

# **Written and Oral Testimony Joint Committee on Agency Rule Review 10 June 2024 Regular Agenda**

## **Agenda Item 47**

**Ohio EPA Rule 3745-32-04**

**Vincent Messerly, Stream + Wetlands Foundation  
vmesserly@streamandwetlands.org  
740-654-4016**

Good afternoon, Chairperson Callender, Chairperson Gavarone, and Committee Members. My name is Vince Messerly, and I am the President of Stream and Wetlands Foundation, a non-profit company based in Lancaster, Ohio that was founded in 1992. We specialize in the restoration and protection of ecological resources in partnership with state and local agencies and other non-governmental organizations to provide high-quality compensatory mitigation for impacts to wetlands and streams throughout the state. Our mitigation projects are a win-win for Ohio - they provide for recreation, research, and education opportunities for Ohioans when opened to the public and also generate compensatory mitigation that allows transportation, energy, sewer, water, commercial, industrial, and residential development projects the ability to secure the necessary state and federal environmental permits that allow them to be constructed. Over our 32-year history, we have restored and protected more than 4,200 acres of wetlands and more than 200,000 feet of streams. Our projects have provided mitigation for more than 2,000 permit applicants which has allowed more than \$40 billion in economic development to take place across the state.

I am here today to express our support for Ohio EPA's rulemaking associated with Rule Number 3745-32-04, titled "Mitigation for Impacts to Streams." This rulemaking represents a significant milestone for the State, as it formalizes stream mitigation requirements within the Ohio Administrative Code for the first time. Historically, stream mitigation standards in Ohio have been driven by inconsistent case-by-case decisions by agency reviewers and from guidelines adopted and by the Ohio Interagency Review Team ("IRT"). This new rule will provide permit applicants and mitigation providers with much-needed clarity and predictability, ensuring a more consistent evaluation of prospective development sites and stream restoration projects. It will also better characterize and reflect the actual ecological condition and function of streams affected by projects.

While the Stream and Wetlands Foundation wholeheartedly supports this rulemaking, we urge Ohio EPA to act now by amending the proposed rule to adopt the use of area, or an adjustment factor to account for stream size. This can be accomplished with a simple modification to the Ohio Stream Assessment Method or "OSAM". OSAM is the functional assessment tool for streams that is part of the proposed rule package. Currently, Ohio EPA, due to concerns raised by the local Army Corps of Engineers Districts (the "Corps"), plans to utilize length in the tool rather than area or a scaling factor. Within the current iteration of the tool and in past practice, stream length is the sole measurement of channel size, without considering width. This means a 3-foot-wide stream is assessed the same as a 20-foot-wide stream, despite the obvious differences of ecological function. This oversight leads to inaccurate characterizations of stream function, inflated costs for applicants, and incentivizes mitigation sponsors (which are often for-profit and based out-of-state), to focus on smaller

headwater streams due to lower costs and higher profits, which ultimately negatively impacts Ohio's businesses and environment.

As I mentioned, not only are the ecological functions not addressed, but the economic impact on permit applicants is extreme when using only length for evaluating impacts to streams and the related compensatory mitigation. In 2021, The Corps' issued their most recent version of the Nationwide Permits, which are a type of "general" permit that regulates small impacts to wetlands and streams under the Clean Water Act. The Corps ironically utilizes area of impact to streams in these permits and the threshold used to determine if stream impacts will require compensatory mitigation is 0.03 acres or just over 1,300 square feet of impact. The current IRT guidelines typically require impacts to be mitigated at a ratio of 2 times the impact length, and mitigation is calculated using length of impact and mitigation even though area is used to determine the threshold for which mitigation is required.

A cost example for an impact to 0.03 acres of a four-foot-wide stream, yields a stream length of 325 feet. Using a 2:1 ratio for the amount of compensatory mitigation would require the applicant to purchase 650-feet of mitigation. The cost of stream mitigation credits across Ohio ranges from \$300 to \$510 per linear foot for an average cost of \$405 per linear foot. Using the average cost, the cost to the permit applicant for impacting 0.03 acres of stream is \$263,250 or \$8.8 million for each acre of impact!

By using length rather than area, the unintended consequence is that mitigation providers are incentivized to utilize the smallest and least difficult stream for their compensatory mitigation projects. This has resulted in a lose-lose scenario for Ohioans – extremely costly mitigation and an inordinate number of small streams used for mitigation that do not provide the environmental benefit that can be delivered by restoring larger streams. The primary sources of degradation and impairment of streams and lakes in Ohio are excessive erosion, sedimentation, and nutrients. Larger streams and watersheds are the largest sources of excessive bank erosion and sediment sources for our rivers and lakes. If OSAM used area or a stream-size adjustment factor, a more level playing field would be achieved and mitigation providers would have just as much incentive to restore large as small streams. We strongly urge the modification of OSAM to use area rather than length to evaluate impacts and mitigation projects. Doing so will allow an economy of scale to be achieved by permit applicants and mitigation providers.

Thank you for considering our perspective. I am happy to answer any questions the committee may have.

**Before**  
**The Joint Committee on Agency Rule Review**  
**In Opposition to The Ohio Environmental Protection Agency's**  
**Proposed Rule OAC 3745-32-04**

**Testimony by:**

**Bradley J. Petru, PWS, ISA-CA MA-5819A**

**June 10, 2024**

Chair Callender and Members of the Joint Committee on Agency Rule Review,

Thank you for the opportunity to provide testimony today. My name is Bradley J. Petru, I have 24 years of experience in mitigation consulting, and I serve as a Senior Project Manager for Civil & Environmental Consultants.

I respectfully submit my concerns regarding the adoption of the stream mitigation rule changes for the Ohio Revised Code (ORC) 3745-32-04 to the Joint Committee on Agency Rule Review (JCARR). While I do support the development of a stream functional assessment that translates into mitigation credit determinations for use in the surface water regulatory framework in the State of Ohio, I do not support the enactment of the Ohio Stream Assessment Method (OSAM) until further improvements have been made. Furthermore, I recommend that OSAM should not be accepted until it is vetted out by the Ohio EPA and their advisory groups and there is concurrence in its use by the United States Army Corps of Engineers (USACE) in the regulatory framework of Clean Water Act permit mitigation.

Specific to JCARR, my concerns regarding the adoption of new stream mitigation rules are related to the effort invested by the Ohio EPA to conduct the following analyses:

1. Fiscal analysis of the rule as required by
  - a. ORC 106.024(B)(4) an estimate, in dollars, of the amount by which the proposed rules would increase or decrease revenues or expenditures during a biennium.
  - b. ORC 106.024 (B)(6) an estimated cost of compliance with the rule to all directly affected persons.
2. Assessment of no-adverse impacts on businesses under ORC 107.52 (D) as it would directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.

Enacting OSAM into policy, prior to the full development of watershed regional curves for varying land-use resource regions across the state and also testing and vetting out of OSAM should be conducted before public application. The 2016 Stream Mitigation Guidelines (2016 Guidelines)

developed by the Interagency Review Team should be maintained as the regulatory framework until OSAM can be developed and tested.

Enforcing the use of OSAM prior to its full development and testing translate to a burden of the businesses, municipalities, non-profits, and virtually anyone requiring a stream impact permit because the variables in OSAM require data that must be collected and evaluated for an assessment that has not yet made it out of beta testing.

Furthermore, at this point, it has been demonstrated that the USACE will not support OSAM in the current form for use in their application of Section 404 Clean Water Act permit mitigation requirements. Should OSAM be required and not in conformity with the USACE, a situation may arise where dual marketplaces would form to service stream marketplaces for federal impacts separate from state impacts in Ohio. While this sounds attractive, Pennsylvania and Florida have such marketplaces and they further impede development and growth, extend regulatory approval timelines, and expand project costs.

As the policy is written, a permit applicant will be able to deviate from OSAM through the approval of the Director of Surface Water at the Ohio EPA, a process referred to as a “Director’s Authorization” to deviate from the code or regulation. This request carries its own timelines, production and consulting costs and would also be an unnecessary burden that a permit applicant would have to go through during the Individual 404/401 Water Quality Certification while OSAM is being developed. It does not appear this burden is being considered by the Ohio EPA.

In summary, the stream mitigation policy, functional assessments, and crediting measures should all be consistent with the 2008 Mitigation Rule (Federal) and with regional USACE district concurrence to ensure that the Section 404/401 permitting process and other state permits do not require dual or inconsistent mitigation deliverables. The development and testing of OSAM should take place before it is used in the regulatory framework for assessing mitigation costs. We suggest that the Ohio EPA, did not sufficiently assess the burden of cost under ORC 106.024 and 107.52 in their submittal to the Common Sense Initiative.

Sincerely,

Bradley J. Petru, MS, PWS, ISA-CA  
Senior Project Manager

**Before**  
**The Joint Committee on Agency Rule Review**  
**In Opposition to The Ohio Environmental Protection Agency's**  
**Proposed Rule OAC 3745-32-04**

**Testimony by:**

**Joshua White, Water & Land Solutions, LLC**

**June 10, 2024**

Chair Callender and Members of the Joint Committee on Agency Rule Review,

Thank you for the opportunity to provide testimony today. My name is Joshua White and I serve as Vice President of Water & Land Solutions, LLC. My education and training centers on fluvial geomorphology. Over my 24 years of professional experience I have assessed, designed, performed construction oversight, and monitored over 100 miles of stream channel. I have worked with 11 USACE Districts across 17 States. I am testifying today in opposition to proposed rule 3745-32-04 Mitigation for Impacts to Streams. I urge JCARR to recommend invalidating Section B(4) of this rule.

I will begin by identifying the JCARR prongs which rule violates. Then, I will provide justification for these arguments.

When evaluating proposed rule 3745-32-04, the Ohio EPA's Business Impact Analysis and the Common Sense Initiative Office did not adequately assess adverse impacts on businesses and failed to consider adverse impacts to mitigation providers, specifically when considering the Ohio Stream Assessment Method (OSAM).

According to Ohio EPA, OSAM is in development and will be modified over the next three plus years as Ohio specific data is collected. Ohio EPA has a USEPA three-year grant in place to capture needed data for regional curves, in order to update OSAM with appropriate and necessary information that will allow the State to determine the actual *adverse impacts* to streams and businesses. At this stage of OSAM development, Ohio EPA cannot reliably claim what the OSAM impacts will be on businesses and whether the potential adverse impacts to businesses is defensible.

Rule Summary and Fiscal Analysis Section II Q.13 and Section III Q.18 D. states "there will be reduced costs to lower quality streams," in theory yes, but how does OEPA know when OSAM hasn't been rigorously tested with appropriate in-state regional curves. Lack of testing and

regional curves are the main reasons the USACE Huntington, Pittsburgh, and Buffalo districts are not supportive of OSAM in its current state.

The actual pricing of mitigation comes down to the cost to generate the credit which falls back on the mitigation providers. Ohio EPA's Common Sense Initiative's (CSI's) Business Impact Analysis does not adequately address those adverse impacts.

Again, OSAM in its current state is not supported by USACE Huntington, Pittsburgh, and Buffalo districts. Until the time that the USACE adopts OSAM, the permitting will be *burdensome* on the impactor, permit reviewer, and mitigation provider. USACE adoption of OSAM will likely not happen until the Ohio regional curves have been completed, inserted into OSAM, and OSAM has been rigorously tested and checked to confirm there isn't a loss of aquatic functions which will make the tool defensible. This is likely 3-5 years away before USACE will adopt OSAM as adequate mitigation. In the meantime, there will be two separate credits type – Federal and State. This will cause confusion on all parts and slow the permitting process down for applicants for the next several years. Another scenario, what happens if the USACE never adopts OSAM? Then there will still be two separate credits in the State of Ohio. CSI did not discuss any of these scenarios that we will be facing if this is put into rule. I don't think anyone wants two crediting systems. Having two separate credits will cause an *adverse effect* to free market capitalism (i.e. deter new mitigation providers from entering the State) and higher credit pricing due to uncertainty. Ask anyone in Florida how the crediting controversy is going. They will tell you it is a big mess between State and Federal crediting AND moving very slow.

My stance from the beginning of the introduction of OSAM was to have a framework of a functional tool and work on it until there is good sound science behind it. When the adequate data is inserted into the tool; and State and Federal agencies are comfortable with the tool and it is defensible, then adopt it into the ORC. Last Summer, this was the direction OEPA was going before doing a 180 degree turn and using OSAM. Many stream assessments in other States have taken years to hone in their tool's intricacies which is completed through rigorous testing and validating the data within the tool. This has NOT been completed within the current OSAM tool. The OSAM manual states "Data will be collected from several high quality, stable reference streams in Ohio." This basically implies an "In development" status and the data currently being used isn't good enough and will be updated with Ohio reference streams. The reference regional curves in OSAM are from TN, GA, AL, SC, WI, and MI.

Proposed rule 3745-32-04 Section B(4) reads: "Compensatory mitigation debit and credit amounts shall be calculated using the "Ohio Stream Assessment Method" or alternative stream mitigation methods, upon approval of the director, if the applicant demonstrates that the method provides an equivalent or greater ecological lift as the Ohio Stream Assessment Method." To my knowledge, the Ohio EPA has not compared debits and credits resulting from OSAM and alternative mitigation methods so it is unable to determine which method provides a greater ecological lift.

The Common Sense Initiative's Business Impact Analysis considered adverse impacts to "a business, organization or landowner who intends to obtain a federal license of permit for the

activity.” These entities would be required to use OSAM when calculating debits. However, the proposed rule indicates that OSAM is to be used for debits and credits. Per the rule, mitigation providers may be required to use OSAM when calculated credits. The Business Impact Analysis only provided surface level information only for the industries impacting streams but did not look at, nor asked, about the impact a new assessment would have on the mitigation community (the providers) or how it would affect pricing. Many mitigation providers and others in the stream restoration community requested more time to do due diligence during the Nov-Dec comment period which was not granted. The Business Impact Analysis failed to consider any impact to mitigation providers.

I agree with the statement in the Common Sense Initiative that the need to protect water quality is in the overall public interest. As such, an adverse impact to businesses may be appropriate. However, the adverse impact must be fully assessed in order for the state to claim it is justified.

I recommend invalidating section B(4) until the Business Impact Analysis is satisfactorily complete. Section B(4) could be rewritten as follows: “Compensatory mitigation debit and credit amounts shall be calculated using a stream mitigation method. The director may authorize mitigation for impacts to streams based upon the methodology. The method shall have an equivalent or greater ecological lift as the Guidelines for Stream Mitigation Banking and In-Lieu Fee Programs in Ohio, 1.1 (Ohio IRT, March 2016), or any newer version.”

Ohio EPA’s Mission statement - *The division's mission is to protect, enhance and restore all waters of the state for the health, safety and welfare of present and future generations. We accomplish this mission by monitoring the aquatic environment, permitting, enforcing environmental laws, using and refining scientifically sound methods and regulations, planning, coordinating, educating, providing technical assistance, and encouraging pollution prevention practices.* Ohio EPA hasn’t provided any information backing OSAM’s ability to protect all waters of the state.

Ohio EPA has failed to demonstrate clearly that the regulatory intent of the proposed regulations justifies or has an *adverse impact* and *burden* on all impacted businesses.

For these reasons, I urge this body to recommend that the Ohio General Assembly invalidate proposed rule 3745-32-04 Section B(4). At this time, I would be happy to address any questions committee members may have.

June 9, 2024

The Honorable Jamie Callender  
House Chairperson, Joint Committee on  
Agency Rule Review  
Vern Riffe Center  
77 South High Street  
Columbus, OH 43215

The Honorable Theresa Gavarone  
Senate Chairperson, Joint Committee on  
Agency Rule Review  
Vern Riffe Center  
77 South High Street  
Columbus, OH 43215

RE: Draft Ohio Step Up To Quality Program Revisions

Dear Chairperson Callender and Gavarone,

On behalf of KinderCare Learning Companies (KinderCare), thank you for the opportunity to comment on the draft changes to the Step Up To Quality (SUTQ) program centered around promoting high-quality early childhood education (ECE) in the State of Ohio.

KinderCare proudly serves over 13,200 young children at our 95 high-quality early learning centers and 42 before/after school sites across Ohio. Our world class educators build confidence in students by providing high-quality educational experiences that meet the unique developmental needs of every child in our care. KinderCare serves all children regardless of background and financial circumstance. Approximately 45% of the children we serve depend on financial assistance offered through Ohio's Publicly Funded Child Care program.

I am writing to provide feedback on the proposed revisions to the SUTQ program rules. As a stakeholder in the ECE field, we believe these revisions are critical to ensuring the success and effectiveness of the SUTQ program. KinderCare is your committed partner to promoting health, safety, and educational excellence for young children and working families throughout Ohio. As such, we recommend the following adjustments to the SUTQ program to better align with its goal of advancing centers to a higher level of quality.

We acknowledge that the new program aims to elevate overall quality and support improvement through substantial base rate increases. This is undeniably a step in the right direction. However, our feedback will concentrate on ensuring that the highest quality centers can sustain and continue to enhance their standards.

**1. Offer Flexibility within SUTQ Categories:**

The current SUTQ rules allow child care programs to gain points across categories, recognizing there are multiple approaches to measuring and delivering high-quality care. Such flexibility, for example, allowed a center with a highly educated staff to demonstrate quality through teacher credentialing, professional development, and national accreditation. Such approach allows each licensed center with the flexibility to operate within the program and in the context of their community.

In the draft rules, a meaningful change was made to Subsection (B)(7) of 5101:2-17-01, which limits providers' ability to earn points in SUTQ. This has a significant impact on centers, especially those that will explore additional pathways to achieving the gold level. We recommend retaining a form of the following language that was removed:



4) Programs who register for a four or five-star rating may be awarded points based on the verification of the three-star rating requirements and their ability to earn additional points as outlined in appendix A.

Reopening this flexibility language allows centers to operate effectively and meet the diverse needs of their communities.

## **2. Retain the Optional National Accreditation Pathway:**

As part of our proposal for streamlining, we recommend retaining the national accreditation standard as an embedded pathway to attaining the gold rating. National accreditation standards frequently overlap with the benchmarks of a quality rating and improvement system, resulting in redundant standards. This would allow for these centers to not operate at enhanced ratios as they have demonstrated quality through an alternative pathway. This approach mirrors the pathway taken by 26 other states across the country to align with common standards. KinderCare aims to achieve national accreditation in all our centers and currently has 81 nationally accredited centers in Ohio.

## **3. Reconsider New Ratios for SUTQ:**

We respectfully request a reconsideration of the new ratios for licensed child care programs. The current proposal exempts family child care, and we suggest extending this exemption to include licensed programs to maintain alignment with current ratio and group size rules. This requirement, while well-intentioned, presents a significant administrative challenge that could limit access and impose further financial constraints on centers and the families we serve.

The proposed SUTQ structure puts heightened emphasis on enhanced ratios, and at this time would not only add administrative burden and oversight for the state but also creates significant operational challenges for centers. KinderCare proudly operates thirty-eight 4- and 5-star centers. To comply with new ratios each center will be operating at a different combination of 40% of classroom with one less child in the room. With more limited pathways to achieve Gold status, many current 4- and 5-star centers may need to disenroll students to maintain their quality status.

The variation of combinations will result in an elevated level of administration paper work to maintain the gold level.

Furthermore, should a center choose to not disenroll, their quality assessment could fall from a 5-star to Silver status, while seemingly instruction, teachers, and children enrolled have not changed during that period. However, the quality payments will be adjusted significantly, thus jeopardizing provider's ability to sustain quality within the state's historically high-quality centers.

Finally, if the enhanced ratios are to be included as a mandatory component of the gold-level accreditation, we recommend establishing a process in the rules to clearly define the expectations for both center staff and Department assessors. This will help alleviate the administrative burden, as the Department will have a standardized plan on file.

We propose that a process be cemented in rules to help center staff understand the expectations as well as the Department assessors. We recommend the follow:

Each center applying for gold-level accreditation in the SUTQ system must specify which classrooms will adhere to the enhanced ratios. Using a form developed by the Department, centers will have 30 days to submit any changes to their plan in response to enrollment fluctuations.

Thank you for considering our feedback. We look forward to continuing to collaborate with you to improve the SUTQ program and support the success of early childhood education in Ohio. If you have any questions or need further information, please do not hesitate to contact me at [brian.holcombe@kindercare.com](mailto:brian.holcombe@kindercare.com).

Sincerely,



Brian A. Holcombe  
Government Relations Representative  
KinderCare Learning Companies