



Environmental Protection Agency

Division of Surface Water

Interim Response to Comments

December 2010

Rule: OAC 3745-1-05 (Antidegradation)

Agency Contact for this Package

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Ohio EPA made available for review and comment draft changes to the Antidegradation rule in OAC 3745-1-05 in October 2008. In December 2010, the Agency is making an updated draft rule available for review and comment. This document identifies the comments and questions received to date on the draft rule. Some of the comments are addressed in this response to comments document. The others will be addressed at the end of the comment period.

Ohio EPA reviewed and considered all comments received during the public comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health.

In an effort to help you review this document, the comments and questions are grouped by topic and organized in a consistent format. The name of the commenter follows the comment in parentheses.

General Comments

Comment 1: The draft rule packages include numerous new terms referenced, such as State Water Quality Permit, water conveyance, and upland drainage to name a few. Throughout our comments we have pointed out those terms that are not adequately defined in the draft rules and of specific significance to all applicants; there is no cross reference of commonality with like terms in USACE rules. We would suggest that OEPA coordinate the development of the draft rules and new terms with the USACE. (Ohio Department of Transportation (ODOT))

Response 1: Originally, Ohio EPA intended to process the five year review of the Antidegradation rule as a separate, stand alone rulemaking ahead of the 401 certification and stream mitigation rulemaking packages. Therefore, references to terms defined in the other packages were not included. Since the Antidegradation rule has been realigned to proceed through the rulemaking process with the other three rule packages, terms within

the draft rule have been revised to be consistent with the other draft rules. A few of the terms may not be found in U.S. Army Corps of Engineer rules because they describe state permitting actions, not federal.

Comment 2: ODOT, unlike the vast majority of applicants to OEPA, is required by federal law to evaluate each project through a rigorous environmental review and approval process as prescribed by the National Environmental Policy Act (NEPA). Identifying and studying alternatives for a project is key to the NEPA process' objective of finding transportation solutions that help preserve and protect the value of environmental and community resources.

The overall expectation of the ODOT's NEPA alternative analysis process is to provide the least damaging alternative to the overall environment through improved decision making, stakeholder and public involvement, and collaboration with various resources agencies. ODOT consistently develops, as required by NEPA, the least overall environmentally damaging alternative. Every ODOT project utilizes pollution prevention and best management practices. Additionally, ODOT mitigates impacts to all environmental resources (i.e., streams, wetland, historic sites, historic buildings, threatened and endangered species, etc.) as prescribed by numerous state and federal laws.

The further development of alternatives for the State Water Quality Permit Application (Preferred, Minimal Degradation, Non-Degradation, and the Mitigative Technique Alternatives) is often redundant, and unnecessarily expensive and time consuming. ODOT respectfully suggests that OEPA consider abbreviated State Water Quality Permit Application requirements for projects, such as ODOT's, that are evaluated through NEPA; specifically, limiting the amount of required alternatives studies. (ODOT)

Response 2: This comment remains under consideration.

Comment 3: Throughout the draft Antidegradation rules issues related to public safety are not listed as a potential cause/reason for the lowering of water quality. The construction and continual maintenance of Ohio's transportation system, in light of maintaining and improving public safety, should be considered when allowing the possible degradation to waters of the State. (ODOT)

Response 3: This comment remains under consideration.

Comment 4: As written, the rules combine regulations and requirements for two separate and very different impacts to waters of the State: Development type project (i.e., dredge and fill) and wastewater treatment projects (i.e.,

discharge of pollutants and pollutant loading). It is extremely difficult to determine how and when to implement the rules for projects that include the otherwise lawful placement of fill into waters of the state. ODOT suggests that applicable sections of the regulations be reformatted so that the regulations impacting the two basic projects are more clearly defined and separated in the draft rule. (ODOT)

Response 4: Revisions have been made to the draft rule. Portions applicable to dredge and fill type projects have been removed. A new rule in the 401 water quality certification rule package, OAC 3745-32-04, was created to address the antidegradation requirements for these types of projects.

Comment 5: The definition for both 401 Water Quality Certification and State Water Quality Permit need to be more clearly defined here and the draft 401 Water Quality Certification rules (OAC 3745-32-1). (ODOT)

Response 5: See the response to Comment 4, above. Since the provisions for dredge and fill type projects have been relocated to a new rule, a definition in this rule will not be necessary.

Specific Comments

Comment 6: 3745-1-05(A)(14) "Minimal degradation alternative ...may include...best management practices." Comment: ODOT's standard practices on all projects in regard to limiting impacts to natural resources in the project vicinity. Consequently ODOT's selection of 401 type alternative is difficult in that as defined, our Preferred Alternative meets the definition of the Minimal Degradation Alternative. (See comment 3 above). This definition of 'Minimal degradation alternative' needs to be expanded to cover the otherwise legal placement of clean non-erodible non-pollution fill. (ODOT)

Response 6: See the response to Comment 4, above.

Comment 7: 3745-1-05(A)(15) "Mitigative technique alternative" Comment: ODOT requires clarification of this alternative. Is this a new alternative requirement? ODOT projects are currently evaluated in 401 WQC applications by developing a Preferred Alternative (PA), a Minimal Degradation Alternative (MDA), and a Non-degradation Alternative (NDA). Is the Mitigative Technique Alternative a stand alone alternative that will need to be presented in the 401 WQC application in additions to the PA, MDA, and the NDA? This definition of 'Minimal degradation alternative' needs to be expanded to cover the otherwise legal placement of clean non-erodible non-polluting fill. (ODOT)

Response 7: See the response to Comment 4, above.

Comment 8: 3745-1-05(A)(19) “Non degradation alternative” Comment: Instead of all wastewater treatment type projects, development type projects (i.e., dredge and fill) need to be included as examples to clarify the NDA. (ODOT)

Response 8: See the response to Comment 4, above.

Comment 9: 3745-1-05(A)(23) The definition of ‘Preferred alternative’ appears to have been deleted from this version of the rules. Is it OEPA’s intention to not include the ‘Preferred alternative’ in the 401 Antidegradation Analysis. Comment: This definition of ‘Preferred alternative’ needs to be expanded to cover the otherwise legal placement of clean non-erodible non-pollution fill. ODOT’s Preferred Alternative always contains mitigative techniques to lessen impacts, both construction and post-construction best management practices, and compensatory mitigation for streams and wetland. For ODOT projects subject to NEPA, the development of alternatives specifically for the 401 WQC application is difficult and overly burdensome. (ODOT)

Response 9: The definition of “preferred alternative” is included in the draft rule. This definition was not included in the changes to the antidegradation rule proposed on August 6, 2009. See the response to Comment 4, above.

Comment 10: 3745-1-05(B)(1)(c) “Any Section 401 water quality certification application pursuant to Chapter 3745-32 of the Administrative Code.” Comment: See comment #1 in the cover letter. [Refers to Comment 1 above under General Comments section.] (ODOT)

Response 10: See the response to Comment 1, above.

Comment 11: 3745-1-05(B)(2) Comment: OEPA should consider exempting discharges that have been previously authorized by a 401 WQC and/or an Isolated Wetland Permit. (ODOT)

Response 11: This comment remains under consideration.

Comment 12: AOMWA’s comments are limited to the draft amendments contained in OAC 3745-1-05(B)(2)(b) regarding existing sources that are exempt from all provisions of the anti-degradation rule. While AOMWA supports the expansion of the existing source exemptions contained in OAC 3745-1-05(B)(2)(b)(ii) and (iii), AOMWA believes that additional clarifying language should be included in the existing source exemption provisions of the rule. Specifically, AOMWA believes that the rule should clarify that net increases from modifications to existing sources that are required under Ohio EPA approved Wet Weather Management Plans and/or Long Term Control Plans that address combined and/or sanitary

sewer overflows should be exempt from all provisions of the anti-degradation rule.

Such plans are subject to anti-degradation review, and as such permit applications or other actions necessary to construct plant expansions or implement other modifications required under these plans should not be subject to additional anti-degradation review under the rule. (Association of Ohio Metropolitan Wastewater Agencies)

Response 12: This comment remains under consideration.

Comment 13: On page 15, proposed rule 3745-1-05(C)(1)(a) includes: "This director shall, pursuant to paragraph (A)(6) of rule 3745-1-07 of the Administrative Code, prohibit increased concentrations of specific regulated pollutants..." I might be missing something, but am having trouble finding 3745-1-07(A)(6). Am I wrong, or is there a misprint in this reference to 3745-1-07(A)(6)? Might it be absent because of changes in the rules of August 15? (The Nature Conservancy)

Response 13: This paragraph has been revised in the updated draft of the rule and the reference is no longer necessary.

Comment 14: 3745-1-05(C)(3) "Public Involvement" Comment: OEPA should consider limiting public hearings to projects that have a significant impact to aquatic resources and public interest. It has been ODOT's experience that many public hearing held by OEPA for ODOT projects do not generate public interest and often times no one from the public attends the hearings.

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

Response 14: This comment remains under consideration.

Comment 15: 3745-1-05(C)(3)(e) As written a Public Hearing is required for any affect to any Category 3 Wetland. Comment: ODOT suggests that a low impact threshold to Category 3 Wetlands, such as 0.10 acres, be instituted. Public Hearings are often required for ODOT projects with the sole impacts being extremely small impacts to Category 3 Wetlands.

The Public Hearing for these types of projects are often unattended by the public. (ODOT)

Response 15: This comment remains under consideration.

Comment 16: 3745-1-05(C)(3)(h) “The director shall notify the Ohio department of natural resources, the United States fish and wildlife service...”
Comment: OEPA notification to ODNR, USFWS, USEPA, and local planning agencies of any project that may require lowering of water quality is redundant; ODOT notifies all agencies through NEPA coordination. We suggest adding the following to the end of the first sentence “...all proposed activities that may lower water quality unless proof is provided in the permit application that all applicable agencies have been coordinated with and agree with the project or is federally funded developed in full compliance with the National Environmental Policy Act.” (ODOT)

Response 16: This comment remains under consideration.

Comment 17: 3745-1-05(C)(4) “Outstanding national resource waters” Comment: Here, as in may places throughout the new rules, issues related to public safety are not listed as possible cause/reason for lowering water quality. The maintenance and/or replacement of existing infrastructure in order to maintain public safety should be sufficient reason to allow the possible degradation of waters of the State. (ODOT)

Response 17: This comment remains under consideration.

Comment 18: 3745-1-05(C)(5) “Other waters. Comment: Any drainage improvement project meeting the conditions in division (C) of section 6111.2 of the Revised Code on a historically channelized watercourse, including all surface waters designated in this chapter as upland drainage or water conveyance, is subject to an abbreviated antidegradation review. Historically channelized watercourse is defined in section 6111.01 of the Revised Code.” Comment: Based on the definitions provided in an earlier draft rule for upland drainage and water conveyance, it is not clear what resources will be subject “to an abbreviated antidegradation review” as indicated in this rule. Further, it is not apparent what will be required of an applicant in regards to application preparation and time needed for review by OEPA under an “abbreviated antidegradation review”. OEPA should provide further clarity on how to delineate these resources and what the abbreviated review will entail. (ODOT)

Response 18: In the revised draft rule, this comment has been revised into rule language under (D)(1)(k) “Any drainage improvement project meeting the conditions in division (c) of section 6111.12 of the Revised Code on a historically channelized watercourse”. This revision should clarify that

drainage improvement projects on historically channelized watercourses are excluded from the submittal and review requirements in paragraphs (B)(3)(e) to (B)(3)(h) and (C)(5) of the rule.

Comment 19: 3745-1-05(D)(4) “Nothing in this rule shall prohibit the director from approving activities that lower water quality on a temporary basis whenever the director determines that an emergency exists requiring immediate action to protect public health and welfare.” Comment: Add “public safety” to public health and welfare. (ODOT)

Response 19: This comment remains under consideration.

Comment 20: I happened to be looking at “Table 5-2 Declining fish species,” in the draft Antidegradation rule and noticed what looks like it might be a typographical error: “South redbelly dace Phoxinus erythrogaster”. Should it be written as “Southern redbelly dace Phoxinus erythrogaster”? (The Nature Conservancy)

Response 20: It should be “southern”. The draft rule has been revised.

End of Response to Comments