

Ohio Environmental Protection Agency

Division of Surface Water

Responsiveness Summary

Project: Nationwide Permits

Ohio EPA held a public information session and public hearing on May 21, 2007 regarding a water quality certification for U.S. Army Corps of Engineers' nationwide permits as proposed in the March 12, 2007, Federal Register. Written comments were received during the public comment period, which ended on May 28, 2007. This document summarizes the interested party questions received at the May 21, 2007, public hearing and associated comment period.

All comments received during the public hearing and the comment period were reviewed and taken into consideration. However, Ohio EPA's regulatory authority is primarily limited to the specific environmental concerns surrounding these nationwide permits, in particular the authority granted through Section 401 of the Clean Water Act related to the protection of waters of the state. Therefore, Ohio EPA does not have the authority to directly consider zoning issues; possible effects the development may have on property values; or, how popular or unpopular a project may be. Some of these issues can more specifically be addressed through local planning agencies and government officials.

In an effort to help you review this document, the Agency has organized the information in a consistent format and used different fonts to distinguish between comments and responses. The document is organized as follows:

•**Comment #:** This section provides a summary of interested party questions/comments. When appropriate, these are direct quotes from interested party comments.

•**Response #:** This section has language in italics and summarizes the Agency's response to the corresponding question/comment.

The following comments are those received in oral testimony during the public hearing held on May 21, 2007:

Comment 1: Ohio State Certification General Limitations and Conditions Part C (Lakes): What is the definition of a "Lake"; and, for the purpose of this condition, does it include uncommonness behind dams and mining pit ponds? We would like to restore mining pit ponds without running into conflicts with Sections 4 and 5 of the Lakes section.

Response 1: *Ohio EPA defines a "Lake" as a surface water of the state that is a natural or constructed pooled or impounded body of water and has either a permanent or periodic connection to other surface waters and/or ground waters of the state. The term "Lake" excludes naturally impounded areas less than 5 acres (2 hectares) in size that are predominantly vegetated with rooted or non-rooted aquatic macrophytes—these habitats are considered wetlands as defined by OAC 3745-1-02. The wetland-lake boundary is inclusive of any associated wetlands which includes fringing wetlands, lacustrine fens, bogs, other wetlands, or areas with submersed and floating aquatic macrophytes, that are contiguous with open water. In addition to Lake Erie, inland lakes include water bodies listed in Appendix B of the 1996 Ohio EPA 305(b) Report, Volume 3, or an updated version of this document; meet the definition of "Lake".*

Paragraphs 4 and 5 of Part 1 C. Lakes is intended to apply to the Lake Erie shoreline where development activities have disrupted the transport of sand within the littoral zone. Projects seeking to reclaim mining pit ponds are not subject to this analysis.

Comment 2: Ohio State Certification General Limitations and Conditions B.4.: Park districts should not be required to undergo an individual 401 water quality certification review to establish a stream or wetland mitigation bank since "they always create very high quality systems to begin with." And, since they "aren't in the fee schedule for...municipalities or townships where they get 50 percent off or – in the case of a state agency where they don't have to pay any review fees at all," they do not have the financial resources to meet the high permitting fees.

"It would be nice to be able to promote these park districts in restoration of their lands...Some of them are actually doing mitigation on their properties, but they're allowing developers to come in, establish an easement, do the work, get it approved and everything else. And in many cases, the park districts are highly unhappy with the results."

Response 2: *The provisions under General Condition B.4 have been implemented to ensure that no new wetland mitigation banking projects are approved via nationwide permits prior to the proposal having completed the Mitigation Banking Review Team approval process. The completion of the MBRT process includes having the bank instrument signed by the director of Ohio EPA. Once the instrument has been signed by the director of Ohio EPA, there is no limitation on the use of nationwide permits to achieve the construction activities necessary to make the bank functional.*

Ohio EPA developed these provisions to address instances when construction of banks commenced prior to the MBRT review process being completed. Ohio EPA does not want any construction to occur until all elements of the banking proposal, including the construction plan, have been approved. The underlying rationale for

this condition is that it is much easier to modify a plan than a constructed project.

It should also be noted that the fees for 401 water quality certifications are dictated by Ohio Revised Code and cannot be altered through this action.

Comment 3: Ohio State Certification General Limitations and Conditions A.3: The definition of “Natural Channel Design” includes the phrase, “engineering technique”. Does this mean that the design work for the channel must be done by a registered professional engineer?

Response 3: *One need not be a registered professional engineer to prepare stream drawings based on natural channel design. However, one must have the requisite knowledge of fluvial systems, such as stream mechanics, hydrology, sediment transport, nutrients, and habitat, and understand the relationship of these factors to supporting biological communities. The qualifications of the person, or firm, preparing the stream drawings, is provided in the plans submitted to Ohio EPA for review.*

Comment 4: Ohio State Certification General Limitations and Conditions B.2.: “I request that the county boundary be removed and the specific HUCs – the 14 HUCs, in which the impacts are going to occur – is specified and not the counties.”

Response 4: *The counties specified in this condition were identified according to census data that shows rapid urbanization in these counties. Since a county could contain multiple 14-digit HUCs, and some of these HUCs could extend beyond county lines, Ohio EPA felt that the more appropriate designation for this condition would be the county as opposed to the 14-digit HUC.*

The remaining comments were received via written correspondence:

The following comments are those received from the Darby Creek Association:

Comment 5: “As one implementation mechanism, the TMDL stated that the Darby watershed should be removed from certification of nationwide permits, except in the case of projects to restore natural stream channel designs...The Darby Creek Association strongly urges the EPA to follow this TMDL recommendation and deny nationwide permits for the Darby watershed, unless the proposed activity improves water quality.”

Response 5: *The certification of the nationwide permits contains provisions which provide the Darby Creek watershed with an added level of protection above many watersheds in the state. These protections include the restrictions on use of the NWP for streams with the exceptional warm water habitat use or designated as superior high quality waters. In addition, the recently implemented Darby Storm Water Permit provides yet another added level of protection. Given that the nationwide permits are designed to only authorize those impacts considered minimal, and the added protections mentioned above, Ohio EPA does not believe that the complete elimination of the use of the nationwide permits within this watershed is required.*

The following comments are those received from the Davey Resource Group:

Comment 6: “Why was there a significant delay in the issuance of the draft certifications? This process should have been initiated before the NWP’s expired so that the certifications would be ready for implementation when the new NWP’s were effective. This delay in action by Ohio EPA has caused at least a 3 month delay/inconvenience to the regulated public in Ohio.”

Response 6: *Ohio EPA drafted conditions for the state certification for the nationwide permit based on the draft nationwide permits issued by the Corps on September 26, 2006 Federal Register (Volume 71, Number 126). However, the state could not put those conditions out for public comment until the Corps issued their final draft of the nationwide permits on March 12, 2007. Since the Corps did not issue their permits until a week before they expired, it was not possible for the state to modify conditions based on the final nationwide permits issued by the Corps; put those conditions out for public comment; respond to comments received during the comment period; and, modify conditions based on comments within a week’s time.*

Comment 7: General Limitations and Conditions A.2.b.: “It appears that Class 3 Headwater Stream impacts are prohibited. Does this apply to all Class 3 streams? Would an HMFEL be necessary to document the “cold water conditions that support species of animals including certain salamander or fish species” etc...? If so, this is a costly process that can only be performed in certain times of the year. To require this additional assessment would place an undue burden on the regulated public. In general, impacts to Class 3 streams should fall under the same thresholds allowable for other headwater streams, they should be permissible under the Nationwide Permit process, and the Ohio EPA certification should be modified to reflect that. Class 3 streams are not equivalent to Category 3 wetlands and should not be treated like Category 3 wetlands.”

Response 7: *Ohio EPA received a number of comments regarding the prohibition of Class 3 headwater impacts through the nationwide permits. While Ohio EPA does believe that these types of habitats are unique and deserving of protection, the inclusion of this provision within the certification of the nationwide permits may not provide the intended results. First, this provision will potentially generate a significant number of individual permit actions. Current resources available to Ohio EPA are inadequate to address such an increase. Second, the current rule structure for the individual permit reviews does not adequately address this type of stream habitat. Given these restrictions, Ohio EPA has decided to remove this provision from the certification of the nationwide permits. Modification of the Ohio Water Quality Standards and 401 water quality certification rules are being undertaken to address this issue.*

Comment 8: General Limitations and Conditions A.3.: “This section seems restrictive. Creating a ‘stable’ channel that maintains its form implies taking the life, dynamics, and movement inherent in natural streams out of the equation as they adjust to ever changing influences from watersheds. Is stable the best word to use here?”

Response 8: *Ohio EPA believes that the commentor is concerned that the term “stable” may be misapplied to advocate use of concrete or other bank hardening measures, in lieu of more natural measures. “Stable”, as the word is used herein, means a stream*

channel that is in dynamic equilibrium and maintains its cross sectional area, plan form and longitudinal profile over time. Further, the definition of natural channel design must be read in the larger context of meeting targeted habitat or biological endpoints. This definition does not totally preclude the strategic use of bank hardening measures as may be warranted so long as those habitat or biological end points are met.

Comment 9: “It is unclear if preservation of existing streams is acceptable as stream mitigation. Stream preservation should be clearly identified as an acceptable method of stream mitigation.”

Response 9: *Ohio EPA accepts both stream preservation and restoration as mitigation for impacts authorized under a nationwide permit. However, rather than specify the type of mitigation to be conducted, Condition A.4 sets forth criteria to be met, and provides the applicant the flexibility to choose the best option given the circumstances of a specific project. As a practical matter, the review process, including the approval of the mitigation will be conducted entirely by the Corps based on the 401 water quality certification criteria.*

Comment 10: General Limitations and Conditions A.4.c.: “Vegetative buffer widths in should be clarified. Is the width calculated from stream centerline or stream bank?”

Response 10: *To clarify how the vegetated buffer strip is calculated, the buffer width is measured beginning at the top of the bank or level of bankfull discharge (Fischer and Fisichenich 2000.)*

Comment 11: General Limitations and Conditions B.2.: “This section requires the mitigation for impacts in specific counties to remain within the 14-digit HUC and the county. What is the basis for the selection of the specific counties listed in this section? If there is a documented need/reason to establish special mitigation requirements for this select list of counties, then the requirement to keep mitigation within a county boundary should be removed and mitigation within the 14-digit HUC should only be required if it is “available and practicable”. If mitigation in the 14-digit HUC is not available and practicable, then mitigation should be allowed to occur in the 8-digit HUC or an adjacent 8-digit HUC.

“The requirement to keep the mitigation within a county boundary and/or within a 14-digit HUC is too restrictive and is not practicable for several reasons:

- a. At a recent discussion during the Ohio EPA wetlands workgroup, it was stated that the purpose of mitigation banks is to mitigate for multiple small impacts. However, the way this part of the regulation reads, a mitigation bank would not be acceptable for impacts in these counties unless it happened to be located in the correct 14-digit HUC.
- b. This requirement would create the need for multiple small mitigation sites in many 14-digit HUC watersheds. To develop, build, and monitor multiple small projects is costly for not only an applicant, but also for the state/federal regulators who have to ensure the mitigation goals were accomplished.
- c. There may be better places to mitigate within the same 14-digit HUC, but outside of a county boundary.

- d. It may be very challenging to find appropriate mitigation sited within heavily developed counties, e.g., Cuyahoga County.

"If there is not a strongly founded reason to establish special mitigation rules for this select list of counties, then mitigation for any impacts should uniformly follow Ohio EPA's WWQS. That is, the language in Section B 4 b should apply to all impacts authorized under a NWP."

Response 11:

Ohio EPA received a number of comments regarding the requirement in the nationwide permits to mitigate for impacts to category 2 wetlands in rapidly developing counties within that county and the 14 digit HUC. Ohio EPA does have data showing that high quality wetlands within these types of areas are already severely impacted or almost non-existent. However, the inclusion of this provision within the certification of the nationwide permits may not provide the intended results. First, this provision will potentially generate a significant number of individual permit actions. Current resources available to Ohio EPA are inadequate to address such an increase. Second, the current rule structure for the individual permit reviews does not adequately address this type of mitigation requirement and could potentially result in increased wetland impacts. Once the incentive to reduce impacts in order to qualify for the nationwide permit has been removed, applicants may seek to maximize impacts through the individual permit review process. Third, the provision as written could have a significant negative impact on existing mitigation banks. While the use of mitigation banks is not appropriate in every instance, they were established in good faith to fulfill an identified need. Drastically reducing the circumstances under which they can be used may serve as a disincentive to establishing banks in the future. Given these restrictions, Ohio EPA has decided to remove this provision from the certification of the nationwide permits.

By removing this condition from this certification, Ohio EPA does not cede the importance of protecting wetlands in urbanizing areas. Ohio EPA's long term goal is to encourage the establishment of local banks. However, in light of the concerns described above, Ohio EPA believes the 401 rule review process provides a more appropriate venue to address this issue.

Comment 12:

General Limitations and Conditions B.4.a and D.2.: These sections seem to indicate that it is necessary for a new mitigation bank to go through the Individual Section 401 WQC process. What is the rationale behind this?"

Response 12:

See Response 2

Comment 13:

General Limitations and Conditions B.4.a and D.2.: "The 401 WQC process is not established to evaluate and approve mitigation banks. What are the perceived benefits of making a mitigation bank go through the question 10 a-k alternatives analysis process? Imagine trying to prepare a WQC application for a bank site. Ohio EPA is already a member of the MBRT and plays a significant role in the review and approval of any new mitigation bank. This request for additional regulatory oversight seems to be a misuse of state resources."

Response 13:

See Response 2

Comment 14: “There are several references to keeping mitigation within a 14-digit HUC. The next option after the 14-digit HUC is the 8-digit HUC. To keep mitigation within a 14-digit HUC area limits many worthy mitigation options. Use of the 11-digit HUC would be preferable over the 14-digit HUC in these cases.”

Response 14: See Response 11

Comment 15: NWP 27: “This exception is confusing when considered in conjunction with the statements in Sections B.4.a. and D.2. This requirement appears to necessitate going through the MBRT process for small individual mitigation projects that impact more than 0.5 acre of forested Category 2 wetlands, i.e., a small project could turn into a mitigation bank. An example would be the creation of vernal pools in a lowland woods or the placement of fill to establish a berm to improve hydrology. These impacts could exceed 0.5 acre. It does not seem practicable to require mitigation projects that are to be used for a single project (or even a small number of projects) to be required to go through the MBRT process—a costly and time consuming process.

Response 15: *Special Condition and Limitation 1 in NWP 27 relates to projects in which there is no tie-in with an individual 401 WQC, i.e. the project itself is proposing aquatic habitat restoration, establishment, or enhancement activities. This Special Condition or Limitation ensures that Ohio EPA has an opportunity to review and comment on these types of projects. Ohio EPA does not require mitigation projects that are proposed and approved in conjunction with an individual Section 401 Water Quality Certification to get any additional authorizations other than the Section 401 WQC.*

Comment 16: NWP 27: “Impacts to Category 3 wetlands are not permitted to occur for mitigation. This requirement should allow for invasive species management and/or enhancement.”

Response 16: *Condition 2.c.i. authorizes invasive species management in Category 3 Lake Erie coastal wetlands. Ohio EPA recognizes that invasive species can be problematic for coastal wetlands. Restoration activities in Category 3 wetlands above 575 feet on a USGS map, outside of the Lake Erie basin are still required to be authorized through an individual permit.*

The following comments are those received from the Ducks Unlimited (DU) and are specific to NWP 27 (Aquatic Habitat Restoration, Establishment, and Enhancement Activities):

Comment 17: Ohio State Certification Special Conditions and Limitations 2.c.: DU recommends this condition not be limited to Lake Erie Coastal and Tributary wetlands but also include wetlands at elevations greater than 575 feet on a USGS map.

Response 17: *The NWP#27 Ohio Special Conditions and Limitations listed in the public notice reflect several months of work with various agencies and stakeholders to develop ways to allow some types of aquatic habitat management activities within wetlands that have been determined to be Category 3 wetlands based solely on the Narrative Rating within ORAM 5.0 but otherwise not have qualified as a Category 3 wetland based on a Quantitative Rating, i.e. they score less than 60. It was never meant to be expanded beyond the Lake Erie coastal and tributary wetlands and*

Ohio EPA does not feel any additional changes are warranted at this time.

Comment 18: Ohio State Certification Special Limitations and Conditions 3.b.: “DU recommends that the term ‘*Macrotopography*’ be added to this statement to reflect the deeper excavations provided under this condition.”

Response 18: *The NWP#27 Ohio Special Conditions and Limitations listed in the public notice reflect several months of work with various agencies and stakeholders. Since excavated depths are limited to 60cm or less, Ohio EPA does not feel the term ‘macrotopography’ is appropriate in this condition. Therefore, Ohio EPA does not feel any changes are warranted at this time.*

Comment 19: Ohio State Certification Special Limitations and Conditions 3.b.: “De-leveling is also beneficial for the management and control of *invasive vegetation* referenced in 2.c.i. DU recommends that this function be added to the purpose of de-leveling.”

Response 19: *Ohio EPA does not agree that the management and control of invasive vegetation needs to be mentioned in Special Limitation and Condition 3.b. This Special Limitation and Condition lists the types of hydrologic diversity that de-leveling can create or enhance. It does not list the purposes for conducting de-leveling. Therefore, Ohio EPA does not feel any changes are warranted at this time.*

Comment 20: Ohio State Certification Special Limitations and Conditions 3.b.: “DU recommends that the maximum *excavated depth* be increased to 75cm (2.5 feet) from the ground surface, measured after topsoil is removed (see comment below). Increasing the maximum excavated depth to 2.5 feet will provide sufficient depths to connect areas of deeper water and to control invasive species such as reed canary grass and *Phragmites* referenced in 2.c.i.”

Response 20: *Ohio EPA does not agree that an increase in the depth of excavation is necessary. Ohio EPA does not feel that this change is warranted at this time*

Comment 21: Ohio State Certification Special Limitations and Conditions 3.b.: “DU wishes to clarify that the calculation of the *depth* of an excavation should commence after the removal of topsoil (typically 3-6 inches) from the ground surface. DU recommends this be changed to reflect that *finished* excavated depths not exceed 3 feet to allow for the replacement of topsoil while still providing, if so desired, a 2.5 foot depth of the scrape.”

Response 21: *Ohio EPA does not agree that an increase in the depth of excavation is necessary. Ohio EPA agrees that some language clarification is warranted and will reword this section of Special Limitation and Condition 3.b. to state “Final grade of any excavation, following topsoil replacement if applicable, shall not exceed 60cm (~2 feet).”*

Comment 22: Ohio State Certification Special Limitations and Conditions 3.b.: “DU recommends the *replacement of topsoil* in almost all situations, except when the seed bank is dominated by invasive vegetation, and when water depths or management capability is unable to sufficiently address invasive species concerns. These situations are typical of drained wetlands throughout the Lake Erie basin.”

Response 22: *Ohio EPA agrees with the comment in regards to the seed bank being dominated by invasive vegetation. Ohio EPA added a statement in Special Limitation and Condition 3.b. that states, "Replacement of the original excavated topsoil is required for all de-leveling activities except when the seed bank is dominated by invasive vegetation. In these cases the area must be seeded by using a seed mix of natural, non-invasive, species appropriate for the hydrological regime present in the area"*

Comment 23: *Ohio State Certification Special Limitations and Conditions 3.b.: "DU suggests this statement be modified to indicate, 'Regrading for the purpose of creating macrotopography and microtopography to increase hydrologic diversity including the creation of shallow scrapes, channels, submerged islands, and interconnected areas of deeper water, and to control the establishment of invasive vegetation. Finished excavated depths cannot exceed 75 cm (~2.5 feet) from the existing ground surface and top soil shall be replaced on at least 75 percent of the areas where it has been removed or is absent due to de-leveling activities.'"*

Response 23: *As stated in the responses above, Ohio EPA has revised the language of Special Limitation and Condition 3.b. to read, in its entirety: "De-leveling. Regrading for the purposes of microtopography to enhance hydrologic diversity, including the creation of shallow scrapes, channels, submerged islands, and interconnected areas of deeper water. Final grade of any excavation, following topsoil replacement if applicable, shall not exceed 60cm (~2 feet). Replacement of the original excavated topsoil is required for all de-leveling activities except when the seed bank is dominated by invasive vegetation. In these cases the area must be seeded by using a seed mix of natural, non-invasive, species appropriate for the hydrological regime present in the area. Excess spoils that are not able to be incorporated into the regrading activities shall be deposited in adjacent non-wetland areas, used in other restoration activities listed in this paragraph, or trucked off-site;"*

Comment 24: *Ohio State Certification Special Limitations and Conditions 3.c.: "The concern regarding base flow in the context of this activity, and the intent of this statement, are not clear. DU discussions with the OEPA focused on agricultural drainage ditches, not headwater streams. Limiting this activity to surface drains originating on the sponsor's property and which have no base flow will greatly reduce restoration and enhancement opportunities on agricultural land in the Lake Erie watershed.*

"A ditch plug can easily be engineered to restore wetland habitat without impacting the drainage or causing flooding on adjacent property. Properly sized control structures will pass base flow and properly engineered emergency spillway will pass flood runoff without impacting the drainage or causing flooding on adjacent property.

"DU suggests this paragraph be reworded to indicate, '~~Disabling surface drains provided the surface drains originate on the property of the project sponsors and have no base flow by filling lengths of the drain or installing water control structures (e.g., riser structures, flap gates, fixed weirs, trickle tubes), or by filling the ditch for its entire length.~~'"

Response 24: *Ohio EPA notes the comment and has made some revisions to the wording to be more clear. Ohio EPA does believe that greater review is necessary for projects*

which propose to disable surface drains that originate off-site and have a base flow due to the potential for these projects to have off-site impacts. In these instances Ohio EPA feels that an individual Section 401 Water Quality Certification is warranted.

However, Ohio EPA also believes the commenter has misread Special Limitation and Condition 3.c. The commenter implies that Special Limitation and Condition 3.c. would prohibit projects that have a properly sized control structures that passes base flow or a properly engineered emergency spillway that passes flood runoff if the surface drain in question originated off-site. Ohio EPA believes that these types of projects could still be authorized under NWP#27 because they incorporate water control structures, not a ditch plug. Ohio EPA will reword Special Limitation and Condition 3.c. to be more clear.

Special Limitation and Condition 3.c. will be revised as follows: "Ditch plugs and water control structures: Disabling surface drains by filling lengths, provided that the surface drains originate on the property of the project sponsors and have no base flow, or installing water control structures (e.g., riser structures, flap gates, fixed weirs, trickle tubes). Ditch plugs may include an emergency spillway to safely route flows back into the ditch below the plug."

Comment 25:

Ohio State Certification Special Limitations and Conditions 3.d Earthen embankments and 3.e Interior dikes.: "After discussions the OEPA had with DU and others it was agreed to make allowances under these activities for the use of stone for erosion control (i.e., class C rip-rap or smaller). Wind-driven wave erosion is typically not an issue during normal winters when wetlands are frozen (usually a spring-time problem). However, the warm temperatures of the past two winters have allowed an additional 1-2 months of wave erosion. Saturated soils (especially on newly constructed berms and dikes), knocked down or uprooted emergent vegetation, and muskrat burrowing compound the problem of winter and spring wave erosion.

"DU suggests that both these paragraphs be revised to allow the use of stone (i.e., class C rip-rap or smaller) to protect from erosion and rodent damage, the infrastructure constructed for purposes of wetland restoration and enhancement (such as berms, embankments, dikes, emergency spillways, pumps, water control structures.)"

Response 25:

Ohio EPA notes the comments on these two Special Limitations and Conditions. However, Ohio EPA feels, the problem should not be that great, especially when it pertains to interior dikes which, by their very nature, should have some degree of protection against wave erosion due to the exterior dike system. Therefore, Ohio EPA does not feel that any changes are warranted at this time.

The following comments are those received from Porter Wright Morris & Arthur, LLP on behalf of FirstEnergy:

Comment 26:

NWP 12: "FirstEnergy requests that Ohio EPA include in the final Certification the specific conditions for Nationwide Permit 12 as found in the" ERAC *Joint Stipulation and Settlement Agreement* dated June 30, 2005; Case Nos. 775137 and 774729.

Response 26:

The language contained in the June 30, 2005 Joint Stipulation and Settlement Agreement: Case Nos. 775137 and 774729, has been inserted into the Nationwide Permit. The two specific conditions of concern raised in this comment pertain to the allowable length of impacts to soils through forested wetlands and width of excavation, grading, and clearing of vegetation and soil. A side-by-side comparison of the language in the Joint Stipulation and Settlement Agreement to the re-authorized nationwide permit reveals no substantive difference between the language from the Joint Stipulation and Settlement Agreement and language Ohio EPA proposed.

Ohio EPA's proposed language restated restriction set forth in General Condition B)3. As a practical matter, a construction right-of-way that is both 500 feet long and 50 feet wide would total 0.574 acres of impacts. A construction right-of-way that is 500 feet long by 43 feet wide would impact 0.49 acres of wetlands. Similarly, a ROW that is 440 feet long and 50 feet wide would impact 0.5 acres of wetlands. Therefore, in order to qualify for this Nationwide Permit, an applicant must either reduce the width, length, or some combination of both, of a project construction right-of-way.

Comment 27:

Ohio State Certification General Limitations and Conditions A.2.: FirstEnergy feels that this condition "prohibits temporary or permanent impacts to Class 3 headwater streams. Although no reference is made to a formal classification system of headwater streams, the Agency appears to be drawing upon the recent development by the Agency of new assessment methodologies for headwater streams. These new assessment methodologies, which have not been subject to peer review, create a new regulatory classification system that has no legal underpinning. There is nothing in Ohio law that defines Class 3 headwater streams, and the definition provided in the General Condition is so vague as to provide no meaningful guidance to the regulated community as to what the Agency will consider Class3 headwater habitat. The absence of a properly promulgated rule defining, at a minimum, the classification system for headwater habitat render the Agency's inclusion of the vague term in the General Conditions unreasonable and likely unlawful. It is unlikely that Class 3 headwater streams, as vaguely described by Ohio EPA, are navigable waters of the United States subject to regulation under the clean Water Act...Consequently, it is inappropriate, unreasonable, and potentially unlawful to include a requirement as vague as General Condition A(2) in the draft 401 Certification."

Response 27:

See Response 7

Comment 28:

Ohio State Certification General Limitations and Conditions A.2.d.: "It is unclear what general high quality waters are excluded from the Nationwide Permit Program...the Agency should provide a complete list of all general high quality water bodies that harbor threatened and/or endangered species...By creating uncertainty as to which general high quality waters are ineligible, Ohio EPA has effectively rendered the program unusable. If the Agency seeks to protect particular water bodies that harbor endangered or threatened species, the Agency should use its rulemaking authority to designate those water bodies, as appropriate, as superior high quality waters, outstanding state waters or outstanding national resource waters. We suggest that the Agency strike condition A(2)(d) in its entirety."

Response 28:

The language of this provision was redrafted to improve its clarity. Ohio EPA's intention is to ensure that streams containing threatened and endangered receive

the level of review associated with an individual 401 water quality certification. Killbuck Creek and Pymatuning Creek are two such streams. Ohio EPA cannot preclude that any given stream will harbor endangered species and cannot provide a comprehensive list of such water bodies.

Comment 29: Ohio State Certification General Limitations and Conditions A.2.d.: The anti-degradation rule definitions of superior high quality water, outstanding national resource water and outstanding waters...include national and state scenic rivers. Thus, it is unnecessary for the Agency to include national or state scenic rivers because impacts to water bodies with these designations are prohibited by General Condition A(2)(c). To the extent there are portions of national or state scenic rivers that are not designated as superior high quality water, outstanding national resource water or outstanding high quality waters, the Agency should look to correct this deficiency through the appropriate regulatory amendments.”

Response 29: *The language regarding national or state scenic rivers will be struck from condition A2.d.*

Comment 30: Ohio State Certification General Limitations and Conditions B.2.: FirstEnergy feels that this condition “is (1) inconsistent with the nationwide Permit Program; (2), unlikely to have a significant, positive impact on water quality; and (3) fails to take into consideration the costs that will result from not only increased mitigation expense, but the movement of projects from these urbanized counties to less developed areas of Ohio. Limiting mitigation options in already urbanized counties may result in further urban sprawl – including, potentially, the loss of higher quality wetlands in less developed counties. For projects with minimal environmental impacts, including the loss of small amounts of Category 2 wetlands, the Agency should not impose additional costs more detailed justifications and a careful review of the potential direct and indirect impacts of such costs. FirstEnergy requests that Ohio EPA articulate a defined need for this restriction, conduct a detailed assessment of the cost, and detail the water quality benefits from this particular condition. Ohio EPA should not impose conditions on the use of the Nationwide Permit Program without a more detailed understanding of not only the costs but the environmental benefits of such requirements.”

Response 30: *See Response 11*

Comment 31: Ohio State Certification General Limitations and Conditions B.4.c.: “The use of the Nationwide Permit Program should not be restricted due to the failure of Ohio EPA to provide a wetland mitigation bank with an ‘active instrument.’ General Condition B(4)(c) imposes a highly restrictive condition that further limits the availability of the Nationwide Permit Program for no obvious reason. Although it appears that Ohio EPA has significant concerns about the environmental value of mitigation banks, for projects that by their very nature involve minimal impacts to water quality, there does not appear to be a sufficient justification for this restriction. The approval of a mitigation bank by the Army Corps of Engineers is sufficient assurance that the mitigation bank will meet appropriate environmental standards for mitigation under the Nationwide Permit Program. Mitigation banking is a long standing, proven, approach for mitigating small impacts to wetlands and Ohio EPA should not arbitrarily restrict their use. This condition should be removed.”

Response 31: *See Response 2*

Comment 32: Ohio State Certification General Limitations and Conditions C.1.: “It appears that the Agency is attempting to limit the diversion of water from the Great Lakes drainage basin to other drainage basins, such as the Ohio River. As written, however, General Condition (C)(1), may exclude all projects that result in the diversion of water from Lake Erie for consumptive uses within the drainage basin from the Nationwide Permit Program. FirstEnergy does not believe that the Agency intended to limit the consumptive use of Lake Erie water resources for industrial or commercial purposes or public drinking water system within the drainage basin, but rather the diversion of water to other drainage basins. FirstEnergy requests that Ohio EPA clarify that this General Condition does not limit the use of water from Lake Erie, provided unconsumed water is returned to Lake Erie.”

Response 32: *The condition has been reworded to clarify that Lake Erie water may not be diverted outside of the Lake Erie drainage basin. Specifically Ohio EPA does not authorize any diversion of Lake Erie water for the purposes of supplying other states or countries with Lake Erie water without a full anti-degradation review.*

Comment 33: Ohio State Certification General Limitations and Conditions C.2.: “There is no definition of coastal wetland found in either the Revised Code or the Administrative Code...Since Ohio EPA has no regulatory definition of coastal wetlands, it is impossible for the regulated community to determine where the line between inland and coastal wetlands exists. It is unreasonable assume that any wetland with an identifiable hydrologic connection to Lake Erie constitutes a coastal wetland. It is also unreasonable to include all wetlands on the Lake Erie Islands as coastal wetlands without a more comprehensive review of the hydrologic/environmental relationship between these wetlands and lake Erie. In order to resolve this vagueness, Ohio EPA should consider defining coastal wetlands as any wetland that is at or below the ordinary high water mark of Lake Erie. This will provide the regulatory certainty and provide a reasonable and justifiable link between the condition in the draft certification and protection the water quality of Lake Erie.”

Response 33: *As is stated in the Ohio Rapid Assessment Method Manual, v. 5.0, a wetland is considered to be a Lake Erie coastal and tributary wetland if it is located at an elevation less than 575 feet on the USGS map, adjacent to this elevation, or along a tributary to Lake Erie that is accessible to fish. Please see the response to Comment 132 for further discussion on Lake Erie Coastal Wetlands.*

Comment 34: Ohio State Certification General Limitations and Conditions C.3.: This condition “includes a reference to ‘public inland lakes’ that lumps a huge area of the State in with Lake Erie without sufficient public notice or comment. Since the vast majority of surface water bodies in Ohio are public waters, the restriction on disturbing more than 200 linear feet of shoreline will further limit the availability of the Nationwide Permit Program without any articulated water quality benefit. It is unreasonable for the Agency to include restrictions on the use of the Nationwide Permit Program without an articulated, concrete water quality benefit.”

Response 34: *Ohio EPA has reviewed this condition in conjunction with other conditions commonly used to regulate impacts to lakes (NWP 13). A conflict in allowable linear footage of impacts exists in the draft language of the two conditions. It has been determined that Condition C.3 is redundant with other conditions and will be eliminated.*

Comment 35:

NWP 12: “Limiting or removing all conditions on the use of Nationwide Permit 12, including both the General Conditions and those specific to Nationwide Permit 12, is consistent with Governor Strickland’s renewed focus on reducing redundant regulatory programs. Most major transmission line projects are already subject to comprehensive review by the Ohio Power Siting Board (‘OPSB’). The staff members of the OPSB, including several employees of Ohio EPA, review applications for a Certificate of Environmental Compatibility and Public Need to ensure the project minimizes potential environmental impacts, including impacts to streams and wetlands. Since Ohio EPA is already responsible for reviewing transmission line projects during the OPSB certification process, once the Certificate of Environmental Compatibility and Public Need issues, there is no reason for Ohio EPA to require another, parallel review of potential impacts to streams and wetlands. If a transmission line project is subject to review by the OPSB, there is no reason for Ohio EPA to limit in anyway the applicability of the Nationwide Permit Program on the proposed project. Ohio EPA should consider whether there is any environmental benefit from the general and specific conditions that limit the availability of the Nationwide Permit Program for utility projects that outweighs the regulatory burdens caused by the redundant review of the project if the Nationwide Permit Program is not available.”

Response 35:

While it is true that the Ohio Power Siting Board and Ohio EPA enjoy a close and productive working relationship, OPSB staff reviews are conducted for the benefit of that Board when determining whether to grant a project a certificate under the requirements set forth in Ohio Revised Code 4906.10. The OPSB review, while wide ranging, is not a substitute for the in-depth water quality reviews conducted by Ohio EPA. In fact, OPSB approvals are conditioned upon an applicant acquiring all necessary state and federal permit approvals, of which 401 water quality certification is but one. The permit decision rendered by Ohio EPA is used to support the decision by the OPSB. It is inappropriate to suggest that a decision by the Board be used as justification to waive the requirement to obtain a 401 water quality certification.

Further, only “major” transmission lines fall within the purview of the OPSB under Ohio Revised Code 4906.01. The comment also does not recognize that Nationwide Permit 12 applies beyond projects reviewed by the OPSB, and includes gas pipelines and other buried utilities such as water and wastewater lines. The impact of the comment would be to remove a substantial number of projects from any water quality review whatsoever.

Comment 36:

NWP 12 – Ohio State Certification Special Limitations and Conditions 2: “FirstEnergy believes that Special Condition No. 2 is redundant, unnecessary, unlawful and unreasonable. If the project is eligible for Nationwide Permit 12, the protections afforded by Special Condition 2 are unnecessary to protect water quality. To the extent the Agency in attempting to circumvent the definition of ‘single and complete’ project from the Army Corps, this Special Condition is unlawful. Finally, this Special Condition is inappropriately vague, including the width or area of impacts and the definition of ‘disturb’ as to render this condition unreasonable.”

Response 36:

Ohio EPA believes that the use of Nationwide Permit 12 is acceptable precisely because of the General and Special Conditions that set reasonable limits for utility construction while protecting water quality. Failure to include any conditions on the use of Nationwide Permit 12 would eliminate the incentive to reduce the scope of work to qualify for the Nationwide Permit in the first instance.

Further, Ohio EPA believes it wholly appropriate to limit impacts to forested wetlands to 0.5 acres of wetlands. This limitation recognizes the length of time forested wetland take to develop, and the unique habitats such as vernal pools, often found therein.

In addition, Ohio EPA believes the term disturb is sufficiently clear. As far as Ohio EPA is aware, there have not been instances where jurisdiction was in dispute over the interpretation of the word disturb within the context of the Nationwide Permit 12. In fact, Ohio EPA used language agreed upon in the Joint Stipulation and Settlement Agreement as previously requested by the commentor.

Comment #37:

NWP 12 – Ohio State Certification Special Limitations and Conditions 4: “There is no reference to water quality in this particular condition. To the extent the Agency is attempting to impose conditions on the construction of utility right-of-ways outside of impacts to wetlands and streams, this condition exceeds the authority of the Agency. To the extent the Agency is attempting to expand its authority to include upland areas associated with minimal impacts to wetlands or streams, not only does FirstEnergy believe that that is an impermissible expansion of the Agency’s authority and is therefore, unlawful, it defeats the purpose of the Nationwide Permit Program. The program was designed to allow expeditious Permit for projects with minimal impact on water quality. Both Condition 2 and 4 should be removed in their entirety from the Certification.”

Response 37:

The special conditions authorized for this Nationwide Permit apply only in those instances where a project will impact water quality. If a utility line is constructed such that Sections 404 and 401 of the Clean Water Act are not invoked, then the conditions set forth herein will not apply. An applicant still has the responsibility to obtain all other necessary permits and approvals.

Comment 38:

NWP 12 – Ohio State Certification Special Limitations and Conditions 8: “Under federal law, a single and complete project is defined as each crossing of an individual stream or wetland. Specific Condition 8 would render most, if not all, utility transmission line projects ineligible for coverage under the Nationwide Permit Program by altering this definition. This is inconsistent with federal law, unreasonable, unlawful and inconsistent with the efforts of the State of Ohio to encourage growth, rebuild the economy and strengthen the electric transmission grid.”

Response 38:

Ohio EPA disputes the claim that Special Condition 8 “renders most, if not all, utility transmission line projects ineligible...”. A cursory review of projects reviewed by Ohio EPA from January 2002 to present revealed four utility transmission line projects requiring individual Section 401 water quality certification. Of these, one was withdrawn and granted under NWP 12, three were necessary to repair existing lines, and one of these three involved impacts Category 3 wetlands.

Ohio EPA is also currently aware of four additional pending projects that will require individual 401 water quality certification. Of these, one is for project that will span the entire state. For the remaining three, the transmission lines are ancillary to other aspects of the power generating/storage project.

Ohio EPA also compared the language currently in Nationwide Permit 12 to the previous language.

Previous Language:

New buried utility lines crossing more than 1,500 feet (cumulative for the entire project) of surface waters (including isolated and non-isolated wetlands, and ephemeral, intermittent, and perennial streams (measured bank-to-bank) and with impacts located in three or more than two Ohio EPA 8-digit hydrologic units as defined in Ohio Administrative code 3745-1-54(F) are not permitted.

Current Language:

New buried utility lines crossing more than 1,500 feet (cumulative for the entire project) of surface waters (wetlands, and ephemeral, intermittent, and perennial streams) or with impacts located in three or more Ohio EPA 8-digit hydrologic units as defined in Ohio Administrative 3745-1-54(F) are not authorized.

While minor changes were incorporated Ohio EPA does not believe the new language will capture projects not previous required to obtain individual 401 water quality certification.

The following comments are those received from the Hamilton County Soil and Water Conservation District:

Comment 39:

“With respect to the Ohio EPA conditions associated with the Nationwide Permits Program (NWP), the Hamilton County Soil & Water Conservation District (HCSWCD) believes that state input is extremely vital because numerous impacts to streams are occurring under the nationwide program with little to no mitigation requirements. Despite the seemingly minimal impact that one project may have on a waterway, the sheer number of nationwide projects that are permitted compared to state 401 reviewed projects, can create irreversible or costly impacts to our water resources. According to the March 12, 2007 Federal Register document from the Department of Defense, numerous commenters have also found this to be true (FR 11094.) We do recognize that the data used for the NWP decision documents are the best available data at a national scale (FR 11099.) However, our field observations do not always validate the fact that the adverse effects on the aquatic environment are minimal. Consequently, it is highly recommended that the Army Corps of Engineers and Ohio EPA implement a national and state (respectively) tracking and monitoring system for the nationwide projects.”

Response 39:

While not specifically addressed in the certification of the nationwide permits, Ohio EPA is taking steps to provide better tracking for the determination of cumulative impacts of individual certifications and mitigation through GIS. Ohio EPA has and will continue to work with the US Army Corps of Engineers to improve tracking of the nationwide permits as well.

Comment 40:

“We are pleased that the Corps has decided to expand the scope of activities requiring preconstruction notification (FR 11095), but we do feel that all projects should require a preconstruction notification regarding the work that will be done and the potential stream or wetland impacts. Additionally, these notifications for categories of NWPs should be shared with conservation organizations such as Soil & Water Conservation Districts (SWCDs) and watershed groups upon request. As

with the 401 water quality certification process, a mechanism should be developed such that these groups can be notified of nationwide impacts. We request that Ohio EPA establish state criteria requiring the ACOE to follow through on this. These organizations often have the best recommendations concerning how projects can be implemented using sound conservation practices.”

Response 40: *Ohio EPA will work with the Corps of Engineers to ensure that adequate notice is provided to interested parties. However, Ohio EPA does not believe that this notification should be required in the context of the certification of the nationwide permits.*

Comment 41: “Permits for which ACOE District Engineers can waive the 300 linear foot requirements for intermittent and ephemeral streams allow them too much authority and it is not clear how they are determining that the impacts to the aquatic environment will be minimal. Even without the waiver requirement, allowing impacts of up to 300’ on any stream are excessive. We recommend a 150 linear foot maximum for nationwide permits in Ohio. If a waiver for a project is provided, it should not be given without appropriate consultation with local SWCDs and watershed organizations.”

Response 41: *Ohio EPA agrees that intermittent and ephemeral streams are important water resources in Ohio, however, Ohio EPA does believe that the 300 linear foot is appropriate. It should be noted that no approval for a project greater than 300 feet can be obtained without a review of the project by the Ohio EPA.*

Comment 42: “We object to comments that ephemeral streams are not subject to Clean Water Act jurisdiction. These streams perform a valuable role in nutrient and sediment removal and should be protected. Additionally, streams that appear to be disconnected from a navigable waterway should still be regulated. As in the case of isolated wetlands, these waterways are often connected through groundwater. Many of these channels have been disconnected over time, but reconnecting headwater systems would seem to be an ideal mitigation project – the full function of a headwater stream system could be restored.”

Response 42: *Ohio EPA concurs with the commentor regarding the functions and services provided by ephemeral streams. However, the issue of whether or not a water body is under the jurisdiction of the Clean Water Act is beyond the scope of the nationwide permits and the certification of those permits. There are a number of policy, legal, and legislative actions currently under way which are designed to address the issues raised in the Supreme Court’s Rapanos decision.*

Comment 43: “For all nationwide projects, a level of mitigation should be a mainstream requirement. Currently, it appears that compensatory mitigation is an option, but we are unaware of nationwide projects that have been permitted with a mitigation requirement. Furthermore, as is the case through the 401 water quality certification program, a venue for public comment such as a hearing should also be an option for projects under nationwide permits.”

Response 43: *Under the proposed certification Condition B.4.b does require wetland mitigation to be consistent with the requirements in Ohio’s WQS. The WQS do not currently address stream mitigation at the same level of detail but an effort is underway to modify the state rules on this issue.*

Since the review of the nationwide permit applications is the responsibility of the U.S. Army Corps of Engineers, issues regarding public comments and hearings should be directed toward that organization. Because the nationwide permits are intended to address projects resulting in only minor impacts, public hearings are not warranted and would defeat the intent of the nationwide permit process.

Comment 44:

NWP 12: "Numerous projects creating stream impacts fall under nationwide permit #12. On several occasions, we have witnessed utility line activities contributing large amounts of sediment and pollution to waterways. These are government entities that should be setting the example regarding the appropriate application of in-stream best management practices. While the Ohio State Certification General Limitations and Conditions provide additional guidance, it is perplexing that temporary use of cofferdams and dewatering devices are not required for utility line crossings. If the utility line is being installed during a time when the stream bed is dry, then omitting these best management practices is understandable. However, through our field work and inspections, *we have observed maintenance on water lines, sewer lines, and gas and electric lines that takes place in an active channel with no efforts to isolate flows and dewater the site.*

Response 44:

The intent of the nationwide permit program is to provide an expedited process to review projects that should, by their nature, involve only minor impacts to water quality. Utility lines, if designed and constructed properly, and if Best Management Practices are properly implemented, should result in minor impacts to water quality. The instances cited in the comment seem to result from lack of proper planning and implementation. That is a separate issue from whether the activity should be covered under a nationwide permit. The commentor is encouraged to refer such incidents to Ohio EPA and the US Army Corps of Engineers, or rely on local enforcement tools should they be observed in the future.

Comment 45:

NWP 12: "Material resulting from trench excavation may be temporarily sidecast (up to three months) into the waters of the US, provided that the material is not placed in such a manner that it is dispersed by currents or other forces." In southwest Ohio, there are generally several storm events that occur in a three month period that would be capable of moving sediment or "sidecast materials" within a waterway. Unless the project can be completed in a few days without rain, *the excavated trench materials should be placed at least 25 feet outside of the bankfull flow elevation and covered with a tarp.* A final consideration regarding nationwide permit #12, is the fact that a utility line trench that remains in the excavated state for an extended period of time, has a high probability of becoming a point of down cutting within the stream. As the scouring moves upstream, the stream channel may deepen, creating additional stream bank erosion and sediment loads downstream."

Response 45:

Special Condition 6. is most applicable to stockpiling side cast material in wetlands. Ohio EPA believes that three months is the maximum time frame that material should be stockpiled, in order to best ensure that the wetland area where the material was stored will recover. It is not Ohio EPA's experience that this Condition is necessary for stream crossings. Many smaller stream crossings are completed within days including excavating the trench, installing the utility line, replacing the substrate, and stabilizing the bank. However, because larger river crossings may take longer to complete, Ohio EPA added the following language to Special condition 6, "Dredged side cast material that will be stockpiled in excess of 45 days shall be stabilized in accordance with the Construction General Storm

Water Permit.” The language was modeled after the existing Construction General Storm Water Permit.

Ohio EPA also believes that properly designed and constructed stream crossings should not head cut. Such instances should be reported so that remedial measures may be implemented.

Comment 46: NWP 12: “Under current NWP requirements, numerous utility line projects less than 500’ and 1/10 acre can be allowed without any oversight. The cumulative impact of these numerous smaller projects can be devastating for streams and wetlands if not implemented appropriately. Consequently, it is recommended that the Ohio state certifications *only authorize the crossing of 250’ of linear forested wetlands rather than 500’.*”

Response 46: *Ohio EPA continually seeks the proper balance between environmental protection and best utilization of staff resources. In light of current resources, and lack of data to justify further restricting the linear footage under this nationwide permit, Ohio EPA believes the 500 foot restrict is appropriate.*

Comment 47: NWP 13: “We recommend that OEPA revise the Ohio state criteria under nationwide permit #13 (bank stabilization.) For bank stabilization projects, there appear to be a couple of conflicting requirements. Point 13b. of the Federal regulations indicates that the bank stabilization activity must be less than 500 feet in length. Meanwhile for permit #13, point 3c. of the state requirements indicates that the nationwide permit shall not authorize bank stabilization projects over 1,000 feet in length. Why list the 1,000 feet specification if the federal requirement is more stringent?”

Response 47: *Revised condition 3.a. states, “This nationwide permit shall only authorize bank stabilization projects up to 500 feet in length.”*

Comment 48: NWP 13: “Ideally, a stream bank stabilization project over 200 feet should trigger a state 401 Water Quality Certification review.”

Response 48: *Ohio EPA reduced the state threshold for stream impacts from 1,000 linear feet in the previous rendition of the NWPs to 500 linear feet in order to be consistent with the 500 linear feet federal threshold for stream impacts. Ohio EPA feels a further reduction of the threshold is not warranted at this time.*

Comment 49: NWP 13: “Given the impact that attempts at bank stabilization can have on waterways, bank stabilization efforts should also be subject to the mitigation protocol.”

Response 49: *Ohio EPA is comfortable with allowing the Corps to require mitigation if they so desire. Many bank stabilization projects do benefit water quality in reducing sediment load in streams by reducing bank erosion. Requiring additional mitigation for the small projects covered by NWP#13 is, in the opinion of Ohio EPA, unwarranted.*

Comment 50: NWP 13: “I would suggest that whether subject to a nationwide or state 401 review, smaller bank stabilization efforts should at least be required to adhere to

soil bioengineering practices, while larger projects should require approval by a professional engineer. The *engineer* should not only show the reduction in shear stress and erosion along the stabilized bank, but *should certify that no adverse water quality impacts or property damage/excess erosion will occur downstream* as a result of the project. Many permitted projects may be a temporary fix for stream bank erosion problems in one location, but will accelerate erosion and property damage upstream and downstream of the project.”

Response 50:

Ohio EPA does not agree that requiring a professional engineer will necessarily improve the quality of the bank stabilization project. Specific training, available to engineers and non-engineers, on channel design is required to produce a well designed project. However, there are currently no plans to implement a detailed certification requirement for individuals submitting bank stabilization projects.

Comment 51:

NWPs 29 and 39: “*the allowance of up to 300 linear feet of stream impact under these permits is far too lenient. Our district has recognized that many developers will design their projects in a manner to maximize their impacts without having to apply for a 401 Water Quality Certification permit. Through the proposed criteria, projects can easily impact 1/3 to 1/2 the distance of a 1st or 2nd order headwater stream channel that plays a key role in the assimilation of nutrients and sediments in a watershed. Furthermore, a waiver allowance for the “length of impact” criteria under this nationwide permit is not advised. The Hamilton County SWCD would like to see some form of mitigation required for any stream impact in order to truly protect existing uses of waterways as required under the Clean Water Act. At a minimum, these **nationwide permits should not be allowing impacts over 150 feet** until there is substantial research to show that the projects are not adversely impacting the existing use of the waterway where they are installed.*”

Response 51:

Ohio EPA believes that the 300 linear foot is appropriate. Limits set forth in the nationwide permits reflect the need to balance agency resources with an appropriate level of environmental protection based on currently available data. Ohio EPA is receptive to additional data that would justify tightening or loosening, the restrictions for any Nationwide Permit. It should be noted that no approval for a project greater than 300 feet can be obtained without a review of the project by the Ohio EPA.

Comment 52:

NWP 44: “Due to the extremely invasive nature of mineral extraction activities on the quality and structure of the stream bed, **we do not feel that mining operations should be permitted through the nationwide process.** The impacts that sand and gravel mining can have on the stability of a stream system and aquatic life are well documented. While several commenters on NWP #44 have noted the potential of mining activities to create increased floodplain storage, there are also very significant economic losses that have occurred as a result of in-stream mining creating a headcut, which migrates upstream, destabilizing stream banks and undermining bridges and other infrastructure. A couple of articles that effectively document the potential environmental and economic consequences associated with in-stream mining are as follows: “Hungry Water: Effects of Dams and Gravel Mining on River Channels” (G. Mathias Kondolf 1997) and Geomorphic and Environmental Effects of In-stream Gravel Mining (G. Mathias Kondolf 1994.)

In Hamilton County, the concern over the destabilization of river systems due to mining operations has already created a large burden for taxpayers. While the particular instances involve floodplain mining rather than in-stream mining, the environmental and economic consequences of a river migrating into a floodplain

gravel pit are similar to those that occur from in-stream mining. There are several locations along the Great Miami and Whitewater River, where we have noticed consistent erosion rates of 5-10 feet per year. Under current Ohio Surface Mining Law, mining excavations only have to sit back 75 feet from a waterway that drains a surface area of more than 100 square miles. Due to the rates of erosion we are observing, in some locations it may only take a few years for a river to erode into the gravel pit, causing water quality and river stability problems. The close proximity to a river and floodplain levees erected at mining operations have had or will have the following economic consequences in Hamilton County:

- In recent years, Hamilton County tax payers paid over a million dollars to restore a stream bank at Lake Isabella along the Little Miami River and prevent the river from eroding into the gravel pit. The property was purchased by the Hamilton County Park District after the mineral extraction process was complete.
- Hamilton County taxpayers are paying at least a half million dollars to restore a similar eroding stream bank at a former mining site along the Whitewater River.
- In 2004, the Village purchased the 300 acre area along the Little Miami River for \$7 million. Although Indian Hill taxpayers were able to “foot the bill”, should it be their responsibility?

Response 52:

Previously, this NWP was revoked from use in Ohio through a regional condition by the Corps. Since regional conditions are, at this time, lacking for the current NWPs, Ohio EPA denied certification of NWP#44.

Comment 53:

General Condition 10 under the Corps' requirements: “The proposed modification to General Condition 10 is to simply require permittees to comply with applicable state or local floodplain management requirements...In addition to the adherence to the FEMA floodplain regulations, we recommend that OEPA implement under General Condition 10, a requirement that a **project engineer must show that near bank velocities and shear stress are not accelerated in upstream or downstream reaches** as a result of the work.”

Although the establishment of requirements for fills within the 100 year floodplain may seem to be redundant, local permits issued under FEMA guidelines can and do generate points of instability and erosion within stream systems. Furthermore, even if local floodplain administrators require details concerning the down stream impacts of a project, enforcement of noncompliant sites can be problematic. Therefore, an additional level of oversight would be extremely beneficial.

Response 53:

The intent of General Condition 10 is to ensure that an applicant complies with state and local floodplain regulations regarding the base flood elevation during a 100 year storm event. General Condition 10 requires an applicant to submit documentation that they have submitted the application to the appropriate floodplain administrator.

While the commentor is correct, that poorly designed floodplain fills may result in destabilization of the channel, it is not appropriate to bootstrap that review to the floodplain permit. Pre-construction notifications for fills occurring below the Ordinary High Water Mark in FEMA designated waterbodies will still be subject to review by the Corps of Engineers. In addition, the Huntington District of the U.S. Army Corps of Engineers has proposed a regional general condition requiring submission of the FEMA Flood Insurance Rate Map (FIRM) as part of the PCN. It

is during the review of the PCN that potential impacts to the stream channel should be reviewed.

The following comments are those received from the National Wildlife Federation:

Comment 54: NWP 13: "Strike the proposed modification to NWP 13 granting the District Engineer discretion to grant exemptions to the permit requirements."

Response 54: *This comment relates to federal requirements, not the proposed state Special Limitation and Conditions. Therefore, this suggestion is outside of the scope of Ohio EPA. Ohio EPA can not strike the condition which grants the Corps District Engineer the discretion to grant exemptions.*

Comment 55: NWP 13: "PCNs must be required for all activities proposed under this permit."

Response 55: *Because the Corps determines which nationwide permits are subject to pre-notification requirements, this suggestion is outside of the scope of Ohio EPA. Ohio EPA can not require a Corps PCN for all activities.*

Comment 56: NWP 13: "Mitigation for the use of this nationwide permit must always be required. At a minimum, for each linear foot of bank stabilization authorized, a foot of existing bank stabilization must be removed, putting into effect a 'no net loss in natural stream banks' policy."

Response 56: *Ohio EPA believes it is appropriate to allow the Corps to require mitigation as needed. Many bank stabilization projects do benefit water quality in reducing sediment load in streams by reducing bank erosion. Requiring additional mitigation for the small projects covered by NWP#13 is, in the opinion of Ohio EPA, unwarranted.*

Comment 57: NWP 13: "A cap of 150 linear feet should be placed on projects utilizing 'hard' bank stabilization techniques like riprap and concrete. A cap of 300 linear feet should be placed on projects utilizing non-structural, vegetative or bioengineering techniques. Projects greater than 300 linear feet must not be authorized without the full review (including cumulative impacts assessment) and public comment required by the individual permit process."

Response 57: *Ohio EPA believes that the 500 linear foot is appropriate. Limits set forth in the nationwide permits reflect the need to balance agency resources with an appropriate level of environmental protection based on currently available data. The suggestion that having different thresholds for "hard" bank stabilization projects and those projects utilizing non-structural, vegetative, or bioengineering techniques appears unnecessarily cumbersome for the small projects covered by this NWP and could lead to confusion during implementation.*

Comment 58: NWP 13: "The permit must require the applicant to use vegetative or bioengineering stabilization techniques unless the applicant demonstrates in

writing that, based on the velocity and configuration of the channel or other factors, other methods are necessary. This written documentation must be provided with the PCN. The permit must also require the applicant to provide written documentation that the applicant has conducted a geomorphic analysis, ensured that secondary channels will not be blocked, and designed the project to be consistent with river morphology, and to maintain channel geometry, meander radius, and other key morphological elements. This written documentation also must be provided with the PCN.”

Response 58:

The suggestion that vegetative or bioengineering stabilization techniques be required unless certain studies are done is inconsistent with the intent of the NWP process for a streamlined permitting process for small projects. The NWP process was set up so that certain types of routine projects could be more quickly processed and be less burdensome to both the applicant and the reviewing agencies. While the suggestions have merit in the context of an individual permit or certification, Ohio EPA feels that these are not consistent with the intent of the NWP process.

Comment 59:

NWP 13: “Stacking of NWP 13 with itself or other general permits must be explicitly forbidden.”

Response 59:

The “stacking” of NWPs is already prohibited in the body of the federal NWPs - see Part C. Nationwide Permit General Condition #24.

Comment 60:

NWP 13: “Ban the use of waste concrete for bank stabilization material. This material is almost impossible to regulate and poses very real environmental threats because it routinely contains toxic paints from sidewalks, rebar from construction, and petroleum products from automobiles.”

Response 60:

Ohio EPA already addresses the types of material that it considers suitable for bank stabilization projects in Special Limitations and Condition 3.b. Broken concrete is considered suitable if there is no exposed reinforcing bar and it is free from toxic contaminants in other than trace quantities.

Comment 61:

NWP 13: “Require careful tracking and monitoring *all* activities carried out under NWP 13, and making that information readily available to the public.”

Response 61:

It is beyond the scope of the certification of the Nationwide Permits for Ohio EPA to require the Corps to track all activities carried out under NWP#13. This comment should be directed to the U.S. Army Corps of Engineers.

Comment 62:

NWP 14: “NWF commends the Ohio EPA for establishing restrictions on NWP 14 limiting the length of the crossing. NWF urges the Ohio EPA to deny NWP 14 despite these limitations because it would allow district engineers to waive the linear impact limits on intermittent and ephemeral streams.”

Response 62:

It is true that the district engineer has the authority to waive the Corps’ linear impact limits; however, the applicant would still have to meet the State Certification General Limitations and Conditions in order to avoid an individual 401 water quality

certification review. Therefore, the nationwide permit would only be able to be issued provisionally contingent on receipt of an individual 401 water quality certification from the state.

Comment 63: NWP 14: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 14: “A 300 linear foot limit for all portions of streams.

Response 63: *Ohio EPA believes that the limitations and conditions placed on transportation projects is appropriate. Limits set forth in the nationwide permits reflect the need to balance agency resources with an appropriate level of environmental protection based on currently available data.*

Comment 64: NWP 14: Ohio EPA should require that the “District engineer review to ensure minimal impact is required. In numerous cases, district engineers do not even have the opportunity to review projects before construction occurs (and no notice of them after the fact), so there is not a meaningful opportunity to intervene if the activities do in fact cause more than minimal harm. For example, because NWP 14 permits a linear transportation project to go forward without a PCN if it will not affect more than 1/10 of an acre of special aquatic sites, the district engineer will not need to be notified of any such project, no matter how many occur in her jurisdiction. Accordingly, there is no way that she will be able to be sure that activities in the covered category are cumulatively minimal.”

Response 64: *This comment refers to federal (Corps) requirements. For clarification, it is Ohio EPA’s understanding that the PCN notification to the district engineer applies to (1) the loss of waters of the United States exceeding 0.1 acre; or, (2) discharges into a special aquatic site, including wetlands. Ohio EPA recommends that you contact the U.S. Army Corps of Engineers for clarification on this matter.*

Comment 65: NWPs 18 and 19: “The Ohio EPA should reject NWPs 18 and 19. “NWF applauds the Ohio EPA for the limitations placed on NWPs 18 and 19 but urges the Ohio EPA to completely deny both NWPs. The primary flaw in these permits is that the categories to which they apply do not describe activities that are similar in nature. Proposed NWPs 18 and 19 cover, respectively, “minor discharges” and “minor dredging.” 71 Fed. Reg. at 56,287. Certainly it cannot be contended that activities are “similar” within the meaning of § 404(e)(1) merely because they involve “discharges” or “dredging.” These are overarching terms inherent to § 404 permitting. 33 U.S.C. § 1344(e)(1) (general permits address activities “involving discharges of dredged or fill material”). The Corps’ duty under § 404(e)(1), as a prerequisite to issuing any general permit, is to define which discharges and which dredging are “similar in nature.” Establishing NWP categories that broadly encompass “discharges” and “dredging” renders the similar-in-nature requirement meaningless.

“Nor can similarity be established by the requirement that the discharges or dredging addressed by NWPs 18 and 19 be “minor.” Once again, the requirement that permitted activities be minor is a pervasive one applicable to all nationwide permits by virtue of the § 404(e)(1) mandate that such permits cause no more than “minimal” adverse environmental effects. It is thus not a basis for concluding that activities are “similar in nature.” Indeed, if compliance with the “minimal” effects requirement were in itself sufficient to comply with the “similar in nature” requirement, the latter would be rendered superfluous. *Circuit City Stores v.*

Adams, 532 U.S. 105, 113(2001) (rejecting interpretation that would render a statutory provision superfluous: “Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment” (internal citation & quotation omitted)); *Holland v. Williams Mtn. Coal Co.*, 256 F.3d 819, 822 (D.C. Cir. 2001) (rejecting reading of a statutory provision under which another provision “would, for the most part, be surplusage”). Nevertheless, the draft decision documents for both NWP’s rely on the size of the activity as the basis for concluding that the category covers similar projects. By doing so, the Corps ignores the plain language of section 404(e).”

Response 65:

Ohio EPA reviews the Nationwide Permits issued by the Army Corps of Engineers to determine if the particular Nationwide Permit can be issued a 401 Water Quality Certification in accordance with Ohio’s Rules and laws. Ohio EPA was not granted federal statutory authority to draft the Nationwide Permit, review the 404(e) guidelines, or determine if projects are “similar in nature” as part of the NWP process. Ohio EPA believes projects authorized under NWP 18 and 19 that meet the state’s requirements will have minimal impacts to water quality, aquatic life and recreational uses of the waters of the state.

Comment 66:

NWP 21: “NWF appreciates the Ohio EPA’s effort to limit NWP 21, but NWP 21 is illegal and should be denied. It grossly violates Clean Water Act requirements limiting general permits to activities that result in no more than minimal individual and cumulative adverse effects on aquatic resources and the environment. Dumping of coal mining waste into streams and wetlands not only obliterates those resources, but seriously harms downstream water quality. Past mining activities authorized by NWP 21 have resulted in the loss of over 1,200 miles of streams in Appalachia, resulting in severe damage to downstream water quality and stream integrity. The environmental devastation and degradation authorized pursuant to NWP 21 also includes harm to aquatic and terrestrial resources.”

Response 66:

Ohio EPA responded to the NWP’s issued by the U.S. Army Corps of Engineers by establishing criteria for the use of nationwide permit 21. Ohio EPA believes these criteria are protective of water quality given the scope of typical coal mining operations.

Comment 67:

NWP 21: “If the Ohio EPA maintains its grant of certification and finding of consistency, it should impose an unwaivable 300 linear foot limit for streams and ½ acre limitation for Category 1 and 2 wetlands and allow no impacts to Category 3 wetlands.”

Response 67:

Ohio EPA implemented thresholds based on a functional assessment of the water resources developed in conjunction with the Army Corps of Engineers and the Ohio Department of Natural Resources.

Comment 68:

NWP 23: “The NWF agrees with the Ohio EPA that NWP 23, if approved at all, should only apply to activities described in 23 CFR Part 771.117 of the Federal Highway regulations but asks that the agency reject NWP 23 completely.

“One major problem with this permit is it violates the public participation requirements of section 404(e). The statute specifies that the Corps may issue general permits, but only “after notice and opportunity for public hearing. . . .” 33 U.S.C. § 1344(e)(1). If new categorically excluded activities are authorized by the permit after the promulgation of the permit, however, the NWP provides only that

“the Office of the Chief of Engineers will solicit public comment.” 71 Fed. Reg. at 56,287. It is unclear what form this solicitation will take (i.e., will the Corps actually provide public notice and a comment opportunity?), and it does not appear to include an opportunity for a public hearing, as the statute requires.”

Response 68: *All activities considered under this Categorical Exclusions nationwide permit (23 CFR 771.117) were promulgated on April 5, 1988. Ohio EPA has evaluated the 2006 nationwide permits authorized by all 4 U.S. Army Corps of Engineers districts in Ohio and found that only 1 NW 23 was issued.*

Comment 69: NWP 27: This nationwide permit “has the potential to authorize activities resulting in significant adverse impacts to aquatic resources.”

Response 69: *Ohio EPA believes that the proper implementation of nationwide permit 27 will result in water quality improvements to streams and wetlands. The intended purpose of this NWP is aquatic habitat restoration, establishment, and enhancement. Additionally, Ohio EPA’s Special Limitations and Conditions and Ohio EPA’s General Limitations and Conditions ensure that only minimal impacts are authorized by NWP 27.*

Comment 70: NWP 27: This nationwide permit “fails to ensure the intended water quality benefits from authorized activities.”

Response 70: *Ohio EPA is not able to respond to this comment in the absence of documentation or detailed rationale supporting the statement*

Comment 71: NWP 27: This nationwide permit “does not allow for adequate tracking and oversight of projects.”

Response 71: *It is beyond the scope of the certification of the Nationwide Permits for Ohio EPA to require the Corps to track all activities carried out under NWP 27. This comment should be directed to the U.S. Army Corps of Engineers.*

Comment 72: NWP 27: This nationwide permit “fails to limit the scope of activities.”

Response 72: *Ohio EPA disagrees with this statement, though it is unclear why the commenter felt that there was inadequate limitations on the scope of activities. Further explanation would be necessary in order to respond more completely to this comment.*

Comment 73: NWP 27: This nationwide permit “authorizes impacts associated with mitigation banking. The NWP agrees that Category 2 forested wetlands and Category 3 wetlands should have a higher level of protection, but NWP 27 should be denied. If not denied, public interest review and adequate monitoring should be imposed.

Response 73: *Ohio EPA Special Limitation and Condition 1 limits the use of this NWP for authorizing a mitigation bank without having a signed Mitigation Banking Agreement first. An applicant wishing to establish a wetland mitigation bank must go through the Mitigation Banking Review Team.*

Comment 74: NWP 27: “Pre-construction notification must be required. Even for restoration projects designed and implemented under agreement with FWS, NRCS, or under permit from OSM or state agencies, the PCN provides essential information, including but not limited to a delineation of the waters to be impacted.”

Response 74: *This comment relates to the Corps’ determination of which nationwide permits require notification, not the proposed state Special Limitation and Conditions. Therefore, this suggestion is outside of the scope of Ohio EPA’s certification of the NWPs and should be directed to the U.S. Army Corps of Engineers.*

Comment 75: NWP 29: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 29: “Vegetated buffers next to open waters are required to preclude water quality degradation due to erosion and sedimentation.”

Response 75: *Part 1.A.4.c-e of the Nationwide Permits (NWPs) – General Limitations and Conditions, Ohio EPA establishes requirements for vegetative buffers on streams. Additionally, in Part 1.D.8 of the Nationwide Permits (NWPs) – General Limitations and Conditions, Ohio EPA requires BMPs to be installed and maintained to minimize sediment runoff to adjacent surface waters. These general limitations and conditions apply to all Nationwide Permits, including NWP 29, in order to minimize water quality impacts from erosion and sedimentation.*

Comment 76: NWP 29: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 29: “‘Single and complete project’ consideration is required. Without the ‘single and complete project’ language, and with the expansion of NWP 29 to apply to subdivision development, NWF is concerned that the permit opens the door to situations where lots containing wetlands are sold to end buyers, who subsequently fill even more wetlands in the same wetland system.”

Response 76: *Ohio EPA changed the title of Nationwide Permit #29 from “Single Family Housing” (previous title) to “Residential Developments” in order to be consistent with the changes made by the Army Corps of Engineers to the title of this section. Ohio EPA reviews the Nationwide Permits as issued by the Army Corps of Engineers to determine if the particular Nationwide Permit can be issued a 401 Water Quality Certification in accordance with Ohio’s Rules and laws.*

The commentor has correctly identified an ongoing problem with the construction of residential developments regardless of whether it they are authorized under a nationwide permit or individual 401 water quality certification. Ohio EPA will continue to work with the Corps through the pre-notification process to identify projects that may result in these secondary impacts, to implement avoidance and long term protection measures.

Comment 77: NWP 29: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 29: “On- and off-site impacts should be minimized and flooding of neighboring properties should be avoided.”

Response 77: *Part 1.D.5 of the Nationwide Permits (NWPs) – General Limitations and Conditions, Ohio EPA requires that peak rates of runoff from an area after development are no greater than peak rates of runoff prior to development. Additionally, in Part 1.D.8 of the Nationwide Permits (NWPs) – General Limitations and Conditions,, Ohio EPA requires BMPs to be installed and maintained to minimize off-site impacts. Projects that result in flooding or damage to neighboring*

properties is typically regulated by local authorities.

Comment 78: NWP 29: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 29: "Use for activities other than single-family housing is not authorized. There is a world of difference between a housing development that requires extensive grading, filling and ditching as opposed to the very limited activities needed to add a garage or another addition to a single house."

Response 78: *Ohio EPA changed the title of Nationwide Permit #29 from "Single Family Housing" (previous title) to "Residential Developments" in order to be consistent with the changes made by the Army Corps of Engineers to the title of this section. Ohio EPA reviews the Nationwide Permits as issued by the Army Corps of Engineers to determine if the particular Nationwide Permit can be issued a 401 Water Quality Certification in accordance with Ohio's Rules and laws*

Comment 79: NWP 29: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 29: "PCN notifications and proposed mitigation should be published on the Corps website in order to provide for public opportunity to review and comment."

Response 79: *In NWP 29, the Corps does require PCN notifications prior to commencing the activity and details of the PCN are outlined in the Corps General Condition 27. The requirement to publish this information on the Corps website is better directed to the Corps of Engineers, since resources would need to be available within the Army Corps of Engineers to accomplish this request.*

Comment 80: NWP 29: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 29: "PCNs must be required for all projects and they must include statements demonstrating avoidance and minimization of impacts to waters of the United States to the maximum extent practicable."

Response 80: *In NWP 29, the Corps does require PCN notifications prior to commencing the activity and details of the PCN are outlined in the Corps General Condition 27(3) which specifies the information required as part of the project description and PCN.*

Comment 81: NWP 34: "The Ohio EPA should deny certification of NWP 34." "NWP 34 allows the destruction of up to 10 acres of waters of the U.S., including wetlands, per cranberry grower during each life of the permit (five years). 71 Fed. Reg. at 56,290. Wetlands may be destroyed under the NWP for conversions of natural wetlands into cranberry bogs, dikes, and water control structures. NWP 34 does require a PCN to the Corps, which in turn notifies the other federal resource agencies.

"NWP 34 is a special interest exemption from standard permitting requirements for a powerful industry that has upland alternatives for its activities. NWP 34 violates CWA §404(e) and the § 404(b)(1) Guidelines, and has been rejected by most cranberry-producing states that have had the chance to consider it."

Response 81: *During the period from July 1, 2003 to June 30, 2006, no projects were authorized under Nationwide Permit 34. Because, cranberry production is not an issue of concern in Ohio, Ohio EPA does not believe it necessary to deny this Nationwide*

Permit.

Comment 82:

NWP 36: "The Ohio EPA should deny certification of this permit." "This permit permits district engineers to waive the 20 foot limit on boat ramp width. Second, it permits district engineers to waive the 50 cubic yard discharge limit. Third, it deletes the existing prohibition on discharges that 'cause unacceptable chemical pollution,' claiming that the general condition prohibiting toxic discharges in toxic amounts will do the same job. On the latter point, it seems clear that a discharge could cause unacceptable chemical pollution without itself being toxic.

"The Corps did not explain how these weakening changes will ensure that the effects of permitted activities will be minimally harmful. Indeed, in estimating the likely impacts of the permit over the next 5 years, the Corps relied on the past use of the permit, without considering the fact that it now is available for more destructive activities. Accordingly, the Corps lacked the substantial evidence needed to conclude that the impacts will be minimal."

Response 82:

Ohio EPA has placed conditions on the use of this permit which the Corps District Engineer can not waive, although they may choose to waive their own conditions if they consider them de minimus.

The Corps has not deleted their condition which prohibits any discharge that causes unacceptable chemical pollution, which was stated as a concern by the commentor about the use of this Nationwide. Ohio EPA considers that the greatest threat to water quality is the placement of a boat ramp in a location that requires maintenance dredging to maintain clearance and therefore the Ohio State Certification Special Conditions and Limitations states that "This nationwide permit shall not authorize boat ramps where dredging is required to establish and maintain water depths necessary for boat launching".

In 2006, only 5 NWP 36s were issued in the state of Ohio and Ohio EPA considers the use of the new Corps language environmentally acceptable.

Comment 83:

NWP 39: "Permitted discharges should not cause the loss of more than 1/4 acre of non-tidal waters including loss of not more than 300 lineal feet of streams or streambeds (whether perennial, intermittent or ephemeral). This limit should not be subject to waiver. Permitted discharges should not impact any vernal pool, bog, fen, or similarly difficult-to-replace special aquatic site."

Response 83:

Ohio EPA believes that the limits set forth in the water quality certification for the nationwide permits are appropriate. Limits set forth in the nationwide permits reflect the need to balance agency resources with an appropriate level of environmental protection based on currently available data. Ohio EPA is receptive to additional data that would justify tightening or loosening, the restrictions for any Nationwide Permit

Comment 84:

NWP 39: "Recreational facilities that require significant earthmoving should not be authorized."

Response 84:

Ohio EPA is not able to fully assess this comment, because the phrase "significant earthmoving" is not defined. Ohio EPA has set forth restrictions on the use of

Nationwide Permits based on the linear footage of streams and acreage of wetlands that may be impacted. Both linear footage and acreage are easily measurable and provide a level of administrative ease to implement. The limits set forth in the nationwide Permits are protective of water quality. If a project will disturb more than a acre of land, the activity will be subject to a Storm Water General Permit which may be the best venue to seek the environmental protections sought by the commentor.

Comment 85: NWP 39: “PCNs must be required for all projects and they must include statements demonstrating avoidance and minimization of impacts to waters of the U.S. to the maximum extent practicable. See *supra* (discussion of section 404 guidelines).”

Response 85: *Projects designed to qualify for coverage under a Nationwide Permit, by definition, demonstrate avoidance and minimization of impacts. The linear footage and acreage restrictions are set to be protective of water quality. PCN requirements are established by the U.S. Army Corps of Engineers and this issue should be directed to them.*

Comment 86: NWP 40: “The Ohio EPA should deny certification of NWP 40.” “NWP 40 authorizes activities that are dissimilar and that would result in more than minimal impact to the environment. This permit should have been withdrawn, not expanded. Many activities covered by this permit can be authorized under other nationwide permits, such as NWPs 3, 39, and 41.”

Response 86: *Ohio EPA reviews the Nationwide Permits as issued by the Army Corps of Engineers to determine if the particular Nationwide Permit can be can be issued a 401 Water Quality Certification in accordance with Ohio’s Rules and laws. Ohio EPA believes projects authorized under NWP 40 that meet the state’s requirements will have minimal impacts to water quality, aquatic life and recreational uses of the waters of the state.*

Comment 87: NWP 41: “The proposed allowance of permanent sidecasting of dredged material into adjacent wetlands must be withdrawn.”

Response 87: *Ohio EPA believes that the limitations and conditions as drafted are appropriate. Limits set forth in the nationwide permits reflect the need to balance agency resources with an appropriate level of environmental protection based on currently available data*

Comment 88: NWP 41: “Limit NWP 41 to ‘drainage ditches’ that lack all of the ecologically significant elements of natural streams, such as riparian habitat, adjacent wetlands, and/or stream meanders.”

Response 88: *Ohio EPA has established criteria restricting the use of nationwide permit 41 to maintained and channelized ephemeral water conveyances. No changes to the limitations and conditions to the certification of this NWP are recommended at this time. It should be noted that Ohio EPA is currently engaged in dialogue with the regulated community, agricultural interests, and other state agencies to find the proper balance of environmental protection that these types of resources should be afforded.*

Comment 89: NWP 41: “Clarify and limit the types of physical reshaping characteristics that would improve environmental performance, and are therefore eligible for authorization under this NWP. The Ohio EPA might add a sentence such as the following: “This general permit is limited to reshaping that would restore more natural stream characteristics by activities similar to increasing the area of riparian vegetation through re-grading or by recreating stream meanders.” At a minimum, the Ohio EPA should retain language in the existing NWP 41 that identifies the following measures as improving water quality: regrading the drainage ditch with gentler slopes to reduce erosion, increase growth of vegetation, and increase uptake of nutrients and other substances by vegetation.”

Response 89: See Response 88.

Comment 90: NWP 41: “Applicants should be required to obtain – and include in a PCN – documentation showing how the project is designed and will be operated to improve water quality (e.g., a Natural Resources Conservation Service minimal effects agreement and certification that best management practices for water quality improvement have been employed). This will help ensure that projects are truly designed to improve water quality.”

Response 90: See Response 88

Comment 91: NWP 41: “Mitigation must be required for adverse impacts to aquatic resources under this permit.”

Response 91: See Response 88

Comment 92: NWP 42: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 42: “Ball fields, ball courts, campgrounds, and other facilities are not authorized unless they are integrated into the natural landscape, are constructed without substantial amounts of grading and filling.

Response 92: *Ohio EPA agrees with the spirit of this suggestion, however the agency feels the condition is vague and subjective. Rather than create a special condition specifically for this activity, Ohio EPA limited the amount of fill allowed under this NWP through the general limitations and conditions listed in the state certification.*

Comment 93: NWP 42: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 42: “Construction or expansion of support facilities in waters of the United States is not authorized.”

Response 93: *NWP 42 includes authorization for the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas or similar facilities. Ohio EPA agrees with the Army Corps of Engineers that support facilities as defined in this NWP should be covered under this Nationwide Permit, except for ski areas and golf courses as the state’s condition specifies.*

Comment 94: NWP 42: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 42: “A PCN avoidance and minimization statement and water quality management measures are required.”

Response 94: *Ohio EPA believes projects that meet the state’s requirements and authorized under NWP 42 will have minimal impacts to the water quality of waters of the state. Comments regarding PCN submittal should be addressed to the U.S. Army Corps of Engineers.*

Comment 95: NWP 42: Ohio EPA should impose a “300 linear foot limit” on NWP 42

Response 95: *Ohio EPA has imposed limits of 200 LF for impacts to perennial and intermittent streams or up to 500 LF for ephemeral streams on NWP 42. Ohio EPA believes projects authorized under NWP 42 that meet these limitations will have minimal impacts to water quality, aquatic life and recreational uses of the waters of the state.*

Comment 96: NWP 42: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 42: “Use in the 100-year floodplain is prohibited.”

Response 96: *Nationwide Permit General Condition #10 requires activities to comply with applicable FEMA approved state or local floodplain management requirements to be eligible for any of the Nationwide Permits. Ohio EPA regulates waters of the United States under Section 401 of the Clean Water Act. Authority to regulate floodplain fill has not been granted to Ohio EPA through Section 401.*

Comment 97: NWP 42: Ohio EPA should place the following Ohio State Certification Special Limitation and Condition on NWP 29: “The acreage impact is limited to ¼ acre.”

Response 97: *Ohio EPA has authority to limit impacts to waters of the United States under Section 401 of the Clean Water Act. Ohio EPA has limited impacts to a maximum of ½ acre of wetland, or 500 LF of stream (of which only 200 LF can be perennial or intermittent) under the Nationwide Permits. Ohio EPA believes that projects that meet these limits and the state’s other requirements will have minimal impacts waters of the state.*

Comment 98: NWP 43: “NWF recommends that the Ohio EPA deny certification” of this nationwide permit.” NWP 43 “authorizes discharges of dredged or fill material into wetlands or other waters of the United States for the purpose of constructing and maintaining stormwater management facilities, provided the activity does not cause the loss of more than ½ acre of non-tidal waters of the United States. While the permittee must avoid and minimize discharges into wetlands to the maximum extent practicable, it is nevertheless counterintuitive, as well as unnecessary, to site artificial stormwater management facilities in natural stormwater management features such as wetlands and streams.

“NWP 43 eases the process by which permittees can convert wetlands and headwater streams to stormwater retention basins. Such conversions can change the hydrology throughout the entire stream section by replacing original flow with

pollutant-laden discharge from the basin. The conversion practice also changes flow regime by replacing natural flow volume and duration with surges of stormwater at higher velocity and altered length. To convert headwater streams to stormwater basins would be especially detrimental to ephemeral and intermittent stream systems, where the normal post-precipitation flow is often attenuated by inflow from groundwater and wetlands after storm events.

“This NWP may have significant impacts on water quality depending on the scale and location of the project. Depending on the source of stormwater runoff, it is conceivable that significant concentrations of metals, turbidity, substances with high biological oxygen demand, oil and grease or other contaminants may be introduced into waters. The consequences to water quality that result from application of this NWP will vary and are dependent on the specific proposals in each watershed site. Each proposed project must be evaluated individually and specific conditions relative to the protection of water quality must be applied in each situation.”

Failing that, the Ohio EPA should place the following additional conditions on NWP 43:

1. Prospective permittees must submit written maintenance plans, and an avoidance and minimization statement.
2. A PCN avoidance and minimization statement and water quality management measures are required.
3. PCNs must be required for maintenance activities that resemble or include repair or construction activities.
4. Maintenance excavation must be conducted in accordance with an approved maintenance plan.
5. A 300 linear foot limit for losses to either ephemeral or intermittent streambeds.

Response 98:

Ohio EPA concurs that construction of storm water facilities located in existing streams and wetlands can result in the impacts described by the commentor. Ohio EPA believes the current conditions of the nationwide permit address these concerns. Ohio EPA's special conditions prohibit the use of Nationwide Permit 43 to construct new storm water facilities in streams or wetlands. While nationwide permit 43 may be used on existing storm water facilities, such facilities must comply with requirements set forth in the Construction General Storm Water Permit, including peak post construction storm water volume requirements. This requirement will be difficult to achieve using an in-stream storm water facility, and should be protective of channel morphology, hydrology, and water quality.

Ohio EPA would note that, from July 1, 2003 to June 30, 2006, ten projects have been approved under NWP 43 resulting in a combined total of 0.1 acres of wetland impacts and 1,404 linear feet of stream impacts. Based on historic use of this NWP, and restrictions on its use, it appears that the impacts resulting from this NWP are minimal.

The following comments are those received from The Nature Conservancy (TNC):

Comment 99: Ohio State Certification General Limitations and Conditions A.1.: "This condition appears to allow projects previously subject to Nationwide Permit 27 to generally continue under a nationwide permit. We support this condition continuing to allow nationwide permits for stream restorations, particularly those that are voluntary, use Natural Channel Design, and are designed to achieve use attainment, including those conducted under programs such as Section 319, which the Agency funds. These 319 and comparable projects are typically conducted by non-profit organizations (such as the Conservancy), park districts and governments, and subject to Agency review through additional mechanisms. It would be a disincentive to require individual permits for these voluntary projects.

"Applicability to Big Darby creek watershed:

"The Agency's 2006 TMDL for the Big Darby Creek watershed states (pg 5-6):

'As a second implementation mechanism to address better management of drainage, stream bank erosion and flood reduction projects in the Big Darby Creek watershed, Ohio EPA intends to evaluate removing the Big Darby Creek watershed from certification of nationwide permits where appropriate and necessary to continue progress towards meeting sediment bed load, habitat and flood plain widths targets contained in this report. Nationwide Permit number 27, which permits work for natural stream channel design, already contributes to the attainment of the sediment bed load, habitat and flood plain width targets and can be retained and renewed without modification.'

"Again, if the Nationwide Permit 27 is still eligible in the Big Darby watershed for such things as 319 projects and other voluntary restoration projects, this seems appropriate and we encourage this position of the agency. Under this draft permit, we would like clarification of the Agency's position for this particular watershed."

Response 99: *The Nature Conservancy is supportive of the Ohio EPA condition that allows voluntary stream restoration projects to proceed under nationwide 27 permits in a timely manner and so that funding dollars do not need to be expended on the 401 application fees.*

Ohio EPA has also limited the issuance of nationwide permit impacts on the Big Darby River (except for NWP 3, 20, 27, 32, 37, 38, 45, and 47 or maintenance activities covered under NWP 7 and 12):

Comment 100: Ohio State Certification General Limitations and Conditions A.7.: "The Conservancy supports establishment of standards for stream crossing, and in this permit, specifically standards for culverts. These standards for culverts appear to 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 stream crossing standards is very evident and local governments
(http://www.etowahhcp.org/research/documents/tech_rpt_stream_crossings_4-30-07.pdf), other states (e.g., <http://streamcontinuity.org/>,

<http://www.fishpassage.wsu.edu/related-links/>) and the federal government (e.g., U.S. Forest Service - <http://stream.fs.fed.us/fishxing/>, U.S. Department of Transportation <http://www.fhwa.dot.gov/engineering/hydraulics/envirohyd/fishback.cfm>) are advancing similar standards.

The draft permit states the 'individual culvert extension shall not exceed 200 linear feet if installed on an intermittent or perennial stream.' This seems like a long distance to traverse for aquatic life. How has the agency determined this will not inhibit fish and other aquatic life passage? We suggest that the 200 foot distance be reconsidered, and a significantly shorter distance be established that is eligible for a nationwide permit."

Response 100: *Ohio EPA evaluated available literature which is primarily based on anadromous fish species. The evaluations conducted have attempted to assess the slope of the culverts, the velocity of water and swimming ability of fish. Only one of 96 studies evaluated the length of the culvert and fish passability. This study indicated that fish could swim through 90 m culvert lengths which exceed the 200ft (60.96 m) restriction.*

The following comments are those received from the Ohio Environmental Council (OEC):

Comment 101: "We encourage the Agency to set a performance standard that is based on sound science and encourages in watershed mitigation. In order to determine if a wetland or stream mitigation project is replacing what was lost, strong tools are needed. This should also be built into the nationwide permit certification."

Response 101: *All wetland mitigation projects in Ohio must meet the mitigation requirements under OAC Chapter 3745-1, which include restrictions on location (i.e., "in-watershed") based on the quality of wetland that is being impacted. However, since impacts to wetlands under the nationwide permit program are relatively minimal in nature, Ohio EPA is comfortable with any performance standards that have been established by the Corps in conjunction with Ohio EPA. Additionally, since authorized impacts to wetlands are minimal under the nationwide permitting program, the applicant will, in most cases, seek out mitigation at a mitigation bank where Ohio EPA does require specific standards and design criteria in terms of the vegetative, chemical, and hydrologic performance of the mitigation wetland.*

Ohio EPA requires that stream reconstruction activities adhere to "natural channel design principles," which may include the over wide channel design (general limitation and condition A.3.); and, stream mitigative measures must meet the requirements stated in general limitation and conditions A.3. and A.4. including habitat and biological targets be met as part of the mitigation.

Ohio EPA is continuously studying ways to improve both stream and wetland mitigation. Through sound science we have been able to set the performance standards required for individual mitigation projects; as well as, mitigation banks. Ohio EPA has also taken steps to devote personnel and resources solely to wetland and stream mitigation work. This should demonstrate that we recognize mitigation as a concern and a problem and will continue to work on ways to improve it.

Comment 102: "Incorporate cumulative impacts when reviewing applications. Ohio's streams are

being strangled by cumulative impacts that are not taken into account in the permit applications. We encourage you to add measures into the NWP's that take into account the true impact of destroying a wetland or stream in a watershed. A method of tracking the impacts should be outlined. Keep track of projects and proposed projects and make a determination if that NWP is having a negative cumulative effect on the watershed. If so, it should be denied."

Response 102: *The Corps tracks linear feet of stream impacts and wetland acreage impacts authorized through nationwide permits and submits annual reporting to Ohio EPA. The 401/Isolated Wetland Wetlands Permitting Section incorporates this information into annual report that are subsequently posted on the Ohio EPA web page. Because the results are tabulated by U.S. Army Corps District, and do not include impacts for which pre-notification is required, they may not provide the level of detail sought by the commentor. Ohio EPA recognizes the need to track cumulative impacts and is currently looking for ways to achieve this.*

Comment 103: Ohio State Certification General Limitations and Conditions A.7.a. states: 'For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 500 linear feet,...'

"OEC believes this length should be determined by the most recent sound science available in regard to aquatic species migratory/swimmable patterns."

Response 103: *Per Fish Passage Through Culverts, An Annotated Bibliography, Updated: November 5, 1999 by Kemset Moore, Michael Furniss, Susan Firor, and Michael Love, the review of 96 annotated citations on culvert design for fish passage, risk analysis, and fish swimming ability, only one study evaluated the issue of culvert length. Therefore, Ohio EPA is not aware of sufficient sound science to establish culvert length limitations.*

Comment 104: Ohio State Certification General Limitations and Conditions A.4.c.i. & ii.: "The proposal states that vegetation buffer length as being 25 feet for preservation of existing vegetation buffer and 50 feet minimum for re-vegetating buffers cleared during construction. OEC strongly urges the Agency to adopt 50 feet for preservation of existing buffer and 75 feet for re-vegetating buffers cleared during construction."

Response 104: *Ohio EPA believes that the limitations and conditions as drafted are appropriate. Limits set forth in the nationwide permits reflect the need to balance agency resources with an appropriate level of environmental protection based on currently available data. Ohio EPA does not intend to pursue a specific increase in the minimum required buffer distance at this time.*

The following comments are those received from the Ohio Department of Natural Resources (ODNR):

ODNR, Division of Wildlife (DOW) – These comments all refer to the Nationwide Permits - Special Limitations and Conditions for Nationwide Permit 27 (Aquatic Habitat Establishment, and Enhancement Activities):

Comment 105: Ohio State Certification Special Limitation and Condition 2.c.: "The DOW recommends Ohio State Certification Special Limitations and Conditions 2.c. not be

limited to Lake Erie Coastal and tributary wetlands but also include wetlands at elevations greater than 575 feet on a USGS map.”

Response 105: *The NWP 27 Ohio Special Conditions and Limitations listed in the public notice reflect several months of work with various agencies and stakeholders to develop ways to allow some types of aquatic habitat management activities within wetlands that have been determined to be Category 3 wetlands based solely on the Narrative Rating within ORAM 5.0 but otherwise not have qualified as a Category 3 wetland based on a Quantitative Rating, i.e. they score less than 60. It was never meant to be expanded beyond the Lake Erie coastal and tributary wetlands and Ohio EPA does not feel any additional changes are warranted at this time.*

Comment 106: Ohio State Certification Special Limitation and Condition 3.b.: “The DOW recommends this be changed to reflect that *finished* excavated depths not exceed 2 feet to allow for the replacement of topsoil while still providing, if so desired, a 2 foot depth of the scrape.”

Response 106: *Ohio EPA will reword this section of Special Limitation and Condition 3.b. to state “Final grade of any excavation, following topsoil replacement if applicable, shall not exceed 60cm (~2 feet).”*

Comment 107: Ohio State Certification Special Limitations and Conditions 3.c.: “The concern regarding base flow in the context of this activity, and the intent of this statement, are not clear. DOW discussions with the OEPA focused on agricultural drainage ditches, not headwater streams. Limiting this activity to surface drains originating on the sponsor’s property and which have no base flow will greatly reduce restoration and enhancement opportunities on agricultural land in the Lake Erie watershed.

“A ditch plug can easily be engineered to restore wetland habitat without impacting the drainage or causing flooding on adjacent property. Properly sized control structures will pass base flow and a properly engineered emergency spillway will pass flood runoff without impacting the drainage or causing flooding on adjacent property.

“The DOW suggests this paragraph be reworded to indicate, ‘Disabling surface drains ~~provided the surface drains originate on the property of the project sponsors and have no base flow~~ by filling lengths of the drain or installing water control structures (e.g., riser structures, flap gates, fixed weirs, trickle tubes), ~~or by filling the ditch for its entire length.~~”

Response 107: *Ohio EPA notes the comment and has made some revisions to the wording to be more clear. Ohio EPA does believe that greater review is necessary for projects which propose to disable surface drains that originate off-site and have a base flow due to the potential for these projects to have off-site impacts. In these instances Ohio EPA feels that an individual Section 401 Water Quality Certification is warranted.*

However, Ohio EPA also believes the commenter has misread Special Limitation and Condition 3.c. The commenter implies that Special Limitation and Condition 3.c. would prohibit projects that have a properly sized control structures that passes base flow or a properly engineered emergency spillway that passes flood

runoff if the surface drain in question originated off-site. Ohio EPA believes that these types of projects could still be authorized under NWP#27 because they incorporate water control structures, not a ditch plug. Ohio EPA will reword Special Limitation and Condition 3.c. to be more clear.

Special Limitation and Condition 3.c. will be revised as follows: "Ditch plugs and water control structures: Disabling surface drains by filling lengths, provided that the surface drains originate on the property of the project sponsors and have no base flow, or installing water control structures (e.g., riser structures, flap gates, fixed weirs, trickle tubes). Ditch plugs may include an emergency spillway to safely route flows back into the ditch below the plug."

Comment 108:

Ohio State Certification Special Limitation and Condition 3.d Earthen embankments and 3.e Interior dikes.: "After discussions the OEPA had with the DOW and others it was agreed to make allowances under these activities for the use of stone for erosion control (i.e., class C rip-rap or smaller). Wind-driven wave erosion is normally not an issue during normal winters when wetlands are frozen (usually a spring-time problem). However, the warm temperatures of the past two winters have allowed an additional 1-2 months of wave erosion. Saturated soils (especially on newly constructed berms and dikes), knocked-down or uprooted emergent vegetation, and muskrat burrowing compound the problem of winter and spring wave erosion.

"The DOW suggests that both these paragraphs be revised to allow the use of stone (i.e., class C rip-rap or smaller) to protect, from erosion and rodent damage, the infrastructure constructed for purposes of wetland restoration and enhancement (such as berms, emergency spillways, pumps, water control structures.)

Response 108:

Ohio EPA notes the comments on these two Special Limitations and Conditions. However, Ohio EPA feels the problem should not be that great, especially when it pertains to interior dikes which, by their very nature, should have some degree of protection against wave erosion due to the exterior dike system. Therefore, Ohio EPA does not feel that any changes are warranted at this time.

The ODNR, Division of Geological Survey has the following comments:

Comment 109:

NWP 13: "Bank stabilization projects should conform to the existing bluff toe and should not be used to fill and straighten the bluff toe. Prior to construction, each distinct unconsolidated unit comprising the bluff should be sampled and analyzed for particle size distribution. The thickness of each unit should be provided with the results."

Response 109:

Suggestions that Ohio EPA require all bank stabilization projects covered by this NWP conform to the existing bluff toe, sample each distinct unconsolidated unit comprising the bluff, and analyze for particle size distribution, defeats the purpose of the NWP process. The NWP process was set up so that certain types of routine projects could be more quickly processed and be less burdensome to both the applicant and the reviewing agencies. While the suggestions have merit in the context of an individual permit or certification, Ohio EPA feels that these are not consistent with the intent of the NWP process.

Comment 110: NWP 19: “Any sediment dredged that is greater than 60% sand and/or gravel should be side cast in the littoral system, down drift of the project site. If the sediment is less than 60% sand and/or gravel, the fine-grained fraction will degrade water quality and should be placed in an upland location.”

Response 110: *Open lake disposal of dredged material is authorized if the sediment concentrations are 1) less than 60 percent sand and 2) below the 75th percentile of the surficial background sediment contaminant concentrations of the basin proposed for disposal. Language will be added under Section C of the General Limitations and Conditions to require the side casting of “sandy” material. Fine grained materials, at the levels anticipated under the NWP’s, is not anticipated to generate a measurable water quality impact.*

Comment 111: NWP 29: “Sand and gravel suitable for near shore disposal shall not be entombed by any structure, but should be removed prior to construction, and placed in the littoral system, down drift of the project site.”

Response 111: *ODNR’s concern about the loss of sand and gravel from the littoral system of lakes and streams is a valid concern. Ohio EPA has revised our condition C.3.c. to minimize the loss of this valuable substrate material.*

Comment 112: NWP 35: “Any sediment dredged that is greater than 60% sand and/or gravel should be side cast in the littoral system, down drift of the project site. If the sediment is less than 60% sand and/or gravel, the fine-grained fraction will degrade water quality and should be placed in an upland location.”

Response 112: *Open lake disposal of dredged material is authorized if the sediment concentrations are 1) less than 60 percent sand and 2) below the 75th percentile of the surficial background sediment contaminant concentrations of the basin proposed for disposal. Language will be added under Section C of the General Limitations and Conditions to require the side casting of “sandy” material. Fine grained materials, at the levels anticipated under the NWP’s, is not anticipated to generate a measurable water quality impact.*

Comment 113: NWP 36: “Sand and gravel suitable for near shore disposal shall not be entombed by any structure, but should be removed prior to construction, and placed in the littoral system, down drift of the project site.”

Response 113: *ODNR’s concern about the loss of sand and gravel from the littoral system of lakes and streams is a valid concern. Ohio EPA has added this condition to Section C (Lakes) under the General Limitations and Conditions.*

Comment 114: NWP 39: “Sand and gravel suitable for near shore disposal shall not be entombed by any structure, but should be removed prior to construction, and placed in the littoral system, down drift of the project site.”

Response 114: *ODNR’s concern about the loss of sand and gravel from the littoral system of lakes and streams is a valid concern. Ohio EPA has added this condition to Section C (Lakes) under the General Limitations and Conditions.*

The following comments are those received from the Ohio Department of Transportation (ODOT):

Comment 115: Ohio State Certification General Limitations and Conditions A.1.: “ODOT believes that NWP 6 and 25 should be included as exceptions. These are activities that are similar to those that are already exempt and have little or no impact on the aquatic environment.”

Response 115: *Ohio EPA does not believe that these NWPs should be considered for the exceptions contained in Section A.1. While the activities may share some similarities with the other excepted activities, Ohio EPA believes that there are sufficient differences to warrant their exclusion.*

Comment 116: Ohio State Certification General Limitations and Conditions A.2.b.: “Prohibiting impacts to all Class 3 Headwater Streams is unreasonable. These streams are very common in Ohio and they are not unique aquatic resources like EWH or SHQW streams or scenic rivers. According to Ohio EPA's Field Evaluation Manual for Ohio's Primary Headwater Streams, V 1.0 (2002), Class III Primary Headwater Habitat (PHWH) Streams represent 16% of the total estimated stream miles in Ohio while all of the named streams (ODNR, USGS blue lines) in Ohio account for only 12% of estimated stream miles. Furthermore, a very small amount of named streams are unique aquatic resources for which impacts are prohibited in Part 1.A.2. ODOT has observed man-made roadside drainage ditches with little or no habitat that meet the criteria of a Class III PHWH stream. While it is recognized that Class III PHWH streams provide perennial flow, the level of protection afforded to these streams is greatly disproportionate to other more unique resources. This requirement might also result in costly, exorbitant permit processes, which often times may not have viable alternatives. As such, it is strongly suggested to remove Class 3 Headwater Streams from Part 1.A.2.b. Ohio EPA should investigate a method to further distinguish streams identified as Class III PHWH streams as unique and non-unique resources. For example, if a Class III PHWH stream flows into a CWH, SSH, or EWH stream, then it should be distinguished as a "Class III-a" stream and receive regulatory protection appropriate for a unique aquatic resource. This method would ensure that feeder streams of CWH, SSH, and EWH streams are protected while providing regulatory flexibility to other Class III PHWH streams. At an absolute minimum, this condition should include NWP 6 and 14 as exceptions to Part 1.A.2.b, in addition to those already included as exceptions.”

Response 116: *See Response 7*

Comment 117: Ohio State Certification General Limitations and Conditions A.2.d.: “We suggest that this condition should only deal with aquatic species that would be impacted by a project. Also, this condition should clarify that it is only pertaining to federally listed threatened and/or endangered species.”

Response 117: *The term “federally listed” will be added to this condition.*

Comment 118: Ohio State Certification General Limitations and Conditions A.4.b.: “Mitigation is not always available in the Ohio EPA 8-digit watershed. Practical alternatives should be considered under the review of the Director. Therefore, ODOT would like to see this condition read, ‘If applicant cannot find appropriate mitigation on streams listed in Section ‘a’ above, mitigation shall be in the Ohio EPA 8-digit watershed or alternative mitigation as approved by the Director’.”

Response 118: *Ohio EPA disagrees with this suggestion. This condition has not changed from the previous certification of the NWP. In addition, the phrase, "alternative mitigation is overly broad and vague. Ohio EPA believes use of the phrase would necessitate a project-by-project review to determine if the alternative mitigation is acceptable, thereby obviating the expedited reviews intended under the nationwide permit process.*

Comment 119: Ohio State Certification General Limitations and Conditions A.4.d.: "ODOT believes that using the term "rapid growth characteristics" is subjective language. ODOT suggests that, "with rapid growth characteristics" removed from this condition. If specific species are required this should be stated in the conditions."

Response 119: *While Ohio EPA agrees that the language as drafted is somewhat subjective we believe that it does provide valuable guidance to the regulated community. Ohio EPA is willing to work with ODOT to establish a detailed list of species with rapid growth characteristics, that would be applicable to both the nationwide permit and individual 401 review processes.*

Comment 120: Ohio State Certification General Limitations and Conditions A.7.b: "The requirement for floodplain culverts should not be included in the General conditions and limitation for the 401 certifications of the NWP. Previously, this condition was included as a condition specific to NWP #14. We feel strongly that this condition should remain as a condition specific to new culverts under NWP #14 and not be applied to all NWP as a general condition and limitation. Should this remain as proposed, it would have a dramatic impact on ODOT's program relative to culvert replacements (which for the most part are authorized under NWP #3) and could significantly increase the costs and reduce the number of small culvert replacements ODOT performs. This could also potentially require utility involvement/relocation, new right of way and require Rosgen measurements on every single culvert replacement ODOT does both in house and by contract.

"ODOT has major concerns with the floodplain culvert condition being applied as a general condition and limitation as it has the potential to greatly increase the amount of water we put on downstream landowners. The state could be liable for any damages to downstream property if our actions are found to be unreasonable."

Response 120: *Language will be added to this condition to clarify that the condition applies only when new road culverts for road crossings are being constructed, consistent with previous requirements.*

Comment 121: Ohio State Certification General Limitations and Conditions A.7.c.i/ii.: "ODOT has informally studied the effectiveness of the buried culverts that have been installed on roadway projects. Based on observations made during these studies, ODOT concurs with Ohio EPA that over sizing and depressing a culvert into the substrate to encourage the establishment of a natural channel bottom is only effective on low gradient streams that are not located on bedrock substrates. However, ODOT has observed that this method only appears to be effective in cases where the slope of the culvert is less than approximately 1 %. While the length of the culvert would also certainly play a role in the effectiveness of allowing for sediments to accumulate within a buried culvert (shorter culverts may fill in at higher % slope?), ODOT has found that in the case of longer culverts (130 lf up to 540 lf) with > approximately 1% slope the pipes become filled with sediments near the outlet of the culvert, but remain sediment free near the inlet of the culvert. A formal study

would likely be required to determine the actual threshold where culvert slope inhibits the accumulation of a natural substrate, and how culvert length may influence goal. ODOT recommends that Ohio EPA alter this NWP condition so that it only applies to culverts with equal to or less than 1% slope (since anything greater may be ineffective). In addition, ODOT believes that this condition should be excluded from NWP # 3. Most of the deficient culverts ODOT replaces are simply replaced in-kind by maintenance workers without any additional hydraulic studies to determine culvert size (culvert size was initially determined by a hydraulic engineer when the roadway was first designed). It would be extremely costly and time consuming for ODOT to design all in-kind replacements of deficient culverts to resize the culverts to "accommodate bank full discharge and match the existing depth of flow". ODOT recommends that this permit condition should continue to only apply to new culvert construction (such as is allowed under NWP #14)."

Response 121: *Ohio EPA appreciates ODOT's observations and recommendations on effective culvert slope and length to maximize the accumulation and retention of natural sediment within buried culverts. Ohio EPA based the 3% culvert slope limit primarily on professional studies and guidance from various state agencies. Ohio EPA agrees that more information is needed to make informed decisions on the appropriate culvert design, slope, and length to expedite flow, substrate development and retention, and movement of organisms in culverts. However, until new information becomes available, we are reluctant to modify the 3% limit.*

Language will be added to this condition to clarify that the condition applies only when new road culverts for road crossings are being constructed, consistent with previous requirements.

Comment 122: Ohio State Certification General Limitations and Conditions A.8: "We suggest adding an option to this section that allows the applicant to provide an alternative mitigation proposal (should a mitigation option satisfying 8 a-d not be available) that can be approved on a case by case basis at the discretion of OEPA's director."

Response 122: *Ohio EPA disagrees with this suggestion. This condition has not changed from the previous certification of the NWPs. Concern regarding what constitutes "acceptable alternative mitigation, discussed in Response 118 above, applies here as well. Ohio EPA is not aware of situations where this condition has triggered the requirement for an individual 401 certification.*

Comment 123: Ohio State Certification General Limitations and Conditions A.8.d.: "Please provide clarification. If no mitigation banks exist within any of the watersheds connected with the project then how can mitigation occur 'within the watershed in which the largest impacts occur'?"

Response 123: *The language in part A.8 is designed to provide guidance on the potential mitigation locations. Specifically, mitigation would be located either a) on site, or b) at various sites or banks within the impacted 8 digit HUCs, or c) at sites or banks within other 8 digit HUCS impacted by the project, or d) a site in the HUC with the largest volume of impacts. Lack a mitigation bank does not preclude mitigation using a non-bank location.*

Comment 124: Ohio State Certification General Limitations and Conditions B.1.: "ODOT strongly suggests adding NWPs #3 and #6 as exceptions to this condition and including

minimum threshold for NWP #14 (1/10 acre). NWP #s 3 and 6 typically result in very minimal impacts to the aquatic environment and generally impact degraded portions of the Category 3 wetlands involved. Typical maintenance activities are required in and around culverts/structures and may involve minor temporary and/or permanent impacts to a degraded portion of a Category 3 wetland that has no effect on the status of the wetland as a whole. It is not a wise expenditure of taxpayer dollars to require an applicant to go through the 401 WQC process for a minor impact to a Category 3 wetland which is necessary for routine maintenance.”

Response 124:

Category 3 wetlands are valuable high quality waters in Ohio that need upmost protection. Although some project impacts may occur in degraded or disturbed areas of Category 3 wetlands, impacts also occur, and will likely continue to occur, in undisturbed or undisturbed portions of Category 3 wetlands. It also would be difficult for us to ascertain the cumulative effects of impacts in degraded areas of Category 3 wetlands. Impacts to degraded portions of Category 3 wetlands can be targeted as compensatory mitigation on the wetlands to improve their quality.

We believe it would be unwise at this time to establish impact threshold values such as you suggested for NWP #14. A 23 acre Category 3 wetland that receives an impact on its edge that is one-tenth acre may remain healthy but if the same impact fragments the wetland or disturbs its hydrology, the outcome could be more severe. A one-tenth acre impact to a wetland that is 0.3 acre could severely disturb the wetland. Incremental impacts of one-tenth acre to a large wetland also could cause problems over time.

Comment 125:

Ohio State Certification General Limitations and Conditions B.2: “This condition conflicts with wetland mitigation requirements set forth in Ohio EPA’s Wetland Water Quality Standards (OAC 3745-1). First, please remember that the NWPs are intended to authorize impacts that are minimal/minor impacts to the aquatic environment. It is not always feasible to find available mitigation opportunities in the subject/county and 14 digit HUC where impacts occur, especially in these urban counties. There should be an option to provide an alternative mitigation proposal outside of the impacted watershed/county whereby the Director of OEPA could approve on a case by case basis without having to go through an Individual 401 WQC process. There are factors such as price of property and the controversial nature of mitigation in urban areas to consider before establishing this type of requirement. When considering mitigation opportunities available, ODOT is required to consider cost into the equation before making decisions regarding the expenditure of taxpayer dollars. As stewards of taxpayer dollars and providers of public infrastructure, we find this requirement to be unreasonable and impractical. ODOT strongly suggests that this requirement be removed.”

Response 125:

See Response 7

Comment 126:

Ohio State Certification General Limitations and Conditions B.4.b.: “ODOT would like to see the language from B (Wetlands) 3 in the previous General Limitations and Conditions (2002) reflected in the new Conditions. In the event that ODOT cannot find suitable mitigation within the impacted watershed, we need to have the option to create wetland mitigation sites in adjacent watersheds or to use a mitigation bank that has an active instrument signed by the director of Ohio EPA in an adjacent watershed. The previous condition was written as follows, ‘Wetland mitigation shall adhere to the requirements set forth in Ohio EPA’s Wetland Water Quality Standards (OAC 3745-1). In the event that suitable mitigation cannot be located on-site (within one mile) or within the watershed, mitigation may be located

outside of the watershed if there are significant ecological reasons to do so'."

Response 126: *This option is still available under the current water quality standards as found in OAC Chapter 3745-1. Ohio EPA did not feel that it was necessary to reiterate the language especially since details regarding mitigation are much more extensive than what was stated in the 2002 condition.*

Comment 127: Ohio State Certification General Limitations and Conditions B.5: "Storm water discharges to surface waters of the state, including wetlands, are regulated by Ohio EPA's NPDES storm water permits, ORC 6111, and other requirements, so Part 1.B.5 is redundant. We feel that Part 1.B.5 is unnecessary, and should be replaced with a reference that compliance with the previously mentioned regulations is required."

Response 127: *Ohio EPA is aware that other applicable provisions, in addition to Section 401 requirements, apply to discharges into waters of the state, including wetlands, but we believe it is important to emphasize the point here, especially for those who may not be familiar with Ohio EPA's regulations. Additionally, the conditions of the NPDES for storm water discharge associated with construction activity are more focused on sediment and erosion control; whereas, this condition addresses impacts from modifications to the hydrologic regime and chemical characteristics of the discharge.*

Comment 128: "The OAC references in General Limitations and Conditions B.5 for discharges or diversions of storm water into wetlands do not seem applicable. Language from OAC 3745-1-52 states that the purpose of the rule is for establishing waste water discharge permit limits for waste water discharges to wetlands."

Response 128: *Ohio EPA disagrees. The provisions in OAC Rule 3745-1-52 were intended to establish NPDES permit limits for [waste water] discharges into wetlands (waters of the state). "Discharge" is defined in OAC Rule 3745-1-02(B)(31) as the addition of any pollutant to waters of the state from a point source. Stormwater from sediment basins is considered a point source discharge, and is therefore subject to regulation under the chemical criteria in OAC Rule 3745-1-52.*

Comment 129: "The OAC Rule citations in General Limitations and Conditions B.5 for narrative and chemical criteria do not match with the titles of these rules in OAC."

Response 129: *Ohio EPA acknowledges that the descriptions (titles) of OAC Rules 3745-1-52 and 3745-1-53 in Part 1.B.5 do not match with the descriptions (titles) of these rules in the Ohio Administrative Code (OAC). Ohio EPA will make the necessary corrections to this condition.*

Comment 130: Ohio State Certification General Limitations and Conditions C: "It is our understanding that this portion of the conditions applies to Lake Erie and not to all lakes in Ohio. Please clarify this."

Response 130: *The condition will be modified to clarify that it only applies to Lake Erie.*

Comment 131: Ohio State Certification General Limitations and Conditions C.2: "ODOT suggests

adding NWP #s 3, 14, and 33 to the exceptions here as well to be consistent with the previously existing MOA that ODNR has agreed to with ODOT regarding Coastal Zone Management.”

Response 131: *Ohio EPA agrees that NWP 3 can be added to the activities exempted under this condition. However, the Agency does not agree that NWP 14 and 33 should be included in this exemption. Ohio EPA believes that coastal wetlands are a rare commodity and impacts for new projects must be reviewed under an individual certification.*

Comment 132: Ohio State Certification General Limitations and Conditions C.3: “ODOT suggests adding NWP # 14 as an exception to this condition in order to be consistent with the previously existing MOA that ODNR has agreed to with ODOT regarding Coastal Zone Management.”

Response 132: *This condition was drafted to prevent impacts to our limited Lake Erie coastal wetlands (at or below 575 feet on a USGS map). Per Herdendorf (1987), of all the Great Lakes, the industrialized Lake Erie shoreline has the smallest number and area of wetlands. Coastal wetlands provide numerous benefits including flood control, shoreline protection, nutrient-cycle control, trapping sediment, fish spawning and nursery grounds and water fowl habitat. Coastal wetlands are considered Category 3 wetlands according to the Ohio Rapid Assessment Method (ORAM) manual if their elevation is less than 575 msl, they have unrestricted hydrology with Lake Erie, and a predominance of native species. These wetlands are rare. The ORAM manual also recommends that the hydrologically restricted coastal wetlands or degraded unrestricted coastal wetlands should be evaluated for Category 3 status. Therefore, because coastal wetlands are rare, Ohio EPA seeks to limit impacts for resulting from new construction without a full anti-degradation analysis.*

The Memorandum of Agreement between the Ohio Department of Natural Resources and Ohio Department of Transportation (effective May 9th, 2005) does not limit Ohio EPA’s ability or need to place conditions on nationwide permits to ensure that Ohio’s high quality resources are evaluated under a full anti-degradation review.

Per ORC 1506.03 “no project or activity directly affecting the coastal area that is proposed by or subject to the approval of any agency of the state shall be implemented or approved until the director of natural resources has determined that it is consistent with the policies in the coastal management program document.” The MOA is a mechanism for streamlining the Coastal Consistency process only.

Comment 133: Ohio State Certification General Limitations and Conditions D.5: “Please further describe and define what is meant by ‘twenty-four hour storms’.”

Response 133: *The provision is from rule 1501:15-1-05 (A) of the Ohio Administrative Code (ODNR, Division of Soil and Water Conservation). It states:*

“In order to control pollution of public waters by soil sediment from accelerated stream channel erosion and flood plain erosion caused by accelerated stormwater runoff from development areas, the peak rates of runoff from an area after development may be no greater than the peak rates of runoff from the same area before development for all twenty-four-hour storms from one- to one-hundred-year frequency. Design and

development to match the peak rate of runoff for the one-, two-, five-, ten-, twenty-five-, fifty-, and one-hundred-year storms may be considered adequate to meet this rule. There are curves and tables available that describe the maximum amount of rain received in a given area for each storm event.”

Comment 134: Ohio State Certification General Limitations and Conditions D.5: “The post construction storm water management requirement in Part 1.D.5 could cause a typical culvert replacement project to need an individual 401 WQC when the project would otherwise meet NWP 3. Ohio EPA’s NPDES Construction General Permit (CGP) does not require post construction storm water management controls for routine maintenance activities and implementing such controls is unreasonable and impractical for the routine replacement of existing infrastructure.”

Response 134: *It is unclear to Ohio EPA how a typical culvert replacement would be impacted by this condition. This language is consistent with the 2002 certification and we do not believe changes are justified.*

Comment 135: Ohio State Certification General Limitations and Conditions D.5/6/7: “Items 5, 6, and 7 in Part 1.D (General) involve storm water management requirements regulated under Ohio EPA’s NPDES Construction General Permit (CGP), so it is strongly suggested to replace these three items with a reference that compliance with the CGP is required where applicable or simply delete the items. Items 5, 6, and 7 could conflict with an applicant’s storm water specifications for contractors (which may be more stringent), local storm water requirements, and even the CGP itself.”

Response 135: *Ohio EPA does not believe that removal of these conditions is appropriate as there may be projects that require NWP coverage which do not trigger the CGP. However, Ohio EPA will add language to conditions 5, 6, and 7 regarding the applicability of the CGP.*

Comment 136: Ohio State Certification General Limitations and Conditions D.8: “ODOT requests a provision that ODOT’s Office of Environmental Services (OES) be notified of inspections by OEPA in advance, so that ODOT provides OEPA safe access to a work site, assists with contractor conflict dispute and provide assistance in gathering any necessary records as documentation may be kept in many different locations within ODOT.”

Response 136: *Ohio EPA understands ODOT’s concern. Language will be added to this condition indicating that Ohio EPA will make a “reasonable attempt” to contact applicants prior to site inspections.*

Comment 137: NWP 3 – Ohio State Certification Special Limitations and Conditions 2.a: “ODOT requests that the language in this condition be modified to allow for minor deviations from the original filled area provided these minor deviations are necessary to accommodate safety standards and/or new construction practices/methods/techniques and/or new materials available which are necessary for the rehabilitation/replacement/repair. This is consistent with USACE language.”

Response 137: *Ohio EPA will incorporate this revised language*

Comment 138: NWP 13: “The word ‘shoreline’ is referenced several times in this language. Since Section 404/401 regulates the discharge of fill materials below OHWM, the language/terminology should be reflected accordingly.”

Response 138: *Comment noted. Ohio EPA feels the only reference to “shoreline” that is in the context of a regulatory requirement is in Special Limitation and Condition 3.a.iii. Ohio EPA will reword the condition to state the “placement of fill between the vertical bulkhead and the existing Ordinary High Water Mark is authorized.”*

Comment 139: NWP 13 – Ohio State Certification Special Limitations and Conditions 3.e.: “The previous version of the 401 conditions allowed for up to 1,000 linear feet in length. We suggest that this limitation remain at 1,000 linear feet and not be reduced down to 500 linear feet.”

Response 139: *Ohio EPA reduced the state threshold for stream impacts from 1,000 linear feet to 500 linear feet in order to be consistent with the 500 linear feet federal threshold for stream impacts. The director of Ohio EPA has the authority to authorize additional impacts if the federal limits have been waived by the District Engineer.*

Comment 140: NWP 33 – Ohio State Certification Special Limitations and Conditions 1: “We suggest adding language that allows OEPA's Director the ability to extend the timeframe allowed for duration of temporary fill to extend beyond one year, provided adequate justification is provided.”

Response 140: *Ohio EPA believes that the limitations and conditions as drafted are appropriate. Limits set forth in the nationwide permits reflect the need to balance agency resources with an appropriate level of environmental protection based on currently available data*

Comment 141: NWP 33 – Ohio State Certification Special Limitations and Conditions 3: “ODOT suggests that allowance be made for a certain amount of temporary fills in special aquatic sites (i.e. 1/10 acre) under NWP #33.”

Response 141: *Ohio EPA believes it is necessary to protect Ohio’s special aquatic sites, some of which are rare. Since we do not have any information that establishes threshold or cumulative values for impacts to special aquatic sites, we believe it would be inappropriate to deviate from this condition at this time.*

Comment 142: NWP 41 – Ohio State Certification Special Limitations and Conditions 2: This condition “should not be specific to ‘existing agricultural and roadway drainage ditches’. Using the identical terminology from the 404 NWP language (‘drainage ditches’) throughout the 401 conditions would be more appropriate and cause less confusion for the regulated community.”

Response 142: *Ohio EPA agrees with your comment. The text of the condition will be modified accordingly.*

The following comments are those received from the Ohio Wetlands Foundation:

Comment 143: “The portions of the Draft Certifications that addresses impacts to streams, particularly intermittent and ephemeral streams, may need to be revised depending upon the Federal policy developed in response to the Raponos-Carabell cases rule on by the U.S. Supreme Court in June of 2006.”

Response 143: *The conditions presented in this certification are based on the nationwide permits issued by the Corps on March 12, 2007. Your comment is correct in that final guidance issued by the federal government may have an impact on the implementation of the NWP. However, it is necessary to proceed with the issuance of these nationwide permits based on the /corps issuance of its nationwide permits on March 12, 2007.*

Comment 144: Ohio State Certification General Limitations and Conditions A.2.: This condition “indicates the temporary or permanent impacts to high quality streams such as EWH, CWH, Seasonal Salmonid, Class 3 Headwater streams, etc is prohibited. Can an Individual Section 404/401 permit be received for impacts to such streams? If so, this should be made clearer.”

Response 144: *This condition only limits the use of the certification of the NWPs and does not imply that the project is prohibited. If a project does propose to impact one of these stream uses, an individual 401 certification will have to be obtained.*

Comment 145: Ohio State Certification General Limitations and Conditions A.2.: “If high quality streams (EWH, CWH, Seasonal Salmonid, Class 3 Headwater streams) are not permitted to be impacted, then it is the belief of Ohio Wetlands Foundation that the Ohio EPA should provide an incentive to protect these streams. A couple of incentives would be:

- a. Allow applicants to utilize the protection of high quality streams as an acceptable form of compensatory mitigation as it is far more efficient to protect the best streams than it is to try to restore or create similar quality streams.
- b. Allow applicants, when excessive amounts of stream are avoided, to bank “stream credits” for avoided streams for mitigation of future impacts or impacts by other parties. The banked credits would only be approved if the applicant could provide adequate buffer, permanent protection and long term management, etc.”

Response 145: *Ohio EPA has allowed stream preservation to serve as part of a mitigation package. Under the appropriate circumstances applicants have been allowed to hold excess mitigation credit for their future use. These issues are, however, beyond the scope of the 401 certification of the NWP and we do not believe that changes to the certification of the NWP are required.*

Comment 146: “The Ohio EPA should work diligently with the Corps and interested parties to develop stream and wetland mitigation plan requirements. The requirements should be agreed to by both agencies and include details such as design, financial assurance, monitoring requirements, perpetual protection, long term care and management. Mitigation plans for individual mitigation projects and for mitigation banks should be the same or very similar. Having standard requirements agreed to by both agencies would help streamline the review and approval process of mitigation plans and 404/401 permits.”

Response 146: *Ohio EPA appreciates your comment and suggestions. Ohio EPA has in the past and will continue to work with the U.S. Army Corps of Engineers on mitigation plan development and other mitigation issues. While there are clearly benefits to developing consistent mitigation requirements, Ohio EPA reserves the rights to develop mitigation criteria specific to Ohio’s waters in light of its obligations to protect state water quality standards.*

Comment 147: “The Ohio EPA should work diligently with the Corps and interested parties to develop stream and wetland mitigation bank review, approval and operation standards. Furthermore, it is suggested that the Ohio EPA work to develop a Memorandum of Agreement that establishes how the two agencies will work collaboratively to review, approve and monitor mitigation banks. The MOA should also address how the two agencies will resolve disputes with regards to mitigation bank review, approval and operation.”

Response 147: *See Response 146.*

Comment 148: General Limitations and Conditions B.2.: “The Ohio Wetlands Foundation has several wetland mitigation banks that have been approved by the Mitigation Bank Review Team (MBRT) or in the review and approval phase by the MBRT. The adoption of this rule would severely impact the financial viability of all of these mitigation banks as the majority of the impacts to wetlands in Ohio occur within the specified counties. As such, Ohio Wetlands Foundation is opposed to adoption of this rule. If this portion of the Certification is adopted, we feel it is imperative that a provision to ‘grandfather’ existing banks and banks currently under development must be included. This provision should also provide meaningful assurances that the “grandfather” mitigation bank projects will not be discriminated against for use by applicants when reviewed for 401 certification.”

Response 148: *See Response 11*

Comment 149: General Limitations and Conditions B.2.: “This proposed rule goes in the opposite direction of the purpose of the Nationwide Permit Program in that it will make obtaining permits for impacts to Category 2 wetlands in these counties more difficult and not provide a streamlined permitting program for the majority of the NWP’s. Also, this rule is much more restrictive than what is allowed under the existing Isolated Wetlands Permit Program administered by Ohio EPA. Lastly, this rule is inconsistent with the existing and the proposed Wetlands Water Quality standards administered by Ohio EPA. It seems that it would be prudent for the Ohio EPA to promulgate new rules that are fair and consistent with existing rules and programs that it administers.”

Response 149: *See Response 11*

Comment 150: General Limitations and Conditions B.2.: “The Ohio EPA’s “Isolated Wetland Permits and 401 Water Quality Certifications in Ohio, State Fiscal Year 2006” indicates that OEPA issued approximately 200 permits through the 401 and IWP programs for FY 2006. The same report indicates that the Corps issued approximately 800 NWP’s during the same time frame. Ohio Wetlands Foundation believes it is reasonable to assume that the distribution of impacts for NWP’s will closely follow the distribution of IWP’s issued as per the map in the report. Based upon this assumption, the majority of the IWP’s and NWP’s occur in the specified counties. While OWF understands and appreciates the concerns of OEPA regarding the loss of wetland habitat in these counties, it is believed that the review and approval of this many NWP’s (estimated conservatively to be 400 more permits for OEPA to review – twice what the agency is currently reviewing) will far exceed the ability of the OEPA staff to process, review and monitor. Ohio Wetlands Foundation believes that the OEPA should not institute a rule that it does not have the staff to manage or operate.

Response 150: *See Response 11*

Comment 151: General Limitations and Conditions B.2.: “Ohio Wetlands Foundation believes that the 11-digit HUC should be utilized for this rule rather than the 14-digit HUC. The current NWP Certification rules and the existing IWP rules as well as the WWQ standards all utilize the 8-digit HUC. There are approximate 38 8-digit HUC’s in Ohio. There are approximately 350 11-digit HUC’s and over 3,000 14-digit HUC’s in Ohio. By going to the 14-digit HUC’s the Ohio EPA is decreasing the acceptable watershed size for compensatory mitigation by nearly 1,000 times on average. With the current staffing levels, compounded by the much smaller watersheds to consider, there is no way the current staff can handle this level of review and compliance.”

Response 151: *See Response 11*

Comment 152: General Limitations and Conditions B.2.: “Ohio Wetlands Foundation has been told by OEPA and it believes that mitigation banks play a vital role in a successful permitting program. However, with the desire to go to much smaller watersheds, mitigation banks would become obsolete under the current bank approval and credit release methodologies. Credit releases typically are 30% of the bank upon approval by the MBRT with the remainder upon demonstration of success. With 14-digit HUC’s as the watershed size, banks would have to be much smaller. Therefore the pre-sale amount would be minuscule and not substantial enough to encourage the development of banks. Without banks, the OEPA and the Corps would have to review and approval each permit with an individual mitigation plan. This would further strain the staff of both agencies.”

Response 152: *See Response 11*

Comment 153: General Limitations and Conditions B.2.: “Ohio Wetlands Foundation understands the desires of Ohio EPA to curtail the loss of wetlands habitat in the specified counties. However, it is just as important to restore and protect large areas of wetland and upland habitat that is far removed from the impacts of heavily developed areas. Wetland mitigation banks can provide a means to provide such areas at no out of pocket expense to the citizens of Ohio. Ohio Wetlands Foundation believes that a balanced mitigation program would encourage the preservation of wetlands in these counties and the restoration of large wetland/upland ecosystems in the rural areas of Ohio. A balanced program would provide incentives for protecting wetland in urban areas (not ‘sticks’), such as the ones previously mentioned for streams, as well as incentives for restoring large areas of habitat that can provide sustainable wildlife populations. “

Response 153: *See Response 11*

Comment 154: General Limitations and Conditions B.2.: “Ohio Wetlands Foundation believes that this segment of the proposed rules should be withdrawn and reviewed with interested parties for a period of one year. During this time the Ohio EPA could work develop a balanced mitigation program with the input of the interested stakeholders.”

Response 154: *See Response 11*

The following comments are those received from the U.S. Fish and Wildlife Service (Service):

Comment 155: General Limitations and Conditions A.2.: “We support the conditions prohibiting impacts to high quality waters, including two streams with important populations of federally endangered mussels (Killbuck Creek and Pymatuning Creek).”

Response 155: *Ohio EPA acknowledges and thanks you for your comment.*

Comment 156: General Limitations and Conditions A.4.c.: “The Service recommends that the width of vegetative buffers required along stream banks be increased. Ohio EPA's stream monitoring program consistently identifies upland development in many of Ohio's watersheds as a leading cause for non-attainment of water quality standards. In addition, the Army Corps of Engineers (Fischer and Fischenich 2000) found the available literature suggests that 100 feet is the minimum width of vegetated buffer that results in measurable fish and wildlife benefits, including fish and macroinvertebrates. The Service believes that increasing buffer widths to 100 feet on both stream banks will help mitigate the effects of upland development on Ohio's water quality, while at the same time providing valuable riparian wildlife habitat.”

Response 156: *Ohio EPA believes that the limitations and conditions as drafted are appropriate. Limits set forth in the nationwide permits reflect the need to balance agency resources with an appropriate level of environmental protection based on currently available data. Ohio EPA does not intend to pursue a specific increase in the minimum required buffer distance at this time. Ohio EPA concurs that wider buffers offer greater protection to streams. However, Ohio EPA also recognizes that 100 feet on either side of a stream is not always available. The intent of the criteria is to require a reasonable, yet protective buffer width.*

Comment 157: Nationwide Permit 21: “We request that OEPA's Certification Special limitations and Conditions for NWP 21 reflect the limitations and conditions included in the "Proposed Regional Permit For Impacts to Waters of the United States Associated with Surface and Underground Coal Mining Activities Within the Huntington and Pittsburgh Districts in the State of Ohio" (draft regional permit), public noticed by the Army Corps of Engineers on April 19, 2006.

“Most of OEPA's Certification Special Limitations and Conditions associated with surface coal mining reflect the conditions contained in the draft regional permit, with one notable and important exception. The Certification Special Limitations and conditions for impacts to streams permitted by NWP 21 do not reflect those proposed in the draft regional permit. The draft regional permit states:

“Using the appropriated functional assessment method verified by OEPA, this general permit authorizes:

1. Unlimited impacts to Class I Primary Headwater Habitat (PHWH) Streams,
2. Impacts to 1,500 linear feet of streams with a Qualitative Habitat Evaluation Index (QHEI) score less than 45, and
3. No more than an aggregate total of 500 linear feet of impacts to:
 - Class II PHWW Streams or
 - Streams with a QHEI score of 45-50

No impacts shall be authorized by this general permit to:

- Class III PHWH Streams or
- Streams with a QHEI score greater than 60

“The Service believes that the Certification Special Limitations and conditions for NWP 21 should be modified to incorporate the limits set out in the draft regional permit.”

Response 157: *Ohio EPA agrees and will revise the Special Limitations and Conditions accordingly.*

Comment 158: NWP 21 – Special Limitation and Condition 3: This condition “should be deleted.” “This condition permits an additional 1,500 linear feet of stream impacts to those streams affected by previous mining, but gives no guidance regarding criteria for determining whether a stream is actually impacted by previous mining. Permitting of streams associated with areas impacted by previous mining is effectively addressed under Nationwide Permit 49 (Coal Remining Activities), and mention of previously mined steams in NWP 21 seems unnecessary.”

Response 158: *Ohio EPA did consider deleting Special Limitation and Condition #3, which was in the previous certification, but has decided to retain this due to uncertainty over how the new NWP#49 would be interpreted, such as when the permit boundary of a mining site includes less than 40% previously mined areas. Ohio EPA wishes to encourage remining of, and the ultimate reclamation of, previously mined areas. However, Ohio EPA has revised the wording of this Special Limitation and Condition to incorporate the functional assessment approach now being used in the other limitation and conditions associated with NWP#21.*

Comment 159: NWP 21: “The Service believes that stream buffer preservation/restoration should extend 100 feet on both banks, and that modifying the Certification Special Limitations and conditions for NWP 21, as discussed above, is a well-reasoned approach to protection of Ohio’s aquatic resources and permitting of impacts associated with surface coal mining.”

Response 159: *This was a summary statement and was summarizing the USFWS comments on both A4 and NWP21. The NWP21 comment is addressed in the response to comment 157.*

The following comments are those received from Shumaker, Loop & Kendrick, LLP on behalf of the Water Task Force of the Environmental Committee of the Ohio Electric Utility Institute (Utilities):

Comment 160: Ohio State Certification General Limitations and Conditions B.2.: “This new condition is poorly worded and is likely to have a negative impact on the construction of new utility lines and substations in parts of the state where they are most needed.”

Response 160: *See Response 11*

Comment 161: Ohio State Certification General Limitations and Conditions B.2.: “The condition appears to require mitigation for temporary impacts, but fails to adequately describe the type of mitigation that will be required. By definition, temporary impacts do not result in the permanent loss of any wetlands. Thus, Ohio EPA should not require mitigation above and beyond that which is required to restore the wetland to the condition it was in prior to the temporary impact. If Ohio EPA does not intend to require mitigation above and

beyond that which will be required to restore the wetland to the condition that it was in before the temporary impact, the rule should be revised to make this clear in order to eliminate the need for further interpretation.”

Response 161: *See Response 11. It should be noted that this certification, as did the 2002 certification, regulates both temporary and permanent impacts to wetlands and does require mitigation for those impacts. No changes to this requirement are contemplated.*

Comment 162: Ohio State Certification General Limitations and Conditions B.2.: “In the high growth counties described in the rule (Cuyahoga, Delaware, Franklin, Hamilton, Lucas, Montgomery, Stark, Summit, and Trumbull) land is at a premium and in many cases the land which is not developed contains wetlands. If a local mitigation bank does not already exist in the same area in which the impact will occur this new requirement could make it very difficult for regulated parties to find a compliant mitigation site.”

Response 162: *See Response 11*

Comment 163: Ohio State Certification General Limitations and Conditions B.2.: “Our review of OEPA's 401 website revealed that the website contains the 8- and 11-digit watershed identifiers, but not the 14-digit identifiers referenced in the rule.”

Response 163: *See Response 11*

Comment 164: Ohio State Certification General Limitations and Conditions B.2.: “It is already difficult enough for the Utilities to find suitable land for new substations and transmission lines. This condition severely limits the areas in which mitigation can be completed and in doing so, it makes it that much more difficult to find suitable locations for substations and transmission lines. If this new mitigation condition can not be met, the Utilities assume that an individual 401 application would have to be submitted to try to justify mitigation outside of the identified area. This would unnecessarily add time and expense to the permitting of routine projects and it would conflict with the entire purpose of nationwide permits (permitting routine projects that cause minor impacts).”

Response 164: *See Response 11*

Comment 165: NWP 13 – Ohio State Certification Special Limitation and Condition 3.e: “This condition limits the length of bank stabilization to 500 feet, down from 1000 feet which as permitted by the current certifications. Implementing this proposed revision would require the Utilities to submit applications for individual 401 permits for all projects with impacts longer than 500 feet and once again defeats the entire purpose for having and using nationwide permits in lieu of the submission of individual permit applications which are much more costly and time consuming than utilizing the nationwide permits.”

Response 165: *Ohio EPA reduced the state threshold for stream impacts from 1,000 linear feet to 500 linear feet in order to be consistent with the 500 linear feet federal threshold for stream impacts.*

The following comments are those received from Jacqueline Driskell of Columbus, Ohio:

Comment 166: Ms. Driskell's comments are generally in support of the state conditions of the

nationwide permits, and she does not offer any suggestions for improvements or modifications to them as they are written. She believes “that creating a more strict policy or enforcing the current regulation is important in keeping our water’s safe,” and “that the regulations for permits to companies and individuals should be strict and well monitored whether it is a small or large project.”

Response 166: *Ohio EPA appreciates your concern for Ohio’s water quality and hopes that you continue to be involved with the rules and standards that are continually being developed and improved to ensure the protection of Ohio’s environment.*

The following comments are those received from Dominic Plavny of Columbus, Ohio:

Comment 167: Mr. Plavny is opposed to the state certifications of the nationwide permits. He feels that the revised conditions result in a lowering of water quality standards, “which by truly environmentally sensitive standards are already too low.”

Response 167: *Thank you for your comment and your concern for Ohio’s environment. Ohio EPA believes that the proposed revisions of the conditions for the state certification of the Corps’ nationwide permits are much more stringent than they were five years ago when the nationwide permits were previously renewed. The conditions placed on this round of nationwide permits were developed based on various factors such as water quality data gathered during the past five years, concerns for cumulative impacts, and revised guidance documents regarding best management practices. Using this information, Ohio EPA is balancing agency resources with environmental protection for projects that should result in only minor impacts, such as those authorized through the nationwide permitting program.*