1-55 so that mitigation can occur at a bank located in the 14 or 8 digit HUC where the impact occurred.
❒ Mitigation banks are a bad solution. They should be done away with altogether or done differently with many smaller sites scattered over a large area.

Narrative Criteria and Wetland Use Designations

❒ Does this rule require that IBI data be collected for every 401 application? Are the IBIs replacing the use of ORAM. Given the category 1-3 system, what purpose do the Wetland Tiered Aquatic Life Uses serve?
❒ The Narrative Criteria create a potential impediment to right-of-way maintenance by expanding the agency's authority to regulate otherwise unpermitted activities.
❒ The current version of this rule is very simple. The revised rule contains significant and complex changes that create and define wetland aquatic life uses and antidegradation categories by assigning each wetland a classification use, tiered aquatic life use, and special uses. These new provisions appear to be drafted with noble goal of discouraging avoidable impacts to the state's most pristine wetlands and obtaining mitigation that produces wetland's of equal size, use, function, and quality. The regulated community cannot be expected to recreate nature's own work. The application of the new requirements is complex and confusing and will no doubt be costly. Complying with the new rules will require the applicant to perform a functional assessment of the impacted wetland's pre-impact functions by studying the hydrogeomorphic characteristics of the wetland and performing vegetation and amphibian IBIs. Ohio EPA should derive a simpler and less costly approach to classifying and characterizing wetlands.
❒ Also see many rule-specific comments in Section III below.

Enforcement

❒ There needs to be tougher enforcement of unauthorized activities and increased penalties beyond and increase in ratios for after-the-fact permits.
❒ There needs to be increased follow-up of development sites and mitigation projects to ensure they are satisfying their permit conditions.
❒ There needs to be a mechanism for citizens to initiate enforcement actions.
❒ Does the state of have the ability to follow up on the heightened monitoring and performance requirements?

Avoidance, minimization, sequencing

❒ More emphasis on avoidance and minimization rather than mitigation. The rules should clearly give priority to avoidance over mitigation.
❒ Adequate buffers around avoided wetlands must be provided
❒ We are concerned with the focus on "mitigation" over "avoidance" and "minimization." The changes to the proposed rules do not increase the ability of the Ohio EPA to avoid and minimize

impacts before considering mitigation.
❒ The best mitigation only performs at a low Category 2 level and this highlights the need to provide more protection for high Category 2 and Category 3 wetlands.

Buffers for Avoided Wetlands

❒ The proposed rules do not provide adequate buffers around wetlands that remain on-site. We believe Ohio EPA should develop recommendations for buffer size around on site wetlands. Sound science exists on what an appropriate buffer should be for a wetland or stream, often cited as 75 to 300 feet or more.
❒ The draft federal rules recognize the importance of upland areas as part of the watershed approach to compensatory mitigation, allowing the Corps to give mitigation credit for upland where "...those uplands increase the overall ecological functioning of the mitigation site or other aquatic resources in the watershed or ecoregion. It is unclear if the Ohio approach allows for this degree of flexibility and in fact the draft rules appear overly restrictive in this regard.

Approval criteria

❒ The rules should incorporate stronger language regarding the criteria for approval and denial of permit applications. Applications to fill wetlands should be denied if 1) the applicant fails to demonstrate that low-impact sites (uplands without wetlands or streams) are not available for the project within a 25 mile radius as based on multiple listing service lists; 2) a "robust" alternatives analysis is not submitted or if the analysis shows a less harmful option is available. A "robust alternatives analysis" would be defined as a review of local topography and existing roadways that considers whether a) no upland site is available within a 25 mile radius; b) no reconfiguration of the building or parking lot footprint can be overlaid on the site with less harmful impact; c) no reduction in the amount of parking lots or impervious surfaces is feasible; d) no alternatives to peak-season parking (e.g. shuttles, gravel or grass parking, etc.) are available; and e) no site configurations are available that would avoid all wetlands and streams.
❒ Criteria to determine social and economic benefit should be included in the rules and should include other water quality improvement projects in the watershed, as well as maps of local parks, estimates of economic benefit of sport fishing in the watershed, and estimates of other water-based recreation in the watershed.
❒ The proposed application and review procedures are very resource and time intensive for the applicant and the state. A category of activities not subject to this level of review should be identified, e.g. certifications for nationwide permits.

Long-term Management and Legal Protections

❒ Protecting and managing every mitigation wetland in perpetuity is not a practical standard for many applicants who may not actually own all the surface rights to a parcel. Flexibility needs to be built into the rules.
❒ The long-term management and protection standards are unreasonable.

Financial Assessment of Draft Rules

❒ The rule package will add significant cost, time, and confusion to the permitting process requiring additional financial resources. Ohio EPA should perform a detailed financial assessment of the impact of this proposed rule package.
❒ The agency should carefully consider the cost of these rules which will at least double mitigation costs Ohio projects and put them at a competitive disadvantage to neighboring states.
❒ Using the most conservative estimates available, we estimate a nearly 100% increase in costs for permitting and mitigating impacts to a 0.6 acre riparian wetland because of additional site documentation, ranking of performance metrics, site hydrology studies, water budgets, soil construction, earthwork, the establishment and monitoring of reference wetlands and other requirements.
❒ The rules will have serious negative consequences on the economy of Ohio and on specific industries including home building, mining, and power.

Federal Mitigation Rules, Nationwide Permit Reissuance, and Federal Wetland Cases

❒ Make sure state rules are consistent with federal rules.
❒ It is premature for Ohio EPA to move forward with these rules given the issues surrounding federal wetland jurisdiction in pending cases and the upcoming reissuance of the Nationwide permits.
❒ Wait to propose these rules until the federal government finalizes its mitigation rules in order to ensure Ohio rules are consistent with the federal rules on the same subject. This may also entail and evaluation whether Ohio is truly taking a watershed approach in its rules.

SUMMARY OF WETLAND COMMENTS
PART II
Comments Addressing Ohio EPA Technical Reports

❒ We are concerned by the complexity of the underlying technical documents which appears to have obscured numerous policy decisions and prevented meaningful discussion of some of the impacts the rules will have and their benefits. The agency has clearly spent years developing the technical support documents which could not be meaningfully reviewed during the short comment period. These documents need careful review by external unbiased experts to ensure the science underlying them is sound and hidden policy objectives are debated.

❒ Specific comments relating to *Integrated Wetland Assessment Program . Part 4: A Vegetation Index of Biotic Integrity (VIBI) and Tiered Aquatic Life Uses (TALUs) for Ohio Wetlands*.

- We have similar concerns about incorporating policy decisions in the details of technical documents relating to the VIBI.
- Metrics in early versions of the VIBI lost reliability with the inclusion of new data. Without additional independent review, is their any assurance that the metrics proposed in Part 4 will not suffer the same loss of reliability when used on a day-to-day basis? If so, what is the value of using the VIBI to guide regulatory decisions.?
- Further, it is also unclear why particular metrics were chosen and others excluded. It is exactly this type of analysis that suggests that the agency was working backward to create assessment tools that support a specific policy agenda. If policy is driving the science, is the science sufficiently reliable to provide a reasonable guideline upon which to create a new regulatory standard. Given the lack of independent review, and the lack of participation by external experts and the regulatory community in the development of these technical documents, it is premature to consider these new metrics sufficiently reliable to base a regulatory program on them. It is also not appropriate to implement a new regulatory program that includes wetland tiered aquatic life uses (WTALUs).

❒ Specific comments relating to *Integrated Wetland Assessment Program . Part 6: Standardized Monitoring Protocols and Performance Standards for Wetland Creation, Enhancement and Restoration, Version 1.0* (the Part 6 report).

- We do not question the need to attempt to increase the success (in both quantity and quality) of mitigation wetlands being constructed, we do question the practicality and necessity of implementing the extremely rigorous monitoring protocols established in Part 6, the use of any untested design standards, and the concept of designing mitigation wetlands and evaluating their success based on being "hydrologically equivalent to the impacted wetlands."
- How will the increase in the quantity of data submitted to Ohio EPA result in increased mitigation success in Ohio? Does Ohio EPA predict that the extra effort, both in money and time, will result in the development of more successful mitigation projects, or is the goal simply to increase the documentation of failure?
- We estimate costs associated with the monitoring required by Part 6 to increase by 3-4 times (from $8-15K annually to $24-60K annually). Before agreeing to incur these additional costs, Ohio EPA should carefully review the protocols in Part 6 so that only

data truly necessary for determining performance is required.

- The design criteria in Part 6 were obviously intended to make mitigation more successful and to more closely replicate natural wetlands. Does Ohio EPA have data on mitigations that indicate these standards will work, or are these requirements untested?
- Attempting to replicate hydrologic class of natural wetlands is a noble goal but attempting to replicate natural hydroperiods, however well-intentioned, will be very difficult, extremely expensive, and likely result in additional mitigation failures. Mitigation should continue to focus on providing adequate hydrology to develop a jurisdictional wetland with the desired biological community and not to replicate natural wetlands in 5-10 years.
- Ohio EPA should develop a standard reporting "form" to ensure data is reported in a consistent manner.

❒ Specific comments relating to *Integrated Wetland Assessment Program . Part 7: Amphibian Index of Biotic Integrity (AmphIBI) for Ohio Wetlands*.

- Ohio appears to be first state to propose the use of a tool like the AmphIBI. We do not understand why the AmphIBI is being required when Ohio has been using the ORAM v. 5.0 for some time. We are concerned that the Agency is trying to expand its jurisdiction beyond the edge of the wetland by requiring the use of this method.
- The technical validity of the AmphIBI is suspect. There does not appear to by any scientific basis for the Coefficients of Conservatism other than the judgment of a limited group of agency staff members. What is the basis and source for these coefficients and how do they impact the wetland scores? For instance why is there a distinction between Jefferson and Tiger salamanders? Were the coefficients adjusted to create a stronger correlation between AmphIBI scores and the perceived health of reference wetlands?
- Due to the small number of amphibian species in Ohio many metrics commonly used in other IBIs are not available. The impact of this on the robustness of the AmphIBI is not discussed. The agency has not conducted a power analysis of the underlying statistics, a useful tool when the data set is small.
- If the Ohio EPA wishes to protect certain amphibians, the agency should not do so by "tweaking" its biological assessment tools to favor a particular policy objective which is not transparent to the public and property owners in Ohio. The agency should not proceed with this rulemaking initiative until all of these "buried" issues are fully debated.
- The short sampling window and need for three separate sampling events are significant practical problems with the use of the AmphIBI.

❒ Comments relating to *An Inventory of Ohio Wetland Compensatory Mitigation* and *Inventory of Ohio Wetland Compensatory Mitigation, Part 2*

- One person extensively commented on these two reports including a reanalysis of data from the reports and stated that these reports do not justify and in fact argue against the changes being proposed in the draft rules.

SUMMARY OF COMMENTS
PART III
Comments Addressing Specific Rule Citations

3745-1-04(C)(3)

❒ We continue to believe that it is important to identify some baseline for what constitutes "significant public interest." In far to many instances, public hearing requests are made solely in an attempt to stop the proposed project, not because of justified and legitimate concerns about water quality or environmental protection.

3745-1-05(C)(3)(h)

❒ This provision is redundant as ODOT notifies all of these agencies through NEPA coordination.

3745-1-05(C)(4)

❒ Here as in many places throughout the new rules, issues related to public safety are not listed as a possible cause or reason for lowering water quality. The maintenance or replacement of existing infrastructure in light of maintaining public safety should be sufficient reason to allow the possible degradation of waters of the State.

3745-1-05(D)(4)

❒ Add "public safety" to public health and welfare.

3745-1-05 Table 5-3

❒ The list of endangered species is incomplete or designations are incorrect. The rule should instead reference the list maintained and promulgated by ODNR under ORC 1531.25.

3745-1-50(A)

❒ Revise and clarify the definition as follows: Alternatives analysis means a systematic review and evaluation of practicable alternatives including avoidance, social and economic justification, public need (in the case of Category 3 wetlands), minimization and compensatory mitigation."

3745-1-50(F)

❒ The word "sufficient" is vague. Specify buffer widths, based on literature, necessary to ensure mitigation success
❒ The new definition unlawfully extends the authority and jurisdiction of Ohio EPA.
❒ The clarification in the definition that upland buffers are part of mitigation is useful guidance but buffer acreage should be weighted similarly to wetland acreage in the ratios. To the extent a buffer is required and it assures the success of the mitigation, it should be included in some

fashion in meeting the applicable ratios.
❒ The phrase "including natural upland buffer areas around the wetland sufficient to ensure the success of the mitigation" should be removed as an unlawful extension of Ohio EPA's authority. If it is not removed, the how much buffer is sufficient should be defined.
❒ The definition would be improved by language that restricts (in surface area or linear feet) how far a buffer may extend from the jurisdictional edge.
❒ Why isn't the state definition the same as the federal definition?

3745-1-50(G)

❒ Many mitigations are built on hydric/nonhydric soil mosaics. This situation should not be considered wetland "creation."
❒ Why is the state definition more restrictive than the federal definition? What is the ecological reason for the difference?

3745-1-50(I)

❒ Accounting for the effects of cumulative impacts is important but it is critical that the method used is scientifically appropriate, consistent, and applied fairly to all projects. The rule needs to clarify what is an "individually minor" impact and how these are aggregated to become "collectively significant." Until these issues are resolved, the Ohio EPA should focus on the merits of each individual project
❒ The revised definition appears to require the applicant to evaluate the incremental effect of previously permitted impacts and predict future impacts. These changes make the rule unfair, speculative and subject to manipulation to prohibit development. If the agency proceeds with implementation, only "well-documented" prior impacts, and future impacts should be considered and only if the agency can demonstrate they are "more likely than not" to occur in the "near" future.
❒ There is no federal definition of cumulative impacts. This concept has not been systematically studied and the lack of data leads to very subjective judgments. Until state and federal regulators reach some sort of consensus on this definition and develop criteria, Ohio should delete this definition.

3745-1-50(M)

❒ The clarification of the definition is overly broad and the existing definition is adequate.
❒ The definition should be revised so that it applies only to man-made degradation and not natural sources of degradation like drought or flooding.
❒ The federal definition is much clearer than the proposed state definition and Ohio should adopt the final federal language.

3745-1-50(P)

❒ The proposed definition is vague, overly broad and includes activities that the agency has no authority to regulate.
❒ Not all wetlands will display each of the listed functions. This provision should be revised to

read, “Examples of functions of a wetland may include...”
❒ The definition implies that functions are in a steady-state when in fact the structure and function of wetlands undergoes natural variation. The definition should be revise to avoid this implication. The definition should be revised to read, “Function means the full range of natural processes occurring in a wetland ranging from....Examples of functions of a wetland include, but are not limited to, ground water exchange, nutrient removal and/or transformation, sediment and/or contaminant retention, water storage, sediment stabilization, shoreline stabilization, and maintenance of normal variations in biodiversity.
❒ The sentence in the middle of the revised definition, “Function also includes processes...of those watersheds and regions,” is not necessary in the context of the state regulating man-induced impacts to wetlands.
❒ Both the federal and state definitions of function need improvement. The federal definition is too general to be helpful and the state definition includes terms like “highly specific nutrient cycling processes” that themselves need definition. You should not need to have a degree in ecology to understand this definition. The policy here is outstripping the science. Has Ohio EPA done one of these highly specific nutrient cycling analyses? Is it practical to do in 180 days? Also, the Ohio definition of function makes clear that ORAM is not a functional assessment analysis since it provides no quantification of any functions.

3745-1-50(S)
❒ The rule evidences the Ohio EPA’s intent to regulate impacts based on the hydrogeomorophic class of the wetland. This will add time and cost to projects. It will also be used in determining “in-kind.” In-kind mitigation is not always the best approach for all projects. In-kind using these classes would be extremely difficult (if not impossible) to design, very costly and of limited long-range ecological value. In the long term, wetlands naturally evolve in their plant community structure and functionality. In-kind should be limited to the definition of plant community in the proposed rule.
❒ The descriptions of the types of hydrogeomorphic classes are useful when establishing requirements for “in-kind” trades in paragraph (V).
❒ Does Ohio EPA intend to regulate farm ponds or other human impoundments by the definition of impoundment? Similarly, does the definition of fringing wetlands apply to fringes of wetland vegetation around farm ponds and other human impoundments?
❒ For riverine wetlands determining stream orders is often confusing. Using drainage area (square mileage) would be preferred and it would be consistent with OEPA biocriteria that uses drainage area. This information is also referenced in 3745-1-53 Table 1a.
❒ The use of “etc.” in the definition is impermissibly vague.
❒ Man-made impoundments behind roads and railroad embankments should not be broadly defined as wetlands and should be removed from the definition.
❒ The federal rules do not include a definition of hydrogeomorphic class and the draft rules diverge from the federal watershed approach and focus only on landscape position. The proposed federal rules define in kind as a resource that is structurally and/or functionally similar to the impacted resource type. The state rule requires replacement by HGM class and dominant plant community, a much more inflexible approach.

3745-1-50(T)

❒ The definition of hydrologically isolated should match the federal definition since the Corps makes the determinations.
❒ Hydrologic isolation should not be determined using FEMA floodplain maps (a risk-based tool) but based on a valid scientific determination.
❒ The fact that a wetland is located in the 100 flood plain is not a technically supportable basis for finding it is hydrologically connected since these flood plains can be 100s or 1000s of feet wide.

3745-1-50(U)

❒ The phrase "Reasonably foreseeable" is vague. Clarify.
❒ The new definition unlawfully extends the authority and jurisdiction of Ohio EPA.
❒ The definition is vague and does not provide an understanding of the legal requirements of the proposed rules.
❒ the definition of indirect impacts along with the new wetland antidegradation rule impermissibly expands the agency's authority to regulate activities associated with development that have no relation to water quality and into areas of zoning land use planning reserved to local jurisdictions.
❒ The rule should read, "Indirect impacts, means man-made effects that are caused by the project and that occur outside the jurisdictional limits of the wetland, but are still reasonably foreseeable to have a significant impact on the wetland function. Indirect impacts may include....the wetland.
❒ The state definition has no federal corollary and it should be eliminated since the state has no criteria for how to apply this definition.

3745-1-50(V)

❒ The definition should include the phrase "or preserving" after creation. There is no basis for failing to include preservation among the types of mitigation that are considered to be "in-kind."
❒ The definition of in-kind references "out-of-kind" mitigation but there is no definition of the latter.
❒ Delete end of definition, "unless out-of-kind compensatory mitigation is specifically approved on a case by case basis."
❒ The relatively simple existing in-kind definition has been replaced by a complicated and costly one. Ohio EPA could achieve the same goals without creating these burdens by simply policing compliance with current mitigation requirements.

3745-1-50(W)

❒ The last sentence should be deleted from the definition as it is descriptive in nature only and does not add any substance or scientific significance to the definition of "Mature Forests."

3745-1-50(Y)

❒ The draft federal rule includes streams in the definition of mitigation bank. Why doesn't the state. Also the "exceptional circumstances" language should be dropped.

3745-1-50(FF)

❒ Use the Cowardin plant community names rather than new names.

3745-1-50(GG)

❒ The cost of maintaining and building the mitigation wetland and maintaining the human infrastructure used to replace the wetland should be considered in determining practicability.
❒ Changes to this definition, to include consideration of alternatives outside of the property boundary, injects an undefined and vague concept into the permit review.
❒ The definition of practicable should read, "...available and capable of being done, with reasonably good chance of success, after taking into consideration..."

3745-1-50(HH)

❒ Add streams to the preservation definition.
❒ The state and federal definitions should be consistent. Also, the law generally recognizes the futility and poor public policy of trying to have anything required in perpetuity.
❒ Preservation should have equal footing with other types of mitigation.

3745-1-50(II)

❒ The new definition of public need excludes consideration of local gains and does not consider the importance of local needs to the state as a whole and the effects compounded local needs have throughout the state. It gives the Agency too much leeway in defining what activities are "public needs."
❒ The definition of public need should be modified so that "immediate and extreme public need" is required to be demonstrated before Category 3 wetlands can be destroyed.
❒ The phrase "purely local gains in the area of the project are not societal gains, although societal gains may also be local gains" should be deleted as there is no basis whatsoever for the statement that local gains are not societal gains.
❒ Add benefits to public safety.
❒ The definition of public need strongly suggests the agency is attempting to prohibit all future impacts to Category 3 wetlands. This would constitute a taking especially since mineral rights are severable and may be considered separate property. Can this requirement ever be met and if so how? How would this requirement apply if other environmental laws required the installation of scrubbers and there associated landfills?
❒ The definition is far too strict especially in light of the state's current practice of identifying every mature wooded wetland or any wetland of any significant size as Category 3. This definition will preclude many worthwhile development efforts. The state should return to the original intent of Category 3 (unique, irreplaceable, rare) or create a new category of wetland

which would require demonstration of public need.

3745-1-50(JJ)

❒ Excellent addition to rule but should also include "and natural plant community"
❒ Delete the last sentence of the definition.
❒ Many mitigations are built on hydric/nonhydric soil mosaics. This situation should be considered wetland "restoration."
❒ The definition of restoration should read, "...the re-establishment of a previously existing wetland at a site where it has ceased to exist and function. The re-established wetland..."
❒ The state and federal definitions are not consistent. The federal definition emphasizes functions; the state definition emphasizes landscape position and is much less flexible.

3745-1-50(NN)

❒ The blanket restriction on mowing and application of herbicides in upland buffers presents serious right-of-way maintenance issues for the power industry.
❒ The phrase "that is not maintained through mowing, application of herbicide or other means that would result in deleterious affects to either the upland buffer or the adjacent wetland" should be deleted as the listed activities have no bearing whatsoever on whether the area constitutes buffer from a functional standpoint.
❒ This definition should allow for the maintenance through mowing or herbicide application of a specific habitat type for flora or fauna or to manage for invasive species.
❒ This definition is far too restrictive and exceeds the agency's authority. It is also not practical to prohibit all management activities.

3745-1-50(OO)

❒ The proposed definition is vague, overly broad and includes activities that the agency has no authority to regulate.

3745-1-50(PP)

❒ The last sentence in the vernal pool definition is purely descriptive in nature and adds no substantive or scientific basis to the definition. It should be deleted.

3745-1-50(UU)

❒ The new definition unlawfully extends the authority and jurisdiction of Ohio EPA.

3745-1-51(A)

❒ The impacts of the proposed narrative criteria are potentially far reaching. The rule requires the protection of hydrology necessary to support biological and physical characteristics of wetlands. What is unclear is what activities the agency may attempt to regulated under this proposed rule. We are concerned that promulgation may result in confusion, uncertainty, and

increased costs.
❒ We see no support in the Ohio Revised Code for regulation of plant communities or the protection of biodiversity outlined in this rule.
❒ The addition of "integrity of natural plant communities" makes sense and cannot be argued against, because one of the important features of wetlands is, of course, the natural plant communities present.
❒ Through the narrative criteria the agency is attempting to codify the authority to regulate activities that do not otherwise require permits from Ohio EPA. Due to the poor drafting of the rule, the potential impacts of the wetland narrative criteria are far reaching and potentially beyond the authority of the agency.

3745-1-52(C)

❒ The introduction to paragraph (C) should read: "The director may approve a request submitted pursuant to paragraph (B) above if the applicant demonstrates the following..."
❒ While the changes to this rule appear minor, they appear to elevate the burden of proof on the applicant. The list of information types appears adequate but the large number chemical-specific criteria that need to be addressed is considerable and burdensome.
❒ Additional language should be added to provide applicants more flexibility and prevent extraordinary resources from being unnecessarily consumed to justify obtaining alternate criteria, as follows: "Alternate criteria for classes of chemical constituents may be proposed if the applicant can demonstrate that the constituents within a class have similar chemical and toxicological properties in terms of modes of action, the specific toxic form, bioconcentration and/or biomagnification potential, and chemical fate within a wetland habitat.
❒ Chemical specific criteria for metals are a good example of how a class of constituents could be developed. The toxicity (bioavailability) of many metals is based on water hardness. These metals are present in water as cations, and the most toxic fraction is the divalent ($^{+2}$) oxidation state. The mode of action of many of the cation trace metals is similar; they do not bioaccumulate, and the toxicity decreases with increasing hardness, pH, and dissolved organic matter. Taking these kind of facts into account will make the burden of proof more reasonable without having adverse environmental effects.

3745-1-53

❒ This section of the proposed rules is difficult to comprehend. If the objective is to have citizen participate in the process the definitions and categories present a tremendous roadblock. It is unlikely that anyone other than an expert scientist or consultant will understand the classification scheme established here.
❒ We have significant concerns regarding the extensive use of IBI evaluations. These are complex methods which can only be performed by individuals with extensive training in plant and amphibian sampling and identification. Although they may be wonderful research tools we do not feel they are suitable regulatory tools and they should not be used to supplant the ORAM.
❒ The amphibian IBI can only be performed during a few weeks or months in spring. Is Ohio EPA considering requiring data that can only be generated during a 45-60 day period? Are amphibians suitable species to drive wetland categorization?

3745-1-53(B)

❒ The use of Hydrogeomorphic classes will increase the costs of delineations and in determining what is in-kind mitigation

3745-1-53(C)

❒ Is it the Agency's intent to replace the use of ORAM v. 5.0 in making assessments for determining Wetland Tiered Aquatic Life Uses with new Vegetation and Amphibian IBI?
❒ The definitions of the TALU categories are unlawful. All of the definitions rely on unspecific references to the AmphIBI and VIBI. This approach allows the agency to change the category of individual wetlands by change the underlying assessment methodology. Ohio EPA cannot alter the legal requirements for a wetland by "updating" an underlying technical document without taking the change through the full rulemaking process.
❒ The proposed TALU standards could greatly increase the regulatory burdens by increasing the number of Category 2 or 3 wetlands by providing that if either VIBI or AmphIBI score meets the threshold for superior wetland habitat, the wetland is Category 3. There is no indication the Ohio EPA has studied the interaction of these indices enough to warrant their use in the regulatory program.
❒ It is unjustified and unreasonable to promulgate a partial set of TALU standards given the agency's the failure to collect data for the fringing HGM class and subclasses of the coastal class.
❒ Establishing specific definitions can be very useful in the planning process and can provide consistency and clarity.
❒ We are concerned with the use of the term "reasonable potential" in the definition of Restorable Wetland Habitat (RWLH). The current definition seems to provide incentive for the designator to find reasonable potential even if none exists. At the very least the term reasonable potential should be defined.
❒ The criteria for defining Superior Wetland Habitat and Category 3 wetlands are far to broad. "High quality" wetlands should not preclude development where the impact can be mitigated. This was not the intent of Category 3. If need be this will have to be addressed through modification of Ohio EPA's statutory authority.

3745-1-53(D)

❒ The rule equates the WTALU designations with the antidegradation categories in 3745-1-54. Notably the Wetland Habitat designation is the minimum standard for wetland restoration or creation purposes. This means that mitigation of a low quality cattail marsh will require an applicant to create or restore a wetland to the WLH designation. Such an end is entirely unreasonable and unwarranted.
❒ Table 2a lists impoundments. Is the intent to regulate farm ponds and other human impoundments?
❒ It is presumed that all performance monitoring for wetland mitigation projects will have to undergo an IBI evaluation using the scores in Table 2a. At this time, it is unclear if the range of IBI scores that have been assigned to the various categories will be accurate.
❒ The comment is confusing and makes it difficult to understand how the WTALU's will be assigned.

3745-1-53(E)(2)

❒ This should read, "Education - wetlands with known, publicly available education uses (e.g. nature centers or schools). Make the same changes to Table 3.

3745-1-53(E)(3)

❒ This should read, "Fish reproduction habitat - wetlands that provide important, known reproductive habitat for fish."

3745-1-54

❒ There is no need to revise this rule at all. After an extensive rule-making process, this rule was adopted in 1998 and since then has afforded adequate protection to Ohio's wetlands.
❒ The new methodology for determining antidegradation categories conflicts with the requirements outlined in the Isolated Wetland Statute since it appears to require other methods than ORAM v. 5.0 for determining an isolated wetland's antidegradation category.
❒ Like the current rule, the proposed rule (3745-1-54) is grounded in the application of an alternatives analysis to wetlands classified by three regulatory categories. Changes to this rule purport to prohibit degradation or net loss of quality and not just acreage.

3745-1-54(B)(1)

❒ Recommend deletion of terms "acreage" and "quality". Rule should read, "does not result in a the net loss of wetland functions in accordance with..."

3745-1-54(B)(3)

❒ The protections for Category 3 wetlands do not appear to be sufficient especially if the mitigation is a failure.
❒ "Critical habitat" is a legal term used in the Endangered Species Act. The rules should not use this term unless it clarifies that it is limited to the definition in the ESA or otherwise defines the term.

3745-1-54(B)(4)

❒ The requirement that the agency may consider "indirect impacts" is vague and there are no standards for when the agency might use this discretionary authority.
❒ Include electric utility right-of-way maintenance and construction in the definition of linear projects

3745-1-54(B)(5)(a), (b), (d)

❒ Wetlands impacted without a permit should be considered Category 3, period.

3745-1-54(D)(2)

❒ The discretion provided the agency in the rule with regard to allowing the director to consider appropriate assessment methodologies is too broad. It is not only vague but is likely unlawful. Because there are no specific methodologies referenced in the proposed rule, the director could require the use of any assessment tool, including an unreviewed update to either the AmphIBI or VIBI.
❒ The last sentence should read "Appropriate wetland evaluation methods may include indices of biotic integrity and/or condition-based rapid wetland assessment methods."

3745-1-54(D)(3)

❒ Delete this subparagraph. The director should not have absolute discretion to categorize wetlands as outstanding national resource waters without first going through the formal rulemaking process.

3745-1-54(E)

❒ The introduction to paragraph (E) should be reworded to place the social and economic justification after avoidance in the sequenced review in order to recognize the reality that applicants must first weigh the social and economic significance of projects before the extent of impact minimization can be determined.

3745-1-54(E)(1)(b)

❒ This raises legal issues regarding the extent of Ohio EPA's authority to assert jurisdiction over upland areas. Regardless, what constitutes adequate buffer should be defined.
❒ Please define th term adequate. Buffers should also be required for avoided Category 1 wetlands.

3745-1-54(E)(2)(b)(iii)

❒ This should read, "The overall and basic purpose of the project and how the purpose relates to the placement, configuration, density and social and economic benefits of the project;..." since determining the extent of minimization depends on the social and economic benefits.

3745-1-54(E)(2)(b)(v)

❒ The word "cumulative" should be deleted. The applicant should not be responsible for assessing direct and indirect impacts; it is the Agency's job to evaluate cumulative impacts.

3745-1-43(E)(2)(C)

❒ In addition to social and economic development, public safety should be included as a reason for lowering water quality.

3745-1-54(E)(3)

❒ The second sentence should read, "For the purposes of this rule, 'necessary' is defined as required such that the public need could not be achieved by any other means" since as currently drafted the rule sets a standard that is virtually unachievable.

3745-1-54(E)(4)

❒ There needs to be a requirement that storm water and water quality control structures are maintained and not just installed. Also control structures can't restrict hydrology to existing wetlands nearby.
❒ The stormwater requirements in the rule are seriously out-of-date and need to be brought into conformance with the new stormwater standards.

3745-1-55(A)

❒ Revise the third sentence to read, "The goal of compensatory mitigation is the ecological replacement of the functions and values of the impacted wetland.
❒ We strongly urge the agency to reconsider the strict sequencing requirement outlined here. In particular mitigation of Category 1 wetlands should be allowed earlier in the process, cf. federal MOA between the Corps and EPA that exempts projects from sequencing where discharge necessary to avoid environmental harm or will result in environmental gain or insignificant impact.

3745-1-55(A)(2)

❒ This sentence is confusing. First it states the ratio is 2:1 and 3:1 and then it says that replacement can occur at a 1:1 ratio.
❒ This paragraph should read, "Evaluation of the quality of the impacted wetland using wetland assessment methodologies acceptable to the director, including the use of Ohio's ORAM methodology and/or wetland indices of biotic integrity."

3745-1-55(A)(5)

❒ Add a clarifying sentence after the first sentence to explain that the balance of the mitigation required could be in the form of enhancement or buffer credit (if that is what is intended here).
❒ The use of the word "minimum" in relation to the mitigation ratios created a serious uncertainty as to the amount of mitigation required. There appears to be no restriction on the state's ability to require significantly more mitigation.
❒ The use of the word "minimum" implies that the Ohio EPA seeks to impose ratios that are significantly greater than the minimums proposed in rule as the agency uses its discretion to extract more mitigation during the permitting process.
❒ The use of a 2:1 ratio for Category 1 wetlands is excessive and unwarranted.
❒ The second sentence should read, "Except as otherwise provided in this rule, replacement is preferred to be in-kind unless local circumstances dictate otherwise" in order to provide the director flexibility in approving out-of-kind mitigation.

❒ Delete the phrase, "with at least 1:1 replacement of impact acreage through restoration and creation..."
❒ Delete the last sentence, "Replacement is in-kind replacement based on the dominant landscape position and plant community of the impacted wetland."

3745-1-50(B)

❒ Delete reference to acreage and replace with function.

3745-1-55(B)(1)

❒ Delete because redundant with (A)(5).

3745-1-55(B)(2)

❒ The amount of buffer should be specified in the rule and reflect current research. Additional credit should be provided if you enhance buffers (e.g. turn a farm field into an upland prairie or forest).
❒ The term "non-natural" should be defined to remove subjectivity.
❒ The initial part of this paragraph should read, "Preservation of natural upland buffers, as specified in paragraph (F) of this rule, around avoided wetlands or the restored or created wetland may occur..." in order to ensure buffer areas around avoided wetlands are included in the amount of acreage offered by the applicant.

3745-1-55(B)(4)

❒ The word "subwatershed" is the term that should be used especially when considering 14 digit HUCs.

3745-1-55(B)(4)(d)

❒ Roadway projects can reach across multiple watersheds. This section should read, "Wetland impacts associated with a linear project may be mitigated at a single mitigation site location or wetland bank, acceptable to the director."
❒ Clarify that mitigation sites associated with linear projects do not have to mitigate for all HGM classes impacted and will usually be just 1 or 2 HGM types.

3745-1-55(C)(1)

❒ There should be some incentive for permit applicants to consider mitigation within their watershed added here, even for Category 1 wetlands.
❒ Mitigation location requirements (in the 14 digit HUC) should be the same for Category 1 wetlands greater than 0.5 acres since, although degraded, larger Category 1 wetlands still provide flood control and water quality functions.
❒ Category 1 mitigation location requirements should be the same as for Category 2 and 3 wetlands. Out of watershed mitigation should only be allowed in exceptional circumstances.

The current language promotes significant losses to urban-suburban watersheds where hydrologic services are need most and land values are high. It currently gives an economic incentive to exporting Category 1 wetland functions out of these watersheds.
❒ The rule should clearly state that mitigation for Category 1 wetlands anywhere in the Corps district can occur at a mitigation bank within the Corps district.
❒ Specify that the first location for mitigation is the 14 digit HUC. Later in 3745-32-04(A)(3)(f) require rationale for eliminating on-site options. On-site mitigation is a component of the mitigation ratio calculation in the current rules, but is not mentioned anywhere else in the proposed rules.

3745-1-55(C)(2)(a)

❒ There needs to be criteria for determining when an applicant has demonstrated the "inability of mitigation within the 14-digit watershed."
❒ The phrase "not practicable" should be used in place of "inability" to mitigate.
❒ We support the 14-digit HUC approach but criteria should be defined for determining the "inability" to do this. If mitigation is allowed outside the 14 digit HUC how will the flood storage or water quality improvement functions be replaced within the local watershed?
❒ We are concerned that high up-front engineering and testing costs of items required in 3745-32-04(A)(2)(e) and (g) and (A)(4)(f) and (h) will be used to demonstrate the inability to mitigate at the 14 digit HUC.
❒ This paragraph appears to reflect a move by Ohio EPA away from using mitigation banks for Category 2 or 3 impacts. Is this correct?

3745-1-55(C)(2)(d)

❒ Significant economic reasons should be added as a justification that mitigation could be located outside the 8 digit HUC.

3745-1-55(D)(1)

❒ With the focus on mitigating with equivalent or higher wetlands, the ratio should never be more than 1:1 replacement.

3745-1-55(D)(2)(b)

❒ Revise this to read, "A watershed management or restoration plan or total maximum daily load (TMDL) review has recommended the restoration of wetlands in the watershed that are not in-kind or other activities that restore wetland functions.

3745-1-55(D)(3)(a) and (b)

❒ If the VIBI or AmphIBI are always going to be required this should be clearly stated in the rules. Also, a list of other appropriate methods should be provided.
❒ It would also seem appropriate to give the option of comparing the compensatory mitigation with the actual impact site since the rules stress the mitigation site should provide functions at an

equal or higher level.
❒ This paragraph should read, "The performance and success of compensatory mitigation shall be evaluated by quantitatively comparing the biological, physical, and where warranted, chemical characteristics of the restored, created, enhanced, or preserved wetland to the characteristics of natural wetlands of the same type using appropriate wetland assessment methods acceptable to the director, including Ohio's ORAM methodology and/or wetland indices of biotic integrity."

3745-1-55(E)

❒ The requirement for perpetual protection and permanent maintenance is unreasonable. With regards to surface mining, in many instances the property owner will not agree to permanent protection or maintenance.

3745-1-55(F)(3)

❒ This paragraph should read, "Upland buffer. Preservation of upland buffer, as that term is defined in rule 3745-1-50 of the Administrative Code, is a highly desirable component of compensatory mitigation" in order to clarify that upland buffers are desired but not required.

3745-1-55(F)(5)

❒ What is a "high quality" Category 2 wetland? Define this or remove his language.
❒ Since preservation alone would represent a net loss of wetland area at minimum 1:1 ratio, mitigation should be done at a 1:1.5 ratio or higher.
❒ Paragraph (F)(5)(C) should be deleted from the rule, or, the words "where feasible" should be added at the start of the paragraph because it is not always possible to transfer title to the preserved wetland prior to impact.
❒ There needs to be flexibility to work through the land acquisition process for preservation that is part of the mitigation for linear projects. We suggest that at least 1 year from the date of certification be allowed for completing all acquisitions.

3745-1-55(F)(6)

❒ Preservation should not be authorized as the sole component of mitigation; however, preservation with enhancement and/or preservation of upland buffers should be allowed as an option.
❒ After "...significant ecological reasons and authorize preservation..." add "...or projects that replace wetland water quality and wetland storage functions within the watershed of the permitted impact as the sole component of compensatory mitigation."

3745-32-04

❒ We recommend a separate list of wetland and stream plan requirements rather than a merged

list or a list of requirements that apply to both and separate lists that have elements applicable to just one or the other.
❒ This entire rule needs to be redrafted to provide reasonable and effective mitigation. As written, it requires over 90 separate types of information. This is unnecessary and far exceeds the requirements of the Corps and US EPA.

3744-32-04(A)

❒ We are concerned that the mitigation requirements will limit the feasibility of creating small on-site or local watershed mitigation sites due to up-front costs of the engineering studies.

3745-32-04(A)(1)(a)(ii)

❒ This requirement is far too broad. It should read, "Describe aquatic resource concerns in the sub-watershed (e.g. flooding, water quality, habitat) and how the impact site contributes to the sub-watershed functions, and identify sub-watershed plans that describe aquatic resource objectives.
❒ Only 22 watersheds in Ohio have approved TMDLs as of 11-8-05. Where is the applicant to retrieve TMDL or TSD reports? Does OEPA have watershed plans for every watershed in Ohio?

3745-32-04(A)(1)(b)(ii)
❒ This should read, "Describe the contribution to sub-watershed functions that the mitigation site or sites are intended to provide."

3745-32-04(A)(2)(a)(I)

❒ Specify the DPGS coordinate system/units preferred by the Ohio EPA.

3745-32-04(A)(2)(b)

❒ The level of baseline information required is excessive and unwarranted. Requiring applicants to classify impact and mitigation sites will impose far greater timing and cost burdens on the permit applicants. In the alternative standard classifications recognized by the Corps (forested, wet meadow, scrub-shrub, emergent) should be used.

3745-32-04(A)(2)(d)

❒ Is the WRAP the best example of an assessment method that could be listed here?
❒ Shouldn't this state ORAM?

3745-32-04(A)(2)(e)

❒ The introductory paragraph should read, "Existing hydrology. As appropriate for the type and size of the mitigation project being proposed, an applicant shall identify the following..."

3745-32-04(A)(2)(e)(I)

❒ The way this is written it appears that a water budget and hydroperiod are required for all projects which is contrary to statements made at the March 10 symposium.
❒ Has or will Ohio EPA provide additional guidance regarding the development of water budgets to satisfy the new rules?
❒ The in-depth hydrologic study will make the permitting process more complicated and less efficient.
❒ Define "wet" and "dry" years.

3745-1-04(A)(2)(e)(iii)

❒ Delete this subparagraph since compliance could not be achieved without speculation.

3745-32-04(A)(2)(e)(v)

❒ The word "tides" should be removed since this does not pertain to Ohio.
❒ This section should be deleted
❒ Define the purpose of water quality monitoring so that appropriate parameters can be identified.

3745-32-04(A)(2)(f)

❒ Clarify what is required: a complete multi-season inventory or a single-season community level inventory that is consistent with the comprehensive determination in the Delineation Manual.

3745-32-4(A)(2)(g)

❒ Why is wildlife usage under existing soils (A)(2)(g)? This provision also requests that applicants indicate T and E habitat. Our opinion is that a general habitat description should be sufficient. Please clarify whether this is acceptable or a more detailed habitat assessment is required.
❒ This should read, "Existing soils. As appropriate for the type and size of the mitigation project being proposed, an applicant shall provide the following..."
❒ This requirement is unnecessary for wetland development and not understood by 401 coordinators. It should be deleted. Also see comments relating to Part 6 report.
❒ Define the purpose of the soils analysis so that appropriate parameters can be identified.

3745-32-04(A)(2)(j)

❒ To describe the watershed context and surrounding land use consultants can only use available maps and data. Is the intent to describe the immediate watershed? If not, what watershed level is intended? This requirement seems like a substantial amount of preparation that will not likely directly affect the permit decision.
❒ This paragraph should be limited to applicants providing information on a subwatershed basis

only. In (A)(2)(j)(ii) the word "estimated" should be inserted in front the word percentages.
❒ Applicants should only have to provide the sizes and widths of buffers on their property.
❒ How do you show connectivity on a map? Delete this requirement.

3745-32-04(A)(3)(C)

❒ What is being asked for here? Simply describing "landscape connectivity" would be subjective and meaningless? Specifically describe what is wanted or delete this.

3745-32-04(A)(3)(I)

❒ Not only is this not a water quality issue, there is no authority in law for this requirement.

3745-43-04(A)(3)(j)

❒ How does this requirement affect the length of the permitting process and workload at the OHPO? Is the OHPO aware of this requirement?

3745-32-04(A)(3)(d)

❒ The applicant or his agent has no place in speculating likely future adjacent land use and compatibility. This requirement should be deleted.

3745-32-04(A)(3)(h)

❒ This should read, "Explain how the design is sustainable and self-maintaining. An applicant shall show, by means of a water budget, that there is sufficient water available to sustain long-term wetland or stream hydrology." Without having control of the overall watershed, it is virtually impossible to provide information that a water source exists or will exist. This paragraph should be deleted.

3745-32-04(A)(3)(j)

❒ This should read, "Provide a state historic preservation office cultural resource clearance letter, if applicable." As the agency is aware, such letters are not required in all instances.

3745-32-04(A)(4)(c)(ii)

❒ I appreciate the recommendation to use reference wetlands as "design templates." I hope to see this approach utilized frequently in the development of mitigation plans.

3745-32-04(A)(4)(d) and (e)

❒ These paragraphs should be deleted from the rule since it would be virtually impossible for applicants to provide such information at the mitigation work plan stage of the project. Such information is typically not available until projects are bid and work is about to commence.

3745-32-04(A)(4)(f)

❒ What is the purpose of this requirement? Paragraph (A)(3)(h) requests similar information.

3745-32-04(A)(4)(j)(I)

❒ How is this to be measured/described? Recommend a simple description of dominant vegetation and width of the buffer.

3745-32-04(A)(5)

❒ The discretion provided the agency in the rule with regard to the vague concepts of project success and adaptive management provide no certainty that the monitoring obligations of anyone in the regulated community will ever end.
❒ The vagueness of this rule will create significant uncertainty in the development of a mitigation proposal. The agency has failed to establish the conditions under which a "reference site" will be required and the purpose for this site.

3745-32-04(A)(5)(a)

❒ The paragraph should read "...These may be on-site values or watershed services including hydrological, vegetative, faunal, POLLUTION TREATMENT, FLOOD ATTENUATION, and invasive species..."

3745-32-04(A)(6)

❒ Given the adoption of the Ohio Uniform Environmental Covenants Act on 12-22-2004 and its definition of "environmental covenant" (ORC 5301.80(D), (E)(2)), the term "environmental covenant" should be added to the rule.

3745-32-04(A)(6-7)

❒ Exempt from all mitigation requirements impacts associated with utility right-of-way maintenance and construction.
❒ Exempt all construction projects associated with the installation and operation of pollution reduction equipment at electric generating plants from the mitigation requirements in the rules and adopt a simple requirement for off-site mitigation at significantly reduced ratios for this important projects.
❒ Identifying the format for the monitoring report is ambiguous. If OEPA wants a particular format, then please specify.

3745-32-04(A)(9)(b)

❒ ODOT has not been required to provide financial assurance in the past. This should not be required of another state agency.
❒ Even hazardous waste landfills do not have such open-ended and vague financial assurance

time frames as are proposed in this rule.

3745-32-04(B)

❒ The statement that monitoring shall be at least for 5 years and the director's ability to reduce the number of years appear contradictory. Please clarify.
❒ The term "environmental covenant should be added to the rule and the stream mitigation procedure.
❒ The lack of specific standards for mitigation performance or the review of proposed performance standards creates significant regulatory uncertainty for applicants.
❒ The discretion provided the agency in the rule with regard to allowing the director to extend the monitoring period is too broad.

3745-32-04(B)(4)(d)

❒ The discretion provided the agency in the rule with regard to requiring additional information is too broad.