

FINAL

By:  Date: \_\_\_\_\_

Effective Date: June 25, 2020  
Expiration Date: June 24, 2025

6/25/2020

**OHIO GENERAL PERMIT FOR FILLING  
CATEGORY 1 AND CATEGORY 2 ISOLATED WETLANDS AND  
EPHEMERAL STREAMS**

Pursuant to Section 6111.021 and 6111.03(J)(1) of the Ohio Revised Code (ORC), the Director of the Ohio Environmental Protection Agency hereby authorizes the filling of, and the discharge of dredged material into, Category 1 and Category 2 isolated wetlands where the proposed project involves the filling of, or the discharge of dredged material into, Category 1 and Category 2 isolated wetlands of a total of  $\frac{1}{2}$  acre or less, and any filling or discharge of dredged material into ephemeral streams, in accordance with the conditions specified in Parts I through IX of this general permit.

Coverage under this general permit is conditioned upon payment of applicable fees, outlined in Part II. below, and submittal of a complete Pre-Activity Notice (PAN) when required.

This Isolated Wetland and Ephemeral Stream General Permit shall be effective for five (5) years and shall expire at midnight on the expiration date shown above.



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Laurie A. Stevenson  
Director

## **Part I. COVERAGE UNDER THIS PERMIT**

Isolated Wetlands: Coverage under this permit is limited to the filling of, and the discharge of dredged material into, Category 1 and Category 2 isolated wetlands of up to a total of one-half acre or less. The filling of, or discharge of dredged material into, greater than one-half acre of Category 1 or 2 wetlands, or any Category 3 isolated wetlands is specifically not authorized under this general permit.

Ephemeral Streams: Coverage under this permit is limited to the filling of and the discharge of dredged material into ephemeral streams, as defined herein, determined to not be waters of the United States and not subject to Section 404 or 401 of the Clean Water Act.

Projects for the filling of or discharge of dredged material into ephemeral streams that impact less than 300 linear feet are required to comply with all terms and conditions of this permit except the following:

- 1) Notification Requirements in Part II;
- 2) General Conditions in Part III. A), H), I), and J);
- 3) Restoration Monitoring and Reporting when the PAN is required in Part IV E);
- 4) Mitigation Terms and Conditions in Part V and Part VI; and
- 5) Limitations in Part VII.

## **Part II. NOTIFICATION REQUIREMENTS**

- A) Notification requirements outlined in this section are required for any amount of fill or discharge into isolated wetlands and the fill or discharge into ephemeral streams exceeding 300 linear feet.
- 1) For culvert maintenance and replacement: Only the impacts to ephemeral streams beyond the enclosed configuration of an existing culvert structure apply toward the linear foot notification and mitigation thresholds referenced in this permit.
- B) Contents of Notification: For coverage under this general permit, a PAN must be submitted, when required per condition A. above, to the Ohio EPA and must contain the following information:
- 1) A completed Isolated Wetland and Ephemeral Stream General Permit Application Form;
  - 2) An acceptable wetland delineation as performed in accordance with the 1987 U.S. Army Corps of Engineers wetland delineation manual and any other procedures and requirements adopted by the U.S. Army Corps of Engineers for delineating wetlands, including a determination from the U.S. Army Corps of Engineers that the wetlands and ephemeral streams proposed to be covered by this general permit are not Waters of the United States and not subject to Section 404 of the Clean Water Act;
  - 3) A completed Ohio Rapid Assessment Method (ORAM 5.0) wetland categorization form for each isolated wetland on the project site. Ohio EPA will make the final assignment of a wetland category in accordance with OAC 3745-1-54 of the Ohio Administrative Code (OAC);

- 4) A stream physical habitat assessment (e.g., Qualitative Habitat Evaluation Index or Headwater Habitat Evaluation Index) for each ephemeral stream on the project site;
  - 5) A detailed project description;
  - 6) Maps showing project footprint, including a U.S. Geological Survey topographic map, and other maps that may be pertinent to assessing the functional level of the isolated wetlands and flow regime of the ephemeral streams proposed to be covered under the PAN, such as county soil maps and National/Ohio Wetland Inventory maps;
  - 7) Photographs of each isolated wetland and ephemeral stream proposed to be covered by this permit with a photograph location map showing photograph number and direction the photograph was taken; and
  - 8) For isolated wetlands, an acceptable mitigation proposal in accordance with ORC Sections 6111.022(D) and 6111.027 including documentation that mitigation credits have either been purchased or reserved. If the proposal includes in-lieu fee mitigation for wetland impacts, an evaluation of other mitigation alternatives must be provided.
  - 9) For ephemeral stream permanent impacts, an acceptable mitigation proposal including documentation that mitigation credits have either been purchased or reserved, or a permittee-responsible mitigation plan, if applicable.
- C) Fees: A PAN shall be accompanied by an application fee of \$200.00 and a review fee of \$500.00 per acre of isolated wetland to be impacted (ORC 3745.113).
- D) Timing: Within fifteen (15) business days after the Director's receipt of a PAN, Ohio EPA shall notify the applicant whether the application is complete. If the application is not complete, Ohio EPA shall include in the notice an itemized list of the information or materials necessary to complete the application. If the applicant fails to provide the information or materials that are necessary to complete the application within sixty (60) days after the Director's receipt of the PAN, Ohio EPA may return the application and take no further action on it.

The Director shall notify the applicant within thirty (30) days after the Director's receipt of a complete PAN:

- 1) If the proposed filling of, or the discharge of dredged material into isolated wetland(s) and/or ephemeral stream(s) will not result in a significant negative impact on state water quality and is authorized to proceed under this general permit; or
- 2) If the proposed filling of, or the discharge of dredged material into isolated wetland(s) and/or ephemeral stream(s) will result in a significant negative impact on state water quality and therefore, the project is not authorized to proceed under this general permit.

If the applicant has not received notice that the project is not authorized by this general permit within thirty (30) days after the Director's receipt of a complete PAN, the applicant may move forward with the proposed project in accordance with the conditions stated in this general permit.

### Part III. GENERAL CONDITIONS

Projects subject to this general permit shall comply with the following conditions except as provided in Part I of this permit:

- A) The project shall be constructed in accordance with the information as set forth in the complete PAN.
- B) The terms and conditions outlined in this section apply to project and/or mitigation construction as described in this permit.
- C) A copy of this permit shall remain on-site for the duration of the project and/or mitigation construction activities.
- D) In the event of an inadvertent spill, the permittee must immediately call the Ohio EPA Spill Hotline at 1-800-282-9378, as well as the Ohio EPA Section 401 Manager (614-644-2001).
- E) Unpermitted impacts to surface waters of the state occurring as a result of this project must be reported within 24 hours of occurrence to Ohio EPA, Division of Surface Water, Section 401 Manager (614-644-2001), for further evaluation.
- F) Pesticide application(s) for the control of plants and animals shall be applied in accordance with the NPDES General Permit to Discharge Pesticides In, Over or Near Waters of the State available at:  
<https://www.epa.ohio.gov/portals/35/permits/OHG870002%20FINAL%20PERMIT.pdf> and may require a pesticide applicator license from the Ohio Department of Agriculture.
- G) Any authorized representative of the director shall be allowed to inspect the authorized activity at reasonable times to ensure that it is being or has been accomplished in accordance with the terms and conditions of this permit.
- H) In the event that there is a conflict between the application, including the mitigation plan (if applicable), and the conditions within this permit, the permit condition shall prevail unless Ohio EPA agrees, in writing, that the application or other provision prevails.
- I) When a project will result in the temporary removal of hydric topsoil from isolated wetlands, the hydric soil shall be separated and placed as the topmost backfill layer when the wetlands are restored.
- J) Wetland narrative and chemical criteria described in OAC 3745-1-51 and 3745-1-52 of the Administrative Code shall be maintained in isolated wetlands wholly or partially avoided.

#### K) Best Management Practices (BMPs)

- 1) All isolated wetlands and ephemeral streams which are to be avoided, shall be clearly indicated on site drawings, demarcated in the field and protected with suitable materials (e.g., silt fencing) prior to site disturbance. These materials shall remain in place and be maintained throughout the construction process and removed after completion of construction.
- 2) Unless subject to a more specific storm water National Pollutant Discharge Elimination System (NPDES) permit, all best management practices for storm water management shall be designed and implemented in accordance with the most current edition of the NPDES construction general permit available at: <http://www.epa.ohio.gov/dsw/storm/index.aspx>, or any watershed specific construction general permit.
- 3) Sediment and erosion control measures and best management practices must be designed, installed, and maintained in effective operating condition at all times during construction activities as required by applicable storm water permits. Proper maintenance ensures corrective measures will be implemented for failed controls within 3 days of discovery.
- 4) Disturbance and removal of vegetation from the project construction area is to be avoided where possible and minimized to the maximum extent practicable. Entry to surface waters shall be through a single point of access to the maximum extent practicable to minimize disturbance to riparian habitat.
- 5) Straw bales shall not be used as a form of sediment control unless used in conjunction with another structural control such as silt fencing. Straw bales may be utilized for purposes of erosion control such as ditch checks.
- 6) Heavy equipment shall not be placed below the ordinary high water mark of any surface water, except when no other alternative is practicable.
- 7) Fill material shall consist of suitable non-erodible material and shall be maintained and stabilized to prevent erosion.
- 8) All dewatering activities must be conducted in such a manner that does NOT result in a violation of water quality standards.
- 9) All disturbed areas which remain dormant in excess of fourteen days must be protected from erosion within seven days from the last earth disturbing activity.
- 10) All areas of final grade must be protected from erosion within seven days.
- 11) In the event of authorized in-stream activities, provisions must be established to redirect the stream flow around or through active areas of construction in a stabilized, non-erosive manner to the maximum extent possible.

- 12) Materials used for fill or bank protection shall consist of suitable material free from toxic contaminants in other than trace quantities. Broken asphalt shall not be used as fill or bank protection.
- 13) To be used for fill or bank stabilization, concrete rubble shall be in accordance with ODOT specifications, free of exposed re-bar, and, free of all debris, soil and fines.
- 14) Chemically treated lumber which may include, but is not limited to, chromated copper arsenate and creosote treated lumber, shall not be used in structures that come into contact with waters of the state.
- 15) At the completion of construction activities, all temporary fill material must be removed to an area that has no waters of the state and the stream and wetland bottom shall be restored to pre-construction conditions and replanted with native seed mixes to the maximum extent practicable.
- 16) Culverts
  - a) When practicable, culverts shall be installed at the existing streambed slope, to allow for the natural movement of bedload and aquatic organisms.
  - b) When applicable, the culvert base or invert with the substrate shall be installed at or below the sediment to allow the natural channel bottom to develop and to be retained.
  - c) The culvert shall be designed and sized to accommodate bankfull discharge and match the existing depth of flow to facilitate the passage of aquatic organisms.
  - d) Where culverts are installed for temporary crossings, the bottom elevations of the stream shall be restored as nearly as possible to pre-project conditions.

#### **Part IV. RESTORATION OF TEMPORARY EPHEMERAL STREAM IMPACTS**

- A) Temporary impacts are those that facilitate the nature of the activity or aid in the access, staging or development of construction; are short-term in nature, not to exceed two years, and that are expected, upon removal of the temporary impact, to result in the surface water returning to conditions which support pre-impact function with minimal or no human intervention within 12 months following the completion of the temporary impact.
- B) All ephemeral streams subject to temporary impacts, shall be restored onsite to pre-existing contours and conditions upon the completion of the temporary impacts.
- C) The flow regime shall be restored to that of the pre-impact ephemeral flow regime.
- D) The ephemeral stream physical habitat, as measured prior to impact, shall be restored.
- E) Restoration Monitoring and Reporting when a PAN is required

- 1) When a PAN is required per condition Part II.A, all restored ephemeral streams shall be monitored for up to two years following the completion of restoration activities. If the restoration areas are meeting or exceeding the restoration performance criteria after the first year of post construction monitoring, the permittee may request to be released from any further monitoring. If the restoration areas are not meeting the restoration performance criteria by the end of the second year of post construction monitoring, the monitoring period may be extended, and/or the permittee may be required to revise the existing restoration plan.
- 2) When a PAN is required per condition Part II.A, annual restoration reports shall be submitted to Ohio EPA by December 31 of each year following the end of the first full growing season and completion of restoration construction. Each report shall contain, at a minimum, the following information:
  - a) The status of all restoration required for the project as specified in the application and authorization.
  - b) Current contact information for all responsible parties including phone number, email, and mailing addresses. For the purposes of this condition, responsible parties include, but may not be limited to, the permittee, consultant, and/or owner.
  - c) Discussion of the status of the stream channel and restoration of pre-impact flow regimes.
  - d) Stream physical habitat assessment (e.g., Qualitative Habitat Evaluation Index or Headwater Habitat Evaluation Index) utilizing the same methodology as the pre-impact assessment.
  - e) A minimum of three high resolution color photographs taken at the restored area, including one facing upstream, one facing downstream, and a close up which clearly depicts the substrate composition and size for each restored stream. Photographs must accurately depict the quality of the stream and may not include excessive cover that would prevent the observation of substrates, such as leaf litter, snow or ice.

## **Part V. MITIGATION FOR PERMANENT EPHEMERAL STREAM IMPACTS**

- A) Mitigation for permanent impacts to ephemeral streams is required for impacts over 300 linear feet in order to qualify for coverage under this general permit. Restoration or enhancement projects that will result in a net improvement of water quality may not be required to provide additional mitigation (e.g. 319 projects, H2Ohio projects, Water Resource Restoration Sponsor Program (WRRSP), or mitigation banks and in-lieu fee projects). To qualify for consideration, applicants must submit a demonstration as part of the mitigation proposal that the project will result in a net improvement in water quality.

Impacts to previously mined ephemeral stream reaches as a result of remining and subsequent reclamation will require no further mitigation.

- B) The permittee shall conduct mitigation through either purchasing credits from an approved mitigation bank with a service area that includes the impacted 8-digit Hydrologic Unit Code (HUC) watershed, purchasing credits from an approved In-lieu fee program that serves the impacted 8-digit HUC watershed, or constructing permittee-responsible mitigation that is within the impacted 8-digit HUC watershed.
- C) Mitigation for the permanent filling of, or the permanent discharge of dredged material into ephemeral streams covered under this permit when required shall be conducted as follows:
- Ephemeral streams with sand/silt/muck/clay dominated substrates at a minimum rate of one linear foot for every linear foot (1:1) of permanently impacted ephemeral stream.
  - Ephemeral streams with bedrock/boulder/cobble/gravel/sand mixed substrates at a minimum rate of one and a half linear feet for every linear foot (1.5:1) of permanently impacted ephemeral stream.
  - Alternative mitigation ratios may be considered, and approved by Ohio EPA, based upon project and site-specific conditions, such as providing enhanced storm water volume reduction practices (e.g. pervious pavement, infiltration best management practices) installed in accordance with the Construction Storm Water permit for the proposed watershed associated with the impacted ephemeral stream.
- D) When mitigation will occur at an approved mitigation bank or In-lieu Fee program, mitigation credits must be acquired within 30 days after receipt of the written notice of approval authorizing impacts to ephemeral streams. Proof mitigation credits have been purchased shall be sent to Ohio EPA within 30 days after receipt of approval for coverage under this general permit.
- E) Permittee Responsible Mitigation
- 1) All permittee responsible mitigation for ephemeral streams shall be monitored for up to five years following the completion of mitigation construction activities. If the mitigation areas are meeting or exceeding the performance criteria prior to the end of the fifth year of mitigation monitoring, the permittee may request to be released from any further monitoring. If the mitigation areas are not meeting the performance criteria by the end of the fifth year of mitigation monitoring, the monitoring period may be extended, and/or the permittee may be required to revise the existing mitigation plan.
  - 2) Construction of permittee responsible mitigation, shall commence within 30 days after completion of fill activities authorized under this general permit, and shall be completed prior to termination of coverage of approval under this general permit.
  - 3) The permittee responsible mitigation site shall be protected long term (e.g. environmental covenant, conservation easement, deed restriction), and appropriate practicable management measures, including appropriate vegetative buffers, shall be implemented to restrict harmful activities that jeopardize the mitigation.
  - 4) Annual monitoring reports shall be submitted to Ohio EPA by December 31 of each year following the end of the first full growing season and completion of mitigation construction. Each report shall contain, at a minimum, the following information:



- a) The status of all mitigation required for the project as specified in the application and authorization.
- b) Current contact information for all responsible parties including phone number, email, and mailing addresses. For the purposes of this condition, responsible parties include, but may not be limited to, the permittee, consultant, and/or owner.
- c) Clearly identify the specific monitoring period the report is intended to represent, as well as the calendar year the monitoring occurred. The report shall also provide a summary of current mitigation status, which compares the previous years' monitoring information with the current report including graphs and tables showing trends or other information as requested by Ohio EPA.
- d) A list of species planted in all mitigation areas.
- e) The first-year report shall include plan views and cross sections of the as-built mitigation area including the location and types of planting.
- f) Discussion of stability of the mitigation stream channel.
- g) Stream physical habitat assessment (e.g., Qualitative Habitat Evaluation Index or Headwater Habitat Evaluation Index) of the mitigation stream channel.
- h) A minimum of three high resolution color photographs taken for each mitigation stream, including one facing upstream, one facing downstream, and a close up which clearly depicts the substrate composition and size for each stream proposed for impact. Photographs must accurately depict the quality of the stream and may not include excessive cover that would prevent the observation of substrates, such as leaf litter, snow or ice.

## 5) Monitoring Requirements

- a) At a minimum, the first, third and fifth year annual reports shall include longitudinal (profile view along the centerline) and cross-sectional plan view measurements of the mitigation stream and shall be taken to include those measurements necessary to determine sinuosity, meander wavelength, belt width, radius of curvature, and meander arc length for a minimum of two meander bends if applicable.
- b) Observations of the stream mitigation channel and banks, including up and downstream, shall be made. Signs of negative effects from the stream mitigation such as excessive bank erosion, sedimentation, headcutting, aggradation, entrenchment, or degradation shall be noted in the annual report, and corrective actions shall be taken.
- c) If applicable, for forested riparian buffers, the location and name of each plant community type within the mitigation area and buffer area shall be marked on a scaled drawing or scaled aerial photograph (base map) and named. The dominant plant species shall be visually determined in each vegetation layer of each community type, and the scientific names of these species shall be included in the report.

- d) If applicable, for forested riparian buffers, standard forestry measurements (e.g., frequency, density, and dominance) for all woody species shall be calculated. These data shall be graphed against time to demonstrate that each of these areas is developing into a functional forested ecosystem.
- 6) Performance standards. Within five years after completion of construction of the mitigation, the permittee shall have:
- a) Provided the minimum number of linear feet of ephemeral stream mitigation required by Part V.C. above.
  - b) Demonstrated that the physical habitat assessment of the mitigation stream channel is equal to or greater than the physical habitat assessment of the originally impacted ephemeral stream.
  - c) Demonstrated that the stream mitigation channel and banks including up and downstream of the mitigation are stable and show no signs of excessive bank erosion, sedimentation, head cutting, aggradation, entrenchment, or degradation.
  - d) Demonstrated that a minimum of 400 native, live and healthy (disease and pest free) woody plants per acre (of which at least 200 are tree species) are present at the end of the monitoring period in the upland buffer, if applicable.

## **Part VI. MITIGATION FOR ISOLATED WETLAND IMPACTS**

- A) Mitigation, in accordance with ORC Sections 6111.022(D) and 6111.027, is required in order to qualify for coverage under this general permit for impacts to isolated wetlands.
- B) Without the objection of the Director and at the discretion of the permittee, -permittee shall conduct either mitigation at a wetland mitigation bank within the same USACE district as the location of the proposed filling, permittee responsible mitigation, or at the director's discretion, the permittee may purchase credits from an approved In-lieu fee program that serves the impacted watershed.
- C) Mitigation for the filling of, or the discharge of dredged material into, isolated wetlands covered under this permit shall be conducted in accordance with the following ratios:
  - 1) For Category 1 and Category 2 isolated wetlands, other than forested Category 2 isolated wetlands, mitigation located at an approved wetland mitigation bank shall be conducted, or mitigation shall be paid for under an in-lieu fee mitigation program, at a rate of two times the area of isolated wetland that is being impacted;
  - 2) For forested Category 2 isolated wetlands, mitigation located at an approved wetland mitigation bank shall be conducted, or mitigation shall be paid for under an in-lieu fee mitigation program at a rate of two and one-half times the area of isolated wetland that is being impacted;
  - 3) All other mitigation shall be subject to mitigation ratios established in division (F) of rule 3745-1-54 of the OAC.

- D) Mitigation that involves the enhancement or preservation of isolated wetlands shall be calculated and performed in accordance with rule 3745-1-54 of the OAC.
- E) The mitigation site shall be protected long term, and appropriate practicable management measures, including reasonable vegetative buffers, shall be implemented to restrict harmful activities that jeopardize the mitigation.
- F) When mitigation will occur at an approved wetland mitigation bank or In-lieu Fee program, mitigation credits must be acquired within 30 days after receipt of the written notice of approval authorizing impacts to isolated wetlands. Proof mitigation credits have been purchased shall be sent to Ohio EPA within 30 days after receipt of approval for coverage under this general permit.
- G) Construction of permittee responsible mitigation not located at an approved bank, shall commence within 30 days after completion of fill activities authorized under this general permit, and shall be completed prior to termination of coverage of approval under this general permit specified in ORC 6111.022(E).

## **Part VII. LIMITATIONS**

An applicant that qualifies for coverage under this general permit shall complete the filling of, and the discharge of dredged material within two (2) years after the end of the thirty-day period following the Director's receipt of a complete PAN. If the permittee does not complete the filling of, and the discharge of dredged material within that two-year period, the permittee shall submit a new PAN. This two-year, project-specific time limitation should not be confused with the five-year effective period of this general permit. If construction has started but is not complete, and the two-year time limitation has not expired, the permittee will be covered by the Isolated Wetland and Ephemeral Stream General Permit that was valid at the time Ohio EPA determined the project met the PAN requirements even if the five-year effective period has expired.

## **Part VIII. FURTHER INFORMATION**

Coverage under this general permit does not relieve the permittee from the need to obtain other Federal, State, or local permits, approvals, or authorizations required by law.

## **Part IX. DEFINITIONS** (For purposes of this permit)

**"Ephemeral Stream"** means a stream that meets all of the following conditions:

- 1) contains an ordinary high water mark;
- 2) flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice;
- 3) has a channel bottom that is always above the local water table; and
- 4) is determined to be excluded from jurisdiction under the federal water pollution control act.

Ephemeral streams do not include agricultural and roadside ditches, grass swales, erosional features, or other artificial channels constructed wholly in uplands that do not relocate an existing stream.

**“Independent Utility”** means a test to determine what constitutes a single and complete non-linear project. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

**“Ordinary High Water Mark”** means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

**“Single and Complete Nonlinear Project”** means the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of “independent utility”). Single and complete non-linear projects may not be “piecemealed” to avoid the limits in this permit.

**“Single and Complete Linear Project”** means that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single waterbody at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of the permit. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.



## Division of Surface Water Response to Comments

**Project: Ephemeral Stream and Isolated Wetland General Permit 2020**  
**Ohio EPA ID #: 206800**

### **Agency Contacts for this Project**

Division Contact: Anna Kamnyev, (614) 644-2146, [anna.kamnyev@epa.ohio.gov](mailto:anna.kamnyev@epa.ohio.gov)  
Public Involvement Coordinator: Mary McCarron, (614) 644-2160,  
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Ohio EPA held a public comment period regarding Ohio EPA's proposed Ephemeral Stream and Isolated Wetland General Permit. This document summarizes the comments and questions received during the associated comment period, which ended on June 17, 2020.

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

In an effort to help you review this document, the questions are grouped by topic and organized in a consistent format.

### **General Concerns**

**Comment 1:** **Ohio EPA already has an isolated wetland permit process (Level 1, 2, and 3). How does this proposed General Permit differ? (Gailey Environmental)**

**Response 1:** This permit combines the existing Level 1 Isolated Wetland General Permit with a new general permit that covers impacts to ephemeral streams that will no longer be regulated under the federal Clean Water Act once the new Navigable Waters Protection Rule goes into effect on June 22, 2020. Level 2 and 3 Isolated wetland permits are individual permits and are not affected by this proposed general permit.

- Comment 2:** We would prefer that the agency issue a separate general permit authorizing the filling of ephemeral streams only and continue to review impacts to isolated wetlands consistent with the existing statutory requirements. (NAIOP, OOGA, and S+W)
- Response 2:** Providing the ephemeral stream general permit under the same cover as the isolated wetland general permit reduces the requirement for a potential additional application and authorization. Review of impacts to isolated wetlands will remain unchanged as the current isolated wetland general permit is integrated within the new draft general permit.
- Comment 3:** We suggest that Ohio EPA re-organize the general permit into three main sections: (1) General Conditions, for terms/conditions applicable to both isolated wetlands and ephemeral streams, (2) Isolated Wetlands, for terms/conditions applicable to isolated wetlands only, and (3) Ephemeral Streams, for terms/conditions applicable to ephemeral streams only. Alternatively, issue a separate general permit for impacts to ephemeral streams instead of combined general permit for impacts to ephemeral streams and isolated wetlands. (OOGA)
- Response 3:** See Response 2. Ohio EPA chose not to reorganize the general permit, but clarifying language was added to Part I to clarify which conditions do not apply to projects that only impact less than 300 linear feet of streams.
- Comment 4:** If the ephemeral stream impacts authorization is combined with the construction general storm water permit, would this prevent the permittee from terminating its permit prior to completion of all monitoring requirements? (API)
- Response 4:** This proposed general permit is separate from the construction storm water general permit and no changes are being proposed to that permit at this time.
- Comment 5:** Ohio EPA's webinar presentation indicates that the agency is not proposing any additional or new requirements for ephemeral stream permitting, however there are numerous detailed requirements in the general permit that are specific to ephemeral streams (particularly in Parts IV & V, addressing restoration and mitigation). In light of this, what current permitting requirements is Ohio EPA comparing in order to make the statement that the addition of this general permit does not add new requirements? (API)
- Response 5:** Currently, discharges of dredged and fill material to ephemeral streams are regulated by Ohio EPA under section 401 of the Clean Water Act with the issuance of a 401 Water Quality Certification (WQC) for a federal permit, such as a 404 permit. The conditions incorporated into the proposed general permit are consistent with the conditions that are

normally incorporated into individual 401 WQCs with ephemeral stream impacts.

**Comment 6:** **Will this proposed general permit also serve as the 401 Water Quality Certification? (Gailey Environmental)**

**Response 6:** No, this permit will not serve as the 401 WQC for ephemeral streams. Once the new federal rule goes into effect on June 22, 2020, ephemeral streams will no longer be regulated under the Clean Water Act, including section 401. If a project also has impacts to federally jurisdictional resources, such as intermittent and perennial streams, that require a 401 WQC, the ephemeral impacts may be attached to that 401 WQC as a separate authorization.

**Comment 7:** **Is this proposed general permit still valid for ephemeral streams located within Ineligible or Possibly Eligible areas (i.e., purple and yellow shaded areas) on the Ohio Stream Eligibility Map? (Gailey Environmental)**

**Response 7:** This proposed general permit is valid for all ephemeral streams in Ohio. The Ohio stream eligibility map is a condition of the 401 WQC for the 404 Nationwide permits, and because these resources will no longer be regulated under 401, the stream eligibility map does not apply.

**Comment 8:** **Please consider adding some criteria for when the filling of ephemeral streams may be denied. Will there be a threshold amount of ephemeral streams that will not be allowed to be filled to prevent direct, indirect, or cumulative impacts to watersheds? Will there be an option for an individual ephemeral stream permit? (FLOW, Brad Petru, CEC)**

**Response 8:** We are not currently proposing a threshold or linear footage of ephemeral streams that would not qualify for coverage under this general permit. However, Part II.D. gives the director the authority to deny coverage under this general permit if the impacts will have a significant negative impact on water quality.

**Comment 9:** **We strongly encourage Ohio EPA to incorporate provisions to address documentation and review of cumulative impacts. Cumulative impacts to ephemeral streams and isolated wetlands should be defined within a specified watershed area (HUC 12 through HUC 16) and for a specified period of time. (NWF/OCF)**

**Response 9:** This general permit does not contemplate or address cumulative impacts as this permit is not subject to the requirements under antidegradation or wetland antidegradation. Isolated wetland impacts authorized under an individual level 3 permit are subject to antidegradation and cumulative impacts would be considered during that review.

**Comment 10:** The permit should define the term “significant negative impairment” or otherwise specify what would constitute a “significant negative impairment” for purposes of determining eligibility for coverage under the general permit. (NAIOP, OCA, OOGA)

**Response 10:** The clause “significant negative impact on state water quality” is taken directly from ORC 6111.022(C) and is in the current isolated wetland general permit. Ohio EPA chose not to define that term in the permit to allow the director the discretion to make this determination on a case-by-case basis.

**Comment 11:** Is there a verifiable point of Ohio Water Quality Standards compliance where a non-jurisdictional ephemeral stream transitions to a jurisdictional stream? (MBI)

**Response 11:** The determination of federal jurisdiction under the Clean Water Act is the responsibility of U.S. EPA and U.S. Army Corps of Engineers (Corps). Once the new federal rule goes into effect on June 22, 2020, ephemeral streams will no longer be regulated under the Clean Water Act. Ephemeral streams will be considered non-jurisdictional by the Corps. Ohio’s water quality standards apply to all surface waters of the state and this includes those waters that are not considered federally jurisdictional.

**Comment 12:** Are projects covered by a certification from the Federal Energy Regulatory Commission (FERC) also required to obtain pre-activity notice (PAN) approval and subject to the permit terms for impacts to ephemeral streams greater than 300 feet? (OMA)

**Response 12:** Yes, all projects which propose the discharge of dredged or fill material into ephemeral streams and isolated wetlands are required to comply with the terms and conditions of this proposed permit even if a FERC certification is required for the project. The requirement to submit a PAN is for any amount of impact to isolated wetlands and greater than 300 linear feet of impact to ephemeral streams.

**Comment 13:** We recommend that Ohio EPA’s Public Interest Center be tasked with developing community education materials to assist members of the public, media, and watershed groups in fully understanding the implications of the federal rule and Ohio EPA’s response through this general permit. Organizations like ours can play a role in disseminating information and assisting with community education. However, the information should come officially from the Ohio EPA. (OEC, Freshwater Future, Alliance for the Great Lakes)

**Response 13:** U.S. EPA and the Corps are putting together a lot of useful information for the public on the new federal rule, including fact sheets and webinars located at: [www.epa.gov/nwpr/navigable-waters-protection-rule-step-two-](http://www.epa.gov/nwpr/navigable-waters-protection-rule-step-two-)



revise. Once this proposed general permit is finalized and the final federal rule is effective, Ohio EPA will consider the development of additional educational materials for the public.

**Comment 14:** **Part VII. Limitations requires applicants to complete the filling of the resources within two years, a Surface Mining Control and Reclamation Act (SMCRA) mining permit runs for a five-year period and most mining permits take five to eight years to complete. Therefore, a two-year renewal frequency for SMCRA permits are not rational and are financially punitive. The general permit for Ephemeral Streams when used with SMCRA mining permits needs to have a five-year renewal period to rationally align with other permits and typical mining time frames. (OCA)**

**Response 14:** The currently effective isolated wetland general permit contains this same language which is taken directly from the requirement in Ohio Revised Code (ORC) 6111.022(E). The general permit is effective for five years, but the filling of the resource must be completed within two years after a receipt of the PAN. This does not mean that the restoration or mitigation of the resource must be completed or that the entire project must be completed within this timeframe, only that the impact or filling of the resource must be completed within two years.

**Comment 15:** **Does the two-year completion requirement for dredges and fills in Part VII of the draft permit also include the restoration and mitigation work required for temporary and permanent impacts? (City of Columbus)**

**Response 15:** See Response 14.

**Comment 16:** **Ohio EPA should remove the reporting requirement for unpermitted impacts to surface water resource buffers (Part III, E). Regulated activities involve the discharge of dredged or fill material into waters below the ordinary high water mark (OHWM). Buffers that are above the OHWM should not be subject to the rule. If reporting requirements for impacts to buffers are not removed, additional clarification defining “buffer” should be included in the rule. (OUG)**

**Response 16:** This condition has been revised to remove buffers from the reporting requirement. Only unpermitted impacts to surface waters of the state require reporting to Ohio EPA, Division of Surface Water.

**Comment 17:** **The timeframe provided for corrective measures to be implemented (Part III, K. 3) should be extended from 48 hours to three days. This will allow maintenance crews or contractors time to remobilize to the site, if necessary, as well as secure additional materials when required. It will also make this requirement consistent with the**

**Storm Water from Construction Activities General Permit (OHC000005). Part III, G.2.i. of Construction Activities allows for repairs or maintenance within three days of the inspection. (OUG)**

**Response 17:** This condition has been revised to allow three days for the implementation of corrective measures for failed controls. This is now consistent with the Storm Water Construction General Permit.

**Comment 18:** Please clarify that a permittee who has submitted a PAN is authorized to proceed without written notice or a written approval. The draft general permit appropriately states that if Ohio EPA does not respond to a PAN within 30 days after the director receives a complete PAN, then “the applicant may move forward with the proposed project in accordance with the conditions stated in this general permit.” Part II., D. However, there is some confusing language in the draft general permit that sets deadlines for purchasing mitigation credits within a specified period “after the receipt of the written notice of approval authorizing impacts...” Part V.D; Part VI.F. No such written notice of approval is envisioned under the general permit. In addition, the deadlines for submitting proof of mitigation purchase are tied to the “receipt of approval for coverage under this general permit.” Part V.D; Part VI.F. However, the permitting process will not typically feature an actual written approval. We request that Ohio EPA correct the language in Part V.D and Part VI.F to account for the fact that, by design, written approval is not expected to be provided. Perhaps these deadlines in Part V.D and Part VI.F could be revised so that they are connected to the “date when the proposed project is authorized pursuant to Part III.D.” (AOMWA)

**Response 18:** Per Part II.D, if applicants do not receive a written notice of approval from Ohio EPA, they are authorized to proceed with the project 30 days after the director’s receipt of a complete PAN under the terms and conditions of the permit. This condition has been modified to include language that explains Ohio EPA will notify the applicant within 30 days after receipt of a complete PAN that their project is authorized. If the applicant does not receive this correspondence, they are automatically authorized. Under the current isolated wetland general permit process, Ohio EPA strives to always send an authorization approval letter, and this will continue under this permit. The date on the authorization letter will begin the timeline for providing proof of mitigation credits.

**Legal Authority**

**Comment 19:** We question the legal ability of the agency to issue the general permit without first modifying Ohio Revised Code Chapter (ORC) 6111 in order to authorize the same. (NAIOP)

- Response 19:** ORC Section 6111.03(J) authorizes the director of Ohio EPA to issue, revoke, modify, and deny permits for, among other things, the discharge of “other wastes” into “waters of the state.” Isolated wetlands and ephemeral streams are waters of the state, and the definition of “other wastes” in ORC Section 6111.01 includes dredged or fill material. Therefore, Ohio EPA has the legal authority to issue this permit. In addition, ORC Section 6111.021 authorizes general permits for isolated wetlands.
- Comment 20:** **We question whether the combined general permit is the appropriate means to regulate such ephemeral streams. Instead, we point to the legislative process, similar to past collaboration during the creation of the isolated wetland program authorized in Ohio Revised Code 6111. (OHBA)**
- Response 20:** Because ORC Section 6111.04 prohibits causing pollution or placing any other wastes, among other things, where they cause pollution of any waters of the state except in compliance with a valid, unexpired permit, this general permit is being issued to provide any person with a project that will result in the filling of or the discharge of dredged material into Category 1 or Category 2 isolated wetlands of ½ acre or less or into any ephemeral stream with an expeditious means of obtaining a permit for the project. Without such a permit, filling or discharging dredged material into an isolated wetland or ephemeral stream would violate ORC Section 6111.04. As noted in Response 19, Ohio EPA currently has legal authority to issue this permit.
- Comment 21:** **There is no need for a separate state permit program to address impacts to ephemeral streams. In order to provide consistency and clarity for the regulated community, the director of Ohio EPA should act to seek an amendment to ORC to reflect that waters of the state of Ohio are the same as the federal regulations, as those regulations may shift over time. This approach would also assure consistency with the federal rule as it might change because of inevitable litigation regarding the rule. (S+W)**
- Response 21:** The decision to amend Ohio’s definition of waters of the state to be consistent with the federal definition of navigable waters is a policy decision that raises a number of significant issues and as the commenter notes would require a change to the ORC. In the meantime, this permit is necessary to provide a level of protection to these resources while giving those who need a lawful permit to impact these resources a predictable path forward.

**Comment 22:** The issuance of the general permit is effectively a rulemaking without the opportunity for a public hearing. Without the benefit of a full and complete analysis, and in just 30 days, we believe imposing a hastily vetted permitting program is not reasonable. (OOGA)

**Response 22:** See Responses 20 and 21.

**Comment 23:** We request that Ohio EPA revise the general permit to include a provision that automatically terminates the general permit if the new Waters of the U.S. (WOTUS) Rule is stayed or again changed such that ephemeral streams revert back to be a jurisdictional WOTUS regulated under the CWA. Will Ohio EPA enact this new permit process even if the Navigable Waters Protection Rule: Definition of “Waters of the United States” is suspended or overturned as a result of lawsuits brought to stop the action? (OOGA and Env. Design Group)

**Response 23:** A provision was added to the permit to limit its applicability to ephemeral streams that are not jurisdictional waters of the United States.

### **Fees**

**Comment 24:** The lack of fees for impacts to ephemeral streams sends the message that there is no requirement to minimize impacts and may result in a lack of funding to support this program. Please consider adding a \$5 per foot review fee. (FLOW)

**Response 24:** Ohio EPA considered adding a review fee for ephemeral streams under this proposed general permit, but because our fee structures are located in ORC 3745, which does not include this new general permit, it was decided to not include a review fee for ephemeral streams at this time.

**Comment 25:** Please clarify that there is no review fee for projects that only impact ephemeral streams. (NEORSD, AOMWA)

**Response 25:** At this time, Ohio EPA is not including a review fee for impacts to ephemeral streams. Projects with only ephemeral stream impacts will only be required to pay the \$200 application fee.

**Comment 26:** In Part II Notification Requirements, Section C Fees, Ohio EPA provides the project proponent with a clear means to estimate fees for isolated wetlands impacts. We recommend adding a sentence to clarify if there will be a review fee for ephemeral stream impacts. We also recommend that this section indicate that the review fee will not exceed \$5,000 per application in conformance with ORC 3745.113. (Dominion Energy, OUG)

**Response 26:** See Response 25.

## **Definitions**

**Comment 27:** Many commenters asked about the definition of ephemeral streams and indicated that the new federal definition was not appropriate. They asked for a definition to be included in the general permit and a clarification on which resources would be excluded from regulation. Some suggested that the definition include the concept of the ordinary high water mark (OHWM) and that Ohio EPA should not regulate swales and erosional features. (MBI, OEC, Freshwater Future, Alliance for the Great Lakes, NWF/OCF, S+W, NEORSD, NAIOP and OHBA, AOMWA, OOGA, Brad Petru)

**Response 27:** A definition of ephemeral streams that will be subject to this permit has been added to Part I of the general permit along with clarification on which features are excluded from regulation under the general permit. Additional clarifying language has also been added to identify features that are excluded from coverage under this permit.

**Comment 28:** Is it Ohio EPA's position that an ephemeral stream has an "ordinary high water mark" as noted in Part IV, (K)(BMPs)(6) when heavy equipment is prohibited below the OHWM of "any surface water?" If the ephemeral stream is to be permanently filled or impacted, then any heavy equipment will more than likely be below any OHWM of the ephemeral stream. (OMA)

**Response 28:** In accordance with the definition added in Part I, ephemeral streams must have an OHWM. The best management practice (BMP) condition referenced in the comment prohibits the placement of heavy equipment below the OHWM, except when no other alternative is practicable. Given the constraints of a project, if it is not practicable to keep equipment above the OHWM, then it is allowable.

## **Pre-activity Notice (PAN)**

**Comment 29:** Please confirm that proposed impacts to ephemeral streams less than 300 feet do not require any notice or pre-approval to Ohio EPA, and that the permittee can just proceed under the general permit to conduct the activity in question. (OMA, NEORSD, OOGA, API, AOMWA)

**Response 29:** Per the conditions in the proposed general permit, impacts to ephemeral streams less than 300 feet do not need to submit a PAN to Ohio EPA for approval, which is outlined in Part II.A. Mitigation is not required for those impacts either, which is outlined in Part V.A. All other terms and conditions of the permit would still be applicable unless otherwise noted in the permit. Further clarifying language was added to Part I of the permit to outline which provisions are not applicable for projects that impact less than 300 linear feet of ephemeral stream.

**Comment 30:** Several commenters asked for clarification if the permit allows for impacts up to 300 feet on any single ephemeral stream or is it a cumulative 300 feet for a project and several asked for the inclusion of the single and complete linear and non-linear concepts.

**(NEORSD, S+W, Dominion Energy, AOMWA)**

**Response 30:** The 300 linear foot threshold is cumulative for the entire project. This is consistent with how the acreage threshold is currently applied for isolated wetland impacts covered under the existing general permit. However, in order to remain consistent with the Nationwide Permits, the definitions of single and complete non-linear and linear projects have been added to Part IX of this permit. Therefore, separate waterbody crossings on linear projects will be considered a single and complete project.

**Comment 31:** Does this mean that ephemeral streams that exceed 300 linear feet on coal remining projects no longer qualify for exemption under NWP 49? If yes, Ohio EPA is flip-flopping on its 401- certification approval for NWP 49, because remining is the mitigation. If yes, then then Ohio EPA needs to restore this exemption for remining SMCRA permits. **(OCA)**

**Response 31:** Per ORC 6111.021, isolated wetlands created from previous mining activities that are subject to remining, are exempt from isolated wetland permitting. Additional language has been added to Part V.A. of the general permit to address this comment so that impacts associated with remining and subsequent reclamation will be consistent with NWP 49 and require no further mitigation activities.

**Comment 32:** The notification requirements outlined in the proposed permit should be required for any amount of fill or discharge into ephemeral streams exceeding 1,000 linear feet. **(OHBA)**

**Response 32:** To maintain consistency with how the program is currently operating under the Nationwide Permit, Ohio EPA has decided to maintain the 300 linear foot threshold.

**Comment 33:** Traditional Nationwide Permits for residential and commercial/institutional developments require notification of any amount of stream impact. Why does Part II. Notification Requirements indicate that impacts to less than 300 feet of ephemeral stream channel do not require a permit? How does Ohio EPA intend to verify that tolerance is not exceeded? **(Brad Petru, CEC)**

**Response 33:** Any impacts to ephemeral streams still require coverage under this general permit. Impacts to less than 300 linear feet are covered under this general permit as non-notifying and do not need to submit a PAN to Ohio

EPA. Permittees are still required to comply with most of the conditions of permit, and condition Part IV.G allows Ohio EPA to inspect the project at any time.

**Comment 34:** **We note the lack of a similar set of thresholds for impacts to isolated wetlands. We suggest that Ohio EPA evaluate the need to establish a minimum, such as 1/10 acre, to maintain program simplicity while still regulating the more significant dredge and fill activities in waters of the state. (Dominion Energy)**

**Response 34:** At this time, we are not making changes to rules set forth by the Isolated Wetland Statute (ORC 6111.022). The statute does not allow for thresholds or reporting for isolated wetlands, and any amount of fill requires a permit.

**Comment 35:** **Part II.B.8 should be revised to clarify that the in-lieu fee option is available for ephemeral stream mitigation. (OOGA)**

**Response 35:** In-lieu fee mitigation is an option for ephemeral streams. Part II.B.8 addresses mitigation proposals whereas the mitigation requirements specific to ephemeral streams are outlined under Part V.B which does contain all three options available: mitigation banks, in-lieu fee, and permittee-responsible mitigation.

**Comment 36:** **Ohio EPA previously mentioned removing or replacing the term PAN because the permit application is titled, “General Isolated Wetland Permit Application”. Will the application form be renamed to reflect the term PAN or “Isolated Wetland and Ephemeral Stream General Permit Application Form”? (ODOT)**

**Response 36:** Ohio EPA is not currently proposing to replace the term PAN in the general permit. The new application form for this general permit will contain a reference to the PAN to avoid confusion.

### **Jurisdictional Determinations**

**Comment 37:** **How will Ohio EPA work with applicants and consultants with respect to field determinations for isolated and jurisdictional resources - will all proposed impacts to isolated wetlands and ephemeral streams be subject to a jurisdictional determination? Will the state of Ohio be conducting their own jurisdictional determination or surface water boundary determination on isolated wetlands and ephemeral stream channels? (Gailey Environmental and Brad Petru, CEC)**

**Response 37:** This is the current process for isolated wetlands. Per the conditions in the general permit, ephemeral streams that require a PAN will also be required to receive a jurisdictional determination (JD) from the Corps. The JD process under the new federal rule should result in a more timely

issuance and allow for more desktop reviews from the Corps. Additionally, projects that impact less than 300 linear feet will not be required to obtain a JD from the Corps, but applicants should be aware of any potential liability should the Corps determine that the resources are, in fact, federally jurisdictional and the project activities are subject to permitting under section 404 of the Clean Water Act.

**Comment 38:** **Several commenters requested clarification regarding who would be making the ephemeral determinations and what methods would be used to make field determinations. They encouraged Ohio EPA to make field inspections and provide guidance to the applicants on how to make these determinations. (OEC, Freshwater Future, Alliance for the Great Lakes, MBI, Sierra Club Brad Petru, CEC, Gailey Environmental)**

**Response 38:** U.S. EPA and the Corps are in the process of developing tools and guidelines to assist the public in making these determinations. These tools, along with the State's definition of ephemeral streams, will support field determinations for ephemeral streams and isolated wetlands. The Corps still plans to evaluate these water resources through the approved jurisdictional determination process. U.S. EPA and the Corps are in the process of developing tools that will allow for more desktop verification of these resources. Sites are frequently visited by Ohio EPA for other resources on the site and resources can be reviewed during that time. Ohio EPA will also plan to conduct field verification in instances where the application does not provide sufficient material for a thorough desktop review. Ohio EPA plans to use the tools proposed by the Corps, supplemental material within the application, as well as the State's definition of ephemeral streams for desktop verification in instances where a site visit is not deemed necessary. It is likely Ohio EPA can increase the efficiency of reviews if applicants provide sufficient details that allow for desktop verification.

**Comment 39:** **Guidance in the text of the general permit or other form of guidance for determining the presence of an "ephemeral stream" on a project site with stream impacts of 300 linear feet or less would be helpful for potential permittees evaluating whether their activities are subject to the general permit. (City of Columbus)**

**Response 39:** A formal definition for ephemeral streams has been provided in the general permit. U.S. EPA and the Corps are in the process of developing tools and guidelines to assist the public in making these determinations. These tools along with the State's definition of ephemeral streams will support field determinations for ephemeral streams.



**Comment 40:** If Ohio EPA is assuming jurisdiction for impacts to ephemeral streams under O.R.C. Chapter 6111, why does the applicant have to first obtain concurrence from the Corps that the streams are not subject to the jurisdiction of the Clean Water Act? This will complicate the process and add time to obtain regulatory approval for certain projects. The Agency should consider revising the order of this process and provide general permit coverage first and then leave it up to the applicant to seek further concurrence from the Corps, if necessary or warranted, given the situation. (OMA and API)

**Response 40:** See Response 37.

**Comment 41:** We suggest that Ohio EPA revise Part II.B.2 of the general permit to remove ephemeral streams from this requirement as follows: An acceptable wetland delineation as performed in accordance with the 1987 U.S. Army Corps of Engineers wetland delineation manual and ~~any other regulations procedures and requirements~~ adopted by the U.S. Army Corps of Engineers for delineating wetlands, including a determination from the U.S. Army Corps of Engineers that the ~~wetlands and ephemeral streams~~ proposed to be covered by this general permit are not Waters of the United States and not subject to Section 404 of the Clean Water Act. (OOGA)

**Response 41:** See Response 37.

**Comment 42:** Ohio EPA should provide for concurrent review and processing of a PAN while the Corps is processing the jurisdictional determination for the impacted waterbody, such that once the Corps issues its determination that the waterbody is not subject to its jurisdiction, the PAN has already been granted and the applicant can proceed immediately under the general permit. (OMA and API, OUG)

**Response 42:** Applicants are encouraged to submit their PAN prior to receiving their official JD response from the Corps. This will allow Ohio EPA to begin reviewing the project while the Corps is processing the JD request. The application will remain incomplete until the JD is received.

**Comment 43:** It is incumbent on the Agency to provide a determinable point in Ohio Water Quality Standards compliance where a non-jurisdictional ephemeral stream transitions to a jurisdictional stream. (MBI)

**Response 43:** See Response 11.

**Comment 44:** We urge the director to amend the proposed general permit to make it clear that change of land use will not alter the regulatory status of an ephemeral stream. In other words, if a drainage feature (surface or subsurface) is not a water of the state when in agricultural

- production, it should remain a non-regulated water of the state if that land is converted to a non-agricultural land use. (S+W)**
- Response 44:** All waters of the state are subject to ORC 6111 and will be evaluated as such during the transition of land use. Impacts to ephemeral streams as defined in the permit are the only streams that will be subject to the terms and conditions of this general permit.
- Comment 45:** If Ohio EPA makes the determination, what definition of "ephemeral" and what criteria and guidance will be used? If the Corps makes this determination, then what definition of "ephemeral" criteria and guidance would they use? If that is the only definition in the 4/21/20 Federal Register notice, it remains unclear what "in direct response to precipitation" (see Section 328.3(c)(3), page 22338, FR 4/21/20) really means. To be sufficient it needs to consider duration of time, water depths, hydrology, and flow regimes all of which seem to require more diligence than a one-day site inspection. (MBI)
- Response 45:** See Responses 37 and 38.
- Comment 46:** We are concerned that the Corps will not agree to delineate waters that are not subject to regulation under the CWA, or that Corps field personnel will not prioritize ephemeral stream determinations, thereby resulting in extensive delays and/or the inability to utilize the general permit for impacts to ephemeral streams. Important economic development projects could wait months for the Corps to act, thus hindering economic development in Ohio. We believe that Ohio EPA should develop a protocol for independently making these determinations, potentially under a Memorandum of Agreement with the Corps. (NAIOP)
- Response 46:** See Responses 37 and 42.
- Comment 47:** We understand the ability of the Corps to conduct any field verifications may be curtailed in the future through implementation of the federal rule. In addition, the number of field assessments required of the Corps, associated with establishing the boundary between federal and state jurisdiction of waterways, will potentially increase significantly. As such, we recommend that Ohio EPA work with the Corps to establish an alternate process for delineation and determinations. (Dominion Energy)
- Response 47:** See Responses 37, 38, and 42.
- Comment 48:** What documentation would be required to substantiate that the resources are not regulated under Section 404 of the federal Clean Water Act? We understand that the only documentation mechanism available to the Corps in a circumstance like this would be an

approved JD. The Corps does not have a statutory timeframe in which it must issue an approved JD. As such, this approved JD process can be extremely lengthy, and that will render certain project schedules untenable. How will Ohio EPA address the time needed to complete the requirement in Part II B) 2) when it does not control the determination of a lack of federal jurisdiction? (Env. Design Group)

**Response 48:** See Responses 37, 38 and 42.

**Comment 49:** How would a third-party audit or appeal a determination made by the Corps, U.S. EPA, or Ohio EPA? Given the high degree of uncertainty regarding the determination of “ephemeral” especially given the lack of sufficient definition and methodology, we are requesting the provision of an opportunity to inspect a representative sample of the initial ephemeral determinations. (MBI)

**Response 49:** See Response 37. Under the new federal rule, the definition and determination of ephemeral flow regime is the responsibility of the Corps. The Corps jurisdictional determinations are subject to an appeal process. Additionally, Ohio EPA added a definition of ephemeral stream to this general permit to provide more clarity.

**Comment 50:** The WOTUS rule mentions intermittent streams – how will these be dealt with, especially considering issues such as the continuum between ephemeral, intermittent, and interstitial streams? (MBI)

**Response 50:** Intermittent and interstitial streams will be federally jurisdictional and subject to regulation under 401 and 404 of the Clean Water Act under the new federal rule.

**Comment 51:** If Ohio EPA is tasked with making the determination, how will Ohio EPA ensure appropriate site visits will be performed? What job title and credentials will be required? (Sierra Club)

**Response 51:** The Corps still plans to evaluate these water resources through the Approve Jurisdictional Determination process. U.S. EPA and the Corps are in the process of developing tools that will allow for more desktop verification of these resources. Ohio EPA specialists, supervisors, and managers trained in the technical evaluation of these resources will be reviewing the applications. Ohio EPA plans to conduct field verification in instances where the application does not provide sufficient material for a thorough desktop review. Ohio EPA plans to use the tools proposed by the Corps, supplemental material within the application, as well as the State’s definition of ephemeral streams for desktop verification in instances where a site visit is not deemed necessary.

**Comment 52:** Since Ohio EPA has yet to determine this procedure, how will Sierra Club (and other environmental groups) be involved to guide the decision-making process? (Sierra Club)

**Response 52:** The extensive stakeholder outreach and public comment process undertaken during the development of this general permit allowed many entities to provide valuable input into this process. Additionally, during each renewal of the permit, every five years, stakeholders will be afforded the opportunity to provide additional input, and the Agency will be able to identify potential improvement opportunities.

**Comment 53:** How does Ohio EPA plan to address the determination of the point of jurisdictional transition between an ephemeral stream and intermittent perennial stream? (Sierra Club)

**Response 53:** See Response 38.

**Comment 54:** How will Ohio EPA ensure there is an appeal process if there is a questionable determination made or permit issued? (Sierra Club)

**Response 54:** See Responses 49 and 51.

#### **Best Management Practices**

**Comment 55:** With respect to Part III.E, this is an entirely new requirement for isolated wetlands. As discussed in the general comments above, requirements applicable to isolated wetlands vs. ephemeral streams need to be clearly delineated. Notwithstanding, there is no obligation under the current law to report non-reportable quantities (RQ) spills or impacts into buffers, nor should there be. Nor is it clear what would constitute an “impact” as that term is used in this condition. We request that the requirement to report spills and impacts into buffers be removed the general permit. (OOGA)

**Response 55:** See Response 16.

**Comment 56:** In Part III.H, the second reference to “condition” should be “permit condition”. (OOGA)

**Response 56:** Ohio EPA appreciates this typographical recommendation; it has been changed in the general permit.

**Comment 57:** In Part III.K.1, insert a comma (,) immediately following “site drawings” (OOGA)

**Response 57:** Ohio EPA appreciates this typographical recommendation; it has been changed in the general permit.

- Comment 58:**           **The current NPDES construction general permit does not specify BMPs for storm water controls; it only mentions post-construction BMPs. Please clarify the storm water BMPs required under Part III.K.2 of the general permit. (OOGA)**
- Response 58:**       The BMPs for storm water controls referenced in Part III.K.2 is referring to during-construction and post-construction BMPs that are required to be incorporated into the Storm Water Pollution Prevention Plan required by Part III.A of the Storm Water Construction General Permit.
- Comment 59:**           **The requirement in Part III.K.3 of the draft permit for implementation of corrective measures for erosion and sediment controls within 48 hours conflicts with the timeframes prescribed in Part III.G.2.i of Ohio EPA's Construction General NPDES Permit. (City of Columbus)**
- Response 59:**       See Response 17.
- Comment 60:**           **The language in Part III.K.6., “the use of heavy equipment, except where no other alternative is practicable” is unclear. Since the term practicable includes the term economically feasible, this language doesn’t have any teeth. It would be better to call for restoration of the compressed soils or require the use of wetland mats to distribute weight. At a minimum, reference should be made to requirements in Part IV. (FLOW)**
- Response 60:**       The use of the term practicable in this instance does not include economically feasible. The condition will remain as written to allow flexibility for projects where heavy equipment must be placed below the OHWM to accomplish the project purpose.
- Comment 61:**           **Part III(K)(16)(C) we request that culvert replacements be exempt from bankfull design (see ODOT Location & Design Manual, Volume 2, Section 1105.2.1). ODOT generally does not upsize replacement culverts to maintain existing drainage flow downstream and minimize liability. (ODOT)**
- Response 61:**       Ohio EPA considered this request but decided to leave this condition as written. As mentioned in the ODOT Location and Design Manual, Volume 2, Section 1105.2.1, the exemption for a replacement culvert required to utilize Bankfull Discharge Design may not apply in cases where a waterway permit is required by regulatory agencies because of minimization (or mitigation) requirements. In this instance, Ohio EPA considers it necessary that replaced culverts convey the bankfull discharge, minimizing the impact to the stream channel and flooding potential upstream.

- Comment 62:** Item 16, Culverts, subparagraph a) discusses that culverts shall be installed at the existing streambed slope to allow for the natural movement of bedload and aquatic organisms. Ephemeral streams are dry streams by nature with typically no aquatic organisms, so why do culverts placed in ephemeral streams need to address aquatic organism passage? We request that the culvert design criteria related to facilitating the movement/passage of aquatic organisms be deleted in Part III.K.16.a and c. (OCA and OOGA)
- Response 62:** Although the drier nature of ephemeral streams results in a channel generally devoid of aquatic organisms, Ohio EPA would like to ensure that these BMPs are still implemented for instances in which a wet year may result in unusual habitation or use of these streams by biological fauna. Additionally, the term contains the clause “when practicable” to allow for project constraints where this condition is not feasible.
- Comment 63:** Ephemeral streams can be quite steep (e.g., 4%, 10% or greater), but culvert gradients placed greater than about 1% will not retain sediment within the culvert. This required condition may be nearly, if not entirely impossible, to create based upon site conditions. It is recommended that this paragraph be revised or clarified. (OCA)
- Response 63:** Ohio EPA understands that installing culverts at or below current grade will not always allow a natural channel bottom to develop, especially on higher gradient ephemeral streams. However, on lower gradient ephemeral streams, the substrates will accumulate within the culvert if installed at or below grade. The clause “When practicable...” has been added to Part III.K.16.b. to allow for exceptions given project site conditions.
- Comment 64:** Item 15 discusses that all temporary fill material must be removed to an area that has no waters of the state at the completion of construction activities and the stream ... restored to pre-construction elevations to the maximum extent practicable. Does this mean that if an ephemeral stream is degraded and incised, then should a degraded, incised ephemeral stream be restored so the stream pre-construction elevation is restored? (OCA)
- Response 64:** Stream and wetlands should be restored to pre-construction elevations to the maximum extent practicable.
- Comment 65:** Part III, Paragraph D requires clarity in terms of what constitutes an “inadvertent spill”. Is there a certain threshold criterion that applies to this provision? We request that this term be defined or further clarified. It is unclear what constitutes reportable “impacts to surface water resources” and what criteria applies to “buffers,” as these terms are used in Part III, Paragraph E. We believe these terms need to be further defined in order to clarify the scope of the permit

**obligation. The GP provides no buffer definition, thus, how are buffers defined to know whether an unpermitted impact has occurred. (API, OOGA OCA)**

**Response 65:** See Response 16. Any amount of material discharged into a water of the state triggers the reporting requirement of this condition. An inadvertent spill means the accidental release or discharge of a pollutant. The reporting requirement is only triggered when that pollutant enters a water of the state.

**Comment 66:** **There are no buffer requirements in the current general permit for isolated wetlands that was established pursuant to ORC 6111 and, as such, this new permit should not add any and there should not be any requirements for buffers to ephemeral streams. Should Ohio EPA decide now to add buffer requirements in the general permit, “buffer” should be defined as it applies to the general permit. (OOGA)**

**Response 66:** Vegetative buffers are included in the current isolated wetland general permit in Part IV.E. The term is not currently defined in the effective isolated wetland general permit and will not be defined in this new general permit. This allows the most flexibility for applicants given site specific conditions. In some instances, wide buffers may be achievable on all sides of wetland or stream proposed for mitigation, but there also may be constraints that limit the size of the buffers.

**Comment 67:** **S+W recommends that Ohio EPA specifically define the terms ‘buffers’ and ‘riparian habitat’ to ensure clarity and maximize consistency for permittees. S+W encourages Ohio EPA to utilize a definition for these features that incorporates, to the extent practicable, an average buffer width of 50-feet from top of bank from each side of an ephemeral stream (for 100-feet total width), with deviations from this width permissible when property boundaries and/or existing infrastructure prevents an applicant from meeting this objective. (S+W)**

**Response 67:** See Response 66.

#### **Ditches**

**Comment 68:** **Streams that have been channelized should be recognized as streams and not “ditches” and therefore covered under this draft permit. (MBI)**

**Response 68:** See Responses 27.

**Comment 69:** **Please confirm that impacts to roadside ditches connecting two ephemeral streams or jurisdictional waters are not subject to the general permit and are unregulated by Ohio EPA. (OMA)**

**Response 69:** Ephemeral roadside ditches that do not capture or relocate an existing stream are not subject to the general permit.

**Comment 70:** **Ohio EPA’s webinar presentation also indicated that roadside ditches will not be considered ephemeral. Please confirm whether this holds true in all circumstances (for example, what if the roadside ditch connects two features, such as a stream flowing into a roadside ditch, through a culvert, and into another navigable stream or wetland)? (API)**

**Response 70:** Ephemeral roadside ditches that capture an existing stream, and have an ordinary high water mark, are subject to the terms and conditions of the this general permit.

**Comment 71:** **Can Ohio EPA consider clarifying the permit language to clearly indicate that ditches or channelized surface water features that possess ephemeral flow do not require permitting and are exempt from this process? (ODOT)**

**Response 71:** See Response 27 and 69.

#### **Temporary and Permanent Impacts**

**Comment 72:** **Permanent versus temporary impacts have not been discussed previously in the permit. Does this mean that ephemeral streams can be utilized in mining or storm water construction and not be counted as permanent? (FLOW)**

**Response 72:** Impacts to ephemeral streams for mining or storm water features would not be considered temporary under the definition of temporary in Part IV.A of the permit. These impacts are not short-term in nature as they may last for several years.

**Comment 73:** **The phrase “short-term in nature” for temporary impacts is problematic. Can this permit be utilized by coal mining projects which typically run from 5 to 10 years? (FLOW)**

**Response 73:** The definition of temporary impacts has been revised to indicate that short-term in nature means less than two years.

**Comment 74:** **Part III.K.4. requires restoration of unavoidable temporary impacts for forested riparian habitat. Tree clearing is not temporary. Please clarify and request mitigation to ensure there is no degradation of water resources. (FLOW)**

**Response 74:** This condition has been revised to remove impacts to forested riparian habitat from temporary impacts.



- Comment 75:** How would this permit address modified or cumulative impacts, either within the same permit, or over time as changing impacts accumulate from multiple permits or modified uses? (FLOW)
- Response 75:** This general permit does not contemplate or address cumulative impacts as this permit is not subject to the requirements under antidegradation or wetland antidegradation.
- Comment 76:** We recommend that Ohio EPA modify the isolated wetland section in the general permit to distinguish temporary wetland impacts from those that are permanent. We propose that temporary isolated wetland impacts can be regulated consistent with the approach proposed for ephemeral streams. (Dominion Energy)
- Response 76:** The isolated wetland statute does not contemplate permanent or temporary impacts, and neither does the current isolated wetland general permit, therefore, Ohio EPA maintained these conditions as written.
- Comment 77:** Further clarity is needed in Part IV, Paragraph A of the general permit, specifically with regards to the reference to “pre-impact biological function.” Particularly because the requirement set forth in Part II, Paragraph B.4 of the permit only requires assessment of the “stream physical habitat,” with no similar requirement to assess the biological function, how is the “pre-impact biological function” to be determined for purposes of this paragraph? Furthermore, please explain Ohio EPA’s expectations for how “biological functions” are to be considered for ephemeral streams that only have periodic flows. (API)
- Response 77:** The referenced condition, which contains the definition of a temporary impact has been changed by removing “biological” from the condition. Ephemeral streams must return to “...pre-impact function with minimal or no human intervention within 12 months following the completion of the temporary impact.”
- Comment 78:** Paragraph A, the phrase ‘returning to conditions which support pre-impact biological function’ is used. Provide a definition for what the phrase ‘returning to conditions which support pre-impact biological function’ means and how it applies to an ephemeral stream. Again, ephemeral streams are dry streams with typically no aquatic organisms, so why is biological function being discussed or how does it even apply? (OCA)
- Response 78:** See Response 77.

## **Assessment Methods**

- Comment 79:** Concerning use of the Qualitative Habitat Evaluation Index (QHEI) - it was not originally designed for use in ephemeral streams and as a result, we have concerns about its applicability. The Ohio EPA Primary Headwater Habitat (PHWH) methods provide a tool (HHEI) that is better suited for use in ephemeral streams. The QHEI should be used in intermittent, interstitial, and perennial reaches where at least some permanent pools are present. The permit should be sophisticated enough to recognize that there may be some ephemeral to intermittent “boundary” situations where it will be necessary to collect both types of habitat data, as well as the appropriate types of biological data, when deciding if and where one of the aquatic life uses should apply. (MBI, ODOT)
- Response 79:** Ohio EPA agrees that an HHEI is the more appropriate tool for assessing the habitat of smaller ephemeral streams. However, in order to allow the most flexibility for applicants, the HHEI and QHEI are examples of tools acceptable to the director that may be used to assess ephemeral streams.
- Comment 80:** We believe that it could be appropriate to utilize the HHEI method to evaluate ephemeral streams. However, to our knowledge, the HHEI methodology has not been adopted into the Ohio Revised Code or the Ohio Administrative Code, thus posing a potential legal issue associated with requiring the use of the methodology in the general permit. Moreover, we understand that other organizations have serious concerns with the use of HHEI to categorize the quality of ephemeral streams. (NAIOP, API)
- Response 80:** The primary headwater manual and HHEI is referenced in OAC 3745-4 as part of the assessment methods for the credible data program. However, the general permit does not require the use of this tool. The QHEI and HHEI are provided as examples that may be used to quantify the physical habitat of the stream since many applicants are familiar with these tools. Other methods may also be acceptable, if approved by the director, and applicants are free to provide those methods and assessments in their applications. The language for the conditions referencing QHEI and HHEI has been changed to clarify that these are examples and not the only options. The “i.e.” has been changed to “e.g.”
- Comment 81:** In Part V E 6(b) (Performance standard), what criteria and thresholds are to be used to determine the physical habitat assessment of ephemeral streams and what the mitigation stream channel is, i.e., what score makes it “adequate”? (MBI)

- Response 81:** Normally the physical habitat assessment will be a QHEI or HHEI, but other methods can be proposed by permittees for Ohio EPA review and approval. The permittee is required to demonstrate that the stream assessment of mitigated stream is equal to or greater than the stream assessment of the originally impacted stream.
- Comment 82:** **Part II B) 4) indicates either an HHEI or QHEI would be required. We do not understand why a QHEI would be appropriate to evaluate an ephemeral stream. The more appropriate and accurate tool for ephemeral stream physical habitat assessments is the Headwater Habitat Evaluation Index (HHEI) method contained in Ohio EPA's Field Evaluation Manual for Ohio's Primary Headwater Habitat Streams (Env. Design Group and City of Columbus)**
- Response 82:** See Response 79.
- Comment 83:** **The draft permit requirement that a PAN contain a stream physical habitat assessment for each ephemeral stream on the project site is more than is necessary for the protection of water quality and aquatic life. To protect water quality and aquatic life, a stream physical habitat assessment of only ephemeral streams that will be impacted by activities at a project site is all that is necessary. (City of Columbus)**
- Response 83:** The current isolated wetland general permit requires Ohio Rapid Assessment Methods (ORAMs) for all wetlands within the project area, so to remain consistent, a physical habitat assessment for all ephemeral streams in the project area will also be required. This ensures that applicants have identified and assessed all potential resources within the project area in the event that one of the resources is inadvertently impacted during the project.
- Comment 84:** **The QHEI and HHEI habitat assessments are subjective and qualitative and cannot evaluate whether a stream including ephemeral streams are geomorphically stable, unstable or in some degree of instability. Further, it cannot evaluate watershed hydrology nor address watershed needs, which is critical to protecting downstream channels and uses. Additionally, these habitat assessments are founded in the River Continuum Concept, which falsely requires single-thread streams from headwaters to the mouth of streams, and blindly ignores the primary watershed need of more storage. (OCA)**
- Response 84:** See Response 80.

**Comment 85:** We request that Ohio EPA revise the general permit by replacing the use of QHEI/HHEI with the use of an objective and quantitative physical integrity assessment to evaluate stream function. This will result in stream mitigation commensurate with the pre-impact physical integrity and degree of function of the ephemeral stream reach to be impacted. (OOGA)

**Response 85:** See Response 80.

**Comment 86:** It could be appropriate to use the HHEI method to evaluate ephemeral streams. However, the HHEI tool has not been adopted into ORC or the Ohio Administrative Code (OAC). Due to the lack of a proper assessment tool, we believe a physical habitat or water quality assessment of an ephemeral stream should not be required. According to the Field Evaluation Manual for Ohio's Primary Headwater Habitat Streams (Ohio EPA 2012), ephemeral streams have no significant habitat for aquatic fauna, no significant aquatic wildlife use, and limited or no potential to provide a higher function in the landscape. Therefore, assessment tools which focus on predicting the expected biological community are an inappropriate measure of the functions ephemeral streams provide. As an alternative to these assessment methods, the focus should shift to how site development can replace lost ephemeral stream functions through incorporating storm water BMPs related to water quality improvement and flood attenuation by decreasing the rate of water runoff, by increasing sediment and nutrient retention, and flood storage. (S+W)

**Response 86:** See Response 80.

**Comment 87:** What is Ohio EPA's justification for using QHEI over HHEI and HMFEI? (Sierra Club)

**Response 87:** See Responses 79 and 80.

**Comment 88:** How will Ohio EPA monitor if QHEI is sufficient without the use of an HHEI/HMFEI? (Sierra Club)

**Response 88:** See Response 51. Ohio EPA will be reviewing and verifying the information submitted with each application. Site visits may be conducted on an as needed basis to verify the information.

**Comment 89:** How will Ohio EPA ensure HHEIs/HMFEIs are performed by trained Ohio EPA staff? (Sierra Club)

**Response 89:** Ohio EPA will not be performing the QHEI, HHEI, or HMFEI assessments. These assessments will be performed by applicants and their consultants. Ohio EPA staff will be reviewing and verifying the assessments. All Ohio EPA 401 program staff regularly receive training in

all of Ohio EPA's qualitative and quantitative assessments methods for streams and wetlands.

### **NPDES Concerns**

**Comment 90:** Could an NPDES permit be required for the periodic discharge of pollutants from a non-jurisdictional ephemeral stream into jurisdictional waters of the state? (MBI)

**Response 90:** This general permit is limited to addressing fill activities to certain isolated wetlands and ephemeral streams. There are other permitting implications raised by the new federal rulemaking as to the application of NPDES permitting but it will be somewhat fact dependent.

### **Restoration of Temporary Impacts**

**Comment 91:** Including a restoration plan requirement in the PAN provisions of Part II.B for temporary stream impacts would enhance the protection of water quality and aquatic life and provide clear guidance to permittees conducting stream restoration. (City of Columbus)

**Response 91:** All permittees are required to follow Part III.K.15 of the general permit, removing the temporary fill and restoring stream and wetland bottom to pre-construction conditions as well as meeting the performance standards of Part IV.

**Comment 92:** The restoration requirements outlined in Part IV A) through D) are problematic. The hydrology and biology of ephemeral streams are not well understood. Flow rates in high-gradient ephemeral streams are very low, on the order of 0.5 cubic feet/second and difficult to measure. These systems are particularly sensitive to changes in the landscape around them. Consider a situation in which an applicant receives a permit to install a culvert in an ephemeral stream for a project that involves creating a residential development in which the ephemeral stream is the only regulated resource. Landscape changes associated with the development would undoubtedly change land cover around and runoff into the ephemeral stream, and these changes are unregulated. How would a flow regime be restored in such a situation? How would channel stability be maintained? (Env. Design Group)

**Response 92:** See Responses 91 and 93.

**Comment 93:** The stability requirement in Part IV.D of the permit should be conditioned upon the stability of the stream prior to impact. Not all streams are "stable" under pre-existing conditions. (City of Columbus)

- Response 93:** The referenced condition has been removed in response to several comments received. If an ephemeral stream is not stable prior to a temporary impact, it does not need to be stable after restoration of that temporary impact. It should be restored to pre-impact contours and conditions.
- Comment 94:** **Part IV, Paragraph D includes a requirement that an ephemeral stream channel subject to temporary impacts “shall be stable” following removal of temporary fills and subsequent restoration of the impact area. Channel stability of an ephemeral stream could be influenced by a myriad of factors outside of the control of a project proponent, such as land-use driven degradation of ephemeral streams due to activities higher in a watershed. These types of external considerations are in no way related to temporary work within the regulated stream channel; if an ephemeral stream is unstable prior to authorized temporary work (e.g. experiencing lateral erosion, aggrading, degrading), then it should not be incumbent upon a permittee to make the stream stable afterwards. We recommend that Ohio EPA remove this language from the general permit. The overarching concern of post-construction channel condition is adequately captured under Part IV, Paragraph B, and the requirement for the stream to be restored to pre-existing contours and conditions. (S+W)**
- Response 94:** See Response 93.
- Comment 95:** **Paragraph D discusses that the ephemeral stream channel shall be stable. Does this mean that it shall be geomorphically stable or does it have some other meaning? If the ephemeral stream is to be geomorphically stable, then this statement conflicts with Paragraph B, which states that temporary impacts shall be restored onsite to pre-existing ... conditions upon the completion of the temporary impacts. It is recommended that the definition of stable be clarified and that the conflict in Paragraphs D and B be corrected. (OCA)**
- Response 95:** See Response 93.
- Comment 96:** **Paragraph F, Restoration Monitoring and Reporting. It is recommended that the reporting requirements in Item 2) be revised to consider a watershed approach and watershed needs (storage), provide a definition for stability, and provide for objective and quantitative standards. (OCA)**
- Response 96:** Given the nature and extent of temporary impacts, the restoration monitoring and reporting section is designed to ensure that the impacted streams are returned to pre-impact conditions. This does not need to include a watershed-based approach since the intent is to put the streams

back to the way they were prior to the temporary impact. A watershed-based approach could be acceptable for Part V. when compensatory mitigation is required for permanent impacts. The compensatory mitigation plan submitted by the applicant, and approved by Ohio EPA, for permanent impacts can include a discussion of watershed specific needs and be used as justification for the mitigation proposed.

**Comment 97:**           **The restoration monitoring and reporting requirements for temporary ephemeral stream impacts (See General Permit Part IV.F.1 and 2) are overly burdensome, particularly for a temporary impact. These requirements will result in permittees unnecessarily incurring additional expenses for monitoring following the completion of restoration activities. We request that Ohio EPA remove the restoration monitoring and reporting requirements in Part IV.F.1 and 2 from the general permit. (OOGA)**

**Response 97:**       The restoration monitoring and reporting requirements included in the general permit are the same as those are currently required for temporary impacts to streams, including ephemeral streams, in an individual 401 WQC. The monitoring requirements are minimal and there is language included in the permit that states: "If the mitigation areas are meeting or exceeding the performance criteria after the first year of post construction monitoring, the permittee may request to be released from any further monitoring." Therefore, if the restoration is meeting the performance standards after one year, the permittee can request to be released.

#### **Mitigation for Permanent Impacts**

**Comment 98:**           **At what length of impact to ephemeral streams is mitigation required? (Brad Petru, CEC)**

**Response 98:**       Per condition Part V.A., mitigation is required for permanent impacts to ephemeral streams greater than 300 linear feet.

**Comment 99:**           **Part III.C should be revised to clarify that a copy of the general permit must be kept onsite during mitigation activities only if onsite mitigation is performed. This requirement should not apply for in-lieu fee or off-site mitigation. (OOGA)**

**Response 99:**       Even if permittee responsible mitigation is not conducted, a copy of the permit shall still be kept on the project site to ensure all workers are familiar with the terms and conditions. The language of this condition was changed to: "...duration of the project and/or mitigation construction activities." This clarifies that the permit does not need to be kept on-site for mitigation construction if the mitigation is done through purchasing of in-lieu fee or mitigation bank credits.

- Comment 100:** The general permit should contain an exemption for and/or require no mitigation for impacts to ephemeral streams when those impacts are part of an approved habitat restoration plan. This exemption for mitigation would include restoration work completed through grant programs (e.g. H2Ohio, Water Resource Restoration Sponsor Program, Wetlands Reserve Program, Conservation Reserve Program, etc.), mitigation banks, in-lieu fee projects, permittee responsible mitigation projects, etc. (S+W)
- Response 100:** In response to this comment, additional language was added to Part V.A. of the general permit that allows applicants to demonstrate that additional mitigation may not be required if the project will result in a net improvement to water quality.
- Comment 101:** We strongly encourage Ohio EPA to only require compensatory mitigation for impacts to ephemeral streams that exceeds 1,000 ft. (OHBA and S+W)
- Response 101:** See Response 32.
- Comment 102:** We encourage Ohio EPA to only require compensatory mitigation for ephemeral streams that exceed the threshold and that are located within areas determined to be ineligible or possibly eligible for coverage under Ohio EPA's 401 Water Quality Certification for the 2017 Nationwide Permits (purple/yellow areas). (S+W)
- Response 102:** The stream eligibility map is a condition of the 401 WQC for the Nationwide Permits and will not be applied to this permit.
- Comment 103:** Part V.A – The mitigation threshold for permanent ephemeral streams is too small. We believe that the proposed general permit should be withdrawn or modified to not require any compensatory mitigation beyond using stormwater and sediment and erosion control BMPs, if Ohio EPA moves forward with the proposed general permit, the Association strongly believes the requirements for compensatory mitigation requirements should be applicable for impacts to an ephemeral stream, at a minimum, in excess of 1,000 linear feet for ephemeral streams that have a watershed size greater than 1/10 of a square mile. (OOGA)
- Response 103:** See Response 32. The standard post-construction storm water controls required under the Storm Water Construction General Permit can replace some of the functions of ephemeral streams but not all of the functions. Therefore, additional compensatory mitigation is required for permanent impacts if they exceed the established threshold.



**Comment 104:** There is no basis for requiring compensatory mitigation for impacts to ephemeral streams. During early stakeholder outreach, the Agency indicated that ephemeral streams in road right-of-way and agricultural fields (e.g. grassy swales, ephemeral ditches, erosional features, etc.) would not be regulated. If Ohio EPA has the discretion to not regulate ephemeral streams (or require compensatory mitigation) in these instances, why has the Agency elected to regulate other ephemeral streams and require compensatory mitigation for these instances? Related to this issue, what if an agricultural ditch becomes surrounded by a well pad, would that ditch now be considered a regulated ephemeral stream? (OOGA)

**Response 104:** Waters that meet the definition of an ephemeral stream, included in the general permit, will be subject to the terms and conditions of this permit, regardless of whether those streams are located in road rights-of-way or agricultural fields. What is not regulated are those features that do not meet the definition of an ephemeral stream that has been added to the permit.

**Comment 105:** In regard to surface mining activities, please provide a definition or examples of what Ohio EPA considers a permanent impact to an ephemeral stream. (OCA)

**Response 105:** A permanent impact is anything that does not meet the definition of temporary impact provided in the general permit. Most surface mining activities are not short-term in nature and would be considered permanent impacts.

**Comment 106:** A clear definition in the permit text of “permanent impacts to ephemeral streams” requiring mitigation, and the clarification of whether temporary impacts to isolated wetlands require mitigation, would provide helpful guidance to permittees. (City of Columbus)

**Response 106:** See Response 105. Any impact to an ephemeral stream that does not meet the definition of a temporary impact, per Part IV.A., will be considered a permanent impact.

**Comment 107:** The permit sets a threshold for mitigation of permanent impacts to ephemeral streams at impacts of over 300 linear feet. However, it is unclear whether this 300 linear foot threshold corresponds to 300 feet per stream, or 300 feet total? Does it include only between individual stream crossings, or 300 feet per entire stream? (OEC, Freshwater Future, Alliance for the Great Lakes)

**Response 107:** See Response 30.

**Comment 108:** We recommend that impacts to a particular stream are cumulative on a project but not cumulative for impacts to distinctly different streams that may be impacted by a single project. (OHBA)

**Response 108:** See Response 30.

**Comment 109:** Recommend that Part V.D. for mitigation of permanent impacts to ephemeral streams mimics the language for wetland mitigation (Part VI.F. for a timeline of 15 days (not 30 days). (FLOW)

**Response 109:** In order to allow flexibility for applicants that may take time to procure funds for the purchase of mitigation credits, such as public entities, the timeline for providing proof of purchase of mitigation credits will be 30 days for both isolated wetlands and ephemeral streams. The condition for isolated wetlands has now been changed to 30 days to make them consistent.

**Comment 110:** In Part V(E)(2), the permit provides for a 30-day grace period to commence mitigation, and the entire duration to complete the construction. This seems problematic for two reasons. First, 30 days just to commence construction itself does not adequately replace the loss of function of the permanently impacted stream. Allowing construction of that mitigation to slowly continue unfinished for five years, eliminates function replacement altogether. Furthermore, allowing construction to continue for the duration of the permit practically makes the requirements for monitoring and successful mitigation in Part V(E)(2) moot. (OEC, Freshwater Future, Alliance for the Great Lakes)

**Response 110:** Ohio EPA understands that there may be a temporary loss within those 30 days, but this gives applicants flexibility to allow for project site conditions that may not allow for immediate mitigation construction. Per Part VII. and ORC 6111.022(E) the termination of coverage under the general permit occurs two years after the director's receipt of a complete PAN, not the five years that the general permit is valid. Therefore, mitigation construction must be completed within two years.

**Comment 111:** Part VI(F) we request a 30-day time period from permit approval to provide Ohio EPA with proof of mitigation bank or credit purchase. Thirty days is consistent with 401 permit requirements and 15 days may not be adequate time to complete the purchase process requirements. (ODOT, NEORSD, Dominion Energy, City of Columbus)

**Response 111:** See Response 109.

**Comment 112:** Are a “written notice of approval authorizing impacts” and an “approval of coverage under the permit” the same event or different events? Are these events equivalent to Ohio EPA’s written notice of approval of the PAN that is implied in the permit? If these notice and approval in Part V.E.2 and Part VI.F of the permit are same event, it may helpful to permittees to stagger the purchase and proof of purchase requirements—30 days for mitigation purchase and 45 days for providing proof of purchase to Ohio EPA—because permittee may not always be able to purchase and get proof of purchase on the same day. (City of Columbus)

**Response 112:** See Response 18. Yes, these are the same events. The condition in Part V.E.2 refers to the timing of construction of permittee responsible mitigation and not the purchase of credits from a mitigation bank or in-lieu fee program. The condition in Part VI.F has been changed to allow 30 days from written notice of approval for permittees to provide the proof of purchase to Ohio EPA. If extenuating circumstances prevent permittees from meeting this deadline, they are encouraged to reach out to Ohio EPA.

**Comment 113:** Part V(D) The term “wetland mitigation bank” is included in the stream mitigation section. We suspect this is a typo. (ODOT, API, OCA)

**Response 113:** Ohio EPA appreciates the correction and “wetland” has been removed this condition.

**Comment 114:** We question the requirements in Part V. We are unaware of successful attempts to recreate or restore ephemeral streams. Indeed, available research indicates the restoration of intermittent streams has proven difficult at best. We question whether compensatory mitigation is possible for ephemeral streams. (Env. Design Group)

**Response 114:** The success of permittee-responsible stream mitigation depends heavily on the site selection. Permittees electing to pursue permittee-responsible mitigation will be required to provide a mitigation plan that outlines how the mitigation will be accomplished and how they will meet the performance goals. This plan will be reviewed and approved by Ohio EPA. Because of the cost and liability with permittee-responsible mitigation, many applicants may elect to purchase mitigation bank or in-lieu fee credits.

**Comment 115:** In the past we have found that the restoration of ephemeral streams may result in a feature that meets all three wetland criteria, and that the Ohio EPA did not consider the resulting feature adequate for a stream restoration, even when the original and restored feature

- exhibited similar ecological function. How will Ohio EPA differentiate between a restored ephemeral stream and a wetland? Given the difficulty inherent in restoring ephemeral streams, will Ohio EPA accept a linear feature the meets all three wetland criteria as an acceptable form of compensatory mitigation? (Env. Design Group)**
- Response 115:** The permittee-responsible mitigation will be required to meet all the of the performance goals outlined in the approved mitigation plan and Part V of the general permit. As long as the mitigation stream meets those performance goals, it will be released from mitigation monitoring.
- Comment 116:** **The requirement for protection “long-time” is vague and confusing. There is no requirement for a copy of the protection vehicle. Please modify. (FLOW, NAIOP, OCA, and S+W)**
- Response 116:** The term “long-term” is used in the statute, so it is repeated in this general permit. Examples of appropriate methods to achieve long-term protection have been added to Part V.E.3.
- Comment 117:** **Effective long-term protection of ephemeral stream mitigation and long-term maintenance of applicable mitigation performance standards may require prescriptions in the text of the general permit for environmental easements, environmental covenants running with the land, or similar guarantees, and for Ohio EPA field verification that performance standards are being met. (City of Columbus)**
- Response 117:** See Response 116.
- Comment 118:** **Provide a definition or examples of what are appropriate practicable management measures. (OCA)**
- Response 118:** The “appropriate practicable management measures” in Part V.E.3. generally refers to the use restrictions that normally appear within protection instruments such as restrictions on vegetation clearing, access, etc. These measures are designed to prevent the degradation of the resources that have been protected as part of a permittee-responsible mitigation project.
- Comment 119:** **Provide a definition or examples of what appropriate vegetative buffers means. Typically, buffers (e.g., grasses or trees) are scaled with geomorphology, such that, they might be three times the bankfull width of the channel. (OCA)**
- Response 119:** See Response 66.
- Comment 120:** **Will Ohio EPA provide guidance for determining size and location of vegetated buffers referenced in Part V.E.3 of the draft permit? (City of Columbus)**

**Response 120:** See Response 66.

**Comment 121:** **In Part V.E.6.b of the draft permit, it is unclear whether the pre-improvement habitat is equal to or exceeds the post-improvement habitat on a metric-by-metric basis or by aggregate score. (City of Columbus)**

**Response 121:** The physical habitat assessment improvement is usually demonstrated by aggregate score. However, if project conditions dictate that a metric by metric score improvement is more appropriate, applicants may propose that in the permittee-responsible mitigation plan for Ohio EPA approval.

**Comment 122:** **Item 6) Performance standards is discussed out of order in the General Permit for Ephemeral Streams and should be placed before current Item 4) Annual Monitoring Reports and Item 5) Monitoring Requirements so that it is known what is to be monitored. (OCA)**

**Response 122:** The order of monitoring reports, monitoring requirements, and performance standards is consistent with how the requirements are currently outlined in the isolated wetland general permit and with individual 401 WQCs. In order to maintain consistency, these will remain in this order.

**Comment 123:** **Many Olentangy streams could benefit from some mitigation, will it now be possible to have stream mitigation bank projects? Can ephemeral stream mitigation money be utilized to enhance or preserve other ephemeral, intermittent, or perennial streams? (FLOW)**

**Response 123:** The approval of mitigation banks and in-lieu fee programs and projects is still required through the inter-agency review team (IRT) established by the federal mitigation rule. Many in-lieu fee providers are currently looking for projects, so if there are specific projects that your organization would like to see done, Ohio EPA encourages you to share those with the in-lieu fee sponsors in the state. As long as the IRT still allows for the purchase of credits for impacts to ephemeral streams, some of the money may be utilized to restore, enhance, or preserve ephemeral, intermittent, and perennial streams.

**Comment 124:** **In Part VI B), appears to establish a preference for mitigation banks and permittee responsible mitigation over in-lieu fee program mitigation. What considerations are there to support such a preference for permittee responsible mitigation? Experience indicates that permittee responsible mitigation should be the least favored alternative. (MBI)**

**Response 124:** The mitigation hierarchy for isolated wetlands under a level one review is outlined in ORC 6111.022(D). Mitigation banks, permittee responsible

mitigation (on or off-site), and in-lieu fee credits are all options open to applicants with the proper justification provided in the application.

**Comment 125:** Part II, Paragraph B.8 of the general permit, we request additional language to clarify that in-lieu fee mitigation is an available option for ephemeral streams, consistent with Part V, Paragraph B of the general permit. In-lieu fee is clearly specified for wetlands, but not similarly specified for ephemeral streams. (API)

**Response 125:** See Response 35.

**Comment 126:** We kindly request that Ohio EPA consider incorporating clarification of the proposed mitigation mechanisms to comply with the hierarchy established under 33 CFR Part 332.3(b)(2) through (b)(6) of the Compensatory Mitigation for Losses of Aquatic Resources Rule. (EIP)

**Response 126:** See Response 124. Since there is no similar hierarchy for ephemeral streams in statute or rule, the language outlined in the Part V.B. allows the flexibility of all options for applicants with proper justification.

**Comment 127:** The mitigation hierarchy found in both Part V (B) for ephemeral streams and for isolated wetlands in Part VI (B) of the Permit present significant problems. Both allow too much reliance on the use of permittee-responsible mitigation—the Agency and its non-governmental partners have worked diligently over the past few years to develop an in-lieu fee program that results in successful mitigation projects. That success cannot be said for permittee-based mitigation. Permittee-responsible mitigation likely does not comport with the Corps mitigation preferences, nor with those of Ohio EPA. The Army Corps' preference hierarchy for mitigation options ranks permittee-responsible mitigation as the least desirable restoration mitigation option, with third-party responsible restoration mitigation options being preferred. (OEC, Freshwater Future, Alliance for the Great Lakes)

**Response 127:** See Responses 124 and 126.

**Comment 128:** The provisions for mitigation in Part VI B) allows for an in-lieu fee program option only at the discretion of the director, with apparent priority given to participation in a mitigation bank or permittee-responsible mitigation. Permittee-responsible mitigation has been demonstrated to be the least effective approach for mitigating losses. The options for mitigation for ephemeral streams in Part V. B) offer the same three options with no stated order of preference. We request a change in both sections to reflect the highest priority

**for in lieu fee programs and permittee-responsible mitigation as the least preferred option. (NWF/OCF)**

**Response 128:** See Responses 124 and 126.

**Comment 129:** Part II(B)(8) states: “For isolated wetlands, an acceptable mitigation proposal in accordance with ORC Sections 6111.022(D) and 6111.027 including documentation that mitigation credits have either been purchased or reserved. If the proposal includes in-lieu fee mitigation for wetland impacts, an evaluation of other mitigation alternatives must be provided.” Additionally, Part VI (B) states: “Without the objection of the Director and at the discretion of the applicant, the applicant shall conduct either mitigation at a wetland mitigation bank within the same USACE district as the location of the proposed filling, permittee responsible mitigation, or at the director’s discretion, the applicant may purchase credits from an approved In-lieu fee program that the serves the impacted watershed.” We do not support this attempt to make in-lieu-fee mitigation acceptable only when all other options are unavailable or only at the director’s discretion. As this reflects a change in the current hierarchy of mitigation types, we ask that these provisions be removed from or modified in the general permit to reflect the current hierarchy. (TNC)

**Response 129:** See Responses 124 and 126.

**Comment 130:** We urge that the general permit should specify that all such mitigation options are equally available, and that no mitigation hierarchy applies to the evaluation of mitigation options for a given project. (OHBA and S+W)

**Response 130:** See Responses 124 and 126.

**Comment 131:** Establishing a geographical hierarchy for ephemeral stream mitigation that creates incentives for mitigation near permanently impacted streams will provide the most effective compensation for the adverse environmental impacts associated with permanent ephemeral stream impacts. (City of Columbus)

**Response 131:** See Responses 124 and 126.

**Comment 132:** Part VI. While we have learned much about and in general have improved the success rate of compensatory wetland mitigation, the rate of success for creation or restoration of isolated wetlands has not been good. Many researchers have reported poor results after long-term monitoring efforts. Given this lack of success, we question whether effective compensatory mitigation through means other than preservation is possible. We are concerned that

attempting applicant provided, in-kind mitigation would fail, an outcome that does not satisfy the ecological goals of mitigation, and potentially leads applicants spending time, energy, and money to correct what may be insurmountable technical problems. (Env. Design Group)

**Response 132:** See Response 114.

**Comment 133:** Part V B) indicates mitigation credits can be purchased from approved banks. Are there credits set aside representing preserved or restored ephemeral streams, or would credits be purchased representing banked areas with more permanent flows? If the latter is the case, how will the State not suffer a loss of the specific functions provided by ephemeral streams? (Env. Design Group)

**Response 133:** Mitigation banking and in-lieu fee credits are not generally parsed out by flow regime; however, ephemeral streams may still be incorporated as part of mitigation bank and in-lieu fee projects approved through the IRT. Ohio EPA contends that the lost functions from impacts to ephemeral streams can be off set through any of the mitigation options outlined in the general permit.

**Comment 134:** Recommend replacing the language in Part V 6(b) with “the permittee shall have demonstrated that the physical habitat assessment of the mitigation stream channel is or will be equal to or greater than the physical habitat assessment of the original ephemeral stream, if unimpacted, or else restored to provide the ecological functions inherent in a natural ephemeral channel and its surrounding habitats.” (MBI)

**Response 134:** Ohio EPA requires the permittee to restore the stream to pre-impact conditions and cannot require additional mitigation for impacts or modifications that the stream may have previously accrued.

**Comment 135:** It is our position that the general permit should allow for the utilization of storm water improvements/best management practices in order to mitigate for impacts to ephemeral streams. The functions and values of ephemeral streams are largely focused on storm water management, while stream mitigation projects are required to provide aquatic habitat improvement, riparian protections, etc. Stream mitigation projects are very expensive and costs of over \$300/foot are common. Assuming 500 linear feet of impact to a low-quality ephemeral stream on a development site, there is no technical or legal basis for mitigation costs exceeding \$150,000 to purchase credits at a mitigation bank or in-lieu fee program site. The “lost” functions and values are fully compensated under Ohio’s existing comprehensive storm water permitting program for



**discharges associated with construction activity. (NAIOP and OHBA)**

**Response 135:** Revisions have been made to Part V.C. to allow for the flexibility of using alternative mitigation techniques pending the approval of Ohio EPA.

**Comment 136:** Please clarify that enhancement/restoration projects that result in temporary and/or permanent impacts to ephemeral streams, but by their nature improve the overall quality of that segment of stream, will likely not require compensatory mitigation as the restoration/enhancement will essentially constitute “Permittee Responsible Mitigation” under Part V. Further, please clarify that these segments of stream do not need to be restored to “pre-existing contours and conditions” as stated in Part IV.B. for temporary impacts. (NEORS)

**Response 136:** Additional language has been added to Part V.A. of the general permit to accommodate this request.

**Comment 137:** We encourage the Ohio EPA to only require compensatory mitigation for impacts to ephemeral streams that have a watershed that exceeds 1/10 of a square mile, and only for impacts that exceed 300 linear feet to ephemeral streams with a watershed exceeding that threshold. (NAIOP)

**Response 137:** See Responses 30, 32, 135, and 136.

**Comment 138:** The general permit contains a performance standard that specifies the number of woody plants per acre that must be present in an upland buffer area at the end of the monitoring period. We feel that the general permit should be revised to delete such a requirement, as the primary function of ephemeral streams is storm water management. In the alternative, we believe that the woody stem count requirement should only be applicable if the impacted stream had a riparian corridor that was dominated by forested or scrub-shrub habitat (e.g., in-kind mitigation). (NAIOP and S+W)

**Response 138:** The language for this performance standard contains the clause “if applicable.” This performance standard only applies if the mitigation plan submitted by the applicant, and approved by Ohio EPA, required the restoration or enhancement of a forested riparian buffer.

**Comment 139:** We believe that the woody stem requirements should only be applicable if the impacted streams had a riparian corridor that was dominated by forested or scrub-shrub habitat (e.g. in-kind mitigation). (OHBA and OOGA)

**Response 139:** See Response 138.

- Comment 140:** The general permit should specify that all such mitigation options are equally available, and that no mitigation hierarchy applies to the evaluation of mitigation options for a given project. In addition, we believe that the general permit shall also allow applicants to propose mitigation in the form of long-term protection of avoided streams on the project site. (NAIOP)
- Response 140:** The mitigation hierarchy for isolated wetlands under a level one review is outlined in ORC 6111.022(D). Mitigation banks, permittee responsible mitigation (on or off-site), and in-lieu fee credits are all options open to applicants with the proper justification provided in the application. Since there is no similar hierarchy for ephemeral streams, the language outlined in the Part V.B. allows the flexibility of all options for applicants with proper justification.
- Comment 141:** To the extent that additional mitigation is required, it should be able to occur anywhere in the 6-digit HUC. This would allow for the establishment of mitigation credits in areas of low land costs and may be able to address agricultural discharges which result in significant water quality impairments. Furthermore, when compensatory mitigation is required, if an applicant proposes to purchase credits from an approved mitigation bank or in-lieu fee program, we strongly believe that the amount of mitigation purchased should be at a 0.5:1 ratio since the mitigation credits will be generated on intermittent and perennial streams and because applicants will still be required to implement on-site storm water and erosion control measures. (NAIOP and S+W)
- Response 141:** The permit now requires permittee-responsible mitigation be conducted within the 8-digit HUC to maintain consistency with OAC 3745-1-54. Revisions have been made to Part V.C. to allow for the flexibility of using alternate mitigation ratios with enhanced storm water techniques pending the approval of Ohio EPA.
- Comment 142:** The draft general permit states that purchasing credits from an approved mitigation bank or in-lieu fee program is allowable when the bank or program has a service area that includes the impacted watershed. However, for permittee-responsible mitigation, there is no associated requirement that clarifies where the mitigation must take place (i.e. within the impacted watershed). Due to the storm water best management practices providing onsite replacement of ephemeral stream functions on development sites, S+W believes it is reasonable for mitigation for ephemeral stream impacts to occur anywhere within the same 6-digit Hydrologic Unit Code watershed where the impact site is located. It should be noted that ORC allows

- compensatory mitigation for Level 1 isolated permits to take place anywhere in the same USACE District (in Ohio). (S+W)
- Response 142:** See Response 141.
- Comment 143:** The amount of mitigation purchased from an approved mitigation bank or in-lieu fee program should be at a 1/2:1 ratio since mitigation credits generated by these means will be completed on intermittent and perennial streams and because applicants will still be required to provide onsite storm water and erosion control measures. (OHBA and OOGA)
- Response 143:** See Response 141.
- Comment 144:** The proposed mitigation ratios for permanent ephemeral stream impacts vary by substrate. Because substrate within a single ephemeral stream channel can differ by stream reach/segment, variable ratios, will lead to confusion among applicants. We suggest that a single mitigation ratio be applied to ephemeral streams and that low-quality ephemeral streams be exempt from mitigation requirements. (OOGA)
- Response 144:** See Response 141.
- Comment 145:** Stream mitigation in the traditional sense (e.g. purchasing mitigation bank or in-lieu fee credits, completing a permittee-responsible stream restoration project) should not be required for impacts to ephemeral streams with sand/silt/muck/clay dominated substrates. As these channels serve only storm water management and water quality functions, the general permit should afford more flexibility in terms of offsetting impacts to these types of streams. The general permit should allow for the utilization of enhanced storm water controls/best management practices in order to mitigate for impacts to ephemeral streams with fine substrates. (S+W)
- Response 145:** See Response 141.
- Comment 146:** The mitigation requirements for fine (i.e. sand/silt/muck/clay) and coarse (i.e. bedrock, boulder, cobble, gravel, or sand) substrate streams utilize different terminology relative to the abundance of the substrate types. For fine substrate streams, the channels must be 'dominated' by these materials, while for coarse substrate streams, the channels must support 'mixed' materials. S+W recommends that the term 'dominated' be utilized in this language for both ephemeral stream types to ensure consistency and minimize confusion when interpreting the results of field studies. (S+W)
- Response 146:** Ohio EPA considered this request but will leave it as written to ensure consistency with the Stream Mitigation Banking IRT guidelines. There

can be some overlap between these two categories since sand appears in both, but some sand is allowable in the coarse substrates category as long as it is mixed with other coarse substrates like boulder or cobble. If a stream is dominated by sand, then it would fall into the fine substrate mitigation category. The final determination on the appropriate mitigation category will be made by Ohio EPA based upon site conditions and information presented in the application.

**Comment 147:** **As with the existing general permit for isolated wetlands, mitigation for impacts to ephemeral streams should be allowed to take place anywhere in the same USACE District (in Ohio). (OOGA)**

**Response 147:** See Response 141.

**Comment 148:** **The ephemeral stream mitigation requirements are arbitrary and fail to use a watershed approach, address watershed needs, determine whether the existing stream condition is geomorphically stable, unstable or in some degree of instability (does not assess functions and services) and ignores watershed scale. (OCA)**

**Response 148:** See Responses 93 and 141.

**Comment 149:** **Part V E). Applicants have, in the past, approached regulators to stop post-construction mitigation monitoring in fewer than five years if data indicate that the applicable performance goals have been met. Is this still possible under the proposed permit? (Env. Design Group)**

**Response 149:** Yes, this is still the case. There is language included in the permit that states: "If the mitigation areas are meeting or exceeding the performance criteria prior to the end of the fifth year of mitigation monitoring, the permittee may request to be released from any further monitoring." Therefore, if the mitigation is meeting the performance standards after one year, the permittee can request to be released.

**Comment 150:** **Please clarify the length of time that annual reports are required under Parts IV and V of the general permit. Is it only for the length of monitoring? (NEORSD)**

**Response 150:** Annual restoration reports (Part IV) and annual monitoring reports (Part V) should only be submitted for the length of the required monitoring. This would be a maximum of two years for restoration and a maximum of five years for permittee-responsible mitigation monitoring.

**Comment 151:** **Five years is an excessive time period for monitoring an ephemeral stream that is only restoring physical integrity. Ephemeral streams have no biological or chemical integrity to address, that is, there is no biology in ephemeral streams (dry), and water flows is only in**

direct response to rainfall. Thus, only physical integrity needs to be addressed, and this can easily be determined by having objective and quantitative stream restoration/mitigation standards, which the Ohio EPA has not addressed in this general permit. Subsequently, only two years of monitoring and observation or less should be required for PRM, which is the case for temporary impacts for ephemeral streams. (OCA)

**Response 151:** See Responses 97 and 150.

**Comment 152:** Part V E) 3). What are appropriate vegetative buffers for ephemeral streams? What future activities would be prohibited in the buffer areas? (Env. Design Group)

**Response 152:** See Response 66.

**Comment 153:** Part V E) 5) a). Are measures of sinuosity, meander wavelength, belt width, radius of curvature, and meander arc length for a minimum of two meander bends appropriate or meaningful for ephemeral streams? Ephemeral streams dissipate energy in ways that are different from Intermittent and Perennial streams. Perhaps some of the variables presented in the Operational Draft Regional Guidebook for the Functional Assessment of High-gradient Ephemeral and Intermittent Headwater Streams in Western West Virginia and Eastern Kentucky may be more appropriate than measures typically used in larger streams. (Env. Design Group)

**Response 153:** Because the Corp's HGM guidance is calibrated for streams in West Virginia and Kentucky, Ohio EPA has not adopted this tool to apply to our projects. The measurements contained in the referenced condition are only to be provided if they are applicable for the mitigation stream, which is indicated in the condition.

**Comment 154:** Item 5) Monitoring Requirements. Ephemeral streams generally exist in the headwaters of watershed where stream gradients are steeper (i.e., greater than 4%). These stream types are step-pool streams and not riffle-pool streams. Terms such as thalweg, sinuosity, meander wave length, belt width, radius of curvature, and meander arc length for a minimum of two meander bends do not apply to step-pool streams. Additionally, thalweg is a feature only observed in lower-gradient streams (e.g., less than 2%) that is the result of double-helical stream flow. It is not correct to measure the longitudinal profile of a stream along its thalweg. The correct measurement for the longitudinal profile of a stream is along its center line. (OCA)

**Response 154:** In response to this comment, the term "thalweg" in this condition has been changed to "centerline."

**Comment 155:** Part V.E)5)c) and d). These requirements pertain to measurements taken in areas beyond the jurisdictional limits of Ohio EPA. Changes in the presumably upland areas surrounding ephemeral streams are not regulated by the Agency. These monitoring requirements could be construed as an attempt to impose regulation on an otherwise unregulated activity through a permit condition. While there are sound ecological reasons to understand and protect forested buffers around ephemeral streams, we believe it is better to do so through appropriate regulation or legislation. (Env. Design Group)

**Response 155:** Riparian buffers have a direct impact on the water quality of streams. If applicants propose to restore ephemeral streams with wooded riparian buffers as part of their permittee-responsible mitigation plan, the buffer measurements required by the referenced conditions will help ensure the water quality improvement of those mitigation streams. In the context of mitigation, monitoring and performance standards requirements are within the Agency's regulatory authority.

**Comment 156:** Part V E) 6) b) and c). Physical habitat quality and channel stability will surely be altered if a project results in changes in land use and land cover in the immediate drainage area contributing to an ephemeral stream. These alterations would occur due to activities that are not regulated as they are carried out in upland areas. These requirements create an untenable situation for applicants. (Env. Design Group)

**Response 156:** Ohio EPA understands that surrounding land uses and disturbances can influence the success of mitigation projects. The performance standards outlined in the general permit are designed to be minimal and do not include biological requirements that can be most affected by upstream disturbances. If the mitigation area is not meeting all performance goals at the end of the monitoring period, permittees can work with Ohio EPA to determine other alternatives to satisfy the mitigation requirements.

**Comment 157:** Part VI. It is our understanding that Ohio's existing mitigation banks do not contain credits specifically allocated to isolated wetlands. Therefore, the specific hydrogeomorphic functions and values provided by isolated wetlands, functions which are necessarily different from those provided by "adjacent" wetlands, are not being directly replaced by obtaining credits from mitigation banks. We wonder whether Ohio EPA will accept applicant-provided mitigation that results in the creation of adjacent wetlands? (Env. Design Group)

**Response 157:** The mitigation hierarchy for isolated wetlands under a level one review is outlined in ORC 6111.022(D). Mitigation banks, permittee responsible

mitigation (on or off-site), and in-lieu fee credits are all options open to applicants with the proper justification provided in the application.

**Comment 158:** **Part V – There are no credits for ephemeral streams available from the federal banking program. The Association assumes that mitigation banks and in-lieu fee programs will only be able to generate stream mitigation credits by preserving, rehabilitating, or restoring intermittent and perennial streams. Therefore, we believe that mitigation ratios should be adjusted down substantially for this reason. In-lieu fees for such “streams” would be excessively costly. (OOGA)**

**Response 158:** It remains undetermined if banks and in-lieu fee programs will still be able to generate and sell credits for ephemeral streams under the inter-agency review process. The fee structure for the in-lieu fee programs in Ohio does not change based upon the flow regime of the stream. The cost per linear foot of credit is the same for types of streams. See response 155.

**Comment 159:** **Mitigation banks and in-lieu fee program produce credits using ratios determined at the time of site approval, with these sites feasibly generating credits using stream enhancement or preservation at a crediting ratio much lower than restoration on a per foot basis. We have concerns that this could potentially lead to scenarios where agency project managers attempt to apply a mitigation ratio to bank or in-lieu fee program credits a second time at purchase, leading to requirements for permittees to secure more mitigation than what is referenced in the general permit. We recommend that the general permit clarify that mitigation credits should be provided at the required ratio and not reference linear feet. (S+W)**

**Response 159:** Ohio EPA considered this request. Mitigation ratios outlined in the general permit will be implemented as written and the ratios are the same regardless of the type of mitigation provided such as restoration, enhancement, or preservation. The wetland antidegradation ratios do not apply to the ephemeral stream mitigation ratios in Part V. Ohio EPA will ensure that all staff are trained on the requirements outlined in the general permit to ensure consistency.

**Comment 160:** **Part VI, Paragraph B states that permittee-responsible mitigation is an option to compensate for impacts to isolated wetlands. However, unlike mitigation bank or in-lieu fee program credits that clarify where mitigation must occur, there is no such requirement for permittee-responsible mitigation. S+W recommends that Ohio EPA clarify that permittee responsible mitigation projects must be**

- completed within the same USACE district as the location of the proposed wetland fills (similar to mitigation banks). (S+W)**
- Response 160:** The permit now requires permittee-responsible mitigation be conducted within the 8-digit HUC to maintain consistency with OAC 3745-1-54. Revisions have been made to Part V. C. to allow for the flexibility of using alternate mitigation techniques pending the approval of Ohio EPA.
- Comment 161:** **Part VI, Paragraph C provides details of mitigation ratios for isolated wetlands when mitigation is completed at a mitigation bank. S+W notes that ORC 6111.027(a)(1-2) also references in-lieu fee programs when describing these same ratios and recommends that the language of the general permit be revised to be consistent with ORC. (S+W)**
- Response 161:** The requested language regarding in-lieu fee from ORC has been incorporated into the general permit.
- Comment 162:** **The timeline to have proof of mitigation credits being purchased should change from 30 days (or 15 days with IWP) to 60 days. Mitigation credits with an outside entity may take a longer time. Contract terms and conditions need to be negotiated and approved by the organizations within a company. These discussions and approvals can take some time especially during the initial purchase due to a company doing due diligence on a contractor for a wetland or stream bank. (OUG, AOWMA)**
- Response 162:** See Response 109. Ohio EPA considered this request and decided to leave it at 30 days, but to maintain consistency between isolated wetlands and ephemeral streams, the timeline for isolated wetlands will be changed to 30 days. It should be noted that the mitigation proposal submitted as required per the PAN provide documentation that mitigation credits have been purchase or reserved, so providing proof of purchase 30 days after the receipt of coverage under this general permit should not be cumbersome.

**End of Response to Comments**