

3745-32-04 **State water quality permit and isolated wetland permit antidegradation review requirements.**

[Comment: For dates of non-regulatory government publications, publications of recognized organizations and associations, federal rules and federal statutory provisions referenced in this rule, see rule 3745-32-01 of the Administrative Code.]

(A) Applicability. The following are subject to antidegradation review requirements under this rule:

- (1) Individual state water quality permit applications covered under rule 3745-32-02 of the Administrative Code;
- (2) Isolated wetlands permit applications subject to a level 3 review in accordance with 6111.024 of the Revised Code; and
- (3) The issuance of general state water quality permits by the director in accordance with this chapter.

(B) Information submittals and review procedures.

[Comment: The information required to be submitted in this rule is in addition to the information required in rule 3745-32-03 of the Administrative Code.]

(1) The director shall assess each proposed project and activity covered by this rule on a case-by-case basis. For each proposed project and activity, the director shall weigh the information acquired relative to the proposals, that were submitted by the applicant or otherwise obtained by the director, and all comments presented during the public review period, including intergovernmental comments, and make a determination of what, if any, of the proposed impacts meet the conditions of this rule. For projects and activities affecting wetlands, antidegradation requirements found in rule 3745-1-54 of the Administrative Code shall also apply.

(2) Except as provided in paragraph (C) of this rule, an applicant covered by paragraph (A) of this rule must submit documentation of:

- (a) An estimate of the important social, economic and environmental benefits to be realized through the project or activity including, as appropriate, the number and types of jobs created and the tax revenues generated;
- (b) An estimate of important social, economic and environmental benefits to be lost, such as lost or lowered recreational opportunities; and
- (c) To the extent that such information is known to those in the local community or is otherwise public, a listing and description of all government or privately sponsored conservation projects that have specifically targeted improved water quality or enhanced recreational

opportunities on the water body affected by the activity.

(C) Exemptions and exclusions.

(1) Exemptions for category 1 wetlands. Applicants requesting permission to impact a category 1 wetland are exempted from:

(a) Paragraphs (B)(2) and (J)(1)(d) of this rule; and

[Comment: Paragraphs (B)(2) and (J)(1)(d) of this rule address the demonstration of important social, economic and environmental benefits.]

(b) Paragraph (J)(2) of this rule.

[Comment: Paragraph (J)(2) of this rule addresses the factors to be considered when determining whether to allow a lowering of water quality.]

(2) Exclusions.

(a) Any impact for which a notice of intent has been filed with the director requesting coverage under a general state water quality permit issued in accordance with this chapter that meets the terms and conditions of the relevant general permit is excluded from all requirements of this rule.

(b) Any impact that is covered by permit by rule provisions found in rule 3745-32-02 of the Administrative Code.

(D) Protection of water body uses.

[Comment: The determination of stream order done pursuant to this paragraph is explained in the definition of local drainage network provided in rule 3745-32-01 of the Administrative Code.]

(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. There shall be no degradation of water quality or aquatic habitat that:

(a) Results in the loss or substantial impairment of existing uses; or

(b) Prevents or inhibits the attainment of designated uses.

(2) Context for the evaluation of impact.

(a) For streams larger than third order, evaluation of impacts to beneficial

uses, including loss of use, shall be within the context of an individual stream or within the context of discrete stream reaches delineated by selected tributaries or other significant habitat features. The evaluation may include consideration of the cumulative impacts.

(b) For first through third order streams, evaluation of impacts to beneficial uses, including loss of use, shall reflect site-specific local conditions including, but not limited to, the condition and relative prevalence of aquatic life uses and the classes of primary headwater habitat streams in the local drainage network. Cumulative impacts within the 12-digit hydrologic unit watershed may be considered.

(c) For wetlands, evaluation of impacts and loss of use shall ensure there is no net loss of wetland use in accordance with rule 3745-1-54 of the Administrative Code.

(d) For other surface waters of the state regulated under this chapter, evaluation of impacts to beneficial uses, including loss of use, shall be within the context of the individual water body or, for a large water body, within the context of discrete water body areas delineated by significant habitat features.

(E) Avoidance and minimization of impacts.

(1) This paragraph applies to projects and activities affecting surface waters of the state other than wetlands. For projects and activities affecting wetlands, paragraph (D) of rule 3745-1-54 shall apply in lieu of this paragraph.

(2) Demonstration of avoidance and minimization of impacts shall serve as the applicant's non-degradation alternative and minimal degradation alternative, respectively, as required in paragraph (B) of rule 3745-32-03 of the Administrative Code.

(3) Avoidance of impact.

(a) The applicant shall identify and take appropriate and practicable steps to avoid all or some of the impact to the water body ecosystem.

(b) For waters listed as outstanding state waters or superior high quality waters in rule 3745-1-05 of the Administrative Code, or streams determined to be class IIIB primary headwater habitat pursuant to rule 3745-1-07 of the Administrative Code, the applicant must demonstrate compelling reasons why the project is necessary and cannot avoid all impacts. Such demonstration may include, but not be limited to, documentation that the project is necessary to meet a demonstrated public need, or the nature of the project is such that it must occur at the location proposed. For purposes of this rule, "public need" is as defined

in rule 3745-1-50 of the Administrative Code.

- (4) Minimization of impact. The applicant shall identify and take appropriate and practicable steps to minimize potential adverse impacts to the water body ecosystem.
- (5) Factors evaluated. Analysis of opportunities for avoidance and minimization of impacts shall evaluate:
- (a) The spatial requirements of the project;
 - (b) The location of existing structural or natural features that may dictate the placement or configuration of the proposed project;
 - (c) The overall and basic purpose of the project and how the purpose relates to the placement, configuration or density of the project;
 - (d) The sensitivity of the site design to the natural features of the site, including topography, hydrology, and existing flora and fauna; and
 - (e) The direct and indirect impacts of the project.
- (F) Compensatory mitigation. After demonstrating avoidance and minimization in accordance with paragraph (E) of this rule, or paragraph (D) of rule 3745-1-54 of the Administrative Code, the applicant shall mitigate any remaining proposed impacts to surface waters of the state.
- (1) Wetlands. Specific mitigation requirements for impacts to wetlands are in rule 3745-1-54 of the Administrative Code.
 - (2) Jurisdictional ditches. Mitigation shall not be required for impacts on jurisdictional ditches as that term is defined in rule 3745-32-01 of the Administrative Code unless the United States army corps of engineers requires mitigation.
 - (3) Streams and other water bodies. The applicant shall compensate for the lost resource according to the applicant's detailed mitigation proposal submitted pursuant to rule 3745-32-03 of the Administrative Code. Methods of providing compensatory mitigation may include stream restoration, creation, enhancement and preservation. All re-constructed or modified stream channel segments must ensure the maintenance of vertical stability of the stream channel under anticipated land use and stream flow conditions. Compensatory mitigation plans shall be reviewed by the director on a case by case basis until such time that the director has adopted specific mitigation requirements in rule.
- (G) Additional restrictions for impacts to outstanding national resource waters. The

director shall impose the following requirements on all projects and activities covered under rule 3745-32-02 of the Administrative Code that impact outstanding national resource waters.

(1) Present ambient water quality and aquatic habitat in outstanding national resource waters shall not be degraded by any regulated activity.

(2) Notwithstanding the provision stated in paragraphs (G)(1) of this rule, activities that result in short-term changes in water quality or aquatic habitat in outstanding national resource waters may be allowed if the director determines there will be no long-term detrimental impact. Activities resulting in short-term impacts on outstanding national resource waters will be subject to a review of non-degradation alternatives, minimal degradation alternatives, mitigation opportunities, economic and social benefits, public participation and intergovernmental coordination.

(3) Notwithstanding the provision stated in paragraph (G)(1) of this rule, discharges of dredged and fill material to outstanding national resource waters that are wetlands, and are owned and managed solely for natural area preservation, public recreation, education or scientific purposes, may be authorized provided the discharges and associated activities result in only a short-term disturbance to water quality and will not adversely affect the ecological quality of the wetland or other surface waters. Authorized discharges and associated activities include boardwalk construction, repair and maintenance of dikes and other hydrological controls, and removal of non-native and invasive plant species. For these discharges and associated activities the director may waive the need for the review outlined in paragraph (G)(2) of this rule.

(H) Public involvement. The director shall provide for public participation prior to taking action on all activities covered by this rule.

(1) Not later than twenty-one days after a determination that an application is complete under paragraph (B)(5) of rule 3745-32-03 of the Administrative Code, the applicant shall publish public notice of the director's receipt of the complete application in a newspaper of general circulation in the county in which the project that is the subject of the application is located. The public notice shall be in a form acceptable to the director. The applicant shall promptly provide the director with proof of publication. The applicant may choose, subject to review by and approval of the director, to include in the public notice an advertisement for an antidegradation public hearing on the application pursuant to section 6111.12 of the Revised Code. There shall be a public comment period of thirty days following the publication of the public notice. Notices shall be sent by first class mail to all persons on the mailing list created pursuant to paragraph (H)(6) of this rule.

- (2) Within one hundred days of receipt of a complete application, the director shall hold a public hearing for any state water quality permit or state isolated wetland permit application whenever a water body categorized as outstanding national resource water, outstanding state water, superior high quality water, or a category 3 wetland. State water quality permits impacting lake Erie or its shoreline are exempt from this requirement.
- (3) If the director determines that there is significant public interest in a public hearing as evidenced by the public comments received concerning the application and by other requests for a public hearing on the application, the director or the director's representative shall conduct a public hearing concerning the application. Notice of the public hearing shall be published by the applicant, subject to review and approval by the director, at least thirty days prior to the date of the hearing in a newspaper of general circulation in the county in which the project that is the subject of the application is to take place. Notices of hearings shall also be sent by first class mail, or by alternative means as requested, to all persons on the mailing list created pursuant to paragraph (H)(6) of this rule. If a public hearing is requested concerning an application, the director shall accept comments concerning the application until five business days after the public hearing. A public hearing conducted under this paragraph shall take place no later than one hundred days after the application is determined to be complete.
- (4) The director shall forward all public comments concerning an application submitted under this section that are received through the public involvement process required by rules adopted under this chapter to the applicant not later than five business days after receipt of the comments by the director.
- (5) The applicant shall respond in writing to written comments or to deficiencies identified by the director during the course of reviewing the application not later than fifteen days after receiving or being notified of them.
- (6) The director shall develop and maintain a list of persons and organizations who have expressed an interest in or may, by the nature of their purposes, activities or members, be affected by or have an interest in antidegradation reviews. These persons and organizations may request that all fact sheets or public hearing public notices identified by this rule be forwarded to them by means other than first class mail (e.g., by electronic transmission).
- (I) Intergovernmental coordination. The director shall notify the Ohio department of natural resources, the United States fish and wildlife service, the United States environmental protection agency and any affected local areawide planning agencies of all proposed activities that may lower water quality. The director or the other agencies may initiate additional intergovernmental coordination.

(J) Criteria for decision by the director.

(1) When making a determination of whether to permit activities that impact a water body, the director shall ensure the following:

- (a) Water body uses are protected pursuant to paragraph (D) of this rule;
- (b) Impacts to water bodies are avoided and minimized pursuant to paragraph (E) of this rule;
- (c) Impacts to water bodies that cannot be avoided or minimized are mitigated pursuant to paragraph (F) of this rule;
- (d) Impacts are necessary to carry out important public health and safety improvements or accommodate important social or economic development in the area in which the water body is located;
- (e) A public participation process is held pursuant to paragraph (H) of this rule; and
- (f) Appropriate intergovernmental coordination is conducted pursuant to paragraph (I) of this rule.

(2) When making determinations required by paragraph (J)(1) of this rule, the director shall consider the following:

- (a) The magnitude of the proposed impact;
- (b) The anticipated impact on aquatic life and wildlife, including threatened and endangered species, important commercial or recreational sport fish species, other individual species and the overall aquatic community structure and function;
- (c) The anticipated impact on human health and the overall quality and value of the water resource;
- (d) The degree to which water bodies located within national, state or local parks, preserves or wildlife areas, water bodies listed as state resource waters in rules 3745-1-08 to 3745-1-30 of the Administrative Code, or water bodies categorized outstanding national resource waters, outstanding state waters or superior high quality waters in rule 3745-1-05 of the Administrative Code will be impacted;
- (e) The effects of the impact on the economic value of the water body for recreation, tourism and other commercial activities, aesthetics, or other use and enjoyment by humans;

- (f) The extent to which the resources or characteristics impacted by the lowered water quality are unique or rare within the locality or state;
- (g) The availability, reliability, cost effectiveness and technical feasibility of the avoidance, minimization and mitigation;
- (h) The reliability of the preferred alternative including, but not limited to, the possibility of recurring operational and maintenance difficulties that would lead to increased degradation;
- (i) The condition of the local economy, the number and types of new direct and indirect jobs to be created, state and local tax revenue to be generated, and other economic and social factors as the director deems appropriate; and
- (j) Any other information regarding the proposed activities and the affected water body that the director deems appropriate.

Effective:

R.C. 119.032 review dates:

Certification

Date

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