



Division of Surface Water Response to Comments

Project: Modification to Section 401 Water Quality Certifications for Nationwide General Permits

Ohio EPA ID #: 113742 and 123911

Agency Contacts for this Project

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Ohio EPA held a public hearing on Jan. 11, 2016 regarding Ohio EPA's modification to the Section 401 Water Quality Certification (WQC) for the 2012 U.S. Army Corps of Engineers' Nationwide Permits (NWP). This document summarizes the comments and questions received at the public hearing and during the associated comment period, which ended on Jan. 19, 2016.

Ohio EPA reviewed and considered all comments received during the public comment period. By law, Ohio EPA has authority to consider specific issues related to protection of the environment and public health. Often, public concerns fall outside the scope of that authority. For example, concerns about zoning issues are addressed at the local level. Ohio EPA may respond to those concerns in this document by identifying another government agency with more direct authority over the issue.

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

General Concerns

Comment 1: Ohio EPA received comments from several entities that expressed a general opposition to the proposed modification and requested that the modification be abandoned given that the 401 WQC will need to be reissued in 2017 (Sierra Club, The Nature Conservancy (TNC), Ohio Wetlands Association (OWA), Ohio Environmental Council (OEC), Dominion Resources, Williams Co., Ohio Department of Transportation (ODOT), and Rettew).

Response 1: Ohio EPA understands this 401 WQC would only be implemented for a short duration. However, given the stream eligibility requirements are significantly different from the current version of the 401 WQC for the NWP, this will give the agency the opportunity to pilot the process. The

shorter implementation period would allow Ohio EPA to identify and refine the positive attributes associated with this process. In addition, the agency would be in a better position to identify improvement opportunities with the intent to deliver a more consistent and predictable product in preparation for the 2017 reissuance. Additionally, while the changes are significant, they have been the subject of an extensive public involvement process and we do not believe there is a legal limitation on the extent of the modifications so long as procedural requirements are followed. This proposed modification has been public noticed as will the decision and will be subject to appeal as a final action of the director.

Comment 2: **Ohio EPA received comments from 1,216 private citizens that expressed opposition to the proposed modification, the director's authorization process, and any impacts to category 3 wetlands.**

Response 2: Ohio EPA thanks the public for their comments and responses to their concerns can be found throughout this response to comments. Please refer to Responses 1, 19, 61, and 68.

Comment 3: **Several comments were received regarding the potential increase in workload, specifically, a high number of individual 401 WQCs, director's authorizations, and Ohio Rapid Assessment Method (ORAM) verifications that the modification could create for the agency, and how this would affect the issuance time for certifications.**

Response 3: Ohio EPA has considered the workload necessary to implement the proposed 401 WQC to the NWP's. The agency is confident that current resources are available to effectively administer the proposed modification. The pilot period will allow Ohio EPA to fully evaluate the resources necessary to implement the program. The proposed modification will ensure a consistent and predictable process thereby minimizing the time necessary for review and processing.

Comment 4: **One commenter requested clarification on how this modification will affect NWP applications that are currently under review by the Corps. They suggested that applications submitted prior to the effective date of the 401 WQC modification be processed under the 2012 version of the 401 WQC.**

Response 4: While this decision is ultimately the Corps', Ohio EPA will work with the Corps to build in appropriate lead time ahead of the effective date of the modification for those projects submitted prior to the effective date.

General Limitations and Conditions: Culverts

Comment 5: **Several comments were received requesting that the culvert conditions apply to installation of culverts on previously**

unculverted portions of streams and replacement of existing culverts instead of only new culverts per condition A.4.

Response 5: Based upon the comments received, condition A.4 was removed. The culvert conditions now apply to the installation of any culvert on intermittent and perennial streams, including the replacement of existing culverts and the installation culverts on previously unculverted streams.

Comment 6: **One comment was received that requested the culvert conditions not apply to the installation of temporary culverts.**

Response 6: The culvert conditions included in the 401 WQC are included to ensure that culverts are properly installed to maintain normal flow and allow for the passage of aquatic organisms. Based upon the definition of temporary in the 401 WQC, temporary culverts may be in place for extended periods of time. Therefore, Ohio EPA maintains that these conditions are necessary for the installation of all culverts in intermittent and perennial streams.

General Limitations and Conditions: Best Management Practices

Comment 7: **Several comments were received regarding condition B.2 that asked for events beyond the applicants control be taken into account and that this condition is required by National Pollutant Discharge Elimination System (NPDES) permits.**

Response 7: Ohio EPA understands that this is a condition of our NPDES permits. Based upon the comments received, condition B.2 will be changed to “Sediment and erosion control measures and best management practices must be designed, installed, and maintained in effective operating condition at all times during construction activities. Proper maintenance ensures corrective measures will be implemented for failed controls within 48 hours of discovery.”

Comment 8: **Several comments were received regarding condition B.3 and the requirement that sediment and erosion control measures shall not be placed in surface waters of the state. The comments included several examples where this would not be practical.**

Response 8: Based upon the comments received, condition B.3 will be changed to “For perennial and intermittent streams, in-stream sediment control measures shall not be utilized, with the exception of turbidity curtains parallel to the stream bank, for purposes of sediment collection. All sediment and erosion control measures shall be entirely removed and the natural grade of the site restored once construction is completed.” This change clarifies that the placement restriction applies only to streams and removes erosion controls from the in-stream restriction.

Comment 9: ODOT requested that silt fence in condition B.4 be removed as they have been told by the Corps that silt fence is not appropriate for demarcating resources.

Response 9: Ohio EPA understands that silt fence may not be appropriate in all cases for demarcation of waters, but the condition as written does not require the use of silt fence. Rather silt fence is given as an option of many acceptable methods to demarcate resources. Ohio EPA maintains that, when installed correctly, silt fence can be an effective method to demarcate resources as well as provide protection from siltation for avoided portions resources such as wetlands.

Comment 10: ODOT requested a change to condition B.7 to allow for the use of straw bales when controls are too close to the road. When practicable, straw bales can be used as an erosion (not sediment) control measure when safety is a concern, i.e., use of ditch checks not acceptable.

Response 10: Based upon the comment, condition B.7 will be changed to “Straw bales shall not be used as a form of sediment control unless used in conjunction with another structural control such as silt fencing.” This will allow for the use of straw bales for erosion control in instances like those described by ODOT.

Comment 11: Many comments were received regarding condition B.11 and the use of the word turbid. The commenters noted that turbid is not defined, and it may an impossible standard to achieve for many construction projects.

Response 11: Based upon the comments received, condition B.11 will be changed to “All dewatering activities must be conducted in such a manner that does NOT result in a violation of water quality standards.” Additionally, if the dewatering activities result in a defined mixing zone downstream, then turbid discharges would result in a violation of water quality standards. Provision such as filter bags, sediment traps/basins, and additional perimeter controls would be expected as a result to prevent a violation of state water quality standards.

Comment 12: Many comments were received regarding conditions B.12 and B.13. Commenters asked for clarification on these conditions such as when they apply as oil and gas are exempt from storm water permitting. They also questioned if Ohio EPA had regulatory authority to enforce conditions on upland areas.

Response 12: In order to maintain consistency with Ohio EPA’s General Storm Water Permit associated with Construction Activities, Ohio EPA utilized these specific erosion protection requirements. The provision is required for all construction activities (greater than 1 acre) in the state of Ohio to

minimize off-site sedimentation. In addition, in cases where the Ohio EPA's permit does not apply, such as sites less than 1 acre land disturbance, this will ensure consistency with the intent. Condition B.12 applies only to areas that have reached final grade and condition B.13 applies to all areas that have been disturbed that will remain dormant for more than fourteen days. When issuing a 401 WQC, the director has the authority to consider the direct and indirect impacts to surface waters of the state, which may include additional BMPs on upland areas, and to condition the certification to protect those surface waters from degradation. Conditions B.12 and B.13 are included to help ensure no further degradation to water quality. Please refer to the following case for precedent regarding this issue: PUD NO. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology, Et Al., 511 U.S. 700, (May 31, 1994).

Comment 13: **ODOT commented that condition B.12 is not in accordance with Ohio EPA's Construction General Permit which requires areas within 50 feet of surface water to receive erosion controls within two days of reaching final grade.**

Response 13: Ohio EPA understands ODOT's concern. However, if ODOT complies with the Construction General Permit, then they will be in compliance with condition B.12. This condition applies to areas subject to the NPDES Construction Permit.

Comment 14: **Many comments were received regarding condition B.14 and the requirement that stream flow be redirected around active areas of construction. The comments included several examples where this would not be practical.**

Response 14: Based upon the comments received, condition B.14 will be changed to "In the event of authorized in-stream activities, provisions must be established to redirect the stream flow around or through the active area of construction in a stabilized, non-erosive manner, to the maximum extent possible.

General Limitations and Conditions: Mitigation

Comment 15: **Several comments were received that objected to the removal of required compensatory mitigation for temporary impacts exceeding 0.10 acres. The commenters stated that mitigation should be required for all wetland impacts regardless of duration and size of the impact.**

Response 15: The agency maintains that temporary impacts, as defined in this 401 WQC are self-mitigating and therefore do not require compensatory mitigation. The definition of temporary impact in the 401 WQC provides a performance standard upon which the agency can determine whether the

impact met this standard, i.e. result in the surface water returning to conditions which support pre-impact biological function with minimal or no human intervention within 12 months following the completion of the temporary impact. The definition provides examples but it is illustrative and not exclusive and thus still envisions that the performance standard is actually achieved. If it is not, it would not be considered a temporary impact and thus mitigation pursuant to condition C.1 would be applicable. The Corps' NWP general condition C.23 regarding mitigation requires mitigation for wetland impacts that exceed 0.10 acres. The condition will remain in order to maintain consistency with the Corps.

Comment 16: **Several comments were received that supported the removal of required compensatory mitigation for temporary impacts exceeding 0.10 acres.**

Response 16: The support for the removal is noted.

Comment 17: **Several comments were received requesting that the condition for stream mitigation to result in the preservation, restoration, or enhancement of stream habitat and/or biological functions be reinstated.**

Response 17: Ohio EPA maintains that the Corps' NWP general condition C.23 regarding mitigation adequately addresses this issue. In order to avoid redundancy, this condition was removed from the 401 WQC and deferred to the Corps NWP general condition C.23.

Comment 18: **Several comments were received requesting that the condition requiring natural channel design principles for stream reconstruction be reinstated.**

Response 18: This condition was difficult to enforce because it was not easily measurable. Ohio EPA supports stream mitigation projects that integrate natural stream processes and achieve targeted goals. However, the agency maintains that the Corps' NWP general condition C.23 regarding mitigation adequately addresses this concern.

General Limitations and Conditions: Director's Authorization and Appendix A

Comment 19: **Several comments were received stating that the director's authorization process is unlawful and violates OAC 3745-1-05 and 3745-1-54. The process does not allow for public comment or a public hearing in the case of potential degradation to high quality waters.**

Response 19: The director fulfilled antidegradation requirements in issuing this 401 WQC. In evaluating the permissible impacts under this WQC, the director first considered the impacts that are authorized by the Corps' Nationwide Permits. Those impacts, which per regulation, are limited to those that

have been determined to have minimal adverse effects on the environment represent the outer extent of what the director could authorize under this 401 WQC. The director's authority under antidegradation includes issuing a certification that mirrors the impacts authorized by the Corps and, in the case at hand, authority to set certain limitations and processes to protect higher quality waters and those waters that support them. The director has constructed a 401 WQC that provides limitations on impacts to certain high quality waters but also provides a process within the 401 Certification that allows certain projects to proceed under the 401 Certification if the project will have such a minimal impact on water quality that individual 401 WQC would not be appropriate. In no case, however, is the director authorizing impacts that would go beyond what is already authorized under the Corps' NWP. Additionally, the director must consider the project and the conditions that would be applicable to the project and make a determination that the project will have such a minimal impact on water quality that an individual 401 WQC would not be appropriate. As a part of the antidegradation process for this 401 Certification, the director conducted public participation and intergovernmental coordination which included, among other things, two public hearings, numerous meetings with interested parties and other governmental authorities. A comment that emerged through these efforts was the desire for a more transparent process for understanding the types of projects that are seeking a director's authorization and an ability to provide comments on the project. In response to these comments, the director has decided to build in a public comment component to the director's authorization process whereby applications will be posted on the agency's web page and the director will accept and review comments before deciding whether to approve or deny such a request.

Comment 20: **Several comments were received in support of the director's authorization process and requested that the process remain as an option to applicants.**

Response 20: Ohio EPA agrees that the director's authorization process is a valuable option for applicants and the director. The process will remain in the 401 WQC.

Comment 21: **Several comments were received stating that requiring photographs of impacted resources from May 1st-September 30th, was too restrictive and would limit their ability to conduct sampling outside of those dates. They also stated that a date restriction is not in accordance the ORAM, Headwater Habitat Evaluation Index (HHEI), or Qualitative Habitat Evaluation Index (QHEI) manuals which allow assessments to occur at any time of year.**

Response 21:

The intent of the date restriction was to ensure that high quality photographs accurately depict the quality of the resource to be impacted. Photographs taken outside of the active growing season do not always give an accurate account due to snow, ice, leaf litter, etc. During the ORAM verification process, Ohio EPA will not be conducting site visits for every project. Therefore, it is necessary to ensure that the photographs are good quality. In response to the comments received, the photograph language in Appendix A, B, and C has been revised for wetlands as follows: "A minimum of four high resolution color photographs taken while facing each of the four cardinal directions of each wetland proposed for impact. Photographs must accurately depict the quality of the wetland and may not include a majority of dying or dead vegetation and excessive cover due to seasonal conditions that vegetation and substrates cannot be observed, such as leaf litter, snow, or ice. Photographs deemed to be insufficient of representing the wetland will be required to be retaken once seasonal conditions are appropriate. Photographs shall be clearly labeled with the wetland name, direction, and date."

For streams, the language in Appendix A and C has been revised as follows: "A minimum of three high resolution color photographs taken while facing upstream of the proposed impact area, downstream of the proposed impact area, and one close up which clearly depicts the substrate composition and size for each stream proposed for impact. Photographs must accurately depict the quality of the stream and may not include excessive cover due to seasonal conditions where substrates cannot be observed due to conditions such as snow or ice. Photographs deemed to be insufficient of representing the stream will be required to be retaken once seasonal conditions are appropriate. Photographs shall be clearly labeled with the stream name, direction, and date."

Comment 22:

Several commenters stated that the new \$2500 review fee for director's authorizations was overly burdensome, and in the case of small projects, this fee could be greater than pursuing an individual 401 WQC. Commenters suggested that the fees be based on the impacts for a project similar to the fee structure for individual 401 WQCs. This would ensure that the fee is representative of the application review time.

Response 22:

Ohio EPA needs to recover costs for director's authorization application reviews. While some requests may be cheaper for the applicant to obtain an individual 401 WQC, the applicant will need to weigh paying this fee against the time it takes (up to 180 days) to obtain an individual 401 WQC. However, in light of these concerns, the fee for a director's authorization has been reduced to \$2000 instead of \$2500.

Comment 23: **Several commenters also wanted to know what would happen to their fees if Ohio EPA did not approve their director's authorization request. They suggested that those fees should be applied toward their individual 401 WQC fees.**

Response 23: When a director's authorization is not approved, the \$2000 fee will be applied towards the individual 401 WQC fees when an individual 401 WQC application is received.

Comment 24: **Several commenters also requested clarification on how the \$2500 review fee will be applied. Will \$2500 be required for each single and complete project or \$2500 for the entire project?**

Response 24: Director's authorization requests will now be a flat fee of \$2000. The director's authorization application should include all instances where the project exceeds the 401 WQC conditions for the NWP within one NWP application. For example, if a linear project crosses and impacts 15 streams and 3 of those streams are located in ineligible areas and all other terms and conditions of the 401 WQC are met, the director's authorization request should only include the information on the 3 streams located in ineligible area. In this example, only one \$2000 fee would be required.

Comment 25: **Several commenters stated that the director's authorization request form was not available on the website link provided.**

Response 25: At the time of public notice for the modification, the development of the form was not complete. The request form will be similar in format to the individual 401 WQC application form. The new form will provide a consistent format to ensure that the 15 items outlined in Appendix A are included in the director's authorization request. Once the form is completed, it will be posted on the website provided in Appendix A.

Comment 26: **Several commenters expressed concern over the lack of a timeline for Ohio EPA review of director's authorizations. Some commenters suggested 30 days from the receipt of the request and others suggested 30 days from the issuance of the Corps provisional NWP.**

Response 26: Due to the unknown amount of individual 401 and director's authorizations that the agency could receive as a result of this modification, no set timeline is established for the director's authorization process. Based on experience, for most director's authorizations, the agency anticipates a target of 30-45 days for processing. During the 2017 reissuance of the NWPs, the agency will reevaluate this topic. Additionally, if applicants would like a more concrete timeline, pursuing an individual 401 WQC is always an option.

Comment 27: **Several commenters stated that the requirements for a director’s authorization seem to imply that a copy of the provisional nationwide permit authorization letter must be received before the applicant can submit their director’s authorization request which could cause project delays.**

Response 27: The intent of the list of required items in Appendix A is to establish clearer requirements for those items that Ohio EPA needs to receive before the director’s authorization request can be formally approved. Applicants may submit their request without the provisional Corps’ NWP authorization with the understanding that their request will not be approved until they have submitted all the required documentation with accurate information.

Comment 28: **Several commenters stated that the current director’s authorization process is being abused to authorize a large number of impacts and they requested a list of how many directors’ authorizations have been issued by the Agency since the 2012 NWP issuance.**

Response 28: Director’s authorizations are only intended to authorize projects which the director determines have a minimal impact to water quality and are within the terms and conditions prescribed in the Corps NWPs which are minimal in nature. Issued director’s authorizations are a public record and can be requested by submitting a public records request with the agency. Procedures for submitting a public records request can be found at: www.epa.ohio.gov/dir/publicrecords.aspx.

Comment 29: **Several commenters asked if the issuance of a director’s authorization is a final action of the director that is public noticed and appealable.**

Response 29: A decision on a director’s authorization is being processed as a final action of the director and thus is subject to an appeal. If the director’s authorization request is approved, the applicant will get a letter from the director indicating his approval of the project to proceed under the 401 WQC for the NWPs.

Comment 30: **Several commenters suggested that the condition within some NWPs that states “Individual 401 WQC is required for use of this nationwide permit when temporary or permanent impacts…” be modified to include “or director’s authorization” after the individual 401 WQC to maintain consistency throughout the document.**

Response 30: Ohio EPA maintains that the condition, as written, is appropriate and that condition D.1 and Appendix A sufficiently describe when a director’s authorization can be pursued by applicants.

Comment 31: Several commenters requested clarification that the director's authorization process can be used to authorize both temporary and permanent impacts, for projects that result in improvements to water quality, and for impacts in any watershed.

Response 31: Ohio EPA maintains that condition D.1 and Appendix A clearly state that the director's authorization process can be used for any project that doesn't meet one or more of the terms and conditions for eligibility. This includes temporary and permanent impacts and stream impacts that occur in ineligible and potentially eligible areas.

General Limitations and Conditions: Miscellaneous

Comment 32: Several commenters asked that the removed language stating that "nationwide permits cannot be combined" be reinstated into the general limitations and conditions.

Response 32: This 401 WQC is in response to the Corps' NWP. The issue of whether a nationwide permit can or cannot be combined on a project is a Corps' requirement and Ohio EPA will act consistently with the Corps on this issue.

Comment 33: One commenter asked if the new condition E.6, which states that temporary swamp or timber mats are not considered fill material, is consistent with the Corps' definition of fill.

Response 33: Based upon Ohio EPA's interpretation of the Corps' definition of fill material, recent communications from the Corps, and recent NWP authorizations received from the Corps, the agency maintains that this is consistent with the Corps' definition.

General Limitations and Conditions: ORAM Assessment (E.7 and Appendix B)

Comment 34: Several comments were received stating that requiring photographs of impacted resources from May 1st-September 30th, was too restrictive and would limit their ability to conduct sampling outside of those dates. They also stated that a date restriction is not in accordance the ORAM manual which allows assessments to occur at any time of year.

Response 34: See response 21 above.

Comment 35: Several commenters expressed concern over the lack of a timeline for Ohio EPA to review ORAMs submitted prior to the submittal of the Pre-construction Notification (PCN) to the Corps. Some commenters suggested 30 days from the receipt of the request and others suggested that the review occur concurrently with the Corps' review of the PCN application in order to avoid further project delays.

Response 35: Verification of ORAM scores for PCN projects is something that the Corps has required of Ohio EPA to conduct as part of this proposed modification. Ohio EPA maintains that there is value, whether it is Ohio EPA or the Corps conducting a verification of the ORAM scores for these projects and that it can be conducted efficiently. In response to these comments and, in coordination with the Corps, Ohio EPA has elected to leave the ORAM Verification Process as it is currently being handled. Appendix B has been revised to reflect this process. This will allow both agencies and applicants to operate as they have been since the 2012 issuance of the NWPs. The Local Procedures Agreement (LPA) between Ohio EPA and the Corps has been updated so that when the PCN application is received, the Corps will send the PCN to Ohio EPA. The process includes a 25 day time limit for Ohio EPA to provide feedback to the Corps.

Comment 36: **ODOT requested that any water quality data collected in a manner that deems it Level 2 or Level 3 credible data under Ohio Revised Code 6111.51 and Ohio Administrative Code (OAC) 3745-4-01 be exempted from the need for Ohio EPA verification under Regional General Condition No. 6(e). This would include any water quality data collected under OAC 3745-4-01 (D)(1) and (D)(2) by qualified data collectors as noted in OAC 3745-4-03 as well as federal environmental agencies (defined in 3745-4-02 (G)) and state environmental agencies (defined in 3754-4-02(S)). Data collected by individuals or agencies considered "qualified" would be considered "credible", and would not require the Ohio EPA's verification before submitting a PCN to the USACE.**

Response 36: The credible data program does not have a process to certify data collectors in wetland categorization with ORAM. Therefore this would not be a viable option at this time. The creation of the water quality certified professional program may allow for more flexibility in the future.

Comment 37: **Several comments were received stating that Ohio EPA should require ORAMs to be submitted to Ohio EPA for all projects that propose impacts to wetlands, including those projects that do not require a PCN.**

Response 37: Limiting review of ORAM verifications to those that trigger a PCN is an attempt to balance the efficiencies to be gained through nationwide permitting against appropriate protections of wetlands. Projects that trigger a PCN are more significant relative to potential impacts than those that do not and thus those ORAM scores will be reviewed. The agency retains its ability to review projects to ensure accurate information and to take corrective measures if information proves to be inaccurate. It must be emphasized that all NWPs are considered minimal impacts, and

requiring ORAMs for only those projects which trigger a PCN is consistent with the conditions in the 2012 401 WQC for the NWPs.

Comment 38: **One commenter suggested that the Appendix B be updated to include what applicants can expect to receive from Ohio EPA after ORAMs have been submitted. They asked if written verification from Ohio EPA will be received and if the Corps would receive notification of the ORAM verification.**

Response 38: See response 35 above. Applicants will be expected to submit the PCN with ORAM forms, when applicable, to the Corps and the Corps will coordinate with Ohio EPA pursuant to the LPA between Ohio EPA and the Corps. This will allow both agencies and applicants to operate as they have been since the 2012 issuance of the NWPs.

Comment 39: **One commenter suggested that the procedures in Appendix B should only apply when impacts are proposed to category 3 wetlands or between 0.1 acres and 0.5 acres of category 1 or 2 wetlands.**

Response 39: See responses 35 and 38 above. Appendix B has been revised to reflect the change and the LPA has been updated to mimic the thresholds in the current LPA.

Comment 40: **One commenter requested that the mapping requirement outlining the entire wetland boundary in Appendix B be clarified that the portions of wetlands located outside of the project areas should be mapped using aerial photography and other available tools as these areas are often inaccessible to the people conducting the assessments.**

Response 40: Ohio EPA understands that applicants are often constrained to the limits of their project area due to property access issues. However, in order to properly assign a wetland category using ORAM, the scoring boundary of the entire wetland must be established. Ohio EPA maintains that condition d in Appendix B does not preclude applicants from estimating the entire wetland boundary based upon other available methods such as aerial imagery if the wetland extends beyond their project area.

Comment 41: **ODOT stated that the condition in Appendix A and B which requires comments from the ODNR Natural Heritage Database and the United States Fish and Wildlife Service regarding threatened and endangered species may not be appropriate for all of their projects. They often perform their own natural heritage database review, using ODNR's data, and provide a statement of findings with regard to that review rather than ODNR providing the letter. Additionally, ODOT does not consult or coordinate with the USFWS or ODNR on**

projects that will result in "no effect" on federally listed species or that will not result in impacts to state listed species. In these cases, ODOT will not provide comments from those agencies, but will provide the determinations that ODOT has made on impacts to state and federally listed species.

Response 41: In response to this comment the conditions in Appendix A and B regarding threatened and endangered species has been changed. Please refer to the final 401 WQC.

General Limitations and Conditions: Stream Eligibility (E.8 and Appendix C)

Comment 42: Several comments were received stating that requiring photographs of impacted resources from May 1st-September 30th was too restrictive and would limit their ability to conduct sampling outside of those dates. They also stated that a date restriction is not in accordance with the HHEI or QHEI manuals which allow assessments to occur at any time of year.

Response 42: See response 21 above.

Comment 43: Several comments were received asking for clarification regarding the use of the term "entire project" in Appendix C in relation to the single and complete linear and non-linear project definitions used throughout the proposed 401 WQC.

Response 43: Appendix C has been revised in an attempt to clarify some of the conflicting language. Please refer to the revised Appendix C. Additionally, for linear projects with multiple single and complete linear projects, one director's authorization letter will be issued for all single and complete projects that exceed the 401 WQC conditions.

Comment 44: Several commenters stated that the stream eligibility process is unlawful and not in accordance with OAC 3745-1-05 and the Clean Water Act requirement for the protection of existing uses. They stated that the process could allow impacts to high quality streams located in low quality watersheds. They also suggested that the rule package for primary headwater streams be taken off the shelf and promulgated.

Response 44: It must be emphasized that NWPs are designed to provide an efficient permitting response for activities that are common in nature for impacts that have minimal adverse effects on the environment. The director has considered these types of impacts as a part of his antidegradation review in fashioning the 401 WQC and has chosen to place additional procedural requirements/protections on certain projects that propose impacts to high quality resources. It does not mean that streams in other watersheds will not be protected but rather, the director has determined that the corresponding impact limits of the NWP along with terms and conditions

placed in this 401 WQS are appropriate mechanisms to ensure that the impacts are consistent with Ohio's water quality standards. It should also be recognized that nothing in this 401 WQC would prevent the project from applying for and obtaining an individual 401 Certification.

Comment 45: **Several commenters expressed concern over the apparent shift from the current policy of evaluating the existing use of surface waters to the new approach of protecting known high quality waters. The commenters requested that Ohio EPA maintain its current policy of determining the existing use at the point of impact and incorporate additional levels of data collection such as chemistry and biology.**

Response 45: It is accurate to characterize the approach embodied in this modification to be a shift in emphasis relative to how the agency is focusing its efforts to provide enhanced protection to high quality waters in the context of the 401 WQC for the NWP's. Based on the role of nationwide permitting in providing an efficient process for authorizing impacts that are considered minimal, the Agency believes this approach represents an improvement towards ensuring protection of known high quality waters. In regards to the request to add additional environmental analysis for those streams depicted in yellow, the tools and analysis were selected based upon the agency's existing data that correlates habitat to stream performance as well as input from the stakeholders. The Agency believes that the tools and methods establish appropriate metrics towards indicating the environmental quality of the stream and its potential influence on downstream water quality.

Comment 46: **Several commenters stated that the stream eligibility process is overly broad and includes streams that may not be high quality in areas listed as ineligible or potentially eligible. They asked that applicants be allowed to do HHEI and QHEI assessments on streams proposed for impact that are located within the ineligible areas and use the provided flowcharts to determine eligibility. This would be similar to the process allowed for streams proposed for impact located within the potentially eligible areas.**

Response 46: Ohio EPA agrees that some of the waters in the purple/yellow area may not themselves exhibit characteristics that would be have an existing use of cold water, exceptional warmwater, or seasonal salmonid aquatic life uses (high quality waters). However, the emphasis of this new approach is requiring enhanced protection to those waters that the agency knows exhibit those characteristics (whether they be listed in the standards or are known based on the agency's water quality data). One way to accomplish that goal is to create additional permitting requirements and review on those waters as well as those waters that may be contributing

to that stream's ability to maintain/achieve that high quality. While there are other ways to accomplish the same end, the agency believes this approach is both technically and legally appropriate in the implementing a water quality certification for the nationwide permits.

In regards to performing HHEI and QHEI assessments and using the flowcharts if impacts are proposed within an ineligible area, Ohio EPA has determined that impacts in the ineligible areas are likely to have an impact on the downstream high quality resource and therefore deserve a more extensive antidegradation review, including the opportunity for public involvement, through an individual 401 WQC or director's authorization.

Comment 47: **Several commenters requested that biological sampling be incorporated into the QHEI and HHEI flowcharts as an option for applicants.**

Response 47: Ohio EPA agrees that biological sampling does provide valuable additional information with regard to stream quality. However, the intent of the flowcharts and the stream eligibility process is to provide a quick, inexpensive, and predictable tool for applicants to use to determine if they qualify for coverage under the 401 WQC for the NWP. The addition of biological sampling would be an added expense to applicants and would add time in data collection as well as agency review.

Comment 48: **One commenter stated that the proposed modifications, with regard to stream eligibility would violate the stated intent of the Nationwide Permit program.**

Response 48: Ohio EPA is attempting to strike the appropriate balance of permitting efficiency against ensuring that impacts to higher quality resources are given greater scrutiny. There are certainly other ways to accomplish this objective and the director considered other approaches but ultimately decided on the current approach as the one to best balance those competing objectives.

Comment 49: **Several commenters stated that the stream eligibility determinations should be reviewed and approved by Ohio EPA and should be required for all projects that propose impacts to streams, including those projects that do not require a PCN.**

Response 49: Limiting the stream eligibility determinations to those that trigger a PCN is an attempt to balance the efficiencies to be gained through nationwide permitting against appropriate protections of streams. Projects that trigger a PCN are more significant relative to potential impacts than those that do not and thus the stream eligibility determination will be required. The agency retains its authority to review projects to ensure accurate information and to take corrective measures if information proves to be

inaccurate. It must be emphasized that all NWP's are considered minimal impacts.

Comment 50: **Several commenters asked for further clarification and explanation on the methods used to create the stream eligibility map. They suggested that a fact sheet be provided to accompany the map.**

Response 50: The data used to generate the map was based upon all of the designated uses that are currently in rule (OAC 3745-1) as well as all of the existing use data that the Agency has gathered, including those that may not be currently in rule. The ineligible areas were delineated with the intent of protecting high quality streams which have a designated or existing aquatic life use or antidegradation categories of one of the following: Exceptional Warmwater Habitat, Coldwater Habitat (with fish), Outstanding State Water, and Superior High Quality Water. In those ineligible areas, the Agency elected to further evaluate impacts in the ineligible areas via an individual 401 WQC or a director's authorization. The GIS map was created by taking the United States Geological Survey (USGS) National Hydrography Dataset (NHD) catchment layer and Hydrologic Unit Code (HUC) 12 boundaries layer and overlaying those on the above described high quality streams layer. Using the HUC 12 watersheds as the outer boundary, any catchment within a HUC 12 that intersected high quality stream received a label of ineligible (purple areas on the map). Any catchment within a HUC 12 that contained an ineligible catchment but didn't directly intersect a high quality stream, received a label of potentially eligible (yellow areas on the map). Any catchment that didn't have either of the two above described conditions received a label of eligible (no color on the map).

Comment 51: **One commenter stated that at the NHD catchment scale, the choice to assign NWP stream eligibility is confounded by the way that the catchments divide the watersheds. This can lead to assignments on the map that may not support the intent of the stream eligibility process.**

Response 51: For purposes of protecting high-quality resources located in ineligible areas on the GIS map, the Agency delineated a boundary set by an outer limit of the HUC 12 boundaries overlain by the associated USGS NHD catchment layer. The NHD catchment is a digital hydrographic data set produced by USGS in cooperation with U.S. EPA and is intended to benefit a wide variety of water quality studies. When the catchment layer is combined with the high quality streams layer, the areas of sensitivity where impacts are most likely to affect water quality are identified. As a result, the Agency is confident this approach will capture most of the high-quality basins and be protective of downstream use.

Comment 52: Commenters provided specific examples where areas of the map did not appear to be in line with the designated uses of streams within the area. As a result, they requested that the map be reevaluated and the boundaries of eligibility redrawn.

Response 52: As stated above, the data used to generate the map was based upon known designated and existing uses for streams, including those that may not be currently in rule but are known based upon data collected by Ohio EPA. Therefore, the map does not completely match up with only those designated uses that are promulgated in rule. The Outstanding State Water layer was incorrectly drawn for the Cuyahoga River; therefore the lower catchments of that river were drawn as ineligible. The map has been revised to correct this error. With each reissuance of the 401 WQC for the NWP, Ohio EPA will reevaluate and refine the map to ensure its accuracy.

Comment 53: Several commenters asked for clarification about when Appendix C would apply. The wording seemed to indicate that Appendix C and condition E.8 would apply for any project that proposed impacts to a stream that required a PCN. They asked if whether this was the intent of the language or whether the conditions only apply if it is specifically addressed in the special limitations and conditions for each NWP.

Response 53: Appendix C and condition E.8 are intended to apply only when it is specifically addressed in the special limitations and conditions for each NWP. The language has been revised for Appendix C and condition E.8 in an attempt to clarify the intent. Please refer to the final 401 WQC for the NWP.

Comment 54: Several commenters stated that an HHEI threshold of 50 was too restrictive to determine eligibility, and as a result, many of the streams within the potentially eligible areas will be ineligible.

Response 54: The HHEI and QHEI breakpoints established in the flow charts were chosen based upon the existing data that was collected by Ohio EPA for many decades. The breakpoints were chosen to be protective of water quality. Additionally, the HHEI flow chart allows for an examination of stream substrates. If an HHEI score is equal to or greater than 50 and less than or equal to 69, then the stream impact could be eligible for coverage under the NWP if the substrate composition is less than 10 percent of coarse types.

Comment 55: One commenter requested that the pH requirements in Appendix C only apply to streams with adequate flow and only to those watersheds that historically have been impacted by coal mining and mine drainage.

Response 55: The intent of the pH measurement is to capture the pH of the water within the stream. If no water is present within the stream, a pH measurement cannot be taken. Applicants can choose to revisit the site when water is present in the stream or they may proceed without collecting a pH value. In response to this comment Appendix C condition 1.c.ii.(2) has been changed to “pH values for each stream proposed for impact taken within the proposed project area, where applicable.”

Comment 56: **One commenter requested that other information in addition to pH, such as visual observations of aluminum or hydroxide precipitates, be used to screen out streams that have been adversely impacted by mine drainage.**

Response 56: Ohio EPA considered the inclusion of other parameters that could be used to screen out lower quality streams. However, the Agency maintains that pH is the only quantifiable metric that allows for a reliable method to screen out streams that have been adversely impacted by mine drainage. If a stream appears to have been adversely impacted by mine drainage and the pH is greater than or equal to 6.5, the impairment should be reflected in the HHEI score.

Comment 57: **One commenter requested that the flow chart process for streams in potentially eligible areas include a screen for intermittent and perennial streams similar to that provided for ephemeral streams.**

Response 57: Ohio EPA considered including intermittent streams as an off ramp, similar to ephemeral stream, but it was determined that intermittent streams are often difficult to discern based upon a single site visit and interstitial streams can often be mischaracterized as intermittent. Therefore, the decision was made to only include ephemeral streams as an off ramp in the flow charts.

Comment 58: **One commenter requested that the pH requirement be further defined to reflect when the measurement should be taken, such as, “not to be used within 24 hours of a significant rainfall event.”**

Response 58: Ohio EPA considered adding specific parameters regarding the pH collection. The flow charts and the procedures outlined in Appendix C were intended to give applicants a clear and concise method to determine whether the streams proposed for impact within their project are eligible for coverage under the 401 WQC for the NWPs. The Agency maintains that additional constraints on sampling times and conditions would further inhibit this intent. If a pH measurement is taken within 24 hours of a significant rainfall event, and the applicant maintains that the value is not representative of the normal pH value, then they can choose to revisit the site when conditions are representative. They also may choose to

proceed with the pH value that was collected or choose to proceed without collecting a pH value.

Comment 59: Several commenters requested that the language in Appendix C be clarified to indicate that the conditions only apply when impacts are proposed to a *stream* located in an ineligible, potentially eligible, or eligible area. The language as proposed indicated that the conditions would apply if any portion of the *project* falls within an ineligible, potentially eligible, or eligible area.

Response 59: The language has been revised to clarify the applicability of Appendix C. Please refer to the final modification of the 401 WQC for the NWP.

Special Limitations and Conditions for Specific NWPs

Comment 60: Several comments were received stating that the change in the culvert length condition for NWPs 3, 4, 5, 6, 7, 12, 14, 29, 33, 39, 40, 43, and 51 could result in excessive culvert lengths for the passage of aquatic organisms. The commenters requested that the previous language for this condition be reinstated. ODOT suggested that the language be changed to “For an individual stream, while the repair or replacement of an existing culvert of any length is not limited by this certification, any culvert extension shall not exceed 300 linear feet.”

Response 60: The culvert condition for the above listed NWPs has been changed to the above language ODOT suggested.

Comment 61: Several comments were received regarding the removal of the 401 WQC conditions for those NWPs that only authorize activities under Section 10 of the Rivers and Harbors Act (NWPs 1, 2, 9, 10, 11, 28, and 35). Commenters stated that the removal of those conditions could result in unlimited impacts to wetlands for those NWPs. The commenters also expressed concern that several NWPs authorize impacts, an apparent unlimited amount in some cases, to category 3 wetlands.

Response 61: Ohio EPA maintains that many of the activities authorized by NWPs under Section 10 of the Rivers and Harbors Act would not have an effect on water quality and thus have not included any conditions to their use in Ohio. However, Ohio believes that NWP 35 could have an effect on water quality and thus we have included some specific conditions for that NWP.

Comment 62: Several commenters requested clarification of how public need is determined for impacts to category 3 wetlands under this 401 WQC. ODOT also suggested that if a project is coordinated through the

National Environmental Policy Act (NEPA) process, then the determination of public need has already been made.

Response 62: The director will go through the same analysis in determining public need as would be done in the context of an individual 401 WQC application. Public need is defined in Ohio's water quality standards as "an activity or project that provides important tangible and intangible gains to society that satisfies the expressed or observed needs of the public where accrued benefits significantly outweigh reasonably foreseeable detriments." These determinations, when they occur, are fact specific. In making this determination, the director considers the language in the rule, and how it has been historically applied and implemented. The public need determination also is a unique provision to Ohio's antidegradation rule. While it is possible that projects that go through a federal NEPA process may be of a nature to be able to demonstrate public need, it is not an absolute legal equivalency.

Comment 63: **ODOT requested that the 401 WQC conditions for NWP 6 (Survey Activities) allow projects that only involve the backfilling of boring holes to be covered under the 401 WQC.**

Response 63: After evaluating the NWP conditions, that allow for exploratory trenching, Ohio EPA has changed condition 2 for NWP 6 to "Individual 401 WQC is required for use of this nationwide permit when temporary or permanent impacts, other than the backfilling of exploratory-type bore holes less than or equal to 12 inches in diameter, are proposed on or in any of the following waters..." This addresses ODOT's concern while also limiting the type and size of the impacts authorized under the 401 WQC for NWP 6.

Comment 64: **One commenter expressed support for the removal of the three 8-digit HUC threshold from NWP 12 (Utility Activities).**

Response 64: The support for the removal is noted.

Comment 65: **Several comments were received regarding condition 8 within NWP 12 which limits the total width of excavation, grading or clearing to a maximum of 50 feet. Commenters asked for clarification that this applies only within waters of the state, not to upland areas.**

Response 65: Condition 8, formerly condition 13, within the 401 WQC for NWP 12 was revised to add clarity to a condition that was incorrectly written in the previous 401 WQC. The intent of the condition is to limit the utility line clearing width to 50 feet at each crossing of waters of the state. If utility clearing is occurring in entirely upland areas, there would be no placement of fill into waters of the state and therefore no trigger for a 404/401. When issuing a 401 WQC, the director has the authority to consider the direct and indirect impacts to surface waters of the state,

which may include additional Best Management Practices (BMPs) on upland areas, and to condition the certification to protect those surface waters from degradation. Condition 8 is included to help ensure no further degradation to water quality. Please refer to the following case for precedent regarding this issue: PUD NO. 1 of Jefferson County and City of Tacoma v. Washington Department of Ecology, Et Al., 511 U.S. 700, (May 31, 1994).

Comment 66: **One commenter asked why the 401 WQC conditions for NWP 15 (U.S. Coast Guard Approved Bridges) are different than the conditions for NWP 14 (Linear Transportation).**

Response 66: NWP15 and NWP14 authorize different activities; therefore, the differing 401 conditions placed on the two NWPs are appropriate.

Comment 67: **Several requests were received to prohibit any impacts to category 3 wetlands for NWP 3 (Maintenance), 12 (Utility Activities), 14 (Linear Transportation), 27 (Aquatic Habitat Establishment, and Enhancement Activities), and 38 (Cleanup of Hazardous and Toxic Waste).**

Response 67: In the 2012 401 WQC issuance, Ohio EPA determined that impacts to less than 0.1 acres of category 3 wetlands associated with existing infrastructure may be authorized NWPs 3, 12, and 14. This narrow exception applies only to existing infrastructure projects that meet public need such as the repair, maintenance, and safety upgrades of roads, bridges, wastewater treatment plants, and utility lines that require emergency repair. NWP 27 only allows impacts to very specific Lake Erie category 3 wetlands. Ohio EPA does not propose changes to those conditions in this modification. The change to allow category 3 wetland impacts for NWP 38 only allows those impacts in emergency situations where immediate threats to public health or the environment exist. Ohio EPA does not want to delay any emergency response for hazardous and toxic waste cleanup by requiring applicants to obtain an individual 401 WQC.

Comment 68: **Several commenters expressed concern that NWP 19 (Minor Dredging), 20 (Response Operations for Oil and Hazardous Substances), and 31 (Maintenance of Existing Flood Control Facilities) appear to authorize unlimited impacts to wetlands.**

Response 68: Per the Corps' condition for NWP 19, dredging or degradation of wetlands is not authorized; therefore no additional 401 WQC conditions pertaining to wetlands are required. With regard to NWP 20 and 31, Ohio EPA determined that it is not prudent to require additional conditions for projects that address responses to human health and safety concerns.

Comment 69: **One commenter stated that the 401 WQC stream eligibility conditions for NWP 13 (Bank Stabilization) and 33 (Temporary Construction, Access, and Dewatering) would cause unnecessary costs and delays and requested that the conditions be removed.**

Response 69: After evaluating the Corps' NWP conditions, Ohio EPA has decided to leave the 401 WQC conditions as written.

Comment 70: **Several requests were made to prohibit any impact to category 2 or 3 wetlands for NWP 43 (Stormwater Management Facilities).**

Response 70: The 401 WQC currently does not allow impacts to category 3 wetlands under NWP 43 and impacts to category 1 and 2 wetlands are limited to 0.5 acres. Given the Corps' conditions for this NWP, the Agency maintains that the 401 WQC conditions as written are appropriate.

Comment 71: **Several requests to allow coverage only under the 401 WQC for the NWP if 100 percent of the total area disturbed has been previously mined for NWP 49 (Coal Remining Activities).**

Response 71: Ohio EPA has removed NWP 49 from this 401 WQC modification. The originally issued 401 WQC for NWP 49 from 2012 will remain in effect and is currently under appeal. Any modifications to NWP 49 will be addressed as part of the Environmental Review Appeals Commission appeal process.