

## **Responsiveness Summary for Public Comments Received Regarding the Draft Section 401 Water Quality Certification Nationwide Permit Renewals**

Ohio EPA's Division of Surface Water has prepared this Responsiveness Summary to address oral and written comments received during the public comment period for Ohio EPA's draft nationwide permit renewal for the U.S. Army Corps of Engineers.

The draft Section 401 water quality certification and public comment period were published in the Federal Register on January 15, 2002. Ohio EPA conducted a public hearing on April 24, 2002, at the Ohio Department of Transportation, 1980 West Broad Street, Columbus, Ohio. Ohio EPA also received written comments during the public comment period.

- 1. The limited applicability of the nationwide permits, taken together with significant restrictions in Ohio EPA's certification of the nationwide permits, will easily triple the number of individual Section 401 Certifications which will need to be processed by Ohio EPA and would impose additional and unnecessary regulatory costs duplicated with the federal review.**

Based on a review of available data regarding the number of permits received, Ohio EPA believes there will be little change in the agency's workload due to approval of this certification.

- 2. Four Corps districts oversee regulated activities in Ohio with a total staff of over 25 field representatives dedicated to this effort. In contrast, Ohio EPA struggles to maintain a staff of six project managers in the 401 unit to certify each individual permit. We strongly urge Ohio EPA to devote these limited resources to those projects where impacts to aquatic resources are significant by certifying the Corps nationwide permits with regional conditions as is.**

Ohio EPA believes that the certification of the nationwide permits as proposed by the Corps would result in more than minimal impacts on water quality. Consequently, Ohio EPA has conditioned the nationwide permits to ensure that impacts would be minimal and in accord with applicable rules and laws.

- 3. To avoid waste of taxpayer and private dollars pledged for the restoration of Ohio's aquatic resources, Ohio EPA should not certify impacts under any nationwide permit where an ongoing restorative effort is taking place.**

Ohio EPA believes that projects that meet the Corps nationwide permit conditions and Ohio EPA's conditions contained in the certification will have minimal impacts on water quality and will not interfere with restoration of Ohio's aquatic resources.

- 4. Please change the certification so that watershed coordinators, environmental groups, and other interested parties are notified via electronic copy of a nationwide permit application and given time to comment.**

The goal of the nationwide permit program is to reduce time and expenditures involved in smaller or less environmentally-sensitive projects. For a project to be approved under the nationwide permit program, it must meet certain requirements to ensure that there will be minimal impacts on water quality. Proposed projects must meet conditions outlined by both the Corps nationwide permit and Ohio EPA's 401 Water Quality Certification to reduce water quality impacts.

- 5. Ohio EPA should not certify any wetland impacts under the nationwide permits because studies show that wetland mitigation projects are usually failures for many reasons including that they are not built. If they are built they are not monitored for success or protected in perpetuity.**

The goal of Ohio EPA's wetland mitigation program is to ensure that applicants provide adequate compensation for any unavoidable impacts to existing wetlands during project completion. If a review of the proposed project shows that wetland impacts are necessary, the project applicant must mitigate those impacts according to Ohio Administrative Code 3745-1-50 through 54. These rules specify that wetland mitigation projects must meet certain requirements related to location, ratios, and quality. The rules require that mitigation wetlands be monitored for five years and that applicants submit an annual report to Ohio EPA. Required monitoring includes assessments of size, hydrology, soils, vegetation, and overall performance. If the project does not meet established mitigation goals, the rules allow for continued monitoring until the goals are met. Lastly, the rules require that the applicant must demonstrate that the mitigation wetland will be protected in perpetuity.

**6. Ohio EPA should review individually every project that will impact streams and wetlands and not allow any impacts under nationwide permits.**

For a project to be approved under the nationwide permit program, it must meet certain requirements to ensure that there will be minimal impacts on water quality. Prior to approval, proposed projects must meet all conditions outlined by both the Corps nationwide permit and Ohio EPA's 401 Water Quality Certification regulations.

**7. When Ohio EPA cannot perform a site visit for a nationwide permit, watershed groups should be allowed to report their site visit to Ohio EPA.**

Ohio EPA does not routinely perform site visits for projects authorized under a nationwide permit and Section 401 certification. However, if local watershed groups have concerns about an ongoing project based on visits to the site, Ohio EPA would welcome any information provided in the event corrective measures are warranted.

**8. Ohio EPA should not allow under a nationwide permit or individual permit any culverting of any stream that reduces to any degree the recreational value for activities such as canoeing and fishing, particularly streams designated with a recreational use in the rules.**

For a project to be approved under the nationwide permit program, it must meet certain requirements to ensure that there will be minimal impacts on water quality. Proposed projects must meet conditions outlined by both the Corps nationwide permit and Ohio EPA's 401 Water Quality Certification to reduce water quality impacts. If affected waterways are designated as recreational use, the proposed project must also meet appropriate conditions to be protective of those uses.

**9. Please provide all information on culverting of streams, and under what scientific, legal, and other justification, Ohio EPA continues to allow creeks and streams to be placed in culverts.**

Ohio EPA does not encourage culverting of natural waterways, but acknowledges that some projects can include this practice with minimal impacts to water quality. For a project to be approved under the nationwide permit program, it must meet certain requirements to ensure that there will be minimal impacts on water quality. Proposed projects must meet conditions outlined by both the Corps nationwide permit and Ohio EPA's 401 Water Quality Certification to reduce water quality impacts.

- 10. Ohio EPA and the Corps do not consider cumulative impacts and in fact do not have a comprehensive, complete computer database of all Ohio wetlands and streams, or the number, nature, and types of impacts already suffered by the various waterbodies. Ohio EPA and the Corps needs to undertake an effort to obtain this information.**

The Corps is working on implementing a database that would track all impacts permitted under Section 404 permits including those with Section 401 water quality certifications. The Ohio EPA is implementing a Total Maximum Daily Load (TMDL) program, under Section 303(d) of the Clean Water Act, which focuses on identifying and restoring polluted rivers, streams, lakes and other surface waterbodies. A TMDL is a written, quantitative assessment of water quality problems in a waterbody and contributing sources of pollution. It specifies the amount a pollutant needs to be reduced to meet water quality standards, allocates pollutant load reductions, and provides the basis for taking actions needed to restore a waterbody. The process builds on existing biological monitoring, modeling, permitting, and grant programs and works within our five-year monitoring strategy. The process calls for increased public involvement in problem-solving and decision-making.

- 11. The Ohio EPA Section 401 water quality certification of the nationwide permits is being promoted by the Ohio legislature and lobbyists.**

Ohio EPA did not receive any letters or public comment from any members of the Ohio legislature regarding the Section 401 certification of the nationwide permits. Ohio EPA did receive several letters from industry groups, environmental groups, and individuals.

- 12. Regarding General Limitation and Conditions A1 and A2, Ohio EPA should not have any limitations on ephemeral and intermittent streams. Ephemeral and most intermittent streams do not support aquatic life. Instead Ohio EPA should, like the Corps, approve impacts on up to ½ acre each of intermittent and ephemeral streams.**

General Limitations and Conditions A1 and A2 are unchanged from Ohio EPA's last certification. Ohio EPA's research has shown that ephemeral and intermittent streams often perform important water quality functions. In addition, intermittent streams often support aquatic life and can even support warmwater biological communities. Based on this information, Ohio EPA will not approve an increase in the affected area designation as it could result in increased negative water quality impacts.

**13. Regarding General Limitation and Condition A1 and A2 and General Limitation and Condition B1 and B2, Ohio EPA should make a distinction between “temporary” and “permanent” and certify under the nationwide permits more projects with temporary impacts.**

These conditions are unchanged from Ohio EPA’s last certification. Ohio EPA data supports the continued use of existing criteria for determining if potential impacts will result in minimal water quality degradation. Any projects whose impacts are determined to exceed minimal impacts to water quality will not be permitted under the nationwide and Section 401 programs.

**14. Regarding General Limitation and Condition A2, Ohio EPA’s regulation of ephemeral streams is outside of the authority of the agency.**

This condition is unchanged from Ohio EPA’s last certification. The Corps considers ephemeral streams jurisdictional, and therefore protection of these streams is covered under Ohio law. Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.

**15. Regarding General Limitation and Condition A5, Ohio EPA should not require that natural channel design be used to replace ephemeral and intermittent streams.**

This condition is unchanged from Ohio EPA’s last certification. Ohio EPA’s research has shown that ephemeral and intermittent streams often perform important water quality functions. In addition, intermittent streams often support aquatic life and can even support warmwater biological communities. Based on this information, Ohio EPA requires that potential impacts to these waterways be mitigated to maintain the original form and function of the waterway to the highest extent possible to reduce potential negative water quality impacts. Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.

- 16. Regarding General Limitation and Condition A6, applicants should only need to review stream mitigation sites that are “practicable”. Also we suggest that stream mitigation should be allowed to go out of the Ohio EPA 8-digit watershed if there are significant ecological reasons to do so.**

The condition uses the term “extent practicable”. Ohio EPA believes that stream mitigation should be limited to the Ohio EPA 8-digit watershed in order to ensure that unavoidable impacts to a watershed are mitigated to produce improvements to the same watershed and lessen overall impacts to affected waterbodies.

- 17. General Limitation and Condition A6, requires that improvements and protective measures be focused on the causes and sources of stream impairment is well-justified legally and scientifically. In addition, that requirement should be amended to say “if the stream is on the Ohio EPA TMDL list, OR IF THE STREAM IS A TRIBUTARY TO A STREAM ON THE OHIO EPA TMDL LIST, which can...’.**

The condition was rewritten to clarify that mitigation shall focus, in order of priority, on 1) the stream segment being impacted, 2) upstream segments and tributaries, 3) the receiving stream. If mitigation cannot be located on the above streams, mitigation shall be in the Ohio EPA 8-digit watershed.

- 18. Regarding General Limitations and Condition A6, Ohio EPA should not require applicants to address point sources of water pollution as mitigation for their projects. Also please define the term “extent practicable”.**

Ohio EPA has written the condition to state that applicants shall focus on the stream being impacted and “should consider” the causes and sources of impairment. The Corps will use their judgement in applying the term “extent practicable”. The condition was not written with the intent that applicants address point sources of pollution and consideration of these sources are not a requirement of the mitigation conditions.

- 19. Regarding General Limitation and Condition A6, Ohio EPA should produce a reference table to show all designated uses, antidegradation categories, and TMDL status for all streams.**

Currently, Ohio EPA plans to incorporate lists of streams placed in the updated antidegradation categories into the rules. Ohio EPA agrees that it is difficult to find this information for streams and works with the project applicant to determine if the information is readily available during evaluation of the permit conditions.

**20. Regarding General Limitation and Condition A6, Ohio EPA should re-evaluate and consolidate this rather large Ohio EPA TMDL list.**

Ohio EPA is in the process of evaluating the list of impaired waters and TMDL schedule. Based on the data gathered, the agency plans to update the information in 2002.

**21. Ohio EPA has no authority for activities occurring outside of the Ordinary High Water Mark. Therefore General Limitations and Conditions A7 regarding buffers for mitigation should be deleted.**

This condition is unchanged from Ohio EPA's last certification. In addition, the Corps' General Condition 19 also requires projects in or near streams or other open waters to establish, maintain, and legally protect vegetated buffers to open waters.

**22. Regarding General Limitation and Condition A7, the on-site buffers requirement should be prefaced to say that the referenced minimum will be provided "where practicable".**

This condition is unchanged from Ohio EPA's last certification. Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.

**23. Regarding General Limitation and Condition A7, this condition is duplicated in the Corps General Condition 19. Therefore Ohio EPA should remove it.**

The Corps condition does not have a minimum buffer width while Ohio EPA's condition does. Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.

**24. General Limitation and Condition A8 requires that the location for mitigation of impacts from linear projects be determined according to the wetland rules. This is inappropriate.**

This condition has been rewritten in response to this comment.

- 25. General Limitation and Condition B3 should be strengthened by amending it as follows: “...mitigation may be located outside of the watershed if there are significant ecological reasons to do so AND ONLY IF SO APPROVED BY THE DIRECTOR.” Or, alternatively, the condition should simply require all mitigation to be in-watershed.**

This condition is unchanged from Ohio EPA’s last certification. As stated earlier, General Limitation and Condition A6 discusses the requirement the mitigation be located in the same 8-digit watershed to the “extent practicable”. Ohio EPA believes that stream mitigation should be limited to the Ohio EPA 8-digit watershed in order to ensure that unavoidable impacts to a watershed are mitigated to produce improvements to the same watershed and lessen overall impacts to affected waterbodies. Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.

- 26. Regarding General Limitation and Condition B3, applicants should only be required to consider “practicable” on-site wetland mitigation options in view of recent studies which have documented that on-site mitigation is often not ecologically successful.**

This condition is unchanged from Ohio EPA’s last certification. According to OAC 3745-1-54(E)(1)(a), “For category 2 and category 3 wetlands, if compensatory mitigation is to be off-site, the applicant shall demonstrate the impracticability of mitigating on-site.” Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.

- 27. A condition should be added under General Limitation and Condition C, that for all projects, pre-development hydrology is maintained and that stormwater controls shall comply with OAC 1501:15-1-05.**

This condition has been added to the certification.

- 28. Regarding General Limitation and Condition C3, there is no reason to reference requirements of an NPDES construction stormwater permit. This NPDES program has its own enforcement authority and should not trigger termination of a Section 401 certification.**

This condition is unchanged from Ohio EPA's last certification. This reference places no additional requirements on the applicant and does not prevent a project from being eligible for coverage under a nationwide permit. Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.

- 29. Regarding General Limitation and Condition C4, Ohio EPA's requirement for post-development storm water ponds is unreasonable and unnecessary.**

Ohio EPA does not require stormwater ponds under this condition. The condition requires that if a stormwater pond is locally required, that the project incorporate water quality features from the ODNR's *Rainwater and Land Management* document.

- 30. Regarding General Limitation and Condition C4, we are concerned that Ohio EPA's requirement that water quality features be incorporated into post-development stormwater ponds may be inconsistent with local zoning/land planning requirements. If a community requires a different type of retention, Ohio EPA cannot override those requirements.**

Ohio EPA has added to the condition that the applicant shall incorporate the features to the extent allowed by local stormwater requirements. However, Ohio EPA does not expect that any of the features would be locally prohibited. In addition, there are features that can be added to stormwater ponds for water quality in addition to the state requirement at OAC 1501:15-1-05 to ensure that peak post development runoff rates do not exceed peak predevelopment runoff rates from the same area for all twenty-four-hour storms from one to one-hundred-year frequency.

- 31. Regarding General Limitation and Condition C5d, it may be impossible to segregate all hydric soils. Delete "all".**

This condition also appears in the General Isolated Wetland Permit. To maintain consistency between this certification and the General Isolated Wetland Permit condition, the language will remain as written.

- 32. Ohio EPA has two conflicting conditions, General Limitation and Condition C5h and C5i. One states a preference for performing work from the bank without getting into the stream, which would then involve impacts to the riparian corridor, while the other states a preference for avoiding impacts to the riparian corridor.**

These conditions have been rewritten to clarify the requirement being imposed.

- 33. Regarding General Limitation and Condition C5j, it is impossible to avoid “any” adverse effect on the aquatic habitat during in-stream activities that might be approved under a nationwide permit.**

This condition has been rewritten to clarify that no permanent adverse effect is allowed.

- 34. For Nationwide Permit 7, outfalls from post-development stormwater ponds that do not require a nationwide permit, should also be certified.**

The conditions were rewritten to allow outfalls for post-development stormwater ponds.

- 35. The Corps definition of a single and complete project may conflict with Ohio EPA intention regarding Nationwide Permit 12. This should be clarified.**

The conditions were rewritten to clarify the requirements. For forested wetlands, up to 500 cumulative feet of impact for the entire utility project is certified. For streams and wetlands, up to 1,500 cumulative feet of impacts for the entire utility project is certified. Ohio EPA believes these changes are necessary to ensure that project impacts remain minimal.

- 36. Condition 8 of Nationwide Permit 12 should be rewritten so that if either 1,500 feet of streams or wetlands are impacted OR the project has impacts in three or more hydrologic units, the certification is not applicable. Also, 1,500 feet should be changed to 200 feet.**

Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.

**37. Ohio EPA has not provided sufficient justification for the rule reference change in the Nationwide Permit 21 certification to include OAC 3745-1-07.**

Ohio EPA believes the change is appropriate because it provides the agency with flexibility in rule writing activities related to stream use designations.

**38. Ohio EPA should deny certification of Nationwide Permit 21 for the reasons stated in the December 26, 2001, Ohio Environmental Council appeal.**

The certification of Nationwide Permit 21 is appropriate.

**39. Regarding Condition 1 of Nationwide Permit 32, please clarify what time limit Ohio EPA has to make the determination of whether it wants to be involved with enforcement on these projects.**

This condition is unchanged from the previous certification. Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.

**40. Regarding Nationwide Permit 33, the condition that limits the duration to one year should be deleted.**

This condition is unchanged from the previous certification. Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.

**41. The proposed condition for Nationwide Permit 41 that allows up to 500 feet of activity on non-man-made streams is not scientifically justified and should be deleted.**

This condition is unchanged from the previous certification. Based on monitoring of previously completed projects of this type, Ohio EPA believes that this condition is necessary to ensure minimal water quality impacts and therefore will not make any changes to the existing language.