



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's). 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.

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

General Comments

Comment 1: "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 1: 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 was asked not to move forward with the proposed rules, regarding primary headwater habitat stream use designations. Therefore, all references to primary headwater habitat streams have been removed from the final NWP certification.

Comment 2: “Last spring, the Corps issued draft regional conditions for the proposed new NWP’s, 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 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 Corps to ensure that any regional conditions imposed on the regulated community in Ohio are absolutely necessary.”
[The Ohio Home Builders Association]

Response 2: 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 the final NWPs published in the Federal Register that were effective on March 19, 2012. Impacts limited to one-half acre of wetlands and 300 linear feet of stream were established by USACE on a national basis. Ohio EPA has included the same thresholds in the 401 WQC and additional restrictions as were in use from 2007-2012. These additional restrictions, such as prohibiting impacts to Category 3 wetlands and high-quality streams, are 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.*”

Comment 3: “Nationwide 21- Surface Coal Mining Activities. Paragraph 5 requires that (ORA) forms, QHEI forms or HHEI forms be submitted to Ohio EPA. Why isn’t this requirement also placed under other high-impact Nationwide Permits like Nationwide #12 and #14.” **[The Ohio Department of Natural Resources]**

Response 3: Through an agreement with the Corps, coordination and review of habitat assessments is typically performed prior to NWP issuance. Regulation of various aspects of coal mining activities in the State of Ohio is performed by ODNR Division of Mineral Resource Management (DMRM), USACOE and Ohio EPA. Coordination of this regulation is performed through a Coordinated Application Process (CAP) and differs from other industries. This condition has been modified since the issuance of the draft 401 WQC for the nationwide permits. Submittal of the ORAM, QHEI or HHEIs will be directed to USACE for coordination with Ohio EPA.

Comment 4: OEC supports the continuance of Ohio EPA’s denial of NWP 44, and requiring individual 401 certification for those non-coal activities. We recommend that the same denial be extended to Ohio’s certification of the three coal mining related NWPs: NWP 21, NWP 49, and NWP 50. We have seen destruction of eastern and southeastern Ohio’s small streams and wetlands from coal mining activities for too long to not make sure that individual, site-specific permitting the sole course of action.” **[The Ohio Environmental Council]**

Response 4: Ohio EPA has mirrored the USACE’s 300 linear foot threshold for stream impacts under NWPs 21 and 50. Ohio EPA has also mirrored the USACE’s condition allowing an applicant the ability to apply for additional impacts, on a case-by-case basis, if the applicant can demonstrate a minimal impact on water quality.

For clarification and consistency purposes, Ohio EPA has added the ½ acre limitation for wetland impacts in the certification language for NWP 21 and 50. This limitation is also found in the USACE specific conditions for NWPs 21 and 50. Additionally, NWPs 21, 49 and 50 do not allow impacts to high-quality water resources.

Ohio EPA believes these stream and wetlands thresholds, in conjunction with a restriction of impacts to high-quality water resources, will ensure only projects that will have a minimal impact on water quality will qualify for coverage under the 401 WQC for the nationwide permits.

NWP 49 also prohibits impacts to all higher quality water resources. This NWP is utilized on areas with a high percentage of previous mining impacts. The higher allowable impacts under this NWP were designed to encourage the remaining effort. Ohio EPA believes the stream and wetland thresholds in this NWP, while higher than for NWP 21 and 50, will ensure a minimal impact on water quality. In fact, use of NWP 49 often improves water quality in areas heavily impacted by acid mine drainage and poor water quality from previous mining activities.

NATIONWIDE PERMIT 49 (COAL REMINING ACTIVITIES)

Comment 5: “Nationwide 49- Coal Re-Mining Activities. Paragraph 7 requires compliance with the ODNR/DMRM- OEPA joint stream reconstruction guidelines when appropriate. Recent work on stream mitigation language for steep slopes (> 2%) was provided to Ohio EPA and included in the Stream mitigation language. DSWR suggests that Ohio EPA mimic that language for this nationwide.” **[The Ohio Department of Natural Resources]**

Response 5: Ohio EPA has considered alternate methods of stream mitigation language. However, ODNR DMRM is the primary regulatory agency for the surface coal mining industry in Ohio and has regulatory authority under the Surface Mining Control and Reclamation Act of 1977. Ohio EPA will continue to require compliance with ODNR DMRM-Ohio EPA joint stream reconstruction guidelines when appropriate to ensure consistency with ODNR DMRM’s engineering requirements. When this stream reconstruction methodology is not appropriate, other stream reconstruction guidelines may be used such the Compensatory Mitigation Requirements for Stream Impacts in the State of Ohio (Revision 5.0), developed with the help of several divisions within ODNR, among others, and is referenced in the draft Stream Mitigation Rules. The stream mitigation techniques referenced in the document are not currently used consistently and are not codified in rule.

End of Response to Comments