



Environmental Protection Agency

Division of Surface Water

Response to Comments

Project: Nationwide Permit State Water Quality Certification Reissuance
Ohio EPA ID Number: 113742

Agency Contacts for this Project

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Ohio EPA held a public hearing and/or comment period on February 27, 2012, regarding Ohio's recertification of the U.S. Army Corps of Engineers' (USACE) nationwide permits (NWP). This document summarizes the comments and questions received at the public hearing and/or during the associated comment period, which ended on March 5, 2012.

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.

Note: Water Quality Certification for NWPs 21, 49, and 50 authorizing impacts associated with coal mining activities will be issued separately. Similarly, responses to comments related to NWPs 21, 49, and 50 also will be provided separately.

GENERAL COMMENTS

Comment 1: "For clarity and consistency, the term 'state water quality permit' should be removed in response to the proposed rules being withdrawn from JCARR review." **[The Ohio Department of Transportation]**

Response 1: The term "state water quality permit" is not contained within Ohio's water quality certification of the nationwide permits.

Comment 2: "If coordination has occurred with Scenic Rivers, an individual permit should not be required for impact to a National or State Scenic River." **[The Ohio Department of Transportation]**

Response 2: National and State Wild and Scenic Rivers are designated Superior High Quality Waters under Ohio's antidegradation rules. Impacts to SHQWs were been prohibited in both the 2002 and 2007 certification of the NWP's. Ohio EPA listed National and State Wild and Scenic Rivers in the 2012 certification, not as a new condition, but rather to clarify a long-standing prohibition since they were not specifically listed in the 2002 and 2007 NWP's.

Comment 3: "ODOT suggests that Ohio EPA certify the USACE Nationwide Permits without additional conditions. ODOT feels that the USACE's conditions are appropriate for activities with minimal adverse impacts, which is the purpose of the Nationwide Permit Program, and that OEPA's conditions limit the use of Nationwide Permits for small projects with minimal impacts to aquatic resources. For example, prohibiting impacts to Category 3 wetlands under the Nationwide Permit Program is often difficult when ODOT is replacing a bridge in northeast Ohio where Category 3 wetlands are relatively common. If wetlands surround the structure, it's usually impossible to avoid a minimal impact, and, currently, Ohio EPA requires an individual 401 WQC for this type of project. We feel that a simple bridge replacement project should allow for a minimal impact even to a high quality resource without an individual 401 if the project has a strong purpose and need and no public controversy." **[The Ohio Department of Transportation]**

Response 3: Ohio EPA's legal requirement under Section 401 of the Federal Clean Water Act is to ensure activities do not violate state water quality standards. Ohio EPA adds conditions when necessary to ensure the standard is met. See also response 33 related to Category 3 wetlands impacts.

Comment 4: "Storm water discharge to natural wetlands is prohibited in several certifications. Definitions need to be provided storm water, and natural wetlands. Generally, storm water ponds are designed to discharge to the lowest point-a wetland or a stream. Wetlands provide functions of filtering, nutrient removal, floodwater attenuation, and siltation removal.

With that said, should storm water basins outlet to a wetland rather than a stream? Where can basins be outlet if a wetland is the lowest point? In many instances then a Section 401 Certification would be required."
[Cindy Paschke]

Response 4: Conditions requiring specific storm water best management practices (BMPs) have been removed from the certification and replaced with language requiring projects to comply with the Storm Water Construction General Permit (CGP) and any watershed specific storm water permits. Because the activities described above are already regulated in the CGP, it is not necessary to repeat them in the NWP.

Comment 5: "To my knowledge, ORAM QHEI and HHEI quality assessment methods have not been peer reviewed, or promulgated as regulation and therefore should not be a required measurement of quality. The Ohio Revised Code (ORC) states the wetland and stream quality should be determined based on a method acceptable to the Director. In the nationwide certification, the methods and specific score requirements are stated. Class III primary headwater habitats are not found in anywhere in the ORC and should not be used as a determining factor as to whether the nationwide permit is not applicable for use." [Cindy Paschke]

Response 5: Methods referenced in the comment above are widely recognized and are in common usage in the administration of the 401 program. The QHEI is well documented and described in the Ohio EPA publication, *The Qualitative Habitat Evaluation Index (QHEI): Rationale, Methods, and Application*, 11/6/89. ORAM v5.0 has been codified in state statute.

While use of the HHEI is also widely acknowledged and accepted, Ohio EPA has removed limitations on impacts to Class III primary headwater habitat streams in light of the rules packages having been withdrawn and currently undergoing a review under the Common Sense Initiative.

Comment 6: "We urge you to not allow coverage under the Nationwide Permits on Class 3 headwater streams (similar to Category 3 wetlands). Projects that will destroy these streams should require coverage under an individual permit." [The Ohio Environmental Council]

Response 6: The NWPs are designed to authorize impacts to aquatic resources that result in minimal impacts. While Ohio EPA recognizes the ecological importance of Class III headwater streams, that does not mean there should not be some minimal level of impacts to these streams that would be considered acceptable.

Comment 7: Impaired Waters – "Already, impaired waters must be protected from additional harm. We urge Ohio EPA to incorporate the following general conditions on impaired waters:

Coverage under NWPs should not be available, and an individual certification be required, for projects:

1. In waters with a Total Maximum Daily Load in place for parameters relative to the discharge of dredged or fill material (e.g., sediment, temperature);
2. On a 303(d) listed impaired waterbody with an impaired reach, if the project impacts the listed waterbody within ½ mile downstream of an impaired reach to within 1 mile upstream of an impaired reach, an individual permit is required. **[The Ohio Environmental Council]**

Response 7: Impacts authorized under the NWPs are considered minimal, and therefore, should not adversely affect the standing of waters on the 303(d) list.

Comment 8: Loss of Stream of Stream Conditions – “One of the bright points of the 2007 certification was the General Conditions regarding stream impacts. We urge Ohio EPA to reincorporate those protective and necessary conditions as outlined below.

- a. “The impact size limitation of 500 linear feet (or 200 linear feet on intermittent and perennial streams).
- b. “The 2007 Certification included language requiring maintenance of habitat values of reconstructed streams through the use of Natural Stream Channel Design. We urge Ohio EPA to restore that requirement to the 2012 Certification.
- c. “The 2007 Certification had a general condition that allowed for no temporary or permanent impacts to three categories of high-quality streams (including Exceptional Warmwater Habitat, Superior High Quality, those with federally listed species). While these were only for a subset of all NWPs, this condition contributes immensely to preserving these waters’ high quality. Further, we urge Ohio EPA to extend the requirement for an individual state water quality certification when temporary or permanent impacts are proposed for Ohio’s high quality waters.” **[The Ohio Environmental Council]**

Response 8: Ohio EPA responds to the above comments in the order in which they appear.

- a. The linear footage restriction was revised from a total of “...500 linear feet of which no more than 200 linear feet may be intermittent or perennial...” used in the 2007 NWPs, to limit impacts to 300 linear feet regardless of flow regime. The revision was made to align Ohio

EPA's certification of the NWPs with those authorized under the federal NWPs.

- b. This language has been inserted into Section F. Mitigation of the certification.
- c. This condition has been retained in the certification, but rather than appear once in the General Conditions, the restrictions have been placed in each specific NWPs when applicable. Ohio EPA's rationale for this change was to ensure an applicant would not inadvertently overlook the restriction because it appeared only in the General Conditions.

Comment 9: Waivers – “Where the Corps grants a waiver from any of its NWPs, it is still imperative that Ohio EPA review those operations to ensure that local impacts are not incurred due to the waived activity. Thus we request that Ohio EPA conditions those waived to require the permittee to apply for and receive an individual permit. We recommend a general conditions stating:

“NWPs issued for which the Corps grants a waiver on the 300 linear feet threshold for stream impacts or ½ acre of wetland impacts shall require an individual certification.” **[The Ohio Environmental Council]**

Response 9: Ohio EPA will review closely any permit where the Corps decides to grant a waiver. Ohio EPA does not believe an individual certification should be required for all waivers.

PART ONE: GENERAL LIMITATIONS AND CONDITIONS FOR ALL OHIO EPA CERTIFIED NATIONWIDE PERMITS

A. WATER SUPPLY INTAKES

Comment 10: In regard to WATER SUPPLY INTAKES, “Will an individual 401 be required for all bridge projects within 1,500 feet of a water supply intake? Does this include projects that do not even impact waters of the State? Is information on the location of these waters supply intakes publically available? The intent of this condition is unclear. ODOT conducts hundreds of projects every year that could potentially require additional coordination on this topic. Is the OEPA Source Water and Assessment Program staffed to handle hundreds of requests (by ODOT alone) for this information and respond in a timely manner? This requirement will require Ohio EPA to review every project in the state prior to the applicant utilizing a NWP. ODOT suggests those transportation projects that meet a NWP and are downstream of the water supply intake receive exempt status from this requirement. **[The Ohio Department of Transportation]**

Response 10: Ohio EPA has removed this condition from the NWPs based on the USACE's decision to adopt Ohio EPA's definition of an emergency management zone as being "in proximity" to a public water supply intake. Ohio EPA's objective was to ensure that the operator of a public drinking water treatment plant with an intake on a river was notified when work was scheduled to occur within the emergency management zone of that intake. Notification would allow the operator time to close the intake if necessary to avoid disruption of plant operations resulting from contamination. Ohio EPA's Division of Drinking and Ground Waters has documented instances in which sediment contamination from construction activities has severely disrupted water treatment plant operations.

Under General Condition 7 of the Corps' March 19, 2012 Final NWPs for Ohio, the Corps will adopt Ohio EPA's definition of the emergency management zone to determine if an activity is located "in proximity" of a water supply intake. DDAGW will grant the Corps access to its database so they can determine compliance with this condition when activities require notification to the Corps (PCN). This procedure will not require any additional effort on the part of Ohio EPA or applicants unless the Corps determines that an individual 404 permit is required.

B. CULVERTS

Comment 11: "Point 1 in this condition states: 'The culvert shall be designed and sized to accommodate bankfull discharge and match the existing depth of flow to facilitate the passage of aquatic organisms.' This condition can have a major impact on all fish and amphibian life upstream of the crossing. Therefore, we encourage the Agency to:

"Establish strict requirements for any stream crossings covered by this general permit, and more specific than has been provided (specifically, require a minimum of 1.5X bankfull width);

"Another approach might be to require that stream crossing designs conforming to the more specific standards such as the three sources below are allowed under this NWP permit." **[The Nature Conservancy]**

Response 11: Ohio EPA concurs with the general concern that improperly designed and installed culverts may create barriers to the migration of aquatic organisms. Ohio EPA bases this conclusion on numerous federal and state studies and design manuals including the Federal Highway Administrator's "Design for Fish Passage at Roadway-Stream Crossings: synthesis Report that maybe found at the following link: <http://www.fhwa.dot.gov/engineering/hydraulics/pubs/07033/3.cfm>. Anecdotal analysis of Ohio EPA's biological sampling of streams also supports the conclusion that culverts can create barriers to migration.

The conditions in Part One A. of this certification require bottomless or countersunk culverts for intermittent and perennial streams. ODOT advises that typically culverts greater than 36" are required for intermittent

streams. Bottomless or countersunk culverts are not required on ephemeral streams. The language is also written with the intention that natural substrate will line the bottom of the culvert in order to facilitate the passage of aquatic organisms. ODOT sizes culverts to accommodate the hydraulic flow at the bankfull stage, which is a different standard than defining specifically for fish passage. The conditions in the certification are intended to require ODOT to also incorporate measures to accommodate fish passage.

Comment 12: "Many states have or are considering establishing stream crossing standards. Our comments on the Agency's draft 2008 Integrated Report encouraged Ohio EPA to conduct a general review of these potential sources of impairment. Such an effort would not only help improve the quality of Ohio's streams, but also would help establish the degree of impact in Ohio and provide clear and effective expectations for mitigation standards, 401 certifications, permits and other actions. The Conservancy supports statewide establishment of improved standards for stream crossings in such actions as Nationwide Permits, 401 certifications and mitigation. In our comments on the draft 2008 Integrated Report, the Conservancy encouraged Ohio EPA to build on the stream crossing (culvert) standards under the adopted Clean Water Act Section 401 Certifications for Nationwide Permits program adopted in 2007 (http://www.epa.state.oh.us/dsw/401/NationwideCertification_final_jul07.html). However, the Conservancy's position is that this Ohio NWP needs more specificity for the design of stream crossings, such as provided by the three examples above.

"In 2007, the Conservancy provided comments to Ohio EPA on the standards for culverts. The standards in the Agency's 2007 Nationwide Permit appear to recognize the issue and be based on similar standards established elsewhere, such as the State of Washington's "Design of Road Culverts for Fish Passage." This is a positive step, especially since there are limited standards elsewhere in Ohio EPA rules or permits for stream crossings. The need for and progress in stream crossing standards is very evident, and local governments, other states, and the federal government (e.g., U.S. Forest Service, U.S. Department of Transportation) are advancing similar standards." [The Nature Conservancy]

Response 12: In light of the comments received on this topic, Ohio EPA would welcome the opportunity for ongoing discussions to establish specific stream crossing standards, including culvert design criteria. Ohio EPA acknowledges the references to the various design manuals provided in the comments to this certification, which could be used to inform any such discussions.

Comment 13: "We also note that in their Reissuance of Nationwide Permits, Federal Register, Vol. 77, No. 34, February 21, 2012, the U.S. Army Corps of Engineers stated on Page 10282:

"All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.'

"We ask that Ohio's general condition for culverts state that they should be designed and constructed to this same effect, ensuring they maintain low flows and movement of aquatic species." [The Nature Conservancy]

Response 13: The conditions in the certification reflect this goal without repeating the language in the USACE's General Conditions.

Comment 14: The Nature Conservancy "strongly supports the requirement in general condition B.1:

"When practicable, bottomless culverts shall be used on intermittent and perennial streams. Otherwise, culverts placed on intermittent or perennial streams shall be installed with the culvert base below the substrate to allow natural channel bottom to develop and be retained. The channel bottom substrate shall be similar to and contiguous with the immediate upstream and downstream reaches of the stream.'

"While 'practicable' is not defined, we assumed it requires use wherever local soils, substrates of other conditions would allow this design, given considerations such as roadway safety." [The Nature Conservancy]

Response 14: Please see responses to comments, 11, 12, and 13.

Comment 15: "We are aware that improper culvert design is a leading cause of restrictions of aquatic species movement along streams and can lead to nonattainment of aquatic life uses and losses of species. Therefore, in order to ensure habitat is maintained along the entire length of a stream, we especially encourage you to include the condition of the culvert spanning a minimum of 1.5X bankfull width." [The Nature Conservancy]

Response 15: See response to comment 11 above.

Comment 16: "The Division of Soil and Water Resources (DSWR) has major concerns about the new language that Ohio EPA has added in Part One, General Limitations, Paragraph B (Culverts) and specifically:

"**Section 1** - Requiring bottomless culverts on intermittent and perennial streams. Per conversations with the Geauga County Engineers Office, since they are required to maintain these culverts on a long-term basis, the issue of their long-term life and stability is a concern. From a geomorphological concern, they also do not provide any grade control and we often see stream headcuts that are limited from moving upstream by culverts with bottoms. We recommend that Ohio EPA mimic ODOT's language requiring a hard apron with a footer as specified in the Stormwater Permit Culvert Language.

Section 2 - What scientific evidence is available to support the need for new permanent or temporary flood plain culverts when the flood prone area is greater than twice the width of the stream?

Section 3 - What scientific evidence exists to prevent stream culverts greater than 3%?

Section 4 - The requirement to fill the lower 10 % of all culvert bottoms buried is also a concern that DSWR would like to discuss. **[The Ohio Department of Natural Resources]**

Response 16: Ohio EPA responds to the comments in the order in which they appear.

Section 1: Ohio EPA is interested in any results demonstrating long-term management risks posed by bottomless or countersunk culverts, and welcomes any studies or reports to this effect. Culverts may, in fact, arrest head cuts, but raise the question whether the head cut contributes to the problem wherein the surface of the stream is now lower than the bottom of the outlet of the culvert, thereby creating the migration barrier. Ohio EPA understands that the apron language is in ODOT's design manual, and is being used during culverts installation.

Section 2: Ohio EPA has removed this requirement from the certification. While Ohio EPA believes that floodplain culverts provide benefits to the stream, ODOT raises reasonable concerns regarding the additional right-of way necessary to construct them that must be addressed.

Section 3 – Based on its review of the literature, Ohio EPA does not prescribe countersunk culverts on streams exhibiting slopes of greater than 3 percent at the stream crossing. The gradient is likely too steep for substrate to remain in the culvert.

Section 4 – Ohio EPA welcomes the insights and expertise of the Ohio Department of Natural Resources. Ohio EPA plans ongoing discussions with ODOT to address culvert design and will invite ODNR participation in these discussions.

Comment 17: In regards to general condition 1 under CULVERTS, "ODOT suggests, at a minimum, this condition only apply to new culverts and not to the replacement of existing culverts. It should be noted that research in Ohio has shown that culverts on streams with an invert slope greater than 1% do not retain substrate. ODOT maintains over 150,000 culverts across the state, the majority of these are less than 36 inches in diameter. ODOT already routinely designs culverts to accommodate at a minimum bankfull discharge. A conditions calling for these small culverts to be buried, especially those with an invert slope in excess of 1%, is a design for failure." **[The Ohio Department of Transportation]**

Response 17: Ohio EPA concurs that the conditions should apply only to new culverts, and has revised the certification, accordingly. The certification has been revised to reflect ODOT's concerns on slope.

Comment 18: In regard to general condition 1 under CULVERTS, "From any given point, most streams typically display some uniformity of bottom substrate. To tell potential applicants that a stream should have contiguous substrate does not provide any guidance or instruction, but simply states what is already the normal condition or what will become the normal condition after construction. Placement of substrate materials in a small-diameter culvert by a potential applicant is impossible. If new culverts are installed at grades of 1% or less, then substrates form upstream will naturally redistribute inside the culverts. We strongly believe that culverts over 1% slope will not maintain natural substrates." [The Ohio Department of Transportation]

Response 18: Ohio EPA concurs with this comment. The word "contiguous" has been removed from the condition. However, this does not change the intent of the condition to create conditions under which natural substrates may migrate throughout the entire length of the culvert.

Comment 19: In regards to general condition 2 under CULVERTS, "ODOT recommends that this only apply to new culverts and not existing culverts proposed for replacement. It is unclear what temporary flood plain culverts are meant to accomplish, so please justify this condition. Additionally, hydraulic design criteria needs to be maintained to make flood plain culverts effective. ODOT is required through case law to maintain given flow downstream of culverts. The placement of floodplain culverts will most probably change long-existing drainage patterns in many situations causing erosion, flooding, etc." [The Ohio Department of Transportation]

Response 19: Conditions requiring the installation of floodplain culverts has been removed from the certification.

Comment 20: In regard to general condition 4 under CULVERTS, "ODOT recommends that this only apply to new culverts and not existing culverts being replaced. Installing buried culverts on maintenance projects would increase costs significantly for ODOT, and would not necessarily result in ecological benefits. Flat or declining gas tax revenue forecasts a smaller transportation budget for ODOT for the foreseeable future. Installing buried culverts for maintenance projects is not practicable and not always effective. ODOT recommends Ohio EPA develop more specific design criteria and thresholds for when this type of culvert installation is required and will be most effective." [The Ohio Department of Transportation]

Response 20: Ohio EPA concurs with this comment. The certification has been revised to clarify that conditions pertaining to the design criteria of culverts should

apply only to newly installed culverts and the maintenance or replacement of existing culverts.

C. DREDGE MATERIAL MANAGEMENT FROM LAKE ERIE COASTAL AREAS

Comment 21: "General Condition C: It should be noted that Ohio has only one 'Lake Erie Coastal Area' (it is written as a plural), and the definition provided in the footnotes is incomplete. The Coastal Area, as defined in ORC §1506.01(A), is sometimes also referred to as the 'Coastal Zone' or 'Coastal Management Area'. The area includes not only Ohio's portion of Lake Erie but also extends inland to include certain wetlands, rivers, and other areas. For example, it extends upstream approximately 16 miles from the mouth of the Maumee River into Lucas and Wood counties and extends approximately 14 miles up the Sandusky River into the City of Fremont in Sandusky County. It may be important to note the inland extent of the Coastal Area when applying this condition to dredging projects." **[The Ohio Department of Natural Resources]**

Response 21: This section was removed; therefore, a definition of "Lake Erie Coastal Area" is not necessary.

D. BEST MANAGEMENT PRACTICES

Comment 22: In regards to general condition 1 under BEST MANAGEMENT PRACTICES, "This section is unnecessary. The permittee will follow the BMPs as dictated in NPDES permitting process. NWP's by design are approval for projects that have been determined categorically to not have a significant impact to water resources. It is unclear why rules covered elsewhere are being restated here. Additionally it should be noted that the ODNR Rainwater and Land development manual is only a guideline, not regulation. This language should be minimized to avoid confusion. All projects that have coverage under the NPDES Construction General Permit (CGP) are required to design and implement BMPs in accordance with the Rainwater and Land Development Manual. However, the permit only references the Rainwater and Land Development Manual as a guidance document. Ultimately, the BMP design and implementation is the responsibility of the owner and professional engineer. BMPs used to treat very small tributaries may need to be modified from the Manual. The language under this section should be similar to the general conditions of the USACE Nationwide Permits for the State of Ohio, "Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction." The term "appropriate soil erosion and sediment controls" also allows the contractor to have flexibility in using non-structural BMPs. Structural BMPs may not be appropriate for the work being performed. **[The Ohio Department of Transportation]**

Response 22: See response to comment 4. Language regarding specific storm water BMPs has been replaced with a general reference requiring compliance with the storm water CGP and any watershed specific permits.

Comment 23: In regard to general condition 2 under BEST MANAGEMENT PRACTICES, "a definition of buffers, as used here, should be provided. How, in this context, does Ohio EPA define appropriate buffer width for streams? What defines buffer for wetlands and what distance of buffer from wetlands is acceptable?" **[The Ohio Department of Transportation]**

Response 23: Implicit in qualifying for coverage under the NWP's is the avoidance and minimization of impacts to aquatic resources and their immediate buffers. After an applicant has established the project footprint, including temporary construction rights-of-way, points of access, staging and laydown areas, any avoided streams, wetlands, and buffers should be marked in the field. The other option would be for Ohio EPA to establish mandatory setbacks for streams and wetlands. However, this may not be practicable or cost effective given the variability in site conditions and the minimal nature of impacts authorized under the NWP's.

Comment 24: In regards to general condition 6 under BEST MANAGEMENT PRACTICES, "the permit language stated here is unnecessary and oversteps reasonable expectations of permit enforcement. Topsoil management should be dictated by the engineer and construction specifications. Separating out topsoil from trench excavations is usually already included in any stripping activities. All the project topsoil would be stored together and separated from structural backfill. The language indicates keeping trench excavation topsoil separate, which will increase project footprints and cost." **[The Ohio Department of Transportation]**

Response 24: This condition has been removed from the General Conditions of the certification and placed in NWP 3 maintenance. Segregation of hydric topsoil is a standard practice when constructing trenches in wetlands.

E. WILDLIFE PROTECTION

Comment 25: "ODNR database review is required for rare threatened and endangered species. However, the document specifies that ODNR is also required to make an 'effects' determination. It is my understanding that the 'effects' determination is a federal process dictated by federal law-it should not be included in this document as a state of Ohio agency requirement." **[Cindy Paschke]**

Response 25: Ohio EPA has removed this condition. Therefore, response to this comment is not necessary.

Comment 26: "General Condition E requires that the applicant must demonstrate via a letter from ODNR that the 'project area' does not contain a listed species. OHBA questions why this was made part of the draft NWP Certifications if condition is not in the present NWP Certifications. This could be a significant problem. Further questions arise: who determines 'project area?' What if ODNR is not sure if an area contains a listed species? How will the Corps resolve disputes?" **[The Ohio Home Builders Association]**

Response 26: Ohio EPA has removed this condition. Therefore, response to this comment is not necessary.

Comment 27: In regard to general conditions under WILDLIFE PROTECTION, "ODOT Office of Environmental Services staff routinely reviews project impacts in accordance with the [sic] Fish and Wildlife Coordination Act and the endangered Species Act. Additionally, ODOT has a Memorandum of Agreement with ODNR and U.S. fish and Wildlife Service (USFWS) detailing coordination between the agencies for projects with minor impacts to aquatic resources. It is therefore suggested that a caveat be added in this section that previous agency coordination conducted satisfies this condition. The additional requirement of ODNR coordination and that ODNR must agree with the proposed project before the permit will be authorized is redundant to ODOT's existing process.

"If a project will have an adverse impact on a listed species, yet does not impact surface waters, how can Ohio EPA require an individual 401 WQC? This requirement is expanding Ohio EPA's authority beyond water quality, and ODOT feels strongly that listed species should be regulated by the agency experts at USFWS and ODNR only." **[The Ohio Department of Transportation]**

Response 27: Ohio EPA has removed this condition. Therefore, response to this comment is not necessary.

F. MITIGATION

Comment 28: In regard to general condition 1 under MITIGATION, "Dominion East Ohio Gas understands that compensatory mitigation for temporary or permanent impacts to wetlands must occur at the ratios provided in rule 3745-1-54 of the Ohio Administrative Code, which result in mitigation above a 1-to-1 ratio. Wetlands and streams in existing Right-of-Way have been previously disturbed and the impacts of Pipeline Replacement Projects in these areas are limited and temporary. Therefore, Dominion East Ohio Gas asks that Pipeline Replacement Projects not be subject to mitigation requirements beyond the 1 to 1 replacement ratio, as required by the General Conditions of the Nationwide Permits.

"If mitigation beyond the on-site restoration of wetlands and streams is required, Dominion East Ohio Gas asks that the in-lieu fee program be

the primary vehicle to satisfy this mitigation requirement regardless of the quality of the wetland temporarily impacted." [Dominion East Ohio Gas]

Response 28: The wetland mitigation rules established in rule 3745-1-54 of the Ohio Administrative Code do not distinguish between temporary and permanent impacts. Ohio EPA has allowed the on-site restoration of impacted waters to pre-impact conditions to be used as compensatory mitigation at a 1-to-1 ratio; however, the remaining ratio would have to be satisfied through some other means such as additional on-site mitigation or the purchase of credits at an approved mitigation bank. The USACE project manager retains the discretion to approve the actual form of the mitigation.

At this time, Ohio does not have an approved in-lieu fee program. However, an in-lieu fee program is currently in development. When an in-lieu fee program is formally approved by the Interagency Review Team and has credits available it would be an acceptable form of mitigation within the framework of Ohio's rules and regulations.

Comment 29: "Proposed General Condition F requires mitigation in accordance with OAC 3745-1-54(E) which establishes a preference for on-site mitigation. OHBA understands Ohio EPA is moving away from this concept and toward banks (and consistent with federal guidelines) thus why reiterate the preference here? [The Ohio Home Builders Association]

Response 29: Mitigation requirements will be determined by the USACE project manager as part of their review of the Pre-Construction Notification. While the USACE project manager retains the discretion to determine the type and location of mitigation based on a weighing of the quality of the resources impacted, significance of the impacts, and quality of the mitigation areas, references to the Administrative Code is intended to inform the USACE's decision-making and provide predictability for the regulated community.

Comment 30: In regards to general conditions under MITIGATION, "For regulatory consistency, this section should retain the same wording as the USACE's NWP language. If mitigation is required per this condition, yet there are no triggers for the applicant to notify the USACE or OEPA (except apparently new Condition A which requires all projects to be sent to OEPA), how does OEPA expect to track applicants following through with this requirement? What are the performance standards or monitoring requirements on this mitigation? Wetland impacts that exceed 0.10 acre do not always require pre-construction notification to the USACE (i.e., NWP #3); so it's possible to not have any 401 or 404 application triggers at all. It is reasonable for wetland mitigation to occur only when impacts exceed 0.10 acre AND an individual 401 is required. Is this OEPA's intent?

"It should be noted that, even though all projects that involve wetland impacts do not require mitigation, ODOT's program mitigates wetland impacts at a ratio of 1:1 or greater on an annual basis; thus, creating a 'no net loss' of wetland acreage resulting from our transportation projects. In 2010, ODOT impacted 1.48 acres of wetland and mitigated 15.04 acres, resulting in a ratio of 10:1. There is variation from year to year, but ODOT routinely over compensates for wetland loss.

"Additionally, temporary impacts to wetland should only require restoration of the impacted area and not require additional wetland to be created." **[The Ohio Department of Transportation]**

Response 30: Ohio EPA's 2012 certification allows the USACE's project manager discretion to determine the appropriate mitigation for impacts being authorized under a NWP on a case-by-case basis. Ohio EPA's conditions provide broad overarching goals rather than highly prescriptive requirements. Ohio EPA does, however, seek wetland mitigation to be conducted at the ratios established in the Administrative Code.

Comment 31: "Mitigation is stated as required for all temporary and permanent impacts that exceed 0.10 acres. To be consistent with the federal process and streamline, Ohio should not require mitigation for temporary impacts since the impacts are considered temporary. In addition, the permit thresholds should not include temporary impacts as part of the total impacts-regardless of quality." **[Cindy Paschke]**

Response 31: Ohio EPA allows for wetlands that are subject to temporary impacts to be mitigated on-site at a ratio of 1:1. However, Ohio EPA has not seen any detailed studies that demonstrate that areas where temporary impacts have occurred have fully recovered to their pre-impact condition. Therefore, Ohio EPA would seek additional on- or off-site mitigation to supplement 1:1 mitigation performed on-site.

Comment 32: Mitigation – "Wetlands perform vital functions (flood control, sediment filtration, recreational opportunities, etc.), and when destroyed, those benefits are lost. If the mitigated wetland is not in the immediate watershed, that local community loses wetland benefits. We urge you to keep these benefits to the local community, and require the mitigation to occur within the sub-watershed." **[The Ohio Environmental Council]**

Response 32: The Corps will determine what constitutes appropriate mitigation on a case-by-case basis. The Corps will use the procedures set forth in General Condition 23 of the NWPs for the State of Ohio issued March 19, 2012 that requires the applicant to submit a mitigation plan.

Ohio EPA understands the broader philosophical point of the comment, and generally concurs. However, there are instances when very small stand-alone mitigation areas are too small to be technically feasible, are

subject to high failure rates, and require disproportionate transaction costs relative to the water quality benefits.

G. MISCELLANEOUS

Comment 33: In regards to general condition 6 under MISCELLANEOUS, "Dominion East Ohio Gas appreciates the flexibility afforded by this condition and asks that it be extended to include minimal impacts to Category 3 wetlands. There are instances when a project would fully qualify for a Nationwide permit if not for a very minor impact to a Category 3 wetland, which is stricter than the federal threshold of 0.1 acres." [Dominion East Ohio Gas]

Response 33: After careful consideration, Ohio EPA has determined that impacts to less than 0.1 acres of Category 3 wetlands associated with existing infrastructure may be authorized NWP's 3, 12, 14. This narrow carve out 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. The carve-out does not apply to any proposed new activities regardless of project type.

Ohio EPA has processed several individual 401 applications for activities resulting in impacts to less than 0.1 acre of Category 3 wetlands located within or adjacent to existing infrastructure. Because of the proximity of the wetland to the existing infrastructure, there were no practicable alternatives to impacting the wetland.

Comment 34: In regard to general condition 5 under MISCELLANEOUS, "ODOT requests that OEPA make confirmed contact with ODOT prior to site inspection." [The Ohio Department of Transportation]

Response 34: This condition requires Ohio EPA to make "reasonable attempts to notify the applicant of its intention to inspect the site in advance of that inspection." Ohio EPA has always done this and will continue to do so.

Comment 35: In regards to general condition 6.b. under MISCELLANEOUS, "It is unclear what OEPA means by 'provisional nationwide permit issued by the USACE.' The USACE does not issue any other type permit for a non-notifying NWP unless there is a PCN required. A NWP from the USACE (PCN required) that includes all attachments and special conditions is a final permit, and ODOT is not aware of a provisional NWP from the USACE. Please explain." [The Ohio Department of Transportation]

Response 35: A *provisional* NWP is issued by the USACE when an activity meets all of USACE's Regional Conditions, but still requires an individual 401 water

quality certification. The NWP is not considered effective until the applicant obtains the individual 401 water quality certification.

PART TWO: SPECIAL LIMITATIONS AND CONDITIONS FOR OHIO EPA CERTIFIED NATIONWIDE PERMITS

General Comments

Comment 36: "The proposed NWP Certifications establishes limits to impacts to Class III primary headwater streams which are not used in the existing Certification. These limits apply to each of the various NWP's, and OHBA is concerned with a more stringent application of limits not currently applied to permits without proper justification." **[The Ohio Home Builders Association]**

Response 36: Please see response to Comment 6. The NWPs are designed to authorize impacts to aquatic resources that result in minimal impacts. While Ohio EPA recognizes the importance of Class III headwater streams, that does not mean there should not be some level of impacts to these streams that would be considered acceptable. Ohio EPA has removed Class III headwater streams as a specific criteria to evaluate the applicability of the NWPs.

Comment 37: "Last spring, the Corps issued draft regional conditions for the proposed new NWPs, and OHBA took the opportunity to comment and responded to the regional conditions. OHBA would like to reiterate its concerns with the proposed regional conditions issued by the Corps USACE in 2011. OHBA expects, in its Certification of the NWP, the OEPA to resolve the issues of the federal minimums and, particularly, those that place burdens on Ohio that are more restrictive than adjacent states. OHBA believe the Corps has already gone to great lengths to address OEPA concerns via the Regional Conditions. Many of the proposed regional conditions are specific to Ohio and set Ohio apart from the states that adjoin it and place Ohio at an economic development disadvantage. We urge the Ohio EPA to work diligently with the Crops to ensure that any regional conditions imposed on the regulated community in Ohio are absolutely necessary." **[The Ohio Home Builders Association]**

Response 37: Ohio EPA and USACE have worked closely to develop a coordinated regulatory program that allows for the issuance of timely permits that are protective of water quality. Limits in USACE's final NWPs for the State of Ohio issued March 19, 2012, reflect the limits codified in final NWPs published in the Federal Register that were effective on February 21, 2012. Impacts to one-half acre of wetlands and 300 linear feet of stream are established by USACE on a national basis. Ohio EPA has included some additional restrictions, such as prohibiting impacts to Category 3 wetlands and high-quality streams necessary to ensure the protection of state water quality standards.

Further, condition 3.c.1., of USACE's Regulatory Guidance Letter 92-04, prohibits states from establishing less restrictive standards which reads, "Higher limits are clearly not acceptable. For example, increasing NWP 18 for minor discharges from 10 to 50 cubic yards would not be acceptable. Such conditions would confuse the public and could contribute to violations."

NATIONWIDE PERMIT 3 (MAINTENANCE)

Comment 38: In regards to special conditions under Nationwide Permit 3 (Maintenance) and Nationwide Permit 12 (Utility Line Activities), "Dominion East Ohio Gas asks that the cumulative one-half acre limitation be removed from the state certification. Other State conditions of NWP 12 ensure that projects impacting no more than a minimal level of wetland would require review by Ohio EPA. For example, Condition 7 requires new underground pipeline projects impacting greater than 1,500 linear feet (cumulative) of aquatic resources (streams and wetlands) be authorized through a state water quality certification. This condition alone will guarantee that projects impacting more than a minimal amount of wetlands would require review under a state water quality certification. For pipeline replacement projects conducted in existing, maintained Right-of-Ways with temporary impacts, the one-half acre limitation should be removed because the required wetland restoration associated with coverage under the Nationwide Permit results in no net loss of aquatic resources." **[Dominion East Ohio Gas]**

Response 38: Ohio EPA believes that projects that exceed one-half acre of impacts to Category 1 or 2 wetlands, cross three 8-digit watersheds, or exceed 1,500 linear feet of waters of the State constitute more than minimal impacts.

Comment 39: In regards to special condition 2 under NWP 3, "Authorization of minimal impact [to] Category 3 wetlands (i.e., 0.10 acre) under NWP 3 will encourage impact minimization project-wide by design engineers to avoid an individual 401 WQC. A minimal threshold for Cat 3 impacts would allow for ODOT to maximize the use of the NWPs when impacts to this resource type are needed for maintenance projects. For example, ODOT may replace a culvert that is hydrologically conned to a large Cat 3 wetland. ODOT may need to impact parts of that wetland immediately adjacent to the culvert for the maintenance project. Typically, the edge portions of wetland near the road, including Category 3 wetlands, are dominated by invasive plants, previously disturbed, and easily restored; thus, not impacts the overall functions and values of the wetland." **[The Ohio Department of Transportation]**

Response 39: See response to comment 33 above.

Comment 40: In regards to special condition 5 under NWP 3, "ODOT questions the validity of including existing filled stream length into the impact calculation. If the existing length of culvert must be included in an impact estimate, then the threshold should be increased to 500 linear feet. Otherwise, this requirement will quickly void the intention of the NWPs, and reduce the need to minimize impacts if the project is forced to go to an Individual 401 certification process because of existing impacts. Any culvert replacement on a major interstate project would require an automatic individual 401 WQC, since most interested culverts exceed 300 feet in length. Replacement of an existing culvert pipe has minimal to no impact on water quality, and should always be applicable for authorization under the NWPs. ODOT suggests that the length of existing pipe be excluded from stream impacts completely, as this topic was discussed in the [sic] recently with OEPA, with the understanding between all parties that the existing pipe length would NOT be considered an impact (see attached email). Again, ODOT recommends that the requirements in general condition B apply only to new culverts and not the maintenance of existing culverts." **[The Ohio Department of Transportation]**

Response 40: Ohio EPA has revised this condition reflect that the length of any culvert extension shall not exceed 500 linear feet. The length of the new culvert may not exceed 300 linear feet.

NATIONWIDE PERMIT 12 (UTILITY ACTIVITIES)

Comment 41: "In the Utility line certification – Tree dimensions are given as a 6 meter height yet all other methods that define forested areas use a diameter at breast height (dbh)." **[Cindy Paschke]**

Response 41: The intent of referenced condition NWP 12 Special Condition # 5 is to limit impacts to forested wetlands. OAC 3745-1-54(O) defines forested wetlands as "a wetland class characterized by woody vegetation that is twenty feet or taller." Twenty feet is approximately 6 meters as written in the special condition. This definition follows the classification outlined in Cowardian et al. (1979).

NATIONWIDE PERMIT 13 (BANK STABILIZATION)

Comment 42: "Nationwide 13 - Condition 4: For bank stabilization projects located within the Lake Erie coastal zone, the project must be located in a known Coastal Erosion Area as established by the Ohio Department of Natural Resources.

"The intent of the Coastal Erosion Area Mapping and Permitting programs is to identify coastal erosion hazard areas and to provide a mechanism to protect investments in areas where land is anticipated to be lost over the next 30 years if no additional measures are taken to address erosion. In

accordance with Ohio Revised Code the coastal erosion designation is reviewed and may be updated at least once every ten years. Based on the current designation (2010 Final Mapping), only 12% of Ohio's Lake Erie Shore is designated to be within a coastal erosion area. This percentage decreased from 36% of the shore designated in the previous mapping (1998 Final Mapping).

"If the intent of this condition is to establish that a proposed project is located in an area with an erosion problem, the Coastal Erosion Area designation should not be used to make that determination, since it is primarily intended to protect investments and does not consider all factors that contribute to erosion. Additionally, not all areas of the Lake Erie coast are regularly studied by the Coastal Erosion Area Mapping and Permitting program, so areas may exist where erosion problems occur although no Coastal Erosion Areas have been documented.

"ORC Section 1506.06 (G) limits the use of the coastal erosion area designation as follows: 'No state agency, county, township, or municipal corporation, or any other political subdivision or special district in this state established by law shall use the fact that property has been identified as a Lake Erie coastal erosion area as a basis for any of the following:

- 1) "Failing to enter into or renew a lease or to issue or renew a permit under section 1506.11 of the Revised Code;
- 2) "Failing to issue or renew a permit required by law, other than a permit issued under section 1506.07 of the Revised Code;
- 3) "Taking private property for public use in the exercise of the power of eminent domain;
- 4) "Determining what constitutes just compensation for a taking of the property in the exercise of the power of eminent domain." **[The Ohio Department of Natural Resources]**

Response 42: The intent of this provision was to limit impacts to Ohio's Lake Erie coast line authorized under the NWPs to only those absolutely necessary. In fact, the language was carried over from Ohio EPA's 2007 certification of the NWPs.

In light of the above comment, Ohio EPA defers to ODNR's expert opinion on the implementation the Coastal Erosion Area designation and has removed the condition from the certification.

Comment 43: "Condition 6: This condition states that 'material used for bank stabilization shall be free from toxic contaminants in other than trace quantities, free of exposed rebar, free of debris and may consist of rock, stone, vegetative erosion control measures, broken concrete rubble, and clean soil. Asphalt and tires are explicitly excluded as material suitable for bank stabilization.' It is recommended that the following comments be considered with respect to this condition:

- “Concrete rubble is inappropriate material if exposed to the waters of Lake Erie due to the small size and tabular nature of concrete rubble this material can be easily transported away from the project site by wave action and littoral currents. Concrete rubble in the nearshore can alter lake- bottom habitat and create hazards to recreational users of Lake Erie.
- “Clean soil or any material consisting of a significant portion of fines is not appropriate material to be placed along the shore of Lake Erie where it may be impacted by wave action or otherwise interact with the waters of Lake Erie. Fine-grained material can be transported into the waters of Lake Erie through surface water run-off, slumping, and wave action.” **[The Ohio Department of Natural Resources]**

Response 43: The USACE’s Nationwide Permits for the State of Ohio General Regional Condition 13 (d) states, “...For bank stabilization projects located in Lake Erie, Sandusky Bay, and Maumee Bay, broken concrete shall not be used as suitable material, unless it is contained within a structure. Because the USACE’s condition is more restrictive, ODNR’s language need not be incorporated into the certification. The original language found at NWP 13.6. will remain as written.

Comment 44: “Nationwide 13- Bank Stabilization. The Ohio Department of Natural Resources - Division of Soil and Water Resources DSWR would like clarification about how the Corps of Engineers may interpret Condition 5 ‘Bioengineering techniques shall be utilized, if practicable’. What geomorphic conditions will be evaluated to determine if it is practicable?” **[The Ohio Department of Natural Resources]**

Response 44: This condition provides USACE with the discretion to determine what is practicable on a case-by-case basis. Writing a condition that would cover every geomorphic condition may prove cumbersome and difficult to implement. As a practical matter, Pre-Construction Notification is only required when the bank stabilization will occur in special aquatic sites, is in excess of 500 linear feet, or exceed an average of one cubic yard per running foot along the bank below the plane of the ordinary high water mark. Therefore, this condition will only be invoked for larger projects that will receive increased scrutiny.

Comment 45: Regarding NWP 13, “The addition of a requirement of bioengineering techniques is an excellent addition. We encourage Ohio EPA to bar the proposal in the 2012 USACE NWP 13 allowing USACE to remove impact limits based on use of bioengineering and other techniques.” **[The Ohio Environmental Council]**

Response 45: Ohio EPA has no authority to bar the USACE from establishing its conditions. However, the intent of the NWPs is to authorize impacts resulting in only minimal impacts, and providing an incentive to an applicant to design a project in a more environmental friendly manner is considered a positive outcome.

NATIONWIDE PERMIT 14 (LINEAR TRANSPORTATION PROJECTS):

Comment 46: In regards to special condition 1e under NWP 14, "it is unclear what will be accomplished by requiring an individual 401 for projects with minimal impacts to a State or National Scenic River. ODOT already coordinates with ODNR on projects that may impact the State Scenic Rivers and both ODNR and NPS for projects on the National Scenic Rivers. None of these projects move forward until both agencies are in agreement with ODOT on project limitation and conditions. ODOT feels that providing opportunity for project input and guidance to come from ODNR and NPS experts on these projects is the most effective approach. Forcing additional permitting and paper work by OEPA when work is proposed on these resources does not appear to achieve any additional benefit to the resource." [The Ohio Department of Transportation]

Response 46: Please see the response to Comment 2 above.

Comment 47: In regards to special condition 1h under NWP 14, "ODOT is pleased to see a minimal impact to Class III streams authorized under NWP 14; however, this threshold still can severely limit roadway projects with minimal adverse impacts to waters of the State. As outlined in the proposed draft rules, ODOT proposed that OEPA utilize Class III A and B stream classifications, where Class III A represents the higher quality stream type requiring an individual 401 WQC for impacts greater than 100 feet, and class III B (the lower quality type) are subject to general stream requirements, allowing for 300 feet of impacts and not requiring an individual 401 WQC." [The Ohio Department of Transportation]

Response 47: Please see response to comment 6, above.

Comment 48: In regards to special condition 2 under NWP 14, "Impact measurements that include the existing culvert in addition to new culvert length severely limit the use of this NWP, especially for limited access highway interchanges. Often these culverts are greater than 300 feet in length and have been that way for over 50 years. Land additions, improved safety grading, development of extra-wide ditches will all increase replacement culvert lengths. This requirement will severely negate the use of this NWP. The construction of only one additional foot of culvert will require a 401 WQC. What benefits would OEPA anticipate for the resource by undergoing an individual 401 process in this example? And at what cost? [The Ohio Department of Transportation]

Response 48: Please see the response to Comment 40 above. Ohio EPA has revised this condition reflect that the length of any culvert extension shall not exceed 500 linear feet. The length of the new culvert may not exceed 300 linear feet.

NATIONWIDE PERMIT 27 (AQUATIC HABITAT ESTABLISHMENT, AND ENHANCEMENT ACTIVITIES)

GENERAL COMMENTS

Comment 49: "Nationwide 27 - Aquatic Habitat Restoration. Paragraphs following paragraph 6 are mis-numbered." [The Ohio Department of Natural Resources]

Response 49: The numbering has been corrected.

Comment 50: "The draft proposed condition requires that the 'primary purpose' of the project be the restoration, enhancement or establishment of aquatic resources. This draft condition does not appear to be an activity-specific additional level of protection against the lowering of water quality in Ohio." [Envirotech Consultants, Inc.]

Response 50: Ohio EPA believes it appropriate to require activities authorized under NWP 27 be for the primary purpose of restoring, enhancing and establishing aquatic habitat. Ohio EPA does not believe that it is appropriate to relocate a stream to construct a residential housing subdivision and authorizer that activity under NWP 27 when the project should have been authorized under NWP 29 – Residential Developments.

Comment 51: 'Determining 'primary purpose' (most, but <100% of the purpose?) may be difficult for the Ohio EPA to implement 'consistently and predictably.' The example given at the public hearing required that the project purpose be 'strictly' and 'genuinely' restoration (100% of the purpose?). The Ohio EPA no longer receives and/or publishes data in its annual reports on which NWPs have been utilized and how much impact has been authorized for each NWP, including NW 27. Consequently, it is difficult to determine whether the draft condition is based on factors like those stated by the Ohio EPA in its 2007 response to comments – water quality data, concerns for cumulative impacts, etc. In the example given at the public hearing, the project proponent (a developer) would have other nationwide permits (NW 29 and NW 39) under which a streamlined permitting process would be available. There might be circumstances in which aquatic restoration activities might not be the 'primary' or 'strictly/genuine' purpose in conducting the activities permitted by NW 27 and the project proponent would be required to seek a 401 certification, not because the purpose is deemed to be disqualifying. For example, a farmer retiring

from the farming business might be willing to donate a substantial farm parcel containing tiles, farmed 100% hydric soils to a park district, if the park district would restore the eroding creek by the farmstead. In this hypothetical, the park district's purpose in applying for a NW 27 to restore a creek damaged by cow meanderings and agricultural runoff includes the facilitation of its acquisition of a substantial parcel of land that can be restored to wetlands without the need for any Clean Water Act permit." **[Envirotech Consultants, Inc.]**

Response 51: USACE will determine compliance with the water quality certification conditions of NWP 27. Ohio EPA's intent is that the purpose (100 percent) for a project certified under nationwide permit 27 be "...the restoration, enhancement and establishment of tidal and non-tidal wetlands and riparian areas and the restoration and enhancement of non-tidal streams and other non-tidal open waters."

NATIONWIDE PERMIT 33 (TEMPORARY CONSTRUCTION, ACCESS AND DEWATERING)

Comment 52: In regards to NWP 33, "Decreasing the culvert length from 500' to 300' is not reasonable for ODOT, especially for limited access highway interchanges." **[The Ohio Department of Transportation]**

Response 52: Please see the response to Comment 40, above. Ohio EPA has revised this condition reflect that the length of any culvert extension shall not exceed 500 linear feet. The length of the new culvert may not exceed 300 linear feet.

NATIONWIDE PERMIT 39 (COMMERCIAL AND INSTITUTIONAL ACTIVITIES)

Comment 53: Regarding NWP 39, "It has come to our attention that oil and gas drilling operations, if their impacts to streams and wetland under 404 of the Clean Water Act are permitted by the federal government, it would be done under NWP 39. As Ohio EPA is close to finalizing its own General Permit for impacts to streams and wetland from shale drilling operations, which have been fully vetted through the stakeholders in this state (and especially to Ohio EPA Division of Surface Water permitting), the Agency must be deliberative in how it regulates the activity. Many of the activities permitted under the NWPs had been occurring in the state, and at times regulated by the state, before the advent of the NWP, and thus there was a clearer understanding of the impacts to Ohio waters. However, that is not the case with the industrial scale oil and gas drilling of today. Shale-related impacts to streams and wetlands in Ohio may be significant over the next five years, and we should have a better understanding of the impacts to Ohio's remaining wetlands before we go down the road of blanket permitting." **[The Ohio Environmental Council]**

Response 53: When developing the shale gas general permit, Ohio EPA established the limits at 0.5 acres of Category 1 and 2 wetlands and 300 linear feet of stream to be consistent with limits established in the NWP. Now that the USACE has revised NWP 39 permit to authorize impacts to streams and wetlands resulting from shale gas operations, the State general permit is no longer required. The USACE has advised Ohio EPA that it will consider each pad site and related features, such as access roads and utilities, as a single and complete project, thereby reducing the authorized impacts to less than 1/2 acre of wetland and 300 linear feet. (Note that there may be instances when the "production line" which conveys gas from the well head to the gathering system, may require separate authorization.)

The actual impacts to aquatic resources that may result from shale-gas operations is unknown. Ohio EPA has determined that limiting impacts associated each pad site, processing plants, or pipelines, to the same standards as other types of development, is protective of the environment.

NATIONWIDE PERMIT 41 (RESHAPING EXISTING DRAINAGE DITCHES)

Comment 54: In regards to NWP 41, "It is unclear what type of water this permit covers. OEPA only has jurisdiction over streams and jurisdictional ditches; therefore, the drainage ditch must be one of the two. This NWP is not useful with the current impact limit of 300 feet, especially for ODOT who maintains tens of thousands of roadway ditches across the State. ODOT suggests that the maintenance of roadside ditches within the existing right-of-way be exempt from 401 WQC requirements." **[The Ohio Department of Transportation]**

Response 54: Typical maintenance that includes excavating roadside ditches to re-establish the as-built capacity does not require authorization because there is no discharge of dredged or fill material. The special conditions established in this NWP are essentially identical to those found in the 2007 NWPs. Therefore, ODOT should be able to determine how many individual 401 water quality certifications were required as a result of the 2007 NWPs to determine what impact the 2012 recertification of the NWPs will impose.

End of Response to Comments

