



State of Ohio
Environmental Protection Agency

February 6, 2003

Responsiveness Summary

OAC Chapter 3745-1 Water Quality Standards

3745-1-05 Antidegradation

OAC Chapter 3745-45 Permit Fees

3745-45-01 Definitions

3745-45-03 Coal mining operations

Proposed March 25, 2002
Public Hearing May 1, 2002

Adoption of 3745-1-05 Effective July 1, 2003

Rescission of 3745-45-01 and 3745-45-03 Effective February 16, 2003

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Preface

Completion of a Responsiveness Summary is a federal requirement. The purpose of the Responsiveness Summary is to summarize the rule-making steps taken by the Agency, the public comments submitted on the proposed rules and the Agency's responses to the comments. This Responsiveness Summary includes information on the adoption and effective dates of the rules, the Director's Findings and Orders and the public notice of adoption.

Summary of Rule-making Actions

Background

This rule-making included proposed revisions to 13 rules in 3 chapters of the Ohio Administrative Code (OAC). The 13 rules are listed below. During the course of the rule-making, Ohio EPA withdrew the proposed revisions addressing antidegradation provisions for dredge and fill activities, review procedures for section 401 water quality certifications, and certification fees. Only revisions to rule 3745-1-05 and the rescission of rules 3745-45-01 and 3745-45-03 were finalized.

Rules included in the proposed rule package

OAC Chapter 3745-1 Water Quality Standards

- 3745-1-05 Antidegradation
- 3745-1-50 Wetland definitions
- 3745-1-54 Wetland antidegradation

OAC Chapter 3745-32 Section 401 Water Quality Certifications

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

OAC Chapter 3745-45 Permit Fees

- 3745-45-01 Definitions
- 3745-45-02 Certification fees
- 3745-45-03 Coal mining operations

Chapter 3745-1 addresses water quality standards for surface waters of the state. Within this chapter, rules 05, 50 and 54 address antidegradation provisions for point source discharges and dredge and fill activities. Antidegradation provisions must be followed before authorizing any increased activity on a water body that may result in a lowering of water quality including an increase in the discharge of a regulated pollutant, or activities that may significantly alter the physical habitat. The proposed changes were meant to clarify and improve efficiency in issuing documents under the provisions of the rules.

The rules in Chapter 3745-32 address the section 401 water quality certification program for dredge and fill activities. Within this chapter, rules 01 to 07 were proposed to be revised

and consolidated into new and amended rules.

The rules in Chapter 3745-45 address permit and certification fees. Within this chapter, rules 01 and 03 are outdated and no longer serve any purpose. Those rules were proposed to be rescinded. The certification fees in rule 3745-45-02 were proposed to be revised and incorporated into Chapter 3745-32.

Key Dates

10/31/01	Draft revisions were made available for review and comment (interested party review)
3/25/02	Proposed revisions were filed with the Joint Committee on Rule Review (JCARR) and made available for review and comment
9/27/02	Proposed revisions related to the Section 401 water quality certification program were withdrawn from the rule-making
11/7/02	Modified proposed revisions were re-filed with JCARR
2/6/03	Final revisions were filed with JCARR
2/16/03	Rescission of rules 3745-45-01 and 3745-45-03 become effective
7/1/03	Revised 3745-1-05 becomes effective

Rule-making Steps and Summaries of Revisions

Interested Party Review

Prior to proposing the rule revisions, the Division of Surface Water notified interested parties of its intention to file revisions in compliance with Ohio Revised Code Section 121.39. On October 31, 2001, notification was sent to known interested parties and was posted on the Division of Surface Water web page, providing an opportunity to review and comment on the draft revisions during this initial public review. A summary of the draft rule revisions is in Appendix A. Comments were requested by December 28, 2001.

After reviewing the comments received on the draft rules, the Agency made additional revisions to the rules. A summary of the more significant revisions made to the draft version of the rules is in Appendix B.

Rule Proposal

The Agency filed proposed rule revisions with the Joint Committee on Rule Review, Legislative Service Commission, Secretary of State and Ohio Department of Development

Office of Small and Developing Business on March 25, 2002. Again notification was sent to known interested parties and was posted on the Division of Surface Water web page, providing an opportunity to review and comment on the proposed revisions.

A public hearing on the proposed rule revisions was held in Columbus on May 1, 2002. The public comment period ended on May 9, 2002. A copy of the notice of proposed rule-making and public hearing is in Appendix C.

Ohio EPA received 46 sets of comments during the public comment period. In addition, 422 "form" e-mails and approximately 150 "form" postcards were also received concerning the 401 certification and wetlands rules. After reviewing public comments, the Agency decided to withdraw the proposed revisions addressing antidegradation provisions for dredge and fill activities, review procedures for section 401 water quality certifications, and certification fees. The Agency withdrew the proposed revisions to rules 3745-1-50, 3745-1-54 and 3745-45-02 and Chapter 3745-32 on September 27, 2002. The Agency will work with interested parties to propose revisions to those rules in the future.

The comments submitted during the public comment period on the rule revisions that were not withdrawn, along with the Agency's responses and positions, are provided below in the Response to Public Comments section. The Agency made additional revisions to rule 3745-1-05 and re-filed that rule and the rescission of rules 3745-45-01 and 3745-45-03. A summary of the changes made to the proposed version of rule 3745-1-05 is in Appendix D.

Rule Re-file

The revisions to rule 3745-1-05 and rescission of rules 3745-45-01 and 3745-45-03 were re-filed with the Joint Committee on Rule Review, Legislative Service Commission and Secretary of State on November 7, 2002. The re-filed rule revisions were considered at the November 18, 2002 meeting of the Joint Committee on Agency Rule Review (JCARR). No comments or concerns were raised at the meeting. The JCARR jurisdiction period for the rules ended December 7, 2002.

Final Rule Filing

The final revisions to the rules were adopted by Director Christopher Jones on February 6, 2003 with no further changes from the re-filed version of the rules. Ohio Revised Code Section 119.04 requires that an effective date for the rule revisions be set at the time they are adopted. The effective date of the rescission of the permit fee rules (3745-45-01 and 3745-45-03) is February 16, 2003. In determining the effective date of the antidegradation rule (3745-1-05), the Director considered the requirement in federal regulations (40 CFR section 131.21) that the rule revisions be approved by U.S. EPA before they become applicable for purposes of the Clean Water Act. Once the state submits the officially adopted rule revisions, U.S. EPA has 60 days to approve them or 90 days to disapprove them. To allow adequate time for U.S. EPA to complete their review, the effective date of

the antidegradation rule revisions is July 1, 2003. Copies of the Director's Findings and Orders and the public notice of adoption are in Appendix E.

To obtain a copy of the rules or to inspect the comments submitted on the proposed rule revisions, write to Mr. Bob Heitzman at the address below or call him at (614) 644-3075. Copies of the adopted rules are also available for inspection at Ohio EPA's District Offices and are available on the Ohio EPA Division of Surface Water web site at <http://www.epa.state.oh.us/dsw>.

Questions of a technical nature about the antidegradation rule should be directed to Mr. Mark Stump at (614) 644-2028 or Mr. Dan Dudley at (614) 644-2876.

Ohio Environmental Protection Agency
Lazarus Government Center
Division of Surface Water
P.O. Box 1049
Columbus, OH 43216-1049

Response to Public Comments on the March 25, 2002 Proposed Revisions to Rule 3745-1-05

Presented below are summarized comments and the Agency's responses to the main issues raised on rule 3745-1-05 - Antidegradation. Minor comments (spelling and typographical) are not included. The Agency received no comments regarding the proposed rescission of rules 3745-45-01 and 3745-45-03.

The list of comment letters received is at the end of this section. After reviewing the comments, Ohio EPA contacted a number of individual and organizations in July 2002 regarding their comments on the categorization of special high quality waters. The purpose of these calls and meetings was to ensure the Agency understood the information and comments made, and that all pertinent biological and water quality information on these water bodies was reviewed by Agency staff. A list of outside parties who submitted additional information is identified at the end of this section. Commenters are identified by the number at the end of the comment.

Letters that commented only on portions of the proposed rule package dealing with the Section 401 water quality certification related rules (Chapter 3745-32 and rules 3745-1-50, 3745-1-54 and 3745-45-02) are listed separately at the end of this section. Because the proposed revisions to Chapter 3745-32 and rules 3745-1-50, 3745-1-54 and 3745-45-02 were withdrawn from this rule-making package, the comments from these letters are not included in this document.

Overall

1. **Comment:** A number of statements regarding improvements and general support for the rule revisions were made:

"... the proposed revisions have clarified several unclear areas of the rule, streamlined the procedures to be followed for projects subject to the rule and provided better guidance on the procedures for the classification of Ohio's streams."

"3745-01-05(B)(1)(b)[combining antidegradation reviews for NPDES and PTIs] ...is one that Butler County commends and supports"

"Although we have some questions and concerns which we discuss in the attachment to this letter, we are impressed that overall, this rule package does appear to be very consistent with state and federal law and the recommendations of the EAG."

"Clarity The proposed rules go a long way to clarifying many aspects of this regulation."

"Public Participation ... very supportive of the Fact Sheet provision in the proposed rules"

"Bacterial standards ... supportive of the Ohio EPA's inclusion of a design standard for E. coli in minimum treatment technologies."

“Combined Sewer Overflows The provisions for dealing with these issues in the proposed rules is consistent with the EAG consensus and should remain the final rules”
(3, 5)

Response: No response needed.

2. **Comment:** The “on-ramp” agreed to within the EAG to allow the director the ability to require a complete antidegradation review if he determines that a project possesses significant public interest or ecological significance should be placed back into the rules.
(5)

Response: Ohio Administrative Code 3745-31-05(C) states that the Director must take into consideration the social and economic impacts an activity may have on the environment for any permit to install or plan approval issuance – not simply those that are subject to an antidegradation review. Similar provisions exist within other rules and statutes within the water quality program, as well as provisions that state that the Director can request any additional information deemed necessary to perform an adequate review. The “on-ramp” language was in the introductory paragraph of the exclusions and waivers section which excluded the project from having an in-depth social/economic review as outlined by the rules; however, some level of social and economic review is required for all projects. Therefore, since the ability already exists to request additional information and the inclusion of this statement in the rules is simply a reiteration of this ability, the Agency feels it is not necessary to make this declaration in the rules.

3. **Comment:** A system of scaled reviews for Section 401 projects that impact streams is needed (similar to what is in place for wetlands). Sediment is the chief concern with such projects, and these impacts merit a more expedited review compared to the review given *“industrial/chemical/waste discharges of most other applicants.”* (11)

Response: Debate on this issue during the course of the External Advisory Group process did not produce resolution on the issue of scaled reviews for Section 401 projects. The final rule maintains the provisions found in the current rule. Ohio EPA will continue with other efforts to streamline and improve the Section 401 permitting process, including looking at standardized protocols to evaluate stream mitigation.

Sediment is not always the major issue with land and stream disturbing projects that require a Section 401 water quality certification and antidegradation review. In some cases the fill or re-location of a stream creates aquatic habitat issues that need attention to ensure that the existing beneficial uses are maintained in the post-project period. Because these impacts can be severe and long lasting they should not, as a general rule, be discounted and given less review than wastewater discharge permits.

4. **Comment:** The Agency is *“... causing a great deal of confusion within the regulated community... by interjecting the antidegradation policy found in Section 402 of the CWA into the water quality certification process required by Section 404.”* (7, 13, 19)

Response: Antidegradation is a required component of the water quality standards program required pursuant to Section 303 of the Clean Water Act. Changes to the Section 401 rules (3745-32) contained in the proposed rule making package have been withdrawn and the basic applicability of the antidegradation rule to Section 401 water quality certifications remains as it is in the existing rule.

5. **Comment:** The rule should provide more definitive standards to follow to evaluate social, economic and environmental benefits. How are “social, economic and environmental benefits” evaluated? There is no verification or follow through to insure that the social-economic values highlighted by the applicant are true or accurate. This includes the number of jobs that may be realized, any benefit to the regional economy, no impact to tax base, etc. The Agency is only taking for granted what the applicant says is true and accurate and there is no true evaluation conducted. (2, 9)

Response: The review of the social-economic aspects of an application is not and cannot be an exact science. The issues presented are considered and evaluated and not simply taken for granted at the application stage. It is true that there is no official follow up or check to insure that the information contained in the application related to social-economic considerations is implemented or actually occurs. There is, however, continued informal follow through that will be taken into consideration with future permitting activities (e.g., experience in application) and future permit actions for a given facility may be scrutinized in greater detail. Additionally, if it is determined that information contained in an application is false or misleading, formal enforcement action may be considered at the discretion of the Director.

6. **Comment:** The rules should establish time lines that the Agency must follow in completing a review. (3)

Response: The Agency is already bound by various direct and indirect time lines in statutes and regulations related to permitting activities (e.g., act within 180 days of receiving complete application, comment periods on draft permits, time lines for public notifications, etc.). Adding time lines within the context of the antidegradation rule is unnecessary and would result in confusion in the overall process.

7. **Comment:** The costs of degraded waters are real, but not considered. Since difficult to measure and support the Agency just assumes they are zero. There should be specific social-economic review criteria that take into account all aspects of the project including the many public benefits of clean water. (9)

Response: The Ohio EPA does recognize that there is a “cost” associated with degraded waters. Although the Agency does not attempt to place a monetary value on that cost, they are not considered to be zero. The Agency attempts to correlate impacts to streams, or “costs”, to environmental, recreational or ecological impacts to those streams. Reduced fish communities, loss of habitat, loss of recreational activities, whether real or perceived, impacts on endangered or threatened species, impacts on swimming and water supply uses, etc. are all “costs” evaluated by the Agency in

conducting a review of a project that may result in a degradation to surface waters of the state. These “costs” may lead, and previously have led, to a project not being approved or needing to be modified.

Definitions [3745-1-05(A)]

8. **Comment:** Placing the list of threatened/endangered species in rule will make it difficult to update the list. (1)

Response: Tables 5-2 and 5-3 in the final rule list declining fish species and threatened species, respectively. The list of endangered species is not in the antidegradation rule because Ohio DNR maintains that list in rule 1501:31-23-01. Ohio EPA believes it is necessary to formalize the lists of declining fish species and threatened species through a rule-making process, even though that makes them harder to update, because these species are integral in the categorization of streams. Ohio EPA will conduct necessary rule revisions should it be appropriate to update these lists of species in the future.

9. **Comment:** The rule should provide a definition of “stream.” Antidegradation should not apply to ephemeral streams or intermittent streams with less than 200 acres of drainage. (11)

Response: No definition of stream was added to the antidegradation rule. The Agency may at a future date decide to propose adding definitions for streams (ephemeral, intermittent, perennial) and other water body types. The final rule maintains the existing rule’s coverage to all “surface waters of the state.”

10. **Comment:** A commenter expressed support for the definition of “modification of a facility” and offered these observations; *“We understand that as long as the permit limits do not have to be increased, there is no ‘modification.’ The permittee can expand treatment plant capacity or treat new wastewater or do both and not fall under this definition providing there is no request to increase limits.”* Another commenter expressed confusion with a literal reading of this definition and other provisions of the rule. (6, 17)

Response: The Agency has retained the proposed definition of modification of a facility in the final rule. The first commenter’s understanding, however, is not entirely correct. It is true that if there is a “modification of a facility” and there is no increase in permit limits then it is not subject to an antidegradation review; however, there is still a “modification”. An added part to this definition addresses when there is a “modification of a facility” where the pollutants added are not permitted. In that case, if a pollutant limit is imposed or becomes necessary, there is an antidegradation review. As for the concerns of the second commenter, the application of this definition focuses on when a permit limitation is imposed in a permit for an existing facility. Basically, whenever there is an activity conducted by an applicant, as outlined by the definition, that will result in new permit limits, the permit is subject to an antidegradation review.

11. **Comment:** How do you calculate the various “mass discharge limits”? What does the “permitted flow” mean? (6)

Response: As expressed in the definitions, the “permitted flow”, or the “permitted discharge flow”, is the discharge flow expressed in an NPDES or PTI application and is representative of the typical wastewater flow expected to be discharged by a facility. For the purposes of this rule, the “permitted discharge flow” is the same as the “effluent design flow” utilized in wasteload allocation or TMDL evaluations as determined by OAC 3745-2-05(A)(4). If not contained in the permit itself, a “mass discharge limit” is calculated using this “permitted discharge flow”, the concentration limitations contained in the permit or in the application for a given pollutant and the appropriate conversion factor. It needs to be stressed that a limitation doesn’t need to be contained in the permit for a “mass discharge limit” to be established and evaluated for the purposes of an antidegradation review.

12. **Comment:** The phrase “...and its associated treatment/production capacity” in the definition of “exiting source” [paragraph (A)(9)] is confusing and should be deleted because these capacity issues are dealt with in the definition of “modification of a facility” [paragraph (A)(16)]. (6)

Response: The phrase needs to remain in the rule. Capacity issues are dealt with through the definition of “modification of a facility”; however, this definition only applies to the case where imposition of a new limitation is in question. Provisions have been added to the rule [paragraph (B)(2)(b)] which, in some scenarios, allow existing sources to avoid antidegradation reviews when permit limitations for parameters currently permitted or authorized in a permit are increased based upon past production/capacity issues.

13. **Comment:** A “net increase” for a thermal component seems to be confusing. If there are no limits or authorized discharge level, does antidegradation apply? Is the ambient temperature change referenced in the rules an outside of the mixing zone temperature change? (6)

Response: For the purposes of this rule, a “net increase” for a thermal component is simply the addition of a heat source that was not previously authorized or discharging. There does not have to be a limit or authorized discharge level specified in a permit. Any addition of a heat source that would increase the ambient temperature by more than 1°F is subject to a review regardless of whether a limit is in or is to be placed within the permit. The ambient temperature change referenced throughout the rule is an outside mixing zone change.

Applicability & Exemptions [(3745-1-05(B))]

14. **Comment:** The rule applicability is too broad and should be based upon a “perceptible change in water quality” as outlined in ORC 6111.12 and not simply on an increase in mass load. Projects that meet the de minimis definition should be exempt

from antidegradation all together. Also, if increase in mass approach kept, then antidegradation should only be triggered if there is a physical change being made at the source – similar to imposition of a limit. (3, 6)

Response: Ohio EPA is confident that the approach that has been historically taken, and is recommended herein, with respect to triggering applicability "*whenever the permitted activity increases the amount of pollutants*" is the appropriate approach. This is supported by not only the *Metroparks* case, but is also the more practical approach to take from a program and project management standpoint both within and outside of the Agency. Also, contrary to the comments presented, with the many variables associated with calculating instream water quality concentrations, there would be no predictability for the applicant when submitting an application as to what process would be followed, what the time line would be or whether the rule applies at all. There would be no time savings realized because the same time would be devoted to simply determining if the rule were applicable.

15. **Comment:** Two commenters requested clarification about the rule's applicability where an NPDES permit specifies no pollutant limit [paragraph (B)(1)(a)(ii)]: "*Please confirm that the proposed rule now eliminates the requirement for an antidegradation review upon changing a parameter from "monitoring only" status to an effluent limit, unless the effluent limit is placed as a result of a modification.*" (2, 17)

Response: Yes, there are situations where the permittee might supply effluent quality data under a "monitor only" permit condition which could prompt a permit limit, and no antidegradation review would be needed. A limitation can be imposed without an antidegradation review when there is a reasonable potential that the projected effluent quality might exceed the water quality based effluent limitation and there is no modification of the facility. See 3745-1-05(A)(16) for a definition of modification of a facility.

16. **Comment:** Paragraph (B)(2)(g) exempts new or expanded industrial users of a publicly owned treatment works (POTW) from an antidegradation review if the additional pollutant load would not trigger a permit limit for the POTW. A comment was made that requiring a safety factor of twenty percent be used to set local pretreatment limits, as proposed in paragraph (B)(2)(g) of the rule, is overly conservative and would make this portion of the rule unworkable for many municipalities. Recommendations were made to eliminate a specific safety factor in rule altogether, and to defer to the local pretreatment programs or, alternatively, to impose a ten percent safety factor in the rule. "*Is the safety factor applicable only to water quality based effluent limits or to other limits as well?*" (6, 10)

Response: Ohio EPA considered both recommendations and the rationale provided and decided to include a ten percent safety factor in the final rule. Additionally, the safety factor, for the purposes of this rule, applies to any pollutant for which a water quality based effluent limitation can be developed – not simply to pollutants that have limitations in place within the permit. Also, it needs to be made clear that additional

requirements within the pretreatment program still apply and there may be instances where a safety factor is necessary for other pollutants or where a larger safety factor is appropriate. All requirements of the pretreatment program still need to be implemented independent of this rule.

17. **Comment:** A number of comments were made that Ohio EPA lacks authority for implementing many of the proposed rule changes, notably those dealing with antidegradation and its applicability to nonpoint sources and Section 401 water quality certifications. *“With the proposed changes to the 401 regulatory scheme, the Ohio EPA goes beyond what is necessary for an effective 404 program as it relates to the Ohio coal industry. ... The coal industry should be exempt from proposed antidegradation and numerous other related rule changes proposed for the 401 water quality certifications.”* These parties maintain in their comments that antidegradation does not apply to nonpoint sources of pollution or to Section 401 water quality certifications. (7, 13, 18, 19)

Response: The proposed changes in the antidegradation rule (3745-1-05) dealing with the Section 401 water quality certification program and all the rule changes in the Section 401 program chapter (Chapter 3745-32) have been dropped from this rule-making. Ohio EPA disagrees with the assertion that antidegradation does not apply to nonpoint source pollution and Section 401 water quality certifications. The final antidegradation rule includes language that maintains the existing rule’s applicability to nonpoint sources and to Section 401 water quality certifications.

18. **Comment:** Additional exemptions to the rule should be specified in (B)(2): 1) addition of new or expanding sources tributary to an existing wastewater treatment plant if no increase in existing discharges from plant; 2) addition of storm water as long as it doesn’t increase WQBELs; 3) conversion of non-controlled non-point into controlled/treated point sources; and 4) temporary impacts resulting in long term improvements. (2)

Response: The additional exemptions requested throughout the comments received are not appropriate because the Agency feels that they are either a lowering of water quality or are already covered by other portions of the rule applicability.

19. **Comment:** *“The [Agency] has no legal authority to incorporate these requirements into a general permit for home sewage systems for 1,2, 3 family homes. That provision conflicts with existing state statute and should be removed.”* (11)

Response: The proposed and final rules make no references to any specific general NPDES permit. The final rule provides that antidegradation applies to the issuance of all general NPDES permits that result in a net increase in the discharge of pollutants. The Agency does not agree that the final rule poses a conflict with state law.

20. **Comment:** Comments were made questioning the provisions in paragraph (B)(1)(d) of the proposed rule. This paragraph states that antidegradation applies to certain

permit to install applications if they result in the placement of fill, or construction of a sewerage system, in or near a water of the state. Suggestions were made to delete the terms “near” and “associated construction disturbances”, or to just delete the entire paragraph because it would be used very infrequently. *“Is the Agency proposing that any construction activity near any ephemeral stream must be reviewed by Ohio EPA regardless of whether a permit is otherwise required?”* (1, 9, 11)

Response: For projects that involve the construction of a sewerage project in or near a stream, there may be two permits required: a Section 401 water quality certification and a permit to install. Since all Section 401 water quality certifications are subject to an antidegradation review, this phrase exempting the permit to install application from such a review is simply to allow the project to receive a review where appropriate and just a single review.

Ohio EPA rejects the notion that a rule’s applicability provision should be deleted on the premise that it is infrequently used. While many stream fill or sewer line crossing projects will be excluded from this provision because they can obtain individual or nationwide Section 401 water quality certifications, the rule should apply in the circumstances stated. Language in the proposed and final rules reflects changes that improve clarity and the need to define additional terms is rejected. Finally, the answer to the question posed is clearly evident in both the proposed and final rule language – the paragraph applies only if a permit to install application is required pursuant to Chapter 6111 of the Revised Code.

21. **Comment:** Several commenters were concerned and raised questions about how antidegradation applies to combined sewer overflows. (1, 6, 11)

Response: Several changes were made in the proposed rule, and were retained in the final rule, to better define the circumstances under which permitting actions associated with the management of combined sewer overflows will be subject to an antidegradation review. First, paragraph (B)(1)(a)(iii) states that combined sewer overflow long term control plans and their incorporation into NPDES permits shall be subject to the antidegradation rule. This up-front review of the CSO management plan should properly account for the anticipated changes in water quality. The CSO control documents will be required to address domestic and industrial growth in the community.

Paragraph (B)(2)(c) then exempts all individual permits to install for sewer line extensions if there is an approved CSO long term control plan for the community. New or expanding industrial users in combined sewer communities are also exempt from the rules if explicit conditions are met through the combined sewer overflow management programs being established by the communities. If there is a new or expanding industrial user not contemplated through these control documents, then that specific project will be subject to an antidegradation review.

22. **Comment:** A provision similar to (F)(2)(c), excluding new effluent limits that are based

on improved monitoring data or new water quality criteria and that are not a result of increased pollutant loading, should be provided for non-Lake Erie basin dischargers. (17)

Response: Similar provisions are already in the rule. If the Agency is to impose a limitation for a pollutant that is a result of a change in water quality criteria or improved monitoring data only, those activities are not subject to an antidegradation review because there is no “modification of the facility” as addressed in paragraph (B)(1)(a)(ii) and an increase in the pollutant load is not being pursued. However, if a pollutant limit already in a permit is to be considered for an increase as a result of new water quality criteria, it is to be reviewed under the provisions of the antidegradation rule because an increase is being authorized or considered.

Antidegradation Review Requirements [3745-1-05(C)]

23. **Comment:** In the protection of the existing use, why doesn't Ohio consider including biological measures of existing use attainment in addition to chemical-specific measures? (1)

Response: The protection of the existing uses utilizing biological measures is already incorporated into the rule. The protection of water body uses section is not explicit to either chemical or biological measures of water quality and that section states that the existing uses to be protected are those determined using the use designations defined in rules which take into account biological quality of the water bodies.

24. **Comment:** *“The District fully supports the proposal to add language at OAC 3745-1-05(C)(1) that allows a net increase in the discharge of a pollutant exceeding applicable water quality criteria where ‘authorized by a water quality standard variance issued in accordance with rule 3745-33-07 of the Administrative Code’.”* (10)

Response: This language was retained in the final rule.

25. **Comment:** The proposed rule language in paragraph (C)(1), in reference to the application of the biological narrative criteria found in OAC 3745-1-05(A)(6), prohibits “fill activities that are incompatible with the attainment or restoration of the designated use”. This language may be interpreted to prohibit any stream fills, including past fills authorized with offsetting restoration projects. (2)

Response: It was not the intent of the Agency to prohibit all stream fill projects. Furthermore, associating fill activities with OAC 3745-1-05(A)(6) is confusing because that paragraph focuses on chemical-specific and whole-effluent criteria. As a result, the reference to fill activities in this sentence was removed.

26. **Comment:** The term “significant public interest” is highly subjective. *“Does that mean one (1) request for a public hearing? This provision should be deleted or amended to allow for a more objective analysis.”* (11)

Response: This issue was discussed during the External Advisory Group process.

The Agency considered the options and decided to leave the term undefined, thereby allowing a more subjective interpretation on a case-by-case basis. The question - does one letter constitute significant public interest? - can be answered only within the parameters of a specific case setting. The State's Continuing Planning Process document provides discussion of the public participation process and should be consulted for additional guidance.

27. Comment: Stating that it is unnecessary, costly and potentially confusing to hold two public hearings for a project, a recommendation was made to delete the last sentence in paragraph (C)(3)(f).

Response: Ohio EPA is sensitive to the need to reduce costs and streamline the regulation, and overall these rule changes accomplish that end. However, a decision was made to retain the referenced language and the ability, at the Director's discretion, to hold two public hearings for especially sensitive projects. As a matter of practice, holding two public meetings will be the exception, not the rule. The Director's option to hold two public hearings is restricted to situations involving a significant lowering of water quality and would be exercised only where case specific circumstances warrant.

Special High Quality Waters and Assignment of Streams to Categories [(3745-1-05(A)(5), (A)(10), (A)(25), (A)(26), (C)(4), (C)(6) and (E) and tables 5-2 to 5-7]

28. Comment: *"While the OEC does not agree with the lack of listing for a few specific segments as SRWs and SHQWs, we are very supportive of the overall methodology and listing used by the agency. By using scenic rivers and threatened and endangered species, for example, the agency has developed a balanced approach that reflects good public policy and is consistent with the EAG".* (5)

Response: No response needed.

29. Comment: *"The Ohio Environmental Council has grave concerns about the removal of ... stream segments from this higher level of protection [the State Resource Water classification]. These waters "...will be exposed to higher levels of toxics and bacteria."* (23)

Response: Many of the streams currently listed as State Resource Waters (SRWs) in rules 3745-1-08 to -30 were so classified in 1978 when, through the definition of the rule, SRWs included waters in "... all National, State and Metropolitan park systems." While the 1978 rule prohibited the discharge of "toxic" substances, it provided no additional level of protection from increased loads of domestic wastewater from permitted sources. It became evident to Agency staff that SRW streams of unique and high biological quality were succumbing to the stresses caused by expanded domestic wastewater treatment facilities.

In 1994 the Agency drafted the first major revision to the antidegradation rule that included the concept of “re-listing” the set of SRW streams based upon data attributes linked to “exceptional ecological value”, and applying a comprehensive “set aside or reserve” of pollutant assimilative capacity on these streams. These rules were adopted in 1996, although the re-listing of the high quality streams was not included. The 1978 listing of SRW streams continued along with the prohibition on toxic discharges and a new provision to apply set asides for other pollutants on a permit-by-permit basis. The current rule-making actually implements the concept first proposed in 1994 of a “re-evaluated” set of special high quality waters with a prescribed amount of assimilative capacity held in reserve to ensure that water quality is preserved for future generations (i.e., held at a level better than the minimum water quality standards). Ohio EPA believes that this step is based on sound technical reasoning and represents good stewardship of the State’s most diverse and valuable aquatic resources. Waters in state and metropolitan parks that are not being categorized as Outstanding State Waters or Superior High Quality Waters do still have the State Resource Water designation (see other comments/responses) and, as general high quality waters, permit actions to lower water quality will be subject to the basic provisions of the rule. While higher pollutant loads and the discharge of toxic chemicals might be permitted, the water quality criteria associated with the beneficial uses are protective.

30. Comment: The proposed rule creates unnecessary confusion by establishing a new meaning for the term “State Resource Waters” in the antidegradation rule (3745-1-05) that is not applicable when that same term is used in rules 3745-1-08 to -30. (4, 10)

Response: The Agency agrees. The final rule was changed to address this issue. A new definition for State Resource Waters has been added that covers those streams listed in existing rules 3745-1-08 to -30 [see paragraph (A)(25)]. The term Outstanding State Waters was selected to describe the category of waters that were listed as State Resource Waters in the proposed rule [see paragraph (A)(10)(c)].

31. Comment: The Agency did not include the list of special high quality waters as a table of listed waters in the draft copy of rules distributed to potential interested parties in October 2001. Local stakeholders were not aware of proposals to change the special high quality water designations. This was a serious impediment to providing informed comments. (4, 23)

Response: The comment that the Agency did not properly inform the public relative to the streams proposed in the special high quality categories is apparently based on the fact that the list of streams was not included in the draft rule mailed to interested parties on October 31. However, the Agency mailed the rule with an accompanying fact sheet that clearly stated that the list special high quality waters was available on the Agency’s web page, or by requesting a copy. The list of streams was posted on web page on or shortly after November 1, 2001. In addition to the mailing and the web posting, the Agency held informational meetings on December 13 and 14 to discuss the draft rules. These meetings were announced in the October 31 letter and on the

Agency's web page.

ORC 121.39 states that prior to adopting a rule or an amendment proposed to a rule dealing with environmental protection, a state agency shall consult with organizations that represent political subdivisions, environmental interests, business interests, and other persons affected by the proposed rule or amendment. We believe we met both the letter and intent of the law with our actions discussed above.

32. Comment: A number of commenters requested that additional stream segments be designated in the special high water categories, Outstanding State Waters (State Resource Waters in the proposed rule) or Superior High Quality Waters. A variety of reasons were given, including the presence of threatened or endangered species. (1, 5, 8, 12, 14, 15, 16, 24, 25)

Response: Ohio EPA contacted those who commented in an effort to obtain all available data on this subject. A list of additional letters received from these parties appears at the end of this section. The Agency met with several parties, including key resource agency staff from U.S. FWS and Ohio DNR. Agency staff then re-examined all available information to confirm that streams on the final lists of Outstanding State Waters and Superior High Quality Waters (Tables 5-5 and 5-4, respectively) demonstrate the following: 1) evidence of viable populations of threatened, endangered or declining species, and; 2) evidence that indicate they support "exceptional warmwater" communities. Pursuant to the existing rule language, each characteristic must be present, not just the presence of threatened or endangered species [see paragraph (A)(10)]. The final list of streams was adjusted based on this re-examination of the data (see summary of the changes, Appendix D).

It appeared from reading the comments and meeting with individuals that many commenters were not aware that the existing rule language specifies that waters in the special high quality water categories have "special species" **plus** attributes associated with "exceptional warmwater" status. Although no comments directly stated the idea, the recommendation to have waters listed in the special categories based solely on records of endangered or threatened mussel species is essentially a call to change the definition provided in paragraph (A)(10). One commenter did ask that "... *Ohio EPA include national and state significant species of mussels as primary criteria for stream designation...*". Agency staff gave this consideration, but opted not to change this aspect of the rule and the listing methodology. The Agency believes that this existing rule language is a balanced and technically appropriate method to carry out the objective found in Ohio law ORC 6111.12(A)(2): "...*there shall be provisions ensuring that waters of exceptional recreational or ecological value are maintained as high quality resources for future generations.*"

The Agency recognizes the continued concern that a number of stream segments with viable populations of mussels were not listed in the special high quality water

categories. Ohio EPA agrees that preservation of endangered freshwater mussel species is an important objective. The situation of the purple catspaw mussel in Killbuck Creek, being the last known reproducing population of this species in the world, certainly merits protection even though our other measures of biological diversity rate Killbuck Creek as an average quality stream. This situation, and a similar one on Pymatuning Creek, illustrate the fact that not all locations where endangered species are found are exceptional quality waters as set forth in the classification scheme of the antidegradation rule. Nonetheless, the antidegradation rule can protect these species from an adverse lowering of water quality. For all but limited quality waters, the rule states:

“When making determinations regarding proposed activities that lower water quality the director shall consider the following:

..... The anticipated impact of the proposed lowering of water quality 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 ...;

.... The extent to which the resources or characteristics adversely impacted by the lowered water quality are **unique or rare within the locality or state**;.....” (emphasis added, see OAC 3745-1-05(C)(5) of the final rule)

Ohio EPA is confident that, by working collaboratively with Ohio’s Department of Natural Resources and the U.S. Fish and Wildlife Service on individual NPDES permits and Section 401 certifications as they arise, Ohio EPA can prevent the lowering of water quality or habitat disruptions that may disturb or harm the endangered mussel populations in Killbuck Creek, Pymatuning Creek and other waters that support populations of endangered species.

33. Comment: The Agency should designate waters lying within state and national parks, wildlife refuges, waters with populations of endangered species and the state and national wild, scenic and recreational rivers as Tier III, Outstanding National Resource Waters. One commenter stated “... *None of these waters is protected, therefore none can return to the public the potential of its utilization for the full range of its economic and social functions.*” (9, 16)

Response: All National and State scenic river segments and selected waters located within state parks were listed in one of the special high quality water categories (see comment 35). These waters are protected because 70 or 35 percent of any remaining pollutant assimilative capacity is **not** allocated to pollution sources, but is held “unused” as a means to ensure a higher water quality for future generations. Placing waters in the Tier III category would require a determination that the water has national ecological or recreational significance. It would also require an assessment of the impacts on local

governments and communities of either no-growth, or growth without increasing wastewater loading. The Agency decided early in the assessment process that the resource demands of these two tasks were beyond what was available. The rule provides a petition mechanism whereby outside parties can provide information to support a Tier III classification on a case-by-case basis [(see 3745-1-05(E)(3)].

34. **Comment:** The rule does not comply with federal law and regulations because it does not list waters in national or state parks and wildlife refuges as Outstanding National Resource Waters (Tier III). The federal regulation [40 CFR 131.12(a)(3)] states that Tier III is "...Where high quality water constitute an outstanding National resource, such as waters of National or State parks and wildlife refuges...", and Ohio is required to place these waters in Tier III. (16)

Response: Ohio EPA disagrees with this interpretation of the cited regulation. The phrase "such as" is used to denote situations listed as examples of what may constitute an outstanding National resource. Ohio EPA's interpretation is consistent with the practice in other state water quality standard programs.

35. **Comment:** The rule should list and protect Exceptional Warmwater Habitat streams and State and National Scenic rivers in the special high quality water categories. The protection of Ohio's scenic rivers should include the listing of all waters tributary to these rivers. (12)

Response: National and State scenic river segments were listed in their entirety as Outstanding State Waters, provided a significant portion of the water displayed the two characteristics discussed in comment number 32. Although the Agency did not list all tributaries to high quality waters, any potential upstream discharge will need to adhere to the set aside amounts in effect for the downstream waters.

36. **Comment:** The pollutant set asides in paragraph (C)(6) are arbitrary and capricious, and without basis in the Clean Water Act. How was the 70% reservation derived and what is the rationale? The reserve capacities of 35% for Superior High Quality Waters or 70% for State Resource Waters should be of the "virgin" pollutant assimilative capacity and not the "remaining" pollutant assimilative capacity, otherwise it is meaningless. For example, if a stream already has a load of pollutants that is 70% of the assimilative capacity then no additional load should be allowed rather than 65% of the remaining 30%. (4, 6, 9, 16)

Response: The Outstanding State Water (OSW) and Superior High Quality Water (SHQW) categories, along with their associated set asides, are intermediate levels of antidegradation protection between the federally mandated Tier II and Tier III levels. Ohio has opted to use this approach because it fits both the historical application of Ohio's State Resource Water designation and the provisions of recent State law. ORC 6111.12 calls for the categorization of waters and measures to ensure preservation of water quality for future generations in Ohio waters that have exceptional recreational or ecological value. Federal regulations do not mandate, nor do they preclude, this

State initiated approach to antidegradation. Guidance issued by U.S. EPA does encourage States to utilize the intermediate "Tier 2 ½" system.

The set aside levels chosen are simple but logical in the overall antidegradation rule framework. Tiers I and II represent the "floor": water quality is not allowed to be lowered below the applicable chemical water quality criteria (a review is needed to show need in Tier II). Here the "set aside" is zero (0%). Tier III represents the "ceiling" of maximum protection: no lowering of water quality, period. Here the set aside is 100%. Logically then, the two intermediate tiers of OSW and SHQW should have set asides approximately equal distance along this scale: thus, the set asides are 70% and 35%, respectively.

The Ohio EPA feels that it is appropriate to apply the reserve capacity related issues to the "remaining" pollutant assimilative capacity and not the "virgin" capacity as mentioned. In developing the rule and any similar action it is necessary to consider impacts not only to the environment, but also to existing regulated entities. Applying the reserve capacity issue to the "virgin" capacity of a stream or waterbody may actually overlap with already "allocated" capacity that is not being utilized (e.g., an industry that is under phase one of construction or operations).

Comments that the rule does not benefit streams with a large portion of the assimilative capacity already allocated to sources are incorrect. Assimilative capacity is a function of the water quality criteria and the stream flow used in the allocation. Stream flow normally increases if a permittee wishes to expand, thus creating more assimilative capacity. The rule requires 70% or 35% of this "added capacity" to be reserved, which in effect makes the effluent quality get better.

37. Comment: The pollutant set asides proposed for the special high quality water categories are not necessary to achieve the goal of protecting the values or attributes that make these waters unique. (4)

Response: The streams selected for the special high quality water categories are among the best and highest quality water resources in Ohio today. The charge provided in ORC 6111.12 is to preserve these waters for future generations. While acknowledging that there are other threats to the preservation of these high quality water resources, the Agency disagrees with the assertion that having pollutant set asides is unnecessary to protect these resources for future generations. Allowing the best streams in Ohio to become effluent dominated will subject the resources to a variety of stresses that will cause their decline to levels of mediocre biological integrity.

38. Comment: The concept of stream "vulnerability" in categorizing streams needs to be used cautiously. Placing a stream in a "less vulnerable" category could result in a stream of high biological diversity being put at considerable risk. (12)

Response: Ohio EPA agrees. Vulnerability is not a term that appears in the rule. It

was explained and used in the methodology for listing waters in the special high quality waters. In short, the Agency gave some accounting to our knowledge of the historical evidence of pollution impacts and stream recovery recorded at some locations. Streams that showed resiliency and full recovery to pre-impact conditions were viewed as less “vulnerable”. This was one line of evidence that was considered in placing streams in the Outstanding State Water category vs. the Superior High Quality Water category.

39. **Comment:** Existing discharges to waters in the special high quality water categories should be excluded from antidegradation reviews. Reductions in water quality based effluent limitations to existing discharges are unnecessary in situations where the water body is placed in one of the special high quality water categories. (2, 17)

Response: The rule as proposed, and as adopted, does not require reductions in the existing NPDES permit limitations based on the listing of the water body in any of the special high quality water categories. The rule requires that increased pollutant loads to these or any waters of the State be subject to the same basic applicability provisions [OAC 3745-1-05(B)].

40. **Comment:** One commenter asked for clarification of the term “bacteriological contamination” used in paragraph (C)(6)(e)(i). A concern was expressed over the applicant’s obligation to study the impact of a proposed project on something that lacks objective standards. (6)

Response: The rule provides that the potential impact on bacteriological contamination be evaluated prior to granting any permit covered by antidegradation on waters categorized as superior high quality waters because of exceptional recreational value. The Director may do this evaluation, or the Director may have the applicant provide this evaluation. Bacteriological contamination refers to the number of indicator organisms (fecal coliform or *E. coli* bacteria) present in the ambient water. There are objective standards to measure bacteriological contamination [see OAC 3745-1-07 Table 7-13].

41. **Comment:** To be consistent with federal water quality standard regulations, paragraph (E)(2) should be revised so that the rule and the categories of special high quality waters are reviewed every 3 years instead of every 5 years.

Response: Ohio EPA agrees with this comment. The final rule provides that the rule be reviewed at least once every 3 years.

42. **Comment:** On August 8, 2002 the Director of the Department of Natural Resources provided notification to all interested parties regarding his intent to designate an additional 5 mile long segment of the upper Chagrin River as part of the State’s Scenic River system. (22)

Response: The lower portion of the Chagrin River was proposed as an Outstanding State Water based upon the biological community found in the river and its designation

in the State Scenic River system. The final rule added the additional 5 mile segment of the upper Chagrin River as an Outstanding State Water.

43. **Comment:** Concerns were expressed that no waters were proposed in the special high water categories based upon their recreational value alone. The segment of the Cuyahoga River that flows through the Cuyahoga Valley National Park is just one example of a river with major recreational value that is no longer in the State Resource Water category. (23)

Response: Two changes were made in the final rule. A new definition for State Resource Waters was added that covers those streams listed in existing rules 3745-1-08 to -30 [see paragraph (A)(25)]. The term Outstanding State Waters was selected to describe the category of waters that were listed as State Resource Waters in the proposed rule [see paragraph (A)(10)(c)]. A separate listing of Outstanding State Waters based upon exceptional recreational value was created. The segment of the Cuyahoga River in the National Park and the segment of the Maumee River designated by the Ohio DNR as a scenic and recreational river were placed in this category (see Table 5-6 of the final rule). The Ohio EPA will consider the addition of more water bodies to this category in future rule-makings.

Credit Projects [3745-1-05(C)(7)]

44. **Comment:** The Ohio Steel Group supports the credit projects as alternatives to set asides; however, they expressed a need for more definitive criteria on what would constitute a credit project. U.S. EPA stated that credit projects should occur prior to any new or increased discharge to prevent lowering of water quality. They also suggested a sliding scale for crediting portions of the set aside depending on the pollutant(s) and the specific impact to the stream or waterbody. (1, 2)

Response: Ohio EPA has left the concept of a "credit project" open to allow any water quality enhancement project to be considered in the process. Such projects include, but are not limited to, habitat enhancement or restoration projects, no-till agricultural practices, buffer zones along streams, pollutant trading with other discharges or activities, etc. The concept is that any water quality enhancement project can be proposed on Outstanding State Waters or Superior High Quality Waters. The Agency will review the environmental benefits to be realized through that project and determine if it is appropriate to offset or reduce the pollutant set asides established for those waters. Since these projects are so diverse and the consideration of credit projects is a new concept, the Agency has not established review procedures within the rules. Credit projects will need to be considered during the permit review process and contained within the application subject to the rule.

Requiring that all credit projects be concluded prior to any new or increased discharge may be counterproductive to the intent of including this provision in the rule. Many of the types of credit projects envisioned may be long term activities while the need to

discharge is based upon economics and/or immediate need. Requiring credit projects to be completed ahead of time would result in applicants unwilling to pursue this option which could ultimately result in water quality benefits.

45. **Comment:** The rule needs to be expanded to allow for innovative stream improvement projects or credit projects for general high quality waters. Such a project might lead to the application being considered to be de minimis even though it exceeds the levels of the wasteloads specified in the rules. (3)

Response: The intent of the credit project concept, as it applies to Outstanding State Waters and Superior High Quality Waters, is to provide a mechanism to improve water quality as a trade off for allowing pollutants to be allocated that would not have previously been allocated (e.g., those in reserve). A credit project or innovative stream improvement project may be proposed on general high quality waters, but would be evaluated as a mitigative technique alternative under the rule. The Agency feels that reducing a review (e.g., allowing an exclusion to be met) would not be the appropriate course to take because chemical water quality would be significantly altered. It should be noted that even if a credit project is proposed for a OSW or SHQW stream, the proposed activities on the stream would not necessarily be excluded from a detailed review.

Exclusions and Waivers, de minimis projects [3745-1-05(D)]

46. **Comment:** The rule should allow for other surrogate parameters (i.e., other than ammonia-N for sanitary wastewater) to be used in determining de minimis net increases without having to go through a rule-making process. (3)

Response: The Agency feels that including surrogate parameters in the rule is the only option available. It needs to be established legally when such a surrogate is being used instead of a pollutant-by-pollutant analysis. It needs to be stressed that a surrogate will only be considered in the rule-making process when it is determined that the pollutant is representative of wastestream characteristics. Including the list of surrogate parameters in rule itself eliminates any debate that may occur on a project-by-project basis.

47. **Comment:** There should not be an alternative analysis for de minimis projects. The proposed rule “... further requires the applicant to document the availability and technical and cost feasibility of using existing treatment facilities rather than creating new discharges, including a review of state and local water quality management planning documents. This requirement more clearly forces the applicant to prove a need for the discharge This revision should be stricken.” Another commenter suggested that the requirement be limited to cases of new or expanded sources of sanitary wastewater because these requirements seem inappropriate for industrial sources. (6, 11, 20)

Response: The Agency disagrees with the suggested changes. Any increase in

pollutant loading is considered to be a “degradation”. One of the key components to any antidegradation review is the consideration of the necessity of a discharge. If there are alternatives to avoid a new discharge of pollutants then those alternatives should be pursued.

48. **Comment:** If a POTW has significant industrial users present, does the Agency still only anticipate evaluating ammonia-N to determine if an exclusion is met? What does “primarily sanitary wastewater” mean? (1)

Response: As history shows, the Agency anticipates that new or expanding POTWs will be for the purpose of addressing domestic/population growth and not significant industrial user growth. Therefore, the Agency does anticipate using ammonia-N to determine if an exclusion is met even if there are significant industrial users tributary to the system. If there is a case where an expansion of a POTW is being pursued to simply address industrial growth, then the Agency will evaluate parameters reflective of that industrial growth. “Primarily sanitary wastewater” simply means that the growth is population/domestic based and any industrial or commercial contribution is insignificant and related to small businesses, etc.

49. **Comment:** Exempting chlorine from review for CSO reduction or elimination projects is inappropriate due to its potential toxicity. (1)

Response: It is true that there is potential toxicity associated with chlorine. However, in the case of CSO reduction or elimination projects where the result will include treatment at the point of the CSO discharge, it is anticipated that the overall environmental benefits associated with the CSO controls will outweigh the concerns associated with a new chlorine discharge – the reason that some of the various exclusions were established. Also, at no time will the permit or the discharge be allowed to exceed water quality standards for chlorine and, due to its nature, the chlorine will dissipate quickly in the environment. It should be noted that the CSO discharges will only be occurring during wet weather events.

50. **Comment:** How does a land application/controlled discharge system qualify for an exclusion since its winter discharge may be a significant portion of the assimilative capacity of the stream during that season? (1)

Response: The discharge of wastewaters associated with the land application/controlled discharge option will only be allowed to occur during the winter months as indicated, when the potential toxicity of ammonia-N is less of a concern. Also, the discharge will still be required to meet BADCT levels which are typically below that necessary to protect water quality standards. The potential for environmental impact is minimized if this type of discharge/option is employed prompting the development of this exclusion.

51. **Comment:** Where did the values for the total suspended solids and oil and grease exclusion come from? Are they the best achievable? Can it be demonstrated that

these levels of discharge for total suspended solids will not result in sediment that will impair water quality? (1)

Response: The oil and grease level recommended through the exclusion is the level established in Ohio water quality standards to protect against adverse aesthetic conditions (see 3745-1-07 Table 7-10). The suspended solids levels correlate to a maximum allowable limit associated with various permitting activities. Experience dictates that facilities discharging below either of these levels have not caused any adverse environmental impacts.

52. **Comment:** The Agency's unwillingness to grant a BADCT waiver and the recommended changes to that waiver establishes a disincentive to governmental agencies to target unsanitary conditions caused by failing septic systems. The rule needs to specify when the pollutant trading contemplated under this waiver can be considered – if can be documented, then the waiver should be granted. (3)

Response: The Agency does not intend to be reluctant on granting BADCT waivers in appropriate situations. Waivers have been granted and waivers have been denied. There are many factors that go into making the determination – volume of transferred flow, whether there is an existing POTW that is to be expanded, whether a new POTW is being built, what the treatment process being utilized is, receiving stream characteristics, other Agency rules, etc. In actuality, the Agency has received very few requests to have the limitations outlined by BADCT in the antidegradation rule be waived.

53. **Comment:** All the exclusions and exemptions should be listed in one location in the rule. The situations listed in paragraph (D) should be excluded from all antidegradation review requirements. (6)

Response: The Agency felt that placing the “exemptions” from an antidegradation review after the applicability portion of the rules was the more prudent approach to take. These “exemptions” are an attempt to clarify situations where no net increase in pollutant limits are anticipated or encountered. The situations identified by paragraph (D) of the rule should not be excluded from all antidegradation rule requirements because there will be a net increase in the discharge of pollutants to the stream environment.

54. **Comment:** Why was the existing language in paragraph (D)(1)(f) deleted (a provision to exclude from antidegradation certain projects “designed exclusively to restore, maintain or ensure design capacity”)? (6)

Response: This provision was deleted because it has no meaning at this point of the rule. If a project is taking place that is simply restoring, maintaining or ensuring design capacity then there is no net increase in the discharge of a pollutant and the rule itself is not applicable.

55. **Comment:** The exclusion in paragraph (D)(1)(i) regarding the addition of heat seems

unnecessary because a broader exclusion from the rule applies in paragraph (B)(2)(e). (6)

Response: The exclusion applies to any increase in temperature greater than or equal to 1°F while the exemption is for any increase that is less than 1°F.

Other

56. **Comment:** In Table 5-1 the *E. coli* limitations should be treated as effluent limits in permits, not just design standards as provided in the proposed rule. (16)

Response: Ohio water quality standards (rule 3745-1-07, Table 7-13) currently lists standards for two bacteriological indicator organisms – *E. coli* and fecal coliform – with the provision that the standards for at least one of the organisms must be met. Fecal coliform has historically been the indicator of preference, although U.S. EPA currently recommends the use of *E. coli*. Ohio EPA is reevaluating the bacteriological standards in Table 7-13 and expects to make revisions within the next couple of years.

E. coli is not listed in Table 5-1 of the antidegradation rule as an effluent limitation because Table 7-13 does not require its use. *E. coli* is listed in Table 5-1 as a design standard to make the regulated community aware that *E. coli* limitations may be required in the future.

57. **Comment:** The rule should acknowledge that the Ohio Department of Agriculture will be issuing general permits too and that the same processes should apply (applicability, exclusions and exemptions). (21)

Response: Revisions reflecting the ODA involvement in the permitting of agricultural facilities were reflected in final rule. Also, a definition of “Director” referencing both programs was added to address future permitting activities.

58. **Comment:** In December of 2001, the Utilities submitted comments on the draft version of these same rule changes. Since the applicability sections and set-aside provisions of the proposed rules are essentially unchanged from the earlier draft version of those rules, the Utilities reincorporate those earlier comments by reference. (4)

Response: For responses to those comments see *October 31, 2001 Draft Ohio EPA Antidegradation, Section 401 Water Quality Certification, and Permit Fees Rule Package - Interested Parties Review - Comments and Responses, 3/26/02.*

**Individuals and Organizations Commenting on
the Following Portions of Proposed Ohio EPA Rule Package:**

**Water Quality Standards - Antidegradation and
Permit Fees - Definitions and Coal Mining Operations**

<u>#</u>	<u>Date</u>	<u>Commenter</u> *
1	05/10/02	Linda Holst, U.S. EPA Region V *
2	05/09/02	Craig A. Sturtz, Squires Sanders & Dempsey, LLP on behalf of the Ohio Steel Group
3	05/09/02	MaryLynn Lodor, Butler County
4	05/09/02	William L. Patberg, Shumaker, Loop & Kendrick, LLP, on behalf of the Ohio Electric Utility Institute *
5	05/09/02	Keith Dimoff, Ohio Environmental Council *
6	05/09/02	Christopher R. Schraff, Porter Wright Morris & Arthur, LLP on behalf of FirstEnergy Corp.
7	05/08/02	Michael Carey, Ohio Coal Association
8	05/08/02	Mary Knapp, U.S. Fish and Wildlife Service *
9	05/08/02	Mike Fremont, Rivers Unlimited *
10	05/08/02	Erwin J. Odeal, Northeast Ohio Regional Sewer District
11	05/08/02	Vincent J. Squillace, Ohio Home Builders Association, Inc.
12	05/07/02	Richard L. Shank, PhD., Ohio Chapter The Nature Conservancy *
13	05/07/02	Denton Bowan, Waterloo Coal Co., Inc.
14	05/07/02	Michael A. Hoggarth, PhD., Otterbein College
15	05/06/02	Paul R. Baldrige, Ohio Department of Natural Resources *
16	05/06/02	J. Dwight Poffenberger Jr., on behalf of Save the Lake Association *
17	05/02/02	Donald R. Perander, AK Steel Corporation
18	05/02/02	R. Wayne Light
19	05/02/02	Charles C. Ungurean, Oxford Mining Company, Inc.
20	04/29/02	C. Clark Street, Ohio Contractors Association
21	undated	unsigned, on behalf of Ohio Department of Agricultural, Livestock Environmental Permitting

* denotes individual or organization contacted by Ohio EPA in July 2002 regarding comments and information submitted regarding the categorization of special high quality waters

**Organizations Submitting Additional Information After
Being Contacted in July 2002 Regarding Their Comments
on Special High Quality Water Categories**

<u>#</u>	<u>Date</u>	<u>Commenter</u>
22	08/08/02	Samuel W. Speck, Director, Ohio Department of Natural Resources
23	09/20/02	Elizabeth Hoffman and Keith Dimoff, Ohio Environmental Council
24	09/25/02	Sam Speck, Director, Ohio Department of Natural Resources
25	10/17/02	Linda Holst, U.S. EPA, Region V

**Individuals and Organizations Commenting only on
the Following Portions of Proposed Ohio EPA Rule Package:**

**Water Quality Standards Chapter - Section 401 Antidegradation,
Section 401 Water Quality Certifications Chapter and
Permit Fees Chapter - Certification Fees**

<u>Date</u>	<u>Commenter</u>
undated	Marilyn M. Lied, League of Ohio Sportsmen
06/05/02	Daniel Nelson
05/29/02	Mr. & Mrs. Ken Brandeburg
05/23/02	Emily Klein (date stamp received)
05/09/02	Chris Hartman, Medina County Soil and Water District
05/09/02	Kathleen Joyce Bradley
05/09/02	Maureen A. Brennan, Baker & Hostettler, LLP on behalf of Heritage Development Company
05/09/02	Robert J. Schmidt, Jr., Porter Wright Morris & Arthur, LLP on behalf of First Energy Corp.
05/09/02	Michael A. Snyder, Shumaker, Loop & Kendrick, LLP on behalf of the Ohio Electric Utility Institute
05/09/02	Michael A. Snyder, Shumaker, Loop & Kendrick, LLP on behalf of the Ohio Electric Utility Institute
05/09/02	Keith Dimoff, Ohio Environmental Council
05/09/02	Kelly Danczak
05/08/02	Julie M. Sibbling, National Wildlife Federation
05/08/02	James P. Amon, PhD., Beaver Creek Wetlands Association
05/08/02	Ray and Judy Vershum
05/08/02	Jay Abercrombie, PhD.
05/08/02	Elayna M. Grody, Columbus Recreation and Parks
05/07/02	Caroline Arnold, Kent Environmental Council
05/07/02	(unsigned) Wetlands Coalition of The Ohio Conservation and Environmental Forum
05/07/02	Marc Conte, Ohio Chapter Office, Sierra Club
05/07/02	Barbara Holt
05/06/02	Theodore J. Voneida and Swanhild B. Voneida
05/06/02	Jennifer Karaffa
05/01/02	Linda Sekura
04/29/02	Linda Bernstein
04/28/02	Hugh Quinn, PhD., Cleveland Metroparks Zoo

Appendix A

Summary of October 31, 2001 Draft Rule Revisions
to OAC Chapters 3745-1, 3745-32 and 3745-45

Most draft revisions to the antidegradation rules were intended to clarify and improve efficiency in issuing documents under the provisions of the rules. The revisions to the section 401 water quality certifications rules and certification fees rule were being considered as a result of changes to several other rules relating to water quality protection and project reviews. The revised rules were intended to place the administrative type requirements and issues in a single rule rather than in several rules. Some of the more significant revisions include:

OAC 3745-1-05

Applicability

Though general applicability of the rule was not recommended to be changed significantly, there were a number of changes to clarify this paragraph of the rule to better define which projects are covered and how they may be addressed. Some specific program areas included evaluating projects in communities with combined sewers, “new sources” vs. “existing sources” and industrial production increases within capacity of facility.

Public Participation

Revisions were made to both streamline and enhance the public involvement process. An informational fact sheet on projects would be forwarded to interested parties in lieu of the public notice of the receipt of the application. This fact sheet would better define the review process and the project proposal. In addition, most public hearings would be held at the draft permit stage of the process rather than at the application, providing more meaningful information to the public at this stage of the permit review.

Alternatives Analysis

All projects, even de minimis activities, would be subject to an alternatives analysis to determine if the discharge proposed is necessary. This minimal alternatives analysis would require that every project determine if central or regional treatment alternatives are available to accommodate the discharge. The more significant projects would still be required to complete the more detailed alternatives analysis defined by the existing rule.

General Permits

The process for issuing permits in this program area would be better defined. The antidegradation review would take place when the general permit is developed and issued, not when coverage under the permit is requested.

Exceptional Quality Waters

The higher quality waters acknowledged by the rule (Outstanding National Resource Waters, State Resource Waters and Superior High Quality Waters) would be categorized through this rule-making effort. Each stream segment, for which Ohio EPA has information, meeting the exceptional characteristics of these stream categories would be listed in tables in the rule and would be subject to the added protections outlined for these categories,

including pollutant set asides, prohibitive discharges, credit projects and mandatory public hearings. Though the list was not present in the distributed version of the draft rules, a document entitled “List of Stream and River Segments Recommended for SHQW and SRW Antidegradation Tiers by Waterbody Name” was made available on the Division of Surface Water web site along with the draft rules.

Unique Parameters

For regulated pollutant discharges, the existing rule focuses on the load associated with the proposed activity to determine the processes and requirements to follow. However, there are a number of regulated pollutants that do not exhibit a traditional pollutant load on the environment (e.g., temperature, toxicity, bacteria). Therefore, revisions that define how these unique parameters would be evaluated were recommended.

OAC 3745-1-54

All references to section 401 water quality certification reviews in OAC 3745-1-05 were removed and placed in OAC 3745-1-54 to give a single rule applicable to section 401 water quality certification reviews – wetlands and streams and lakes. This was also done to reflect recent changes to review requirements for isolated wetlands to provide for similar reviews for similar projects.

Applicability and Applications

Specificity was added to this rule to state that the provisions of the rule apply to all section 401 water quality certifications, including those for section 404 nationwide or general permits. Projects meeting the eligibility requirements to be covered by a section 404 nationwide or general permit, as authorized through a section 401 water quality certification, are not subject to review. Detail was also provided as to what is to be included in an application for a section 401 water quality certification.

Public Participation

Public participation and intergovernmental coordination procedures were added to this rule. These procedures reflect those established in OAC 3745-1-05 which are appropriate for any antidegradation project. An informational fact sheet would be established for the more environmentally significant wetland projects and would be forwarded to interested parties. This fact sheet would better define the review process and the project proposal.

Two Levels of Review for 401 Certifications

The present antidegradation rule does not offer the potential for a reduced review for section 401 water quality certification projects that would result in lesser impacts to waters of the state. Two levels of review were recommended for wetland related projects. The lesser review would streamline reviews of less environmentally significant projects – primarily those that may previously have been granted coverage under a nationwide permit. The more significant projects would be required to possess a demonstrated public need,

where applicable, and accommodate important social and economic development. These levels of review were reflective of those established by the legislature in Sub. H.B. 231.

OAC 3745-32

Applicability and Applications

Clarification was provided to stress when a section 401 certification is necessary. The application requirements were written to require information submittals necessary for the Agency to perform an adequate review under OAC 3745-1-54. The director shall determine if any application submitted is complete within 15 business days of receipt of the application and inform the applicant of such or request additional information if necessary. Review time frames do not begin until the application is deemed complete. These revisions were reflective of the concepts contained in Sub. H.B. 231.

Outstanding Violations Clause

A paragraph was added to the rule allowing the director to consider if an applicant is currently in violation of any previous certifications or actions before considering to approve or deny the new application and to use this information to recommend denial.

Review Time Frames

Time frames were incorporated into the rules specifying when the director shall complete the review of the project. For projects subject to a level two review the review shall be completed within 120 days. Level three reviews were to be completed within 180 days.

Modification/Re-application

The rules outlined provisions such that a second section 401 certification would not be issued for a project unless the project was anticipated to be significantly modified or altered from a previous approval.

Expiration/Termination

Provisions were outlined requiring an applicant to begin activities within twelve months of receiving the certification.

Modifications/Transfers

The rules allowed for modifications or transfers of section 401 certification approvals. Currently these actions are non-transferrable and if ownership changed, etc. no section 401 certification approval would be effective.

OAC 3745-45-02

Revisions to this rule addressed fees associated with reviews of section 401 water quality certification applications. The fees to be assessed were based upon the magnitude of the project – a set fee per acre of wetland impacted, per linear foot of stream or lake impacted

or volume of dredged material to be removed – and were necessary to offset costs associated with the review of the project.

Appendix B

Summary of Changes Made in
OAC Chapters 3745-1, 3745-32 and 3745-45
from the October 31, 2002 Draft Version
to the March 25, 2002 Proposed Version

Rule 3745-1-05*Candidate streams included*

The draft rules were accompanied by a list of candidate streams to be categorized as State Resource Waters and Superior High Quality waters. These streams were incorporated into tables within the text of the proposed rules.

E. coli design standard

As a result of U.S. EPA initiatives, Ohio EPA included a design standard in the minimum treatment technology (BADCT) for sanitary wastewaters for E. coli bacteria.

Net increase definition and applicability modification

The definition of a “net increase” was modified in conjunction with minor modifications to the applicability section of the rule to better clarify intent.

No “on-ramp”

The “on-ramp”, or statement allowing the Director to request more information or require a project that meets the de minimis standard to go through a detailed social/economic review was removed. This ability is already at the disposal of the Director in other program issues.

Rule 3745-1-54*Minimum thresholds*

Clarification was added to the rule to address projects that are small and fall under previously identified thresholds contained in the draft rules for a level 2 wetland review. Projects below those thresholds would be subject to a nationwide permit in many cases, but in situations where the conditions to those permits do not dictate such, those projects would be subject to an individual section 401 certification and a level 2 review.

Chapter 3745-32*Expiration of section 401 water quality certifications*

The time frame associated with expiration of a certification was extended from twelve months to twenty-four months.

Review time frame for streams and lakes

A time frame of 180 days was added to address projects that are taking place in or on waters of the state other than wetlands – streams and lakes.

Rule reconfiguration

The Agency reconfigured the rules by merging similar/applicable sections. Also, the fees previously proposed for project reviews in OAC 3745-45-02 were added to this rule.

Chapter 3745-45*Relocation*

All of OAC 3745-45 was being rescinded and the fees associated with section 401 water quality certification rules were added to OAC 3745-32.

Exemption of in-stream mining from the need to submit fees

The rules were modified to exempt in-stream mining projects, which are subject to Ohio Department of Natural Resources permitting and fees, from having to submit fees to Ohio EPA for section 401 water quality certification applications.

Appendix C

Notice of Proposed Rule-making and Public Hearing

State of Ohio
Environmental Protection Agency
Notice of Proposed Rule-making and Public Hearing

Notice is hereby given that the Director of Environmental Protection, under the authority of Ohio Revised Code Sections 3745.11, 3745.113, 6111.03, 6111.041 and 6111.12, proposes to amend rules 3745-1-05, 3745-1-50 and 3745-32-01, rescind rules 3745-1-54, 3745-32-02, 3745-32-03, 3745-32-04, 3745-32-05, 3745-32-06, 3745-32-07, 3745-45-01, 3745-45-02 and 3745-45-03, and adopt new rules 3745-1-54, 3745-32-02, 3745-32-03, and 3745-32-04 of the Administrative Code.

Chapter 3745-1 of the Administrative Code addresses water quality standards for surface waters of the state. Within this chapter, rules 05, 50 and 54 address antidegradation provisions for point source discharges and dredge and fill activities. Antidegradation provisions must be followed before authorizing any increased activity on a water body that may result in a lowering of water quality including an increase in the discharge of a regulated pollutant, or activities that may significantly alter the physical habitat. The proposed changes clarify and improve efficiency in issuing documents under the provisions of the rules.

The rules in Chapter 3745-32 address the section 401 water quality certification program for dredge and fill activities. Within this chapter, existing rules 01 to 07 are revised and consolidated into new and amended rules 01 to 03.

The rules in Chapter 3745-45 address permit and certification fees. Within this chapter, existing rules 01 and 03 are outdated and no longer serve any purpose. The certification fees in existing rule 3745-45-02 are revised and incorporated into new rule 3745-32-04.

A public hearing on the proposed rules will be held on Wednesday, May 1, 2002 at the Ohio EPA Central Office, fifth floor conference room A, located in the Lazarus Government Center at 122 South Front Street in Columbus, Ohio. The public hearing will begin at 3:00 p.m., adjourn when commenters complete their statements, reconvene at 7:00 p.m. and end when commenters complete their statements.

All interested persons are entitled to attend or be represented at the hearing and give written or oral comments on the proposed rules. Written comments may be filed with the presiding officer at the hearing or with Ohio EPA (Attn: Mark Stump, Ohio EPA Division of Surface Water, P.O. Box 1049, Columbus, Ohio 43216-1049) by the close of business on Thursday, May 9, 2002. Comments received after this date may be considered as time and circumstances permit.

To obtain copies of the proposed rules and supporting documentation, contact Mark Stump at the address above or by calling (614) 644-2028. Copies of the proposed rules are also

available for inspection at Ohio EPA's District Offices and are available on the Ohio EPA Division of Surface Water web site at <http://www.epa.state.oh.us/dsw> and the Register of Ohio web site at <http://www.registerofohio.state.oh.us>.

Appendix D

Summary of Changes Made in OAC 3745-1-05
from the March 25, 2002 Proposed Version
to the November 7, 2002 Re-filed Version

Summary of changes made in antidegradation rule (OAC 3745-1-05)
from the March 25, 2002 proposed version
to the November 7, 2002 re-filed version.

Note: paragraph numbers refer to those in the re-filed rule.

Paragraph #	Change
Throughout	State resource water changed to outstanding state water.
(A)(3)(c)	Reference to 40 C.F.R. changed to 40 C.F.R. 400 to 40 C.F.R. 471.
(A)(5)	Definition of declining fish species clarified.
(A)(6)	Definition of designated uses clarified.
(A)(7)	New definition of director added; subsequent paragraphs renumbered.
(A)(10)(b)	References to exceptional recreational values moved from superior high quality waters to outstanding state waters.
(A)(10)(c)	Definition of state resource waters replaced with new definition of outstanding state waters.
(A)(23)	Reference to 40 C.F.R. changed to 40 C.F.R. 400 to 40 C.F.R. 471.
(A)(25)	New definition of state resource water added; subsequent paragraphs renumbered.
(A)(26)	Definition of threatened species clarified.
(A)(27)	Definition of total maximum daily load procedures clarified.
(A)(25)	Definition of trace contaminants of primarily domestic origin deleted; subsequent paragraph renumbered.
(B)((1)(c)	Section 401 water quality certification language reinstated ¹ ; subsequent paragraphs renumbered.
(B)(1)(g)	Reference to the director of agriculture added.
(B)(1)(h)	New paragraph added to address isolated wetland permit applications.
(B)(2)(d)	Reference to the director of agriculture added.
(B)(2)(g)	Safety factor changed from twenty per cent to ten per cent.
(B)(3)(a)	Dredge and fill language reinstated ¹ .
(C)(1)	Reference to fill activities in third sentence deleted.

Paragraph #	Change
(C)(2)	Effective dates for U.S.C. Sections 1288, 1313 and 1329 added.
(C)(3)(a)	Section 401 water quality certification language reinstated ¹ .
(C)(3)(b)	Language added excluding section 401 water quality certification and state isolated wetland permit activities from this new paragraph.
(C)(3)(e)	Section 401 water quality certification language reinstated ¹ . Reference to state isolated wetland permit application added.
(C)(3)(f)	First paragraph: section 401 water quality certification language reinstated ¹ ; reference to state isolated wetland permit application added. Second paragraph: sentence added addressing section 401 water quality certification and state isolated wetland permit applications.
(C)(4)(e)	Paragraph addressing dredge and fill materials reinstated ¹ .
(C)(5)	Section 401 water quality certification language reinstated ¹ . Reference to state isolated wetland permit added.
(C)(5)(d)	Reference to waters listed as state resource waters in rules 3745-1-08 to 3745-30 added.
(C)(6)(a)	Sentence added that this paragraph does not apply to waters categorized as outstanding state water solely because of its exceptional recreational value.
(C)(6)(e)	Reference to superior high quality waters changed to outstanding state waters.
(C)(8)(d)	Paragraph addressing Section 401 water quality certification reinstated ¹ .
(C)(8)(e)	New paragraph added addressing state isolated wetland permit applications.
(D)(1)	Sentence added addressing downstream waters.
(E)(1)(d)	Reference to table of state resource waters changed to outstanding state waters due to exceptional ecological values.
(E)(1)(e)	New reference to table of outstanding state waters due to exceptional recreational values added.
(E)(2)	Review period changed back from five years to three years.

Paragraph #	Change
Table 5-2 Declining fish species	List of species alphabetized.
Table 5-3 Threatened species	Lists of species alphabetized.
Table 5-4 Superior high quality waters	Table renumbered from 5-5; Cuyahoga river segment (4-mile segment near Congress lake outlet) deleted; segments of Deer creek, North Fork Paint creek, Rocky fork and Salt creek moved to outstanding state waters table 5-5; segments of Muskingum river and West Branch St. Joseph river added.
Table 5-5 Outstanding state waters based on exceptional ecological values	Table renumbered from 5-4; table re-titled outstanding state waters based on exceptional ecological values; Chagrin river upstream segment changed from Aurora branch (RM 29.09) to Woodiebrook road (RM 49.14); segments of Deer creek, North Fork Paint creek, Rocky fork and Salt creek moved from superior high quality waters table 5-4.
Table 5-6 Outstanding state waters based on exceptional recreational values	New table listing segments of Cuyahoga river and Maumee river added.
Table 5-7 Outstanding national resource waters	Table renumbered from 5-6.

- 1 The March 25, 2002 proposed revisions to this rule and rule 3745-1-54 included changes to Section 401 water quality certification language. On September 27, 2002, the changes to rule 3745-1-54 and other rules were withdrawn from this rulemaking. The proposed changes to Section 401 water quality certification language have been removed in re-filed rule 3745-1-05 and the currently effective language is reinstated.

Appendix E

Director's Findings and Orders and
Public Notice of Adoption

**BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

The Rescission of Existing Rules 3745-45-01 :
and 3745-45-03 :
and :
The Adoption of Amended Rule 3745-1-05 :

FINDINGS AND ORDERS

The Director of Environmental Protection, having considered in compliance with the Administrative Procedure Act the rescission of the existing rules of the Ohio Administrative Code cited above and the adoption, in final form, of the proposed amended rule of the Ohio Administrative Code also cited above, finds:

1. That due notice of a public hearing in this matter pursuant to the Administrative Procedure Act was given, that a public hearing was held May 1, 2002 in Columbus, Ohio, and that all interested persons were afforded the opportunity to be heard; and
2. That upon due consideration, the rescission of the existing rules of the Ohio Administrative Code cited above and the adoption, in final form, of the proposed amended rule of the Ohio Administrative Code cited above are reasonable and lawful and within the purview of authority provided by law.

It is therefore

ORDERED that existing rules 3745-45-01 and 3745-45-03 of the Ohio Administrative Code be rescinded.

It is further

ORDERED that proposed amended rule 3745-1-05 of the Ohio Administrative Code be adopted in final form.

It is further

ORDERED that the effective date of the rescission of existing rules 3745-45-01 and 3745-45-03 of the Ohio Administrative Code shall be February 16, 2003.

It is further

ORDERED that the effective date of amended rule 3745-1-05 of the Ohio Administrative Code shall be July 1, 2003.

It is further

ORDERED that copies of said rescinded and amended rules, in final form, shall be filed with the Secretary of State, the Joint Committee on Agency Rule Review, and the Legislative Service Commission, as required by law.

Original signed by Christopher Jones
Christopher Jones, Director
Ohio Environmental Protection Agency

Issued at Columbus, Ohio this 6th day of February, 2003.

State of Ohio
Environmental Protection Agency
Notice of Adoption of Rules

Notice is hereby given that the Director of Environmental Protection, under the authority of Ohio Revised Code Sections 3745.11, 6111.041 and 6111.12, has rescinded existing rules 3745-45-01 and 3745-45-03, and has adopted amended rule 3745-1-05 of the Administrative Code.

The rules in Chapter 3745-45 of the Administrative Code address permit and certification fees. Within this chapter, rule 01, Definitions, and rule 03, Coal mining operations, are outdated and no longer serve any purpose. Chapter 3745-1 of the Administrative Code addresses water quality standards for surface waters of the state. Within this chapter, rule 05 addresses antidegradation provisions for point source discharges and dredge and fill activities. Antidegradation provisions must be followed before authorizing any activity on a water body that may result in a lowering of water quality including an increase in the discharge of a regulated pollutant, or activities that may significantly alter the physical habitat. The proposed changes clarify and improve efficiency in issuing documents under the provisions of the rule.

A public hearing on the proposed rule revisions summarized above, and on additional proposed rule revisions addressing the Section 401 water quality certification program, was held on May 1, 2002 in Columbus, Ohio. As a result of public comment and further analysis, the proposed revisions addressing the Section 401 water quality certification program were withdrawn on September 27, 2002. Furthermore, additional changes to rule 3745-1-05 of the Administrative Code were made and refiled on November 7, 2002. The Director's action in this matter is pursuant to the procedural requirements of Ohio Revised Code Chapter 119 and is based upon the record of the public hearing and comments received during the comment period. The Director's order of adoption was issued on February 6, 2003. The effective date of the rescission of existing rules 3745-45-01 and 3745-45-03 of the Administrative Code is February 16, 2003. The effective date of amended rule 3745-1-05 of the Administrative Code is July 1, 2003. To request a copy of these rules, write to Mr. Bob Heitzman, Ohio Environmental Protection Agency, Division of Surface Water, P.O. Box 1049, Columbus, OH 43216-1049 or call Mr. Heitzman at (614) 644-3075. Copies of the adopted rules are also available for inspection at Ohio EPA's District Offices and are available on the Ohio EPA Division of Surface Water web site at <http://www.epa.state.oh.us/dsw>.

This action of the Director is final and may be appealed to the Environmental Review Appeals Commission (ERAC) pursuant to Ohio Revised Code Section 3745.04. The appeal must be in writing and set forth the action complained of and the grounds upon which the appeal is based. The appeal must be filed with ERAC within thirty (30) days after the notice of the Director's action at 236 East Town Street, Room 300, Columbus, Ohio 43215. A copy of the appeal must be served upon the Director of the Ohio EPA within three (3) days of filing with ERAC. Ohio EPA also requests that a copy of the appeal be served upon the Environmental Enforcement Section of the Ohio Attorney General's Office.