



## Division of Surface Water Response to Comments

### National Pollutant Discharge Elimination System (NPDES) General Permit for Discharges of Storm Water Associated with Construction Activity

Ohio EPA General Permit No.: OHC000005

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Ohio EPA held a public hearing and information session on March 28, 2018 regarding NPDES General Permit for Discharges of Storm Water Associated with Construction Activity (OHC000005). This document summarizes the comments and questions received at the public hearing and/or during the associated comment period, which ended on April 4, 2018.

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. The name of the commenter follows the comment in parentheses.

#### General Comments

**Comment 1:** It was requested that the Ohio EPA extend the timeframe associated with reviewing and addressing the comments and questions that are submitted to the Ohio EPA by April 4, 2018. The BIA does not feel that a two-week period for review is feasible to accurately review and respond the comments that are projected to be submitted to the Ohio EPA from across the state. (BIA of Central Ohio)

**It was requested for the comment period to be extended at least 90 days to allow for a stakeholder meeting between OEPA and City of Delaware or remove the Appendix for the Olentangy Watershed and allow the special permit to continue to exist separately. (City of Delaware)**

**Response 1:**

Ohio EPA actively provided outreach and opportunities for discussing this proposed general permit renewal with stakeholders by participating in the following events:

- Potential revisions shared at public forums:
  - May 11 and 12, 2017 Ohio Stormwater Conference
  - September 28, 2017 Stormwater, Erosion and Sediment Control Expo for Southwest Ohio & Northern KY
  - November 24, 2017 Summit SWCD Annual Meeting (Akron)
  - November 1, 2017 WMAO Annual Meeting (Columbus)
- OEPA CGP Renewal Early Stakeholder Outreach Sessions
  - November 17, 2017 in Richfield, Ohio
  - November 29, 2017 in Columbus, Ohio
  - December 1, 2017 in Hamilton, Ohio
  - A recorded session available for stakeholders at [epa.ohio.gov/dsw/storm/index.aspx](http://epa.ohio.gov/dsw/storm/index.aspx)
- Meeting with ODOT – January 5, 2017
- Meeting with Association of Shopping Centers – February 21, 2018
- Meeting with Central Ohio BIA – March 21, 2018
- Meeting with Ohio Manufacturers' Association April 5, 2018

Ohio EPA met with any organization which requested a meeting to discuss the draft general permit renewal. In addition, topics and comments discussed during all the outreach efforts allowed Ohio EPA adequate time to evaluate common comments received and proceed with final issuance of the general permit renewal.

The Portions of Olentangy River Watershed CGP (OHCO00002) expires on May 31, 2019. Projects can continue to obtain coverage under OHCO00002 until May 31, 2019. After this date, such projects would apply for coverage under OHC000005.

**Comment 2:**

**The OMA fully supports the comments separately submitted by General Motors LLC (“GM”) and GM’s specific list of issues with the current permit. The OMA additionally shares in the overarching concern articulated by GM that with this draft permit, Ohio EPA’s new approach to construction storm water permitting suffers from “mission creep” into areas that are not authorized by the Clean**

**Water Act or NPDES regulations, and in fact, that some of the provisions in the draft permit conflict with NPDES regulations.**

**The proposed changes encompassed in the draft permit would fundamentally change how this permit currently operates. The OMA is very concerned that Ohio EPA has expanded the scope and complicated the application and compliance processes associated with the draft permit. Many of the new conditions included in the draft permit are unnecessary for Ohio EPA to have an environmentally-protective and fully compliant construction storm water permit program under the NPDES. Moreover, the changes would create state requirements that are substantially different than the federal requirements. This latest draft moves even farther from federal guidelines than previous drafts. The draft permit not only requires the protection of storm water quality during the construction phase of projects, but now also attempts to control engineering and site hydrology both during and after (into perpetuity) all construction, resulting in a substantially increased burden on permittees. Further explanation and clarity is needed with these changes, to allow permittees to understand Ohio EPA's expectations and intent. (*The Ohio Manufacturers' Association*)**

**Response 2:**

Ohio EPA is updating the water quality volume capture requirements that were first included in the permit in 2003. The changes are being made after 15 years of application of post-construction practices and are being modified to incorporate updated rainfall, the performance of BMPs and to raise capture nearer to the performance target established at that time. The intent was described in the text provided in 2003 and is the same. The term "in perpetuity" was part of that original language and has the intent that post-construction BMPs would be designed and constructed for continued function after the construction has ceased and permit coverage has closed. However, in response to comments "perpetuity" was removed and replaced with "long term".

**Comment 3:**

**In a competitive economic development environment, placing more restrictions and greater potential expense on a business for storm water mitigation will place Ohio at an even greater disadvantage to surrounding states. (City of Delaware)**

**Response 3:**

Ohio is competitive with other states in their storm water requirements and these requirements do not represent a "leading of the pack". We recognize the concern and therefore have proposed very reasonable updates and even provided relief for the most affected sites that would affect small business and

individuals most. Ohio EPA contends the new requirements are, the new requirements are mindful to economic growth and add certainty for the development community. In addition, in response to comments, the agency has changed the requirements of post construction associated with the 2 acres or less construction site.

**Comment 4:** **Ohio Senate President Larry Obhof stated on March 21, 2018, “Unnecessary red tape and regulation is stifling the potential of Ohio’s small businesses, which in turn limits job opportunities for Ohioans. The legislature has a responsibility to make sure any rules or regulations created by state government have a specific purpose and intent to protect our citizens and do not create needless barriers to growth and opportunity”. We propose that if the regulations are implemented they be paired with removal of existing regulations at a 2:1 ratio of removed regulations to new regulations. (City of Delaware)**

**Response 4:** See Response 3.

**Comment 5:** **The webpage for the Olentangy watershed permit does not provide information about the new permit, giving the impression to visitors that there is no proposed change to the permit. (City of Delaware)**

**Response 5:** Thank you for your comment. This has been corrected.

**Comment 6:** **The Construction and Demolition Association of Ohio, Inc. (“CDAO”) is a statewide association of construction and demolition debris (“C&DD”) disposal and recycling facilities in Ohio. As a representative of the C&DD industry, the CDAO has an interest in assuring that programs, plans, guidance, studies, regulations and regulatory definitions affecting the C&DD industry in Ohio are appropriate.**

**The CDAO has many members that operate in many fields that are and will be affected by OEPA’s General Storm Water Permit, through Construction and Demolition (C&DD) Facility construction or the operation of construction or demolition sites. The customers of C&DD facilities, ie home builders, general contractors and road builders, are also directly influenced by these proposed regulations. Soil and water conservation districts may also be affected by the proposed permit, as they may be involved in reviewing the applications to the local authorities. The C&DD industry currently provides significant funding the Soil and Water Conservation Districts, adding additional unfunded burdens on the these organizations may result in the need for additional fees.**

**Of concern to the CDAO include any reference to “perpetual care/management” or any reference to undefined terms like**

**the term “Contaminated Soil” in the proposed general permit. Terms as such, create ambiguity that can influence other permits and create waste streams that the waste industry may not be capable of handling. The CDAO is also concerned about the unfunded work that is created by the additional submittal of information the OEPA and the local authorities. This action can create delays in construction and/or create the need for additional funds to the reviewing agencies.**

**The CDAO supports the comments of the coalition of Construction and Development Associations, who has provided the agency with comments in greater detail. Many modifications seem necessary in creating the final draft of the permit to reduce confusion, create consistency, and refrain from creating an undue burden on the regulated community. (Construction and Demolition Association of Ohio)**

**Response 6:** Adequate plan review has always been a part of sound local building and development programs and these changes do not increase the level of plan review and therefore should not create delays or increase the need for funding. Many of the proposed modifications should remove uncertainty and assist in clarifying local reviews. Ohio EPA does not anticipate any increased burden to Soil and Water Conservation Districts because of these changes. The term “contaminated soil” has been replaced with “known contaminated soil”. The term “perpetual” has been changed to long-term in the final permit.

**Comment 7:** **There are many sections in the draft permit that specify the number of days for when a condition applies. Where applicable, we recommend Ohio EPA include the word "calendar days" to further clarify each of these conditions.** *(American Electric Power)*

**Response 7:** Ohio EPA recognizes that days is calendar days unless otherwise noted in the text of the permit.

**Comment 8:** **We suggest replacing the word "you" with "operators", which is a defined term, throughout the permit.** *(American Electric Power)*

**Response 8:** In response to this comment, the following definition has been added to Part VII (Definitions) of the final permit:

“You” and “Your” as used in this permit is intended to refer to the permittee, the operator or the discharger as the context indicates and that party’s responsibilities.

**Eligibility**

**Comment 9:** **Part I.A.** Although we understand the specific, more stringent requirements are only applicable to the named watersheds, we object to the incorporation of the Big Darby and Olentangy storm water permitting requirements into the statewide permit. First, the statewide Construction Storm Water General Permit (CGP) includes general design requirements that are intended to apply across the state and becomes more complicated and onerous when referencing specific permit requirements or individual watersheds in an appendix.

Second, we believe that the incorporation of requirements applicable to only the Big Darby and Olentangy watersheds would open the door to the potential inclusion of similar requirements for additional watersheds in the future. This was acknowledged by Ohio EPA at the public hearing on the CGP.

Finally, we are concerned that the Big Darby and Olentangy watershed-specific requirements impact private property rights, and that objections to the incorporation of these watershed-specific requirements into the statewide permit, whether now or in the future, could result in legal challenges that might potentially impact the ability to obtain permit coverage for projects in other watersheds and, therefore, adversely affect the viability of the statewide permit.

For these reasons, we strongly urge the Ohio EPA to maintain separate storm water permits for the Big Darby and Olentangy watersheds, and to develop separate storm water permits for any additional watersheds that, in the opinion of the agency, require enhanced protection in the future. (*Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio*)

**Response 9:** Ohio EPA assures that watershed specific requirements apply only to the areas designated within the appendices and that no application of these additional or higher standards would be applied to the statewide standard without a sufficient public review process. Ohio EPA is selecting to proceed in combining the three permits to place future renewals on the same cycle. Ohio EPA also is maintaining the current geographic separation of the watershed specific requirements and has separated these within the permit document with watershed specific appendices.

**Comment 10:** **Part I.A.** Clarification is needed on whether sites within the watershed covered by the Olentangy GCP will be able to

**follow that permit if it is not expired before the renewal GCP is issued.** (Franklin County Engineer's Office)

**Response 10:** The Portions of Olentangy River Watersheds CGP (OHCO00002) expires on May 31, 2019. Projects can continue to obtain coverage under OHCO00002 until May 31, 2019. After this date, such projects would apply for coverage under OHC000005.

**Comment 11:** **Part I.A.** Although the Ohio Utilities Group (OUG) members understands the more stringent requirements are applicable to the named watersheds (Appendix A (Big Darby) and Appendix B (Olentangy)), OUG members seek clarification that these requirements will not be applied to all projects. With the blending of the three permits, the general construction permit is elevated to a new level of complexity, which is more in line with the Darby general permit. OUG members suggest that Ohio EPA continue to keep these three permits separate. In the alternative, OUG members suggest that non-Darby and non-Olentangy projects be excluded from some of these provisions that are above and beyond the general construction permit. (*Ohio Utilities Group*)

**Response 11:** Ohio EPA affirms that the conditions contained in the appendices are only applicable to the special watershed areas designated within them. We appreciate your concern and can assure you that the current NOI application has multiple fields that will be used to ensure that special conditions are only applied to these watershed areas.

**Comment 12:** **Part I.B1.** Site development often includes pre-construction activities that do not disturb the ground and therefore are not required to be covered under the construction storm water general permit. To further clarify eligibility, we recommend the following sentence in Part I.B.1 of the draft permit be revised to "For the purposes of this permit, construction activities include any clearing, grading, excavating, grubbing and/or filling activities that ~~disturb~~ **result in ground disturbance of one or more acres.**" (American Electric Power)

**Response 12:** Ohio EPA did not incorporate the suggested change as this is the current understanding and application of the existing language.

**Comment 13:** **Part I.B.1.** Up to this point there have been allowed exceptions to the requirements of the permit for routine maintenance. However, there is no language in the permit that defines what is considered "routine maintenance" and what is not maintenance. Additionally, the US EPA has defined in its latest Construction General Permit small and large construction activities and both definitions include the language "...construction activity does not include routine maintenance that is performed to maintain the original line

**and grade, hydraulic capacity, or original purpose of the site.” As this language is included in both definitions it is apparent that the intent of the general permits was not to include projects that do not change the current drainage patterns. (Ohio Turnpike and Infrastructure Commission)**

**Response 13:** This change will be addressed outside of the permit, either in an approved L&D manual addition (referenced in the permit as an acceptable alternative for linear transportation projects) and in material explaining routine maintenance on Ohio EPA’s website.

**Comment 14:** **Part I.B.4. This permit part highlights the exceptions to discharges composed entirely of storm water. The City suggests adding waterline repairs (emergency and non-emergency) along with saw-cutting and saw slurry control as these relate to street repairs and curb cuts. (City of Columbus)**

**Response 14:** The list of allowable non-storm water discharges stated in Part I.B.4 of the general permit is a list created by U.S. EPA, which are typical discharges that will not violate water quality standards. This list is also found in OAC rule 3745-39-04(D)(2)(d)(ii)(a). Discharges of potable water from waterline repairs is part of the list, Ohio EPA believes that discharges from “saw-cutting and saw slurry control” will likely violate Ohio’s water quality standards. Ohio EPA did not make the suggested change as other construction related discharges, such as concrete wash out, are not acceptable.

#### **Authorization & Notice of Intent Requirements**

**Comment 15:** **Part I.E.1 and Part I.F. It is unnecessary for the submittal of SWP3s. The permit proposed submittal of a SWP3 with each NOI for coverage. USEPA considered a similar proposal in 2016 during the renewal of its CGP. The agency ultimately dropped this provision after receiving many comments from regulated entities and the U.S. Small Business Administration. We strongly suggest Ohio EPA also remove this provision.**

**Submitting a SWP3 before construction has even begun means this information is already stale. USEPA acknowledged in 2017 in its final CGP that the SWP3 is a “living, breathing document” that can and should be updated regularly to reflect changing site conditions. Thus, citizens groups or inspectors attempting to use “on file” SWP3s to investigate current site conditions will be using an inaccurate, misleading picture. Plans should continue to be required to be kept on site and be made available for review upon request. Currently, permittees must develop SWP3s,**

but are only required to provide copies, upon request to Ohio EPA. Storm water plans must be revised frequently to comply with the terms and conditions of the CGP. Enforcement tips should come from people who observe pollutant discharges that have environmental consequences – not from well-meaning citizens who scan outdated paperwork online. The current process already allows engaged citizens to access updated copies of SWP3 documentation at their request.

Providing the public with access to initial jobsite SWP3s will not improve the government's enforcement or permit requirements. Instead, it could lead to 'false alarms' and dilute enforcement resources. Further, mandating SWP3 e-reporting requirements would impose unreasonable, unprecedented paperwork burden for permittees. (*Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio*)

**Part I.F.1.a.** It was not clear in the proposed permit text whether the review and approval of SWPPP plans will be required as a pre-requisite for start of construction. If review is required, it is unclear which government entity would be responsible for conducting the review. This isn't an issue if the submission to the MS4 community is considered a concurrent review by the OEPA. However, there is an issue if the MS4 must approve the SWPPP before submission to the OEP A. Requiring individual reviews by MS4's could present unnecessary cost and delays for the construction industry. Is there assurance that each MS4 has enough qualified staff to review every plan in a timely manner? Does the state have funding available to assist with hiring and training additional staff to meet this increased demand? Moreover, USEP A 2017 CGP does not include such provisions for plan review at any site level, and this is an unnecessary overreach beyond minimum federal standards. The OEP A should remove the requirement of submitting an approved SWPPP and Operation and Maintenance plan (O&M) with the Notice of Intent (NOI) submission and allow for submission of a preliminary SWPPP and O&M along with the potential for updates. Furthermore, the OEPA should clarify in the construction storm water permit that the approval of an SWPPP is not a required prerequisite to obtaining an approval letter granting coverage under the statewide permit. (*Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio*)

**Response 15:** Based on comments received, Ohio EPA has elected to not require the submission of a SWP3 with the NOI application unless the construction activity is in the Big Darby Creek watershed or specified portions of the Olentangy River Watershed. This approach continues the previous NOI application requirements throughout the entire state. The language in OHC000005 has been updated to reflect this change.

**Comment 16:** **Part I.E.1 and Part I.F. The concern here is if the regulated entity is solely responsible for submitting the completed SWPPP via the Ohio EPA STREAMS portal and the SWP3 cannot be uploaded by the SWP3 designer this could result in the regulated entity not uploading the required SWP3. As such, Ohio EPA would not receive this document as required by the draft permit.**

**It is recommended to allow the SWP3 designer to upload the completed SWP3s on behalf of the regulated entity. Allow the SWP3 designer to obtain a PIN for uploading these plans on behalf of the regulated entity. (American Council of Engineering Companies of Ohio)**

**Response 16:** The SWP3 designer can upload the SWP3 onto the NOI application in Ohio EPA's eBusiness Center. A signature PIN is not required to do this. Once the NOI application is complete with the uploaded vicinity map and SWP3, then the SWP3 designer can save the NOI application and delegate it to his/her client to submit. Ohio EPA has developed detailed guidance to do this and can be found at <http://epa.ohio.gov/dsw/ebs.aspx#170645012-streams-applications>.

Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.

**Comment 17:** **Part I.E.1 and Part I.F. Requiring a completed SWP3 with the NOI is a positive step and clearly defines the requirement. (Envi-Environmental)**

**Response 17:** Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.

**Comment 18:** **Part I.E.1 and Part I.F. Recommend a joint notification within NOI form (including engineer contact information) to assist with inspection/contact information for the most current SWPPP, etc. (BIA of Central Ohio)**

**Response 18:** Thank you for this suggestion and Ohio EPA will evaluate the implications and feasibility of this during this permit term.

**Comment 19:** **Part I.E.1 and Part I.F.** Due to the number of transmission and generation projects taking place in Ohio, we frequently obtain coverage under the construction storm water general permit. Since 2007, AEP and its subsidiary companies have applied for coverage for over 200 projects. Our projects typically have aggressive construction schedules to meet mandated reliability of the electric transmission grid or to ensure uninterrupted service to our customers. The draft permit includes a new provision under Part I.F.1 that a completed Storm Water Pollution Prevention Plan (SWP3) must be submitted with the Notice of Intent (NOI). However, a technical review of a project SWP3 by Ohio EPA prior to NOI approval could severely impact the timeframe necessary for Ohio EPA to grant coverage under the permit and consequently, delay project schedules.

It is our understanding that Ohio EPA is not changing the processing of NOI applications and will not conduct a technical SWP3 review under Part I.F.1. except for projects located in the Big Darby and Olentangy Watersheds and within the 45-day stipulated period for them. We support this approach. Further, we do not see an immediate benefit in requiring permittees to upload SWP3s for projects outside of those watersheds. We note that USEPA had requested comments during the 2017 renewal of the federal general permit on the question of requiring the initial SWP3 to be made publicly available by requiring operators to either post it online on a website or submit it to EPA. Ultimately, USEPA did not include such a requirement in the final permit. We recommend that the electronic NOI form only include a checkbox that requires the applicant to certify that a SWP3 meeting the requirements established in the permit has been prepared prior to the submittal of the application. Alternatively, and/or to the extent that Ohio EPA ultimately requires submittal of SWP3s, we request the agency clarify that this applies only to the initial project SWP3 and that subsequent amendments or revisions to the SWP3 made after coverage is granted (other than increases in disturbed acreage) only be made available if requested by Ohio EPA. Continual uploading of amended SWP3s would be overly burdensome. (American Electric Power)

**Response 19:** Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.

**Comment 20:** **Part I.E.1 and Part I.F.** That SWPPP's for an approved NPDES permit coverage area, can be filed on a site for activities such as clearing and/or mass grading, and then updated to include final engineering if the disturbed coverage area indicated on the initial approved NOI hasn't changed. This includes

**allowing for the updating of the SWPPP and O&M (operations and maintenance) manual as design progresses. This will result in not having to submit multiple NOI's for the same project and rely on developers to submit multiple Notice of Termination's.** (BIA of Central Ohio)

**Response 20:** A SWP3 must be developed for each NOI application. If a SWP3 can be prepared for the clearing and for the "final engineering" before the NOI application is submitted, then the NPDES general permit coverage can address both phases of activity. Although the SWP3 can change as the project continues, the SWP3 must include details about the final engineering BMPs before the NOI is submitted. If this cannot be done and a second SWP3 is needed, then a second NOI application may be needed as well.

Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.

**Comment 21:** **Part I.E.1 and Part I.F. The EPA should make it clear on how O&M manuals are to be uploaded with the SWPPP. It is suggested that there is an option to submit separate.** (BIA of Central Ohio)

**Response 21:** This is not a new requirement and maintenance plans are currently included in the SWP3 by designers in construction drawings and/or in narrative documents. A maintenance plan needs to be in place prior to termination of the NPDES general permit coverage, but it does not need to be included with the SWP3 prior to initiation of construction activities.

Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.

**Comment 22:** **Part I.E.1 and Part I.F. Submitting the SWPPP with the NOI will offer little or no value but will significantly increase the cost for Public Transportation Linear Capital Improvement Projects. Under current regulations, the contractor who is selected for a project has the right to determine the means, methods and sequence of construction. For that reason, we require the contractor to develop a SWPPP after award of the contract but before the start of construction.**

**Preparing the SWPPP prior to awarding the project would be futile. The pre-award version would bear little resemblance to the version filed after the selected contractor determines the means, methods and sequence of construction. Therefore, the money and effort spent to develop the SWPPP in advance of the contract award would be largely wasted and additional money would need to be spent through the construction**

**contract to redo the SWPPP.**

**If the above comments are ignored and the OEP A insists that the SWPPP be submitted with the NOI, please commit to reviewing each SWPPP in a timely manner and providing feedback to the Permittee. If the OEP A is unwilling to make that commitment, it is unreasonable to require the submission with the NOI. (Franklin County Engineer's Office)**

**Part I.E.1 and Part I.F. The agency should consider an effective means to ensure that the initial submittal of the SWP3 to the MS4 Permittee (MS4) is not the final version on file with the agency. Changes to the SWP3 may be required by the MS4 and thus the approved version may differ from that which is on file with the agency. (City of Columbus)**

**Response 22:** Ohio EPA has a memorandum of understanding with ODOT to accept an initial base drainage plan only rather than a fully developed SWP3 to allow for contractor development of SWP3.

Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.

**Comment 23:** **Part I.E.1. It is requested that the NOI coverage letter include a disclaimer that Ohio EPA's authorization does not replace the local MS4/jurisdiction's approval process. (City of Toledo)**

**Response 23:** Ohio EPA recognizes this fact and will consider whether to add this to the authorization letter.

**Comment 24:** **Part I.F.1.a. The draft permit requires the SWPPP to be electronically submitted with the NOI. The Ohio Turnpike and Infrastructure Commission's process currently includes a starting template SWPPP with the bid documents. Upon award to a contractor, the contractor's hired SWPPP inspector is to modify SWPPP bid template with the applicable project information and modify the SWPPP by adding or modifying any required construction site runoff controls to construct the project according to the contractor's estimated means and methods. The language in the permit should be modified to allow the most current SWPPP available at the time of the NOI submission. (Ohio Turnpike and Infrastructure Commission)**

**Response 24:** Please see Response 22.

**Comment 25:** For "... and portions of the Olentangy Watershed)...", Add "River." We assume this should be stated as "and portions of the Olentangy River Watershed" here and throughout the permit. (*The Nature Conservancy*)

**Response 25:** In response to this comment, the final permit has been revised to address this error.

**Comment 26:** **Part I.F.5. Will the Ohio EPA notify permittees of continued coverage under OHC000005 after submittal of a timely renewal application? Also, it is our understanding that the renewal process will not require an upload of a project-specific SWP3 for projects permitted since 2013. See item 5 under the following section. (Comment: 5. It is our understanding that project SWP3s must be updated within 180 days after the effective date of the renewed permit and that coverage under OHC000005 will not require submittal of project-specific SWP3s with the application, since a renewal NOI is required within 90 days of the effective date of the renewed permit.)** (American Electric Power)

**Response 26:** In response to comments, Ohio EPA has revised Part I.F.5 to allow 180 days from the effective date of OHC000005 to submit a NOI application to renew coverage if needed. Ohio EPA will provide renewal notifications to all active permits that OHC000005 has been issued and provide instructions on how to continue coverage if needed.

**Comment 27:** **Part I.F.5. The EPA should implement an appeal process if a developer misses the 90-day window for permit coverage renewal.** (BIA of Central Ohio)

**Response 27:** Please see Response 26.

### **Non-Numeric Effluent Limitations**

**Comment 28:** **Part II.A. Throughout this section are references to minimizing soil exposure, disturbances, sediment discharges, and soil compaction. However, the term "minimize" is vague and subject to interpretation. The City would appreciate a clarification as to how to quantify the term "minimize".** (City of Columbus)

**Response 28:** Each of these terms requires an evaluation of circumstances against required controls. These non-numeric effluent limitations are generally provided more definition in other parts of the permit and a failure to minimize any of these is shown by the lack of controls, lack of timely seeding, uncaptured sediment or erosive runoff.

**Comment 29:** **Part II.A.1. Non-Numeric Effluent Limitations (A.)(1) requires you "Control storm water volume and velocity within the site to minimize soil and stream erosion:" At issue here is that in**

a situation where you are in a lower portion of a watershed and there is activity in the upstream watershed that causes increased flow through your site that are required to manage the stream flow. There needs to be a watershed apportionment per the acres disturbed within an entire watershed. Upper watershed activity that could also increase stream flow include releases from flood districts and/or dams. (Envi-Environmental)

**Response 29:** This is understood, there is no expectation that offsite areas can be managed except that some controls are required to be sized according to the contributing drainage area whether onsite or offsite.

**Comment 30:** Part II.A.2. Requires the permittee to “Control storm water discharges, including both peak flow rates and total storm water volume.” The agency should specify how “minimize” is determined. Departures or disruptions from or to many flows (base flows, channel forming flows) are detrimental to stream quality and survival of stream life. The Agency should establish release rates that are protective of stream quality under all flow conditions.

While peak flows and total volume are important, the whole range or flows is critical to lessening the impacts of stormwater. The National Research Council (2010) stated:

“The full distribution and sequence of flows (i.e., the flow regime) should be taken into consideration when assessing the impacts of stormwater on streams. Permanently increased stormwater volume is only one aspect of an urban-altered storm hydrograph. It contributes to high in-stream velocities, which in turn increase streambank erosion and accompanying sediment pollution of surface water. Other hydrologic changes, however, include changes in the sequence and frequency of high flows, the rate of rise and fall of the hydrograph, and the season of the year in which high flows can occur. These all can affect both the physical and biological conditions of streams, lakes, and wetlands. Thus, effective hydrologic mitigation for urban development cannot just aim to reduce post-development peak flows to predevelopment peak flows.” (NRC 2010, Executive Summary, page 6)

Release rates must protect downstream channel integrity and not cause channel scour or instability. The Agency should establish and clarify how the stormwater BMP release rates improve upon stream protection required for stormwater permits. The release rates must prevent unstable channels, and protect stream integrity and biological diversity. A combination of release rates and groundwater recharge is

**needed to protect base flows. (The Nature Conservancy)**

**Response 30:** Part III of the permit contains the specific design criteria to meet the objectives of the Part II. Non-Numeric Effluent Limitations. The permit requires the permittee to develop and implement the SWP3 in accordance with Part III of the permit to satisfy these non-numeric effluent limitations.

**Comment 31:** **Part II.B. It appears as if Ohio EPA (agency) does specify a maximum area or percentage of site that may be exposed at one time. To facilitate clarity, the agency ought to limit the amount of disturbance at any one time to five (5) acres or less - as has been done in the USEPA 2017 CGP, Section 2.2.14. (City of Columbus)**

**Response 31:** This was not in the draft permit and Ohio EPA has not made this change. Phasing is considered a BMP under the permit and is encouraged to the maximum extent practical, however to propose a limit would be extremely difficult to impose in association with the dynamics of large construction activities.

**Comment 32:** **Part II.F. This section states that when discharging from sediment basins, one should use "outlet structures that withdraw water from the surface .... " The City suggests replacing this phrase with the term "skimmer". (City of Columbus)**

**Response 32:** Ohio EPA evaluated this comment, but no changes were made to the final permit as the current language meets the intent.

**Comment 33:** **Part II.G. "So that receiving stream's physical, chemical and biological characteristics are protected, and stream functions are maintained, post-construction storm water practices shall provide perpetual management of runoff quality and quantity."**

This new permit term is problematic due to the "perpetual" clause, which is further expanded on in various other sections of the draft permit. Requiring perpetual management of runoff quality and quantity is concerning for several reasons. First, it significantly expands the permitting obligation, from applying only during construction activities to potentially applying long after construction activities have ceased.

Moreover, the idea of "perpetual" management is poorly applied within the scope of this permit, resulting in confusion over what "perpetual management" actually requires.

Lastly, this permit term appears to exceed the scope of Ohio EPA's regulatory jurisdiction, as courts have ruled that EPA does not have jurisdiction to regulate runoff quantity. Courts

have already ruled that storm water flow and volume are not storm water pollutants. The OMA supports the comments of GM that further clarify Ohio EPA's regulatory jurisdiction in this regard.

The OMA requests that Ohio EPA remove this requirement from the permit, or at a minimum, clarify with specificity what "perpetual management" seeks to require of permittees. *The Ohio Manufacturing Association*

**Part II.G.** Post-Construction Storm Water Management Controls (G) states "So that receiving stream's physical, chemical and biological characteristics are protected, and stream functions are maintained, post-construction storm water practices shall provide perpetual management of runoff quality and quantity. This is a new section. See comments 3 & 4 above. This responsibility can only be borne by an Owner. (*Envi-Environmental*)

**Response 33:** Ohio EPA adopted this language in 2003 when post-construction requirements were first adopted. The term "perpetual" was part of that original language and has the intent that post-construction BMPs would be designed and constructed for continued function even after the construction has ceased and permit coverage has closed. In consideration of comments this term has been changed to long-term in the final permit.

**Comment 34:** **Part III.A.** References that the SWP3 is subject to an antidegradation review. It is unclear what this means. Is OEPA requiring an antidegradation addendum with SWP3? (*Envi-Environmental*)

**Part III.A.** SWPPPs should not be required to identify activities requiring authorization under Section 401. A SWPPP is not a wetland delineation, nor should it be required to substitute for a wetland delineation. The statewide construction general permit should not blend the storm water and 401 programs together. They are separate programs and should be dealt with separately. The requirement that a SWPPP identify activities requiring authorization under Section 401 should be deleted from the statewide permit. (*Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio*)

**Response 34:** No, the SWP3 is not subject to an antidegradation review, but the applicant does need to identify activity associated with their project that are authorized under CWA Section 401 and subject to an antidegradation review. In addition, specific storm water

management controls are considered to ensure all resources are adequately protected.

### **Timing**

**Comment 35:** **Part III.B.** We suggest replacing the last two sentences of the first paragraph with this for clarity: "If a waiver has been granted, the SWP3 must be completed *and implemented* prior to the initiation of ~~construction~~ *land disturbance* activities. ~~The SWP3 must be implemented upon initiation of construction activities.~~" (*American Electric Power*)

**Response 35:** Ohio EPA evaluated this comment, but no changes to the final permit were made as the permit is intended to address earth disturbing activities.

**Comment 36:** **Part III.B.** This permit part identifies "An acceptable SWP3 shall be completed and submitted to the applicable regulated MS4 entity prior to the timely submittal of an NOI and SWP3." Because the review and approval process varies between MS4 entities, we recommend this provision be revised to be consistent with Part I.F.4 of the draft permit stating "If required by the MS4, an acceptable SWP3 shall be completed and submitted to the applicable regulated MS4 entity ~~prior to the timely submittal of an NOI and SWP3.~~" (*American Electric Power*)

**Part III.B.** Despite the planning nature of the SWPPP and expectation that it will be revised/modified throughout the term of the active construction operations subject to the permit, Ohio is proposing, in Part III.B of the Draft CGP, that the SWPPP be submitted to the MS4 as if it was a directly enforceable plan prior to submitting it with the Notice of Intent (NOI) ("An acceptable SWPPP shall be completed and submitted to the applicable regulated MS4 entity prior to the timely submittal of an NOI and SWPPP.") The previous permit required the completion of an acceptable at the time of NOI submittal, which makes sense. But the requirement to submit the SWP3 to the MS4 prior to submitting an NOI implies a review and approval step (of a planning document) by the MS4 with no specified timeframe for completion.

While GM recognizes the important role that the MS4 play and its regulatory obligations under the state stormwater permitting program, this subsection as written places undue resource and timing burdens on MS4s, let alone construction permittees. Limited MS4 resources could unduly prolong this review process and the start of construction, costing the site

**owner/operator or permittee significant resources during this “hold.” In addition, what occurs if the construction stormwater directly discharges to state waters and not into an MS4? What is the purpose of submitting a SWPPP to the MS4? GM believes this proposed revision is unduly burdensome and unnecessary and, accordingly, requests that it be deleted. (General Motors)**

**Response 36:** Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.

**Comment 37:** Part III.B. It is requested the Ohio EPA remove the requirement of submitting an approved SWPPP and O&M with the NOI submission and allow for submission of a preliminary SWPPP and O&M manual. Furthermore, allow for submission of updates to the SWPPP and O&M, alter plans are approved by the MS4 community (this submission should be done through the eBusiness system). While we understand Ohio EPA's objective in reviewing the "final" MS4 approved SWPPP, the agency should allow for submittal prior to approval. There are all sort of timing issues and concerns about what constitutes "approval". Ohio EPA is obligated to review what it is submitted and if the MS4 requires amendment the SWPPP can then be updated with Ohio EPA. Additionally, these are supposed to be "living" documents that are adjusted to meet developing site issues.

**Bottom line is that it is our understanding that this provision is not required by USEPA and this administration has been clear that Ohio requirements should not exceed federal standards. (BIA of Central Ohio)**

**Response 37:** Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.

**Comment 38:** Part III.B. Ohio EPA indicated that current permittees must refile a complete notice of intent application as well as a complete storm water pollution prevention plan (“SWP3”) once the existing permit expires. OUG members object to this requirement as the SWP3 is a living document and is revised frequently. This requirement is unreasonable. The previous permit simply required that the permittee review and update the SWP3. Ohio EPA should continue with this practice and only require permittees to refile their Notice of Intent (“NOI”).  
*(Ohio Utilities Group)*

**Response 38:** Your suggestion has been accepted and current permittees renewing coverage will not have to submit their SWP3, although they will still need to renew their coverage by submitting a renewal

NOI within 180 days of the effective date of OHC000005. An NOI application fee will only apply to permittees renewing coverage that is greater than 5 years old.

**Comment 39:** **Part III.B.** It is our understanding that project SWP3s must be updated within 180 days after the effective date of the renewed permit and that coverage under OHC000005 will not require submittal of project-specific SWP3s with the application, since a renewal NOI is required within 90 days of the effective date of the renewed permit. (American Electric Power)

**Response 39:** SWP3 updates are required within 180 days after the effective date of OHC000005.

Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.

Please see Response 42 for revisions made to the Part III.B draft permit language regarding “grandfathering” scenarios.

**Comment 40:** **Part III.B.** “*An acceptable SWP3 shall be completed and submitted to the applicable regulated MS4 entity prior to the timely submittal of an NOI and SWP3. The SWP3 shall be updated in accordance with Part III.D. Submission of a SWP3 does not constitute review and approval on the part of Ohio EPA.*”

The draft permit requires that a permittee submit the SWP3 to the appropriate municipal separate storm sewer systems operator prior to submitting to Ohio EPA. The permit language lacks specificity and therefore creates confusion. It is unclear whether the permittee must first wait for the MS4’s acceptance or approval prior to submittal to Ohio EPA. Such a double approval system has the potential to cause significant permit delays and create confusion among the permitted community. Further concerning, it also appears that this additional permit term will require MS4s to now approve the hydrological designs in the SWP3. It is questionable whether all MS4s even have the technical expertise or requisite funding to complete such a technical review. *The Ohio Manufacturing Association.*

**Part III.B.** The new permit requires that a permittee must submit an acceptable SWP3 to a Municipal Separate Storm Sewer System “MS4” (where there is an MS4) before submitting the NOI and SWP3 to Ohio EPA via the eBusiness Center. The Utilities request that Ohio EPA provide a map on the Storm Water Program website of all active MS4s as an aid for quick identification of MS4s for permittees. In addition,

**OUG members request that Ohio EPA clarify how much coordination is needed with the MS4 before sending in the NOI as MS4 coordination can be lengthy. Of primary concern to the Utilities is that transmission line projects may cross only a small area of a MS4 while the rest of the project is outside of the MS4; if there is a delay with the MS4, this could delay the entire project. (Ohio Utilities Group)**

**Response 40:** In response to this comment, the permit has been changed to read “An acceptable SWP3 shall be completed and submitted to the applicable regulated MS4 entity (**for projects constructed entirely within a regulated MS4 area**) prior to the timely submittal of an NOI. The SWP3 shall be updated in accordance with Part III.D. Submission of a SWP3 does not constitute review and approval on the part of Ohio EPA.”

Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.

**Comment 41:** **Part III.B. Need to submit Storm Water Plan to MS4 prior to submittal of NOI and SWP3 to Ohio EPA. Can MS4 put construction activities on hold if Ohio EPA approved the NOI and MS4 does not approve the SWP3? (Envi-Environmental)**

**Response 41:** Please see Response 40.

**Comment 42:** **Part III.B. The draft permit requires an update of the SWP3 to reflect the new permit and we appreciate that Ohio EPA understands in some situations it will be infeasible to comply with a specific requirement of the renewed permit. While all projects covered under the current general permit have been required to address post-construction storm water runoff and consider installation of structural BMPs, only large construction projects (greater than 5 acres) have been required to implement the specific structural post-construction practices to address water quality volume runoff. Consequently, the changes proposed in the draft permit could have significant impacts to budget and schedule for projects that are in advanced stages of planning, detailed design, or execution. These changes could feasibly require substantial redesign, re-budgeting, purchase of additional property, as well as potentially impacting project implementation particularly for projects currently permitted, with awarded construction contracts, or under construction.**

It is our understanding that projects currently designed and permitted under the conditions of OHC000004 and seeking renewal coverage under OHC000005 will not be required to be redesigned and reconstructed to meet the new post-

construction calculation and structural control conditions. However, for projects not yet permitted but where design has been completed and which are currently well into the project execution phase (e.g., where construction bids have been requested, where contracts have been awarded, etc.), we are very concerned that reconsideration of any significant design aspects will result in untenable impacts or delays to a project. We propose that we would document the infeasibility of such significant design changes in the SWP3.

If our understanding or approach is not accurate as described, we request Ohio EPA provide relief from the post-construction requirements in these situations in the final issued permit. (American Electric Power)

**Part III.B.** The second paragraph of Part III.B includes a note with examples of conditions that OEPA considers to be examples of permit conditions in the renewed permit that may be deemed infeasible to certify compliance upon renewal. This is identical to the language in the permit currently in effect. GM requests adding another example that consider alternative BMP's that had already been installed in compliance with the previous permit: "(3) alternative BMPs approved under the previous permit that have already been installed". (General Motors)

**Part III.B.** The date at the end appears to be a typo and we recommend the language is revised to " ... (2) Sediment settling pond design requirements, if the general permit coverage was obtained prior to April 21, 2013~~8~~ and the sediment settling pond has been installed.)" As written it appears to require, for example, that ponds already installed under the current permit (April 2013 to April 2018) would need to be reconstructed. (American Electric Power)

**Part III.B.** Ohio Utilities Group (OUG) members seek clarification regarding what needs to be refiled with Ohio EPA within 90 days of the expiration of the old permit. The new permit essentially requires an overhaul of the previous SWP3 because it must address the new requirements. For those cases where the contract has already been awarded or construction has commenced, and the permit is less than 5 years old, can Ohio EPA clarify if a permittee does not have to redesign the SWP3 to meet the new permit requirements? (Ohio Utilities Group)

**Part III.B.** Clarification is needed for the process and requirements for renewal within 90 days of the new permit for existing permits, and 180 days for existing SWPPPs. We believe that the Draft CGP places an undue burden on permit applicants that have existing jobsites covered with the 2013

**CGP. We believe additional time should be provided to jobsites already under construction and that it should be made clear in the Draft that existing jobsites will not be required to retrofit stormwater facilities to comply with the new CGP.** *(Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio)*

**Part III.B. That the Ohio EPA waive this change in requirements for all future phases of an overall common area of development where the runoff from these phases are tributary to a regional BMP that was approved by the MS4 community within 180 days of the new permit effective date and the regional BMP was constructed within two (2) years of the new permit.** *(BIA of Central Ohio)*

**Part III.B. Projects permitted under the current or previous permits will be required by this provision to update their SWP3 if construction is not complete and the site stabilized within 180 days after the effective date of OHR000005. Several local MS4s have advised that they will interpret this language to mean that existing on-going projects will be required to update their SWP3 and comply with the new post-construction requirements. It is recommended to allow projects or phases of projects that are in construction and that have been legally permitted under the current or previous permits to not have to update their SWP3 to comply with new requirements of OHC000005 regardless of length of schedule.** *(American Council of Engineering Companies of Ohio)*

**Part III.B. Grandfathering Projects Already In Development**  
The OEPA should not underestimate how far in advance projects are designed and should either explicitly state grandfathering rules or explicitly leave it to the judgement of the MS4. In private subdivision development, projects are often built in phases over many years with the post construction BMP designed months in advance of the initial phase of construction and typically constructed in the initial phase. When this has occurred, the BMPs should not have to be redesigned if the initial preliminary design has been submitted to the MS4 for review within 30 days after the GCP renewal. The preliminary design cost estimates for public projects are often done years in advance for the purpose of submitting funding applications. The OEPA should grandfather public projects when it can be shown that funding approval was based on an application submitted before the GCP renewal. *(Franklin County Engineer's Office)*

**Part III.B.** We have a concern over the new permit going into effect 13 months prior to the expiration of the current Olentangy River permit, which expires on May 31, 2019. Projects under various stages of development prior to the new statewide permit going into effect are proceeding with design using the current Olentangy permit, with the belief that approval could be gained under those conditions up until the end of May 2019. Some designs may have been completed even prior to the new statewide permit being released in draft format for public comment, especially multi-phased developments. Therefore, to prevent the need for re-designs, we recommend that the current Olentangy permit remain in effect until May 31, 2019, after which time coverage could fall under the proposed statewide permit. (City of Delaware)

**Part III.B.** The change to the Water Quality Volume (WQv) calculation, increasing rainfall from 0.75 inches to 0.90 inches, and the change to require post-construction practices to treat 100% of the WQv is a significant and unjustified change. Any increase in the final permit should be clarified to apply prospectively; i.e., no modification would be needed for existing post-construction BMPs (e.g., such as increasing the detention volume of a basin). It is also unclear how this revised requirement pertains to in-process projects that are renewing coverage under more stringent conditions (i.e., post-construction BMPs either installed or approved for installation under the previous permit but no longer meet the post-construction requirements of the renewed permit). GM requests confirmation that any such changes apply only prospectively, as well as the basis for these more conservative criteria. (*General Motors*)

**Part III.B.** Due to the significant changes in post-construction BMP designs proposed under OHC000005, should April 21, 2003 be changed to the effective date of OHC000005?

We request that OEPA consider allowing the completion of projects under previous permit conditions so long as the SWPPPs, being part of the construction plans, received formal approval by an MS4 or OEPA and were under construction within 180 days of the effective date of the new permit.

To comply with MS4 permits, many MS4 communities incorporate by reference OEPA's effective CGP as part of their stormwater quality regulations. Until the effective date of a new CGP, MS4s are approving SWP3s as part of the plan review process based on the current CGP that is in effect at the time of plan review. This section of the permit currently

**requires compliance with the new permit within 180 days of the permit effective date regardless of where in the development process a project exists at the time (i.e., planning, design, approved plans, or construction). The re-planning, re-design and re-submittal of once-approved development plans places an undue burden on developers and MS4s alike that were in full compliance with their respective CGP and MS4 permit requirements. (City of Columbus)**

**Part III.B. For the first paragraph on page 24 of redline/strikeout version, it is requested that Ohio EPA provide clear direction on what to do if an existing structural post-construction BMP is designed for WQv in accordance with OHC000004 (or earlier), but its entire drainage area still includes future development lots that are: A) part of the larger common plan of development; and/or B), not part of the larger common plan of development. (Northeast Ohio Regional Sewer District)**

**Response 42:**

Regarding the current Portions of Olentangy River Watershed CGP (OHCO000002), please see Response 10.

Revisions were made to the Part III.B draft permit language regarding “grandfathering” scenarios. The final permit includes the following examples of OHC000005 permit conditions that would be considered infeasible for permittees to update their SWP3:

- OHC000005 post-construction requirements, for projects that obtained NPDES construction storm water coverage and started construction activities prior to the effective date of this permit;
- OHC000005 post-construction requirements, for multi-phase development projects with an existing regional post-construction BMP issued under previous NPDES post-construction requirements. This only applies to construction sites authorized under Ohio EPA’s Construction Storm Water Permits issued after April 20, 2003;
- OHC000005 post-construction requirements, for renewing or initial coverage and you have a SWP3 approved locally and you will start construction within 180 days of the effective date of this permit;
- Sediment settling pond design requirements, if the general permit coverage was obtained prior to April 21, 2013 and the sediment settling pond has been installed; or
- Case-by-case situations approved by the Director.

**SWP3 Signature and Review**

- Comment 43:** **Part III.C.** Plan signature and retention onsite states “The SWP3 shall include the certification in Part V.H., be signed in accordance with Part V.G., and be retained on the site during working hours.” The references to Part V.G. and V.H. are not in this draft document. Signature requirements are in G.1 on page 40 of 69 of the draft general permit. (*Envi-Environmental*)
- Response 43:** Ohio EPA reviewed this comment and both the Part V.H reference to certification language and the Part V.G signature requirement are correct references in the permit. No changes to the final permit were made.
- Comments 44:** **Part III.C.2.** Further, during construction, some Utilities have noted that revisions to the SWP3 are required. If Ohio EPA does require submission of the SWP3 to eBusiness Center (see comment above), the Utilities seek clarification on whether they have to resubmit every revised SWP3 to Ohio EPA via the eBusiness Center. This is unreasonable; thus, the Utilities request that they only have to submit the original to Ohio EPA and keep the revised SWP3 onsite and available for inspection. (*Ohio Utilities Group*)
- Response 44:** Please see Response 15 regarding the revised requirement in the final permit pertaining to submittal of a SWP3 with the NOI application.
- Comment 45:** **Part III.C.3.** Plan Revision - The agency must be mindful of the review and approval process for each MS4. If the agency requires changes to the SWP3 but does not route them through any established review and approval process of the MS4, then the MS4 is in a position of having to enforce a plan that it neither reviewed, nor approved; or alternatively, enforce a plan that differs from that which the agency has updated. Otherwise, this will lead to confusion, and potential counterproductive efforts among all parties. (City of Columbus)
- Response 45:** Ohio EPA agrees that they must not have conflicting requirements for each storm water pollution prevention plan (SWP3). It has been Ohio EPA’s policy of allowing the MS4 to perform the SWP3 review and inspections for construction activities within their municipality. Ohio EPA can then focus their SWP3 review and inspections for construction activities outside of a MS4.

### Duty to Inform Contractors and Subcontractors

**Comment 46:** **Part III.E.** We suggest changing the word "work" in the last sentence to "land disturbing activities" as all "work" at a construction site does not necessarily affect storm water discharges. (*American Electric Power*)

**Response 46:** In response to this comment, Ohio EPA has made this suggested change in the final permit.

### SWP3 Requirements

**Comment 47:** **Part III.G.1.c.** The site description includes many new or expanded requirements. The Utilities would like clarification regarding why the additional site description requirements are necessary. In addition, the new permit requires a "measure" instead of an "estimate" of the impervious areas created by the construction area. The Utilities ask Ohio EPA to clarify what constitutes a "measure" as opposed to an "estimate." (*Ohio Utilities Group*)

**Response 47:** SWP3s contain scaled drawings of site improvements, a "measure" is more descriptive of what is included than an "estimate" and not a change in plan development practice.

**Comment 48:** **Part III.G.1.d.** *"Each SWP3 shall provide: ...d. Storm water calculations, including the volumetric runoff coefficients for both the pre-construction and post- construction site conditions,; and resulting water quality volume; design details for post-construction storm water facilities and pretreatment practices such as contributing drainage areas, capacities, elevations, outlet details and drain times shall be included in the SWP3; and if applicable, explanation of the use of existing post-construction facilities. Ohio EPA recommends the use of data sheets (see Ohio's Rainwater and Land Development manual and Ohio EPA resources for examples)."*

This new addition to the permit is highly prescriptive, as it appears that Ohio EPA now seeks to approve and regulate engineering for the hydrologic design of the site beyond construction and into the post construction life of the site. Such additional regulatory hurdle increases the burden on permittees and may cause delays in obtaining permits. Further, this section fails to address scenarios in which the local authorities and Ohio EPA are not in agreement with the plans of the permittee. More clarity is needed. (*The Ohio Manufacturing Association*)

**Part III.G.1.d.** This includes new criteria for describing stormwater runoff from the construction project area. Noted changes include stormwater calculations, including the volumetric runoff coefficients for both the pre-construction and post-construction site conditions and resulting water quality volume; design details for post-construction stormwater facilities and pretreatment practices such as contributing drainage areas, capacities, elevations, outlet details and drain times shall be included in the SWP3; and if applicable, explanation of the use of existing post-construction facilities.

Ohio EPA recommends the use of the data sheets (see Ohio's Rainwater and Land Development manual and Ohio EPA resources for examples). This added requirement may inhibit the ability to use a design-build type contract as design details often are not complete before the start of the project. To accommodate the evolving process of these complex projects, GM requests that OEPA provide language in this subsection that would allow some of these elements to be completed at a later date. As design details are determined, and needed changes identified, the SWP3 may be updated and submitted per Part III.D of the general permit. The inability to use a design-build contract significantly increases the time required to execute a project in Ohio and potentially could negatively impact future siting determinations.  
(General Motors)

**Response 48:** The prescriptive requirements for sediment settling pond volumes and drain times as well as for post-construction water quality volume and drain times existed in the previous 3 NPDES construction storm water general permits (OHC000002, OHC000003, and OHC000004). The new language in Part III.G.1.d of general permit (OHC000005) requires that the details be included into the SWP3.

**Comment 49:** **Part III.G.1.e.** This section outlines that a SWP3 shall provide a description of the "quality of any discharge .... " Given that the term "quality" is subjective, does the agency provide any method of quantifying the term? (City of Columbus)

**Response 49:** If this information is not available, it does not need to be included into the SWP3. The goal is to include any known information about pre-development storm water contaminant sources (e.g., runoff from abandoned mine land).

**Comment 50:** **Part III.G.1.j.** It is requested that Ohio EPA retain the following language from this section:

**“...where SWP3 does not call for a centralized sediment control capable of controlling multiple individual lots...”.**

**A centralized basin is the most cost-effective way to address sediment control on subdivided developments. The party responsible for the centralized basin should be identified on the plans, as should a requirement that the basin be returned to its original design volumes prior to transferring long-term responsibility over to another party. (Northeast Ohio Regional Sewer District)**

**Response 50:** Removal of the above language requires every SWP3 for a subdivision to include a detailed drawing of a typical individual lot with sediment and erosion control practices. If the language remains, it will limit this detailed drawing to only those subdivisions without a centralized basin. Subdivisions without centralized basins will be very rare.

**Comment 51:** **Part III.G.1.n. Of concern to the CDAO include any reference to “perpetual care/management” or any reference to undefined terms like the term “Contaminated Soil” in the proposed general permit. Terms as such, create ambiguity that can influence other permits and create waste streams that the waste industry may not be capable of handling. (Construction and Demolition Association of Ohio)**

**Part III.G.1.n.ii. Identification of contaminated soil should not be a required element of the SWPPP plan. Running necessary tests to positively identify the extents of, level and type of soil contamination can be cost prohibitive. This section should be revised to direct operators to mark "known" areas of soil contamination. While this information may be useful for site planning, it is not tied so directly to water quality that operators should be held liable for consistent delineation of fill soils, which in many areas may be almost impossible to identify. (Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio)**

**Response 51:** Ohio EPA adopted this language in 2003 when post-construction requirements were first adopted. The term “in perpetuity” was part of that original language and has the intent that post-construction BMPs would be designed and constructed for continued function even after the construction has ceased and permit coverage has closed. In response to comments this term has been changed to long-term in the final permit.

This language in the final permit has been revised to state “known contaminated soils.” If an environmental site assessment has not been performed and there are no known areas of soil

contamination, Ohio EPA is not expecting a site assessment to be performed under this permit. Materials that can be disposed in a construction and demolition debris landfill are not considered “contaminated soil.”

**Comment 52:** **Part III.G.1.n.** This is a new requirement. How will a contractor know of contaminated soils on a site? Will OEPA provide a reference database like a FEMA Firmette or ODNR Endangered Species list? What kind of characterization or SAP is required? What are the standards that determine if a soil is contaminated? (*Envi-Environmental*)

**Response 52:** Please see Response 51.

**Comment 53:** **Part III.G.1.n.vii.** “*Each SWP3 shall provide: ...n.vii. Sediment traps and basins noting their sediment storage and dewatering (detention) volume and contributing drainage area. Ohio EPA recommends the use of data sheets (see Ohio EPA’s Rainwater and Land Development manual and website for examples) to provide data for all sediment traps and basins noting important inputs to design and resulting parameters such as their contributing drainage area, disturbed area, detention volume, sedimentation volume, practice surface area, dewatering time, outlet type and dimensions;*”

Notably, the term “water quality” has been deleted, and the term “volume” remains. Such edits are confusing and implausible, as water quality can be regulated but runoff “volume” cannot, as it is not a storm water pollutant. The OMA requests that Ohio EPA clarify its intent with these proposed edits. Furthermore, use of the term “sediment traps” is highly prescriptive. The OMA requests that Ohio EPA instead use the term “sediment controls” in order to provide greater flexibility to the permittee. (*The Ohio Manufacturing Association*)

**Response 53:** Ohio EPA replaced the term “water quality” with the word “detention” since the term “water quality” incorrectly applies only to post-construction detention basins. A minimum volume for sediment settling basins has been required since 1992 to achieve a goal of 80% reduction of total suspended solids for sediment-laden runoff from active construction sites. Sediment basins (including sediment traps) are prescribed sediment controls to treat concentrated sediment-laden runoff. Other sediment controls (e.g., silt fence) are not designed to treat concentrated storm water runoff.

- Comment 54:** **Part III.G.1.n.vii. We recommend including an electronic link in the permit to the Rainwater and Land Development Manual when referred to in Part III.G.I.vii. (American Electric Power)**
- Response 54:** Ohio EPA has considered this comment and has elected to not put the hyperlink in the permit due to the long (5 year) cycle of the permit. The manual is easily accessible on Ohio EPA's website.
- Comment 55:** **Part III.G.1.n.xi. We request the Ohio EPA clarify if the SWP3 needs to show all stream crossings or just those below the ordinary high water mark per Part III. G. I .xi. We believe only the latter is appropriate. (American Electric Power)**
- Response 55:** Ohio EPA considers a "stream crossing" to be a location where fill material will be placed within the ordinary high-water mark of a stream for vehicles to cross the stream.
- Comment 56:** **Part III.G.1.n.xi. "Each SWP3 shall provide:....xi. The location of any areas of floodplain fill, floodplain excavation, stream restoration or stream crossings."**
- The addition of this permit term is confusing, and further clarity regarding the scope of this new regulation is needed. It appears Ohio EPA may be asking for details beyond the scope of the stream that the storm water runoff may reach. Does the agency seek to require information regarding floodplains both on and offsite? (The Ohio Manufacturing Association)**
- Response 56:** This requirement is intended to identify the locations of impacts to floodplain and streams caused by the construction activity. This does not include offsite impacts unless those are done for the same development.
- Comment 57:** **Part III.G.1.n.xi. A requirement for floodplain fill, floodplain excavation, stream restoration or stream crossings. These are new requirements. How will a contractor know of any such historic activities such as excavating or filling? Will OEPA provide a reference database like a FEMA Firmette or ODNR Endangered Species list? What kind of characterization or SAP is required? (Envi-Environmental)**
- Response 57:** This should not be more than the current activities known by the applicant and no exhaustive or historic characterization. Common resources can be provided on Ohio EPA's website, but it is only intended to be simple characterization.
- Comment 58:** **Part III.G.1.n.xi. This statement lists out multiple impacts that are generally permanent after construction is completed. However, stream crossings are often temporary features that allow access to opposing sides of a stream during a**

**construction operation. Therefore, they should be included as a required site map component. As such, it is requested that Ohio EPA include the following language (underlined) in this section:**

**"...stream restoration and temporary or permanent stream..."**  
(Northeast Ohio Regional Sewer District)

**Response 58:** In response to the comment, Ohio EPA has made this clarification to Part III.G.1.n.xi of the general permit.

### **Controls**

**Comment 59:** **Part III.G.2.** We would urge that a specific adopted version of the rainwater manual be referenced in the permit language (e.g. version 1.0). Simply referring to the manual leaves room for the adoption of new standards or an updated manual without proper notice. The consistency and predictability of the permit is important, and we would suggest including which version of the referenced document is applicable. In the definition section of the Draft, the ODNR Rainwater Manual is still referenced. (Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio)

**Response 59:** Part III.G.2 states that Ohio EPA recommends that the erosion, sediment and storm water management practices used to satisfy the conditions of the permit should meet the standards and specifications in the most current edition of Ohio's Rainwater and Land Development manual or other standards acceptable to Ohio EPA. Please see Response 66 for more information. No changes to the final permit were made.

**Comment 60:** **Part III.G.2.c.** We suggest revising the last sentence for clarity: "Velocity dissipation devices shall be placed at discharge locations and *at required intervals* along the length of any outfall channel to provide non-erosive flow velocity *reduction* from the structure..." (American Electric Power)

**Response 60:** Ohio EPA considered your request, but no changes to the final permit were made and contends the intent is satisfied with the currently language.

**Comment 61:** **Part III.G.2.c.** This section requires that "*velocity dissipation devices* shall be placed at discharge locations .... " We submit that a better reference would be "energy dissipation devices" and suggest that all references to "velocity" dissipation

devices be changed to "energy" dissipation devices. (City of Columbus)

**Response 61:** Please see Response 60.

**Comment 62:** Part III.G.2.d. This section includes a reference to "silt fences." This reference ought to be updated to "sediment barrier" as has been done elsewhere. (City of Columbus)

**Response 62:** Agreed, the final permit has revised "silt fence" to "sediment barrier".

**Comment 63:** **Part III.G.2.d.ii.** "Accumulated sediment shall be removed from the sediment storage zone once it exceeds 50 percent of the minimum required sediment storage design capacity and prior to the conversion to the post-construction practice unless suitable storage is demonstrated based upon over-design."

The intended reach of this permit term is confusing. Does Ohio EPA plan to make sediment settling ponds mandatory on all permitted sites, as opposed to just the larger developments? Such requirement would be burdensome, unnecessary, and challenging for smaller sites. Furthermore, setting the sediment removal requirement at the 50% mark appears arbitrary; is there a reason for the standard of 50%? How was the 50% mark arrived at? (The Ohio Manufacturing Association)

**Part III.G.2.d.ii.** At the fifth paragraph on page 18, reference is made to accumulated sediment being removed from the storage zone once it exceeds 50% of the sediment storage design capacity. The City questions how will 50%, of what amounts to "chunky soup", be determined and who will make that determination - especially if that volume is under several feet of pond storage? (City of Columbus)

**Part III.G.2.d.ii.** Sediment Settling Ponds – sediment needs to be removed when it "exceeds 50 percent of the minimum required sediment storage design capacity and prior to the conversion to the post-construction practice unless suitable storage is demonstrated based upon over-design" Used to be remove sediment when it was FULL. What do contractor do with sediment that has been removed from sediment basins. Is it able to be reused on site or is it trucked off? Would a LAMP be required for removed sediment? Comparative Standards to reuse sediment? (Envi-Environmental)

**Part III.G.2.d.ii.** GM also believes the proposed revision in G.2.d.ii to remove accumulated sediment from a storage zone after it exceeds 50 percent capacity instead of the current requirement of being full is unduly burdensome, over-reaching, and an unnecessary added expenditure with no anticipated benefit. GM requests that the original language remain intact. *(General Motors)*

**Response 63:** This corrects variations in construction general permits and the Rainwater and Land Development manual. Sediment can be spoiled and seeded onsite unless it is known to be contaminated. This is not a typical problem on construction sites. Failure to remove the sediment from the sediment storage zone greatly affects the basin to function as intended.

**Comment 64:** **Part III.G.2.d.ii.** The first paragraph on page 18 of the red line draft states that a permittee may request approval from OEPA to use alternative controls. The City suggests adding the following sentence to the end of the paragraph: "The permittee shall obtain approval from Ohio EPA prior to submitting the SWP3 to the applicable MS4 for review." *(City of Columbus)*

**Response 64:** Ohio EPA recognizes that approved MS4s have review authority, and as such, can require Ohio EPA approval at any time for considerations of alternatives to the General Permit. For this reason, no change was made to the final permit.

**Comment 65:** **Part III.G.2.d.iii.** This permit language states that a 12" sediment barrier can be substituted for a standard silt fence. 8" socks are the right size for use when appropriately sized for slope & flow as shown below from <https://www.erosionandstormwater.com/images/pdf/SlopeInterruption.pdf>. We are strongly opposed to requiring a 12" or larger sock based on the engineering and math behind the table below and infield performance of 8" socks. *(Envi-Environmental)*

CFS Diameter	Slope Interruption: Maximum Interval Spacing (in feet)				
	2:1	3:1	5:1	10:1	25:1
8 in	30	40	75	125	200
12 in	40	50	100	150	250
18 in	50	60	125	200	300
24 in	60	70	200	300	400
32 in	70	80	300	400	500

**Response 65:** No change was made in response to this comment as the current general permit reconciles the construction general permit with guidance given in the Rainwater and Land Development manual.

**Comment 66:** **Part III.G.2.d.iii. Sediment Barriers and Diversions.** Both silt fence and filter sock are used interchangeably in the field as equivalent sediment controls for sheet flow. Therefore, we appreciate Ohio EPA modifying the language in Part III.G.2.d.iii. of the draft permit from "Silt Fence" to "Sediment Barriers." We also agree for most applications, 12-inch diameter sediment barriers are an appropriate substitution for silt fence.

The Rainwater and Land Development Manual provides a detailed discussion on utilization of sediment barriers and applicable contributing drainage areas and slope lengths. While we understand sediment barrier function is limited by the contributing drainage area and slope, we recommend the renewed permit simply refer to the Rainwater and Land Development Manual for applicable design criterion instead of including Table 3 of the draft permit. (*American Electric Power*)

**Response 66:** Ohio EPA can recommend the use of the Rainwater and Land Development Manual or other guidance documents from other NPDES permit programs. A concern of Ohio EPA is that language to refer the use of the manual will make the manual a part of the NPDES general permit. Ohio EPA can only suggest use of the manual.

**Comment 67:** **Part III.G.2.d.iii. New language was added to the Sediment Barriers and Diversions portion which suggested that for most applications, a standard silt fence may be "substituted with a 12-inch diameter sediment barrier."** We suggest using the terms "wattle" and/or "filter sock" instead. (*City of Columbus*)

**Response 67:** Ohio EPA prefers to use the broad term "12-inch diameter sediment barrier" so that it does not limit the use of other potential barriers such as compost filter berms. Details of acceptable sediment barriers will be described in Ohio EPA's Rainwater and Land Development Manual.

**Comment 68:** **Part III.G.2.d.iv. It is unclear what Ohio EPA means by "All inlets receiving runoff from drainage areas of one or more acres will require a sediment settling pond."** in Part III.G.2.d.iv. of the draft permit. Not all projects will require a sediment settling pond, but implementation of inlet protection devices for sediment control are certainly applicable for storm water structures accepting runoff from an active construction area. Therefore, we recommend this condition be modified to "All inlets receiving runoff from drainage areas of one or more acres will require a ~~sediment settling pond~~ **sediment inlet protection at the structure.**" (*American Electric Power*)

**Response 68:** The use of sediment inlet protection alone is appropriate for drainage areas under one acre. Larger drainage areas than that will exceed the design capacity of most inlet protection. For this reason, no change was made to the language.

### **Part III.G.2.e – Post -Construction Storm Water Management Requirements**

**Comment 69:** **Part III.G.2.e.** Ohio EPA is proposing many updates to the Construction General Permit that will increase the post-construction treatment requirements for permittees by a significant amount. Ohio EPA is proposing to increase the water quality volume depth, increase the volumetric runoff coefficient, increase the water quality volume calculated from the redevelopment equation, increase the water quality volume for wet extended detention basins, and increase the treatment requirements for sites disturbing 1 to 5 acres. Based on the information provided, it appears that the benefits of the proposed permit changes have not been quantified or communicated and impacts to development in Ohio have not been thoroughly considered.

In the Construction General Permit renewal fact sheet, Ohio EPA indicated that "during a short period of time, construction sites can contribute more sediment to streams than can be deposited naturally during several years." The sediment load during active construction is managed by erosion and sediment controls; however, Ohio EPA has focused the Construction General Permit updates on post-construction stormwater treatment. ODOT recommends that Ohio EPA utilizes the wealth of Ohio-specific water quality data available in TMDL reports to quantifiably estimate the benefits of increased post-construction requirements. ODOT would like Ohio EPA to consider the following questions to justify the increased regulatory requirements:

- How much sediment does Ohio EPA estimate is being captured by existing post-construction practices?
- How much more sediment does Ohio EPA expect to keep out of Ohio's streams based on incorporating the proposed permit changes?
- How much closer would this reduced sediment load bring Ohio's streams towards waste load allocation attainment?

- **How do the new post-construction requirements impact development in Ohio?**
- **Does the estimated water quality benefit of the proposed requirements justify the potential impacts to development?**

Based on the information provide it is unclear how the proposed regulatory changes are related to any specific water quality goals. ODOT is concerned that since Ohio EPA has chosen to consider sediment in TMDL reports as a function of habitat indicators, and not discreetly with a quantifiable waste load allocation, that it may not be possible to compare the benefits of the proposed permit changes towards stream waste load allocation attainment.

In justifying the increased requirements, Ohio EPA has referenced the following memo: "Water Quality Capture Volume Analysis" provided to Ohio EPA from the Ohio State University Stormwater Management Program. The analysis in this memo focuses on the goal of achieving "removal of at least 80% of the average annual total suspended solids (TSS) load. " The memo assumes if a BMP captures 90% of the average annual runoff and gets 90% TSS removal, that the total TSS reduction will be 81% ( $0.9 * 0.9 = 0.81$ ). This analysis assumes that TSS load is equally distributed throughout the distribution of storm events and throughout an individual hydrograph. This assumption is that there is no first flush of TSS in the run off. Ohio EPA's 2007 Post-Construction Q&A Document, which is referenced as the source of the 80% average annual TSS load removal in the memo, states on Page 20 that the "WQv is designed to capture and treat the first flush of runoff. " A report titled "First Flush Phenomenon Characterization" prepared for Caltrans by the University of California, Los Angeles and the University of California, Davis in August 2005 quantified the magnitude of the first flush for TSS for various sites. That study showed that approximately 90% of the TSS for an average hydrograph was contained in the first 60% - 70% of the runoff volume. If 90% of the TSS runs off within the first 70% of runoff volume, and the BMPs are assumed to achieve 90% TSS removal, then BMPs would only need to be sized to capture the first 70% of the average annual volume to achieve a removal of at least 80% average annual TSS. Therefore, by following the memo's assumptions, but including consideration for first flush, it may be appropriate to consider reducing the post-construction treatment requirements. (The memo states that the current precipitation value of 0.75 inches captures 83% of the average annual runoff, which would capture more than 80% of the average annual TSS load if 90% of the TSS load runs off in the first 70% of the runoff volume.)

**ODOT is concerned that although the proposed regulatory requirements are based on positive objectives, such as making Ohio's streams better, or making Ohio's regulation s more in line with neighboring states, the science to support those requirements remains unclear. (Ohio Dept. of Transportation)**

- Response 69:** The commenter's questions seem to represent a request to rethink the approach used that Ohio has used since 2003. Ohio EPA is updating the water quality volume capture requirements that were first included in the permit in 2003 and proposed changes represent updates being made after 15 years of application to incorporate updated rainfall, the performance of BMPs and to raise capture nearer to the performance target established at that time.
- Comment 70:** **Part III.G.2.e. On page 26, 1<sup>st</sup> paragraph, it states that post-construction practices shall be located to treat areas most likely to generate the highest pollutant load. Aren't all impervious areas to be routed through post-construction practices? Additionally, how would this be enforced? (City of Columbus)**
- Response 70:** On previously developed areas, permittees have a reduced requirement for treating the impervious area and therefore have choices about selecting a portion of their project. Ideally this is best considered during plan development and plan review. The enforcement mechanism is the General Permit itself as all applicants are required to adhere to this and all conditions.
- Comment 71:** **Part III.G.2.e. In the last paragraph on page 21 of the redline draft reference is made to "another design manual acceptable for use by OEPA. The City would like clarification as to whether the design manuals maintained by the MS4 have or receive blanket approval from the agency? If the manuals are not approved by the agency, the City requests that the agency maintain a list of approved manuals on its website so it is clear as to what design manuals are in fact acceptable to the agency. (City of Columbus)**
- Response 71:** If the base requirements of the permit area can be fulfilled and alternate specifications or design manuals appear to represent sound design practices, these alternatives will be accepted. As staff resources allow your suggestion for creating a list of approved manuals will be considered.
- Comment 72:** **Part III.G.2.e. In general, OUG members think it could be disastrous if Ohio EPA does not relax the post-construction criteria for projects that are already well under way in the design phase or contract execution phase, which in some cases takes months to complete (e.g., bidding, approvals,**

etc.). Regarding projects currently under construction, OUG members are very concerned that a requirement to revise the design to meet the new post-construction criteria will cause them problems because it would require them to re-engineer and, possibly, impact the planned project bid and schedule. This could also have rippling effects for the budget allocated for this year and beyond, and impact PJM schedules. Thus, the Utilities ask that these projects be grandfathered in under their NOI and SWP3. (*Ohio Utilities Group*)

**Response 72:** Ohio EPA has addressed this concern by clarified permit language in Part III.B. Please see Response 42.

**Comment 73:** **Part III.G.2.e.** The draft permit has a new emphasis to streams. Could Ohio EPA clarify if this relates to the purple and yellow areas that Ohio EPA has designated for more stringent permitting? (*Ohio Utilities Group*)

**Response 73:** The permit does not add any new requirements for streams except that SWP3 plans should identify: activities authorized section 401, areas of stream restoration, crossings, any boundaries for riparian setbacks or the general stream condition/maintenance that should be known by the landowner. This permit does not have any special requirements related to the commenter's reference to the map of Ohio EPA 401 Water Quality Certification for Nationwide Permits.

**Comment 74:** **Part III.G.2.e.** In small development situations, the design, construction, installation, and maintenance of a structural storm water control will be excessive and burdensome. Depending on the type of construction project, the change in water quality volume from the pre-construction to post-construction condition may be negligible or able to be managed without a designed structural control. For example, a small expansion of an existing gravel electrical substation pad that does not drain to a common drainage point and/or is adjacent to a vegetated area will adequately manage the post-construction water quality volume. Implementation of runoff control practices (e.g., rock check dams, outlet dissipation) alone may also be adequate to address the calculated water quality volume.

Although Ohio EPA acknowledges situations where post-construction storm water criterion does not apply (i.e., linear construction projects), we request Ohio EPA also acknowledge situations where it may not be necessary to install a structural control. Additionally, because there is no criterion in the draft permit that identifies the

conditions for when a structural storm water control should be implemented, the need for a structural storm water control based on the change in runoff should be evaluated and at the recommendation of a professional knowledgeable in storm water management practices. Based on this discussion, we request the following revision to Part III.G.2.e. of the draft permit:

"For all construction activities that will disturb one or more acres of land, or will disturb less than one acre, that is part of a larger common plan of development or sale which will disturb one or more acres of land, the ~~post construction BMPs(s) chosen~~ **development shall be able to manage storm water runoff for protection of stream channels, stream stability, and water quality.**" (*American Electric Power*)

**Response 74:**

In response to comments, Ohio EPA has inserted a threshold of 2 acres for the size of the disturbed area that must apply a practice from the table of acceptable practices (now table 4a and 4b). The intent remains for all sites to meet the purpose of the post-construction section, but there is now smaller subset of sites where the designer is not necessarily bound to a table 4a or 4b practice and may choose a BMP that is acceptable with the MS4. They must show their technical rationale for selecting the BMP. For projects that are disturbing 2 acres or greater, they are directed first to select from table 4a or 4b, but alternative practices may still be proposed. This reduction of the threshold from 5 acres to 2 should not affect most linear utility projects to any significant degree as they often do not require post-construction practices. For other development sites, it will improve the application of acceptable post-construction practices and remove any misunderstood ambiguity about the need for post-construction practices.

**Comment 75:**

**Part III.G.2.e. "So that receiving stream's physical, chemical and biological characteristics are protected and stream functions are maintained, post-construction storm water practices shall provide perpetual management of runoff quality and quantity. To meet the post-construction requirements of this permit, the SWP3 shall contain a description of the post-construction BMPs that will be installed during construction for the site and the rationale for their selection. The rationale shall address the anticipated impacts on the channel and floodplain morphology, hydrology, and water quality."**

While "The rationale shall address the anticipated impacts on the channel" requirement is good, it seems vague and it is not clear what would be adequate. Ohio EPA needs to develop clear expectations on these impacts. While all are

**important, we strongly encourage you to address hydrologic impacts, i.e., the flow regime, of stormwater units and ensure these are adequate to protect downstream aquatic life. This rule should clarify when the channel is protected from stormwater runoff, especially channel-forming flows or flashiness.**

**This section states “practices ... shall provide perpetual management of runoff quality and quantity.” How do these practices ensure a natural flow regime that is critical to stream life, such as base flow, among other factors? How does this rule protect base flow?**

**No stormwater BMPs should be sited within the floodplain or stream meander belt. BMPs in the floodplain will eventually lose their pollutants in floods, and these pollutants will be released to the stream. BMP units within the meander belt will eventually be eroded by the stream and result in the same releases. Also, BMPs with berms or levees within the meander belt can restrict streams and damage the natural and higher quality formation of stream features (riparian areas, meanders, riffles, pools, etc.) Damage to or restrictions of these natural stream features should always be avoided since it could be a significant negative impact on stream quality. (*The Nature Conservancy*)**

**Response 75:**

Ohio EPA recognizes the commenter’s concerns regarding hydrologic impacts and changes to the natural flow regime as legitimate concerns in developing watersheds. Through the water quality monitoring and total maximum daily load programs, Ohio EPA will continue to evaluate streams to recognize trends, determine appropriate use designations, and to see if the use is meeting the goals of the federal Clean Water Act. On this basis, Ohio EPA established recharge requirements, higher sediment control standards and riparian setbacks in the Big Darby Creek and riparian setbacks in portions of the Olentangy river watershed. As more information becomes available, Ohio EPA will attempt to incorporate sound requirements that are strongly connected with a source into applicable permits.

The siting of berms, levees and perhaps storm water BMPs is problematic on frequently inundated floodplains and within the meander belt of streams, but the riparian setback has proved is helpful in discouraging this practice. Ohio EPA contends the recharge requirement in the Big Darby watershed as beneficial in providing some protection of base flow and the natural flow regime. We welcome more information that helps to define these requirements or additional requirements that improve for the protection of the natural flow regime but has not proposed additional requirements in this permit aside from an increase in water quality volume.

**Comment 76:** **Part III.G.2.e. Hydrology. We strongly encourage that Ohio EPA further evaluate the impacts of altered hydrology and stormwater, and review and propose practices that can be demonstrated to achieve minimum stream degradation, maximum protection and achieve attainment. For a review of this issue, see Walsh et al (2016)<sup>1</sup>, who emphasize that “stormwater management objectives still typically center on flood and pollution mitigation without an explicit focus on altered hydrology. Resulting management approaches are unlikely to protect the ecological structure and function of streams adequately.”**

**The 2018 permit should further encourage (compared to the 2013 permit) smaller development footprints, conservation development green infrastructure and low impact development where these would significantly reduce the downstream impacts on the receiving stream. Stormwater management and rules should result in reaching attainment goals for those streams out of attainment and avoid declines toward nonattainment and degradation where streams are in better condition. (*The Nature Conservancy*)**

**Response 76:** Thank you for your comments. Ohio EPA welcomes suggested evaluation metrics that would better monitor flow regime change as related to potential permit activities. The suggested additions to the permit of encouraging smaller development footprints, conservation development, green infrastructure and low impact development are positive and currently a consideration in the permit as non-structural alternatives in the permit. As new TMDLs are finalized, the agency will consider additional BMP's with the understanding Ohio EPA is not directly a Land Use governing agency. Methods to encourage green infrastructure was considered to some degree and resulting in the addition of runoff reducing practices in the practice.

**Comment 77:** **Part III.G.2.e. Green Infrastructure and Low Impact Development. The 2018 permit should further encourage green infrastructure, low impact development and conservation development. We see some of this in response to some of the content proposed in the Agency's 11/28/17 presentation on the rules. The 2013 “Response to Comments” (Response 61) stated that “Ohio EPA supports the use of green infrastructure practices” and “is supportive of this approach” (referring to the “credit system associated with the runoff reduction method” that the former ODNR (now DSW) stormwater staff was tasked with). These BMPs require demonstration that they meet performance standards for stormwater management, and we strongly encourage such**

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analysis and inclusion in Table 2 prior to establishment of the 2018 rules. In the 2018 stormwater permit draft, we also see reference to green infrastructure in the Runoff Reduction Practices in G.2.e., page 26, and we support this and further refinement of an adequate flow regime that avoids channel instability and maintains low flows.

We need to emphasize that whether “green” or gray/conventional, stormwater practices must achieve performance goals, i.e., achieving and exceeding stream use designation goals. While many gray infrastructure practices are inadequate to protect stream health, “green” infrastructure without adequate performance achievement can be no more beneficial than, and as damaging as, conventional stormwater management. Factors can be overlooked but can make important differences, for example, long-term performance decline such as through occlusion of permeable pavements, or lack of groundwater recharge from green roofs. Performance of both green and gray infrastructure need to be carefully evaluated for water quality, hydrology results and stream biology results, e.g., see <https://www.epa.gov/green-infrastructure/performance-green-infrastructure>.

**Encouraging going beyond the minimum permit standards through Low Impact Development**

While we appreciate the effort in these rules and the thought that went into improving Ohio’s stormwater protections, we ask that Ohio EPA also consider ways to encourage permittees to exceed the present requirements of permits by significant amounts, particularly to the degree that stream life is permanently protected, especially high-quality species and aquatic communities. To date, despite the best efforts of stormwater management, it appears that streams in urban areas continue to fail to support high quality (rare and sensitive) species and communities. In fact, very few, if any, reach Exceptional Warmwater habitat attainment, and few seem to have Antidegradation status as Outstanding State Waters.

We encourage the Agency to develop incentives and new programs that are based on adequately protecting these species and communities. This might entail incentives for Low Impact Development (LID) that uses local planning that reduces the overall impact and protects sensitive resources, performance-based “green infrastructure” and significantly exceeds stormwater permit requirements for quality and quantity. While we recognize that examples of LID are already in place and concepts are known, we are concerned about additional factors such as establishing a natural flow

**regime, and, above all, the adequacy of stormwater management to prevent declines in stream quality. We feel the evidence is lacking that shows that full protection is achieved.**

**We encourage Ohio EPA to work with local governments to establish adequate protections of high quality streams through such local planning, related requirements and incentive programs. We encourage working with U.S. EPA for guidance on BMP and LID performance. (*The Nature Conservancy*)**

**Response 77:** Please see Response 76 regarding flow regime. Additionally, Ohio EPA will continue to support the use of LID, green infrastructure, and updated BMP guidance and welcomes suggestions on refining requirements or incenting the use of these approaches.

**Response 78:** **Part III.G.2.e. Thermal impacts. We strongly encourage Ohio EPA to evaluate the post-construction storm water permit requirements and identify needed improvement opportunities related to thermal impacts of stormwater management.**

**“Urbanization is known to increase the temperature of surface runoff during storm events and to increase the mean summer monthly temperature of receiving waters downstream.”<sup>2</sup>**

**We note that related rules, Ohio’s Water Quality Standards, OAC 3745-1-07, Table 7-1, state “At no time shall the water temperature exceed the temperature which would occur if there were no temperature change attributable to human activities.” This criterion should apply to stormwater discharges and be incorporated or referenced in this permit. (*The Nature Conservancy*)**

**Response 78:** Ohio EPA acknowledges that thermal impacts to storm water runoff from urbanized areas is a concern that has been documented in literature. No changes regarding this issue were made in this permit renewal. Understanding, Ohio EPA is in the process of finalizing over 40 plus TMDL’s and will evaluate whether there are sufficient data to support a change in requirements or whether there are means for permittees to address the concern. The recharge requirement (within the Big Darby) does provide some amelioration of this concern.

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### **Post-Construction - 1-5 Acre Sites**

**Comment 79:** **Part III.G.2.e.** The proposed requirement of all sites from 1 to 5 acres to have a post-construction BMP from Table 5 will deter development of small sites. These small sites are often limited in budget and in site characteristics. The post-construction BMP for these smaller sites should be left up to the local jurisdiction and should maintain the option to install hydrodynamic separators as a satisfactory post-construction BMP. *(Choice One Engineering)*

**Part III.G.2.e.** Action threshold defined as one or more acres. This catches Ohio up to current Clean Water Act requirements. *(Envi-Environmental)*

**Part III.G.2.e.** It is essential that Ohio EPA provide maximum flexibility to address storm water issues on infill projects and encourage green infrastructure. *(BIA of Central Ohio)*

**Part III.G.2.e.** Reduction of the acreage threshold from 5 acres to 1 acre, along with the redevelopment requirements for small sites will discourage development or redevelopment of "in-fill" lots in existing developed areas and instead push development out into areas with more land availability, due to the relatively high cost of providing water quality treatment on small lots with limited space compared to larger lots with available area for traditional water quality treatment practices. Regulations such as this should encourage in-fill development, not make it harder than green field development, especially if the entire watershed is to be better served long term. *(City of Delaware)*

**Part III.G.2.e.** Ohio EPA has proposed the same requirements for both large (greater than five acres) and small (greater than one acre but less than five acres) construction projects. The Utilities find this burdensome for small construction projects. OUG members understand that Ohio EPA thinks this is necessary because some permittees with small construction projects were not fulfilling the requirements under the permit. While this may be the case, it is unreasonable for those permittees with small projects that did fulfill the requirements to now require the more stringent provisions that were previously only required for large construction projects. The Utilities request that Ohio EPA continue to separate the requirements for small and large projects and use its enforcement discretion for those bad actors that are not following the permit requirements. *(Ohio Utilities Group)*

**Part III.G.2.e. Requiring Detention On Sites with Less than 5 Acres of Disturbed Area.** This requirement, combined with the increased redevelopment requirement, will significantly discourage private investment in high density areas where revitalization is most needed, and it would likely result in more urban sprawl.

If the water quantity treatment threshold for linear public transportation projects is lowered in an equivalent way, it will cause significant additional costs for right of way, design, construction and maintenance. The result will be less funds available for transportation safety improvements, particularly for small county, township and village agencies. (Franklin County Engineer's Office)

**Part III.G.2.e. “For all construction activities that will disturb one or more acres of land, or will disturb less than one acres, that is a part of a larger common plan of development or sale which will disturb one or more acres of land, the post construction BMP(s) chosen shall be able to manage storm water runoff for protection of the stream channels, stream stability, and water quality.”**

This section makes the extra requirements for post-construction BMPs mandatory for all sites which are at least one acre. This could have major impacts on small construction activity and may bring an entire site's hydrology into a permit's engineering design requirement, thereby substantially increasing the engineering and regulatory burdens for numerous permitted sites. The OMA requests further explanation for what Ohio EPA hopes to achieve with this proposed change, and requests that Ohio EPA consider leaving this provision at the previous five acre requirement. (*The Ohio Manufacturing Association*)

**Part III.G.2.e. On pages 20-21 of the redline draft, it appears as if the large construction project designation of disturbing more than five acres has been eliminated and now speaks to all construction projects disturbing one or more acres requiring post-construction BMPs. A question the City has is why have these different designations (i.e., disturbance of 5 acres, disturbance of 1 acre) been rolled into one category?** (*City of Columbus*)

**Part III.G.2.e. We believe it would be worthwhile to see the reasoning for changing the water quality volume acreage threshold from 5 acres to 1 acre.** (*City of Delaware*)

**Part III.G.2.e. The water quality volume threshold being moved from 5 acres to 1 acre impacts small business and re-**

development of small sites the most. Instead of adding office space to accommodate new jobs, small business will be forced to build more ultra-expensive underground storage – or even worse, kills the expansion project altogether. (City of Delaware)

**Part III.G.2.e.** Ohio incorporates or modifies various “land use” provisions for post construction that are inappropriate. The fifth paragraph changes applicability of post-construction BMPs from projects involving 5 or more acres to projects involving 1 or more acres. The requirement to calculate and manage water quality volumes and install structural controls for small projects (1-5 acres) adds unnecessary complexity and cost. GM requests that the requirement for post-construction BMPs be applied to large projects only. (*General Motors*)

**Response 79:** Please see Response 74.

**Comment 80:** **Part III.G.2.e.** For the last paragraph on page 21 of redline/ strikeout version, it is requested that Ohio EPA provide clarification that it is not necessary for bioretention cells designed in accordance with the standard in the Rainwater and Land Development Manual to provide an additional storage volume equal to 20 percent of the WQv. (*Northeast Ohio Regional Sewer District*)

**Response 80:** Ohio EPA is clarifying here that while bioretention practices do need adequate pretreatment, they do not need additional storage volume equal to 20 percent of the WQv. The use of guidance with in the Rainwater and Land Development manual is recommended.

**Comment 81:** **Part III.G.2.e.** The draft permit includes the incentive (20% WQV vs. 40%) to use infiltration-based BMPs on re-development projects. It appears there are no such incentives for non-redevelopment projects. If OEPA prefers infiltration-based BMPs, and would like to encourage their use, it is suggested that an incentive (similar to the 25% reduction in WQV for wet ponds in the current permit) be included in the permit for non-redevelopment projects as well. (*Korda*)

**Response 81:** OEPA has provided a credit for infiltration practices listed in table 4b in the runoff reduction credit summary provided on Ohio EPA’s website:  
<http://epa.ohio.gov/Portals/35/permits/OHC000005/Runoff%20Reduction%20Credits%20and%20Criteria.pdf>.

**Comment 82:** **Part III.G.2.e.** Given that the post-construction requirements are significant enough on their own and distinctly different from the temporary construction BMPs, the City proposes

that the entire section, and all related sections, be *moved* to a separate Part of the permit. Such a reorganization of the permit would provide better clarity and ensures proper emphasis. [NOTE: The additional language added to Part III.G.2.e in the first full paragraph on page 20 is necessary and appreciated.] (City of Columbus)

**Response 82:** This comment was evaluated however the agency contends the current structure is sufficient and clear on what is required for post-construction.

### WQv Change from Previous General Permit

**Comment 83:** **Part III.G.2.** It is not clear from the SWMM Runoff Modeling Analysis results narrative in the 2/12/18 “WQv Analysis” memo if the percentage runoff captured is considering a detention practice that also provides water quantity control. These practices have much more storage volume in addition to the water quality volume in order to attenuate peak flows, thus providing essentially 100% capture of the runoff volume from the site. (City of Delaware)

**Response 83:** Each peak discharge scenario would be complicated by the watershed and the local peak discharge requirements. Peak discharge controls do add additional storage and some additional level of treatment, but not all communities require peak discharge control and peak discharge requirements discharge runoff at a substantially higher rate than that of the water quality volume and extended detention thus providing little additional treatment (comparatively minutes and hours rather than 24-48 hours).

**Comment 84:** **Part III.G.2.e.** Rather than relying completely on modeling, we believe it would valuable to examine actual constructed BMPs to determine if the 80% removal of total suspended solids is being achieved, especially in a community with its own regulations and enforcement of construction storm water and post-construction storm water practices. (City of Delaware)

**Response 84:** Ohio EPA agrees and would be supportive of any local effort.

**Comment 85:** **Part III.G.2.e.** Quoting from the 2/12/18 “WQv Analysis” memo, “the intent of post-construction best management practices (BMPs) was to assure that storm water runoff from developed land does not negatively impact receiving streams, either through hydrologic impacts or pollutant discharges”. However, the reasoning behind the increased water quality volume requirements does not include a discussion about the quality of receiving streams. Removal of 80% of total suspended solids is a “means” to achieve an “end” of

**improved water quality in receiving streams. It is unclear if the Ohio EPA has determined that the increased water quality volume requirements proposed in this permit will result in a noticeable difference in the water quality in the receiving streams. Has a cost/benefit analysis for the proposed increase in water quality volume been performed? (City of Delaware)**

**Response 85:** This has not been performed due to the resources and uncertainty required in performing this work. Water quality of receiving streams is complex and it would be difficult to determine the exact result of improving just one adverse source. The water quality volume method is an accepted approach that is known to reduce pollution from development and reducing erosive energy in receiving streams.

**Comment 86:** **Part III.G.2.e. On page 21 of the redline draft, the water quality volume calculation has been revised. The City asks what is the empirical basis for changing the calculation? Further, is there evidence that the regions are starting to meet set criteria? (City of Columbus)**

**Response 86:** The basis for the changes were provided in the Water Quality Capture Volume Analysis, which can be viewed at: . There is evidence that SWP3 designers are beginning to incorporate the changes into upcoming projects.

**Comment 87:** **Part III.G.2.e. We are concerned about the effect of the proposed changes on development costs. Increased costs to industrial projects have an effect on job creation. The proposed permit would result in a 63% increase to the water quality volume on a recent industrial project proposed in the City, requiring either an increase in the pond depth or an increase in the pond size from 0.6 acres to 1 acre. (City of Delaware)**

**Response 87:** While the increase in the water quality volume is significant (to bring performance up to acceptable standards), most sites should not experience as significant of an increase as you describe. On most sites, the footprint of a storm water pond should only increase slightly if at all, but the capacity of the pond may increase about 10% (dry basin) or less. Because every situation is unique and local peak discharge control has greater influence over pond sizing, it is difficult to do objective comparisons.

**Comment 88:** **Part III.G.2.e. The design standard proposed in this section will result in the requirement of larger retention basins, leading to a potential increase of basin size by 42+%. There is grave concern that this may not be attainable for many sites. Additionally, the OMA is concerned that this decision appears arbitrary. The OMA requests further explanation for**

**the reasoning behind this change. Further, the OMA requests that Ohio EPA amend this permit term to provide for additional cost effective alternative options for compliance. (The Ohio Manufacturing Association)**

**Part III.G.2.e. The proposed increases in the water quality volume will result in significantly larger detention basins and much higher costs. So far, the OEPA has only expressed its desire to increase water quality volumes, which is certainly admirable. But it seems prudent, here, to caution the OEPA to conduct a comprehensive cost-benefit analysis to compare the costs associated with stricter regulations and the benefit in terms of water quality in receiving streams.**

**Additionally, there are insufficient alternatives available in areas where space and road right-of-way are limited. One consideration might be a formalized credit system where permittees can accumulate credit on sites with favorable conditions or combine funds for regional BMPs when favorable site conditions are not available. It is possible that much more favorable cost/benefit results and much better water quality in receiving streams could be achieved with such a system for water quality and groundwater recharge. (Franklin County Engineer's Office)**

**Response 88:** Please see Response 87. The draft contained additional alternatives to the list of acceptable practices (in tables 4a and 4b). Ohio EPA also already allows for off-site mitigation and alternative practice approval.

**Comment 89:** **Part III.G.2.e. The current post-construction requirements of OHC000004 should be maintained as it offers the proper balance between successful economic development and successful protection of the environment. The proposed method of calculating the water quality volume/flow to be treated results in significantly higher volumes/flows, which will increase detention volumes and the size of post-construction BMPs. (Choice One Engineering)**

**Response 89:** Ohio EPA acknowledges the increases in treated volume and sizing of practices, but these updates are expected to bring performance to that expected when the requirements were first implemented in 2003. We believe that successful economic development can still occur with these changes.

**Comment 90:** **Part III.G.2.e. Proposed regulations will result in larger retention ponds, increasing the probability of vehicles driving into ponds, and will enlarge a drowning hazard. Regulations must level the playing field between wet retention ponds and dry detention basins. (City of Delaware)**

**Response 90:** Dry detention basins are still an option in table 4a. Wet basins have been in use long before the water quality volume approach. And safety is something that nearly every storm water designer incorporates into design by necessity.

### **Table 5a and Table 5b**

**Comment 91:** **Part III.G.2.e. Tables 5a and 5b. Drain times and channel instability and erosion. Drain times for WQv are included in Tables 5 a and b. Ohio EPA should evaluate the drain times to ensure that they are adequate to avoid downstream channel erosion.**

**The Agency should establish an approach to estimate flows that will disturb the stream bed, such as described by Vietz and Hawley (2016), and establish stormwater BMP release rates that will avoid such stream bed disturbance. A statement such as “avoid the creation of nuisance conditions” (SWP3 Requirements, G.2.e., page 22) related to drain times does not provide sufficient guidance. (*The Nature Conservancy*)**

**Response 91:** The established minimum and maximum drain times balance residence time to maximize treatment processes (including infiltration) and readiness for the next rainfall to maximize the annual runoff captured. Detention and/or infiltration of the Water Quality Volume does afford some physical protection of the stream bed and function. OEPA will continue to monitor the effects of post-construction practices.

**Comment 92:** **Part III.G.2.e. See Table 5b Infiltration Post-Construction Practices with Maximum Drain Times. This table includes “permeable pavement.” Since all pavements eventually are replaced, there is likelihood that this permeability would be lost when replaced with a pavement that is not permeable. Also, pores might become occluded and reduce the permeability. Permeability could lead to groundwater pollution in certain high pollution and shallow groundwater situations (a problem common to all infiltration). Permeable pavement should only be used when it is ensured that the maintenance and performance is permanent. The permit, such as in the Post-Construction Storm Water Management Requirements, should require permanent inspection and maintenance of all permeable pavement installations, and it should be required to be demonstrate that it is permanently adequately functional. (*The Nature Conservancy*)**

**Response 92:** In this permit, Ohio EPA requires that a maintenance plan be developed that ensures that storm water management systems

function as designed and constructed. The long-term functioning of these practices is also addressed through requirements that the MS4, through their separate MS4 permit have a program focused on this issue. The issue of properly siting and constructing permeable pavements is addressed through proper design and use of standards such as the Rainwater and Land Development manual and through the MS4 review of plans and site inspection.

**Comment 93:** Since "Table 5" is actually split into two tables (5a & 5b), we suggest revising all references to "Table 5" as "Table 5a & 5b" for clarity. (*American Electric Power*)

**Response 93:** The language in the permit has been updated to refer to these tables as "4a" and "4b".

**Comment 94:** **Part III.G.2.e.** Table 5a is used for extended detention practices, while Table 5b is used for infiltration post-construction practices. Underground storage is listed for both. What determines if an underground system is being used for extended detention versus infiltration? For closed systems (i.e., solid pipe), it is obvious that extended detention will be used. However, open systems (i.e., perforated pipe and chambers) may be used for extended detention and/or infiltration. An advantage of open systems is the use of surrounding stone void space for storage which results in a smaller footprint and lower installation costs as compared to solid systems. Stone void space may be utilized for storage even if a site is not conducive to infiltration. Will all open systems be classified as an infiltration practice? Clarification of this item is important because it will dictate the type of pretreatment that is required for each system. (*Contech*)

**Response 94:** Classification is based on whether the system is open or closed to the surrounding soil and will infiltrate the WQv or claim runoff reduction credit for infiltration. If so, it is expected that the designer will follow recommendations in the RLD manual or other technical guidance on the configuration of the BMP, outlets and pre-treatment, to prevent clogging at the soil interface and to maximize exfiltration.

**Comment 95:** **Part III.G.2.e.** At Table 5a, Note 3, page 22 of redline draft, discussion is included relative to dry basins including a forebay and a micro pool sized appropriately. It is the City's experience that standing water is a common problem associated with forebays and micropools. One question the City has is whether flow-based BMPs (e.g., centrifugal separators) are considered acceptable, alternative pretreatment practices? In addition, another question is what is considered an alternative "protected outlet"? (*City of Columbus*)

- Response 95:** Ohio EPA is willing to work with the City and others to determine suitable alternatives. Flow-based BMPs will be considered acceptable alternative pretreatment based on their effectiveness and services (coarse sediment removal and energy dissipation) compared to forebays. Generally, protected outlets will be assessed on their ability to provide non-clogging service.
- Comment 96:** **Part III.G.2.e.** At Table 5a, Note 4, page 22 of red line draft, discussion is included relative to underground storage must have pretreatment for removal of suspended sediments included in the design and documented in the SWP3. It is unclear to the City how pretreatment applies to pervious pavement as presented here and the *Rainwater Manual*. The *Rainwater Manual* recommends pretreatment for higher pollutant areas such as maintenance yards. The CGP; however, appears to require pretreatment in all cases. Was this intended? What pretreatment practices does OEPA find suitable for pervious pavement systems? (*City of Columbus*)
- Response 96:** The surface itself is the pretreatment in most pervious pavements. Where water from other sources (i.e., roofs or vegetated areas) is directly introduced into the underground storage below the previous pavement, a sump or other pretreatment maybe necessary.
- Comment 97:** **Part III.G.2.e.** The City questions whether the paragraphs immediately prior to and following Tables 5a and 5b are redundant? (*City of Columbus*)
- Response 97:** Ohio EPA agrees with this comment and the final permit has been revised to correct this issue.

### **Post-Construction – Transportation Projects**

- Comment 98:** **Part III.G.2.e.** Are pedestrian path projects, not related to roadway improvement projects, considered transportation related and the ODOT L&D Manual can be used regarding BMP options? Additionally, can grass filter strips or channels be used for such projects? (*EMH&T*)
- Response 98:** Based on the nature of these projects (narrow, long and linear) not being well suited for storm water being captured in a typical storm water basin, Ohio EPA allows these projects to use grass filter strips as appropriate treatment. Sizing is guided by the ODOT L&D Manual in that case.
- Comment 99:** **Part III.G.2.e.** It is our understanding that in the recent years, the Ohio Environmental Protection Agency (OEPA) and Ohio

**Department of Transportation (ODOT) have had multiple discussions regarding acceptable post-construction controls on roadway projects. The result of these discussions were a set of transportation-minded post-construction BMPs, along with applicable design parameters in the current ODOT Location & Design Manual, Volume II (L&D Vol.II). It is requested that WQv calculations remain unchanged or allow linear roadway projects to continue to provide BMPs on transportation projects in accordance with the current version of the ODOT L&D Vol. II manual. If this is not acceptable, please provide what new information is available to suggest that the BMPs recently approved by the OEPA for the latest ODOT L&D Vol. II manual are not providing water treatment to the maximum extent practicable. (Ohio Turnpike and Infrastructure Commission)**

**Response 99:** The WQv calculation represents the maximum extent practical for all categories of development. Highways and interstates are unique types of development because of their linearity, public investment and safety issues. Because of this uniqueness, OEPA continues to accept ODOT's L&D Volume II manual to engineering storm water BMPs for these areas. For this reason, ODOT has requested Ohio EPA's review and approval of updates to the L&D as permit changes are made.

**Comment 100:** **Part III.G.2.e. It is requested that transportation related projects utilizing the current ODOT L&D Vol. II manual to design and install OEPA approved BMPs, continue to design with the twenty (20%) redevelopment standards. If this is not acceptable, please provide what new information is available to suggest that the BMPs recently approved by the OEPA for the latest ODOT L&D Vol. II manual are not providing water treatment to the maximum extent practicable. (Ohio Turnpike and Infrastructure Commission)**

**Response 100:** Because of the interpretation of right-of-way imperviousness in the ODOT L&D Manual, OEPA has agreed to continue the general approach to redevelopment as of the 1/19/2018 L&D Manual, with the understanding that designers would first attempt bioretention and green infrastructure practices prior to utilizing extended detention practices or other suitable practices.

### **Offsite Mitigation of Post-Construction**

**Comment 101:** **Part III.G.2.e. Offsite mitigation only results in a net environmental improvement if the site designated for mitigation is developable, and is designated for development, such as within an area zoned (or could be zoned) as residential, a municipal planning area and/or within a facility**

**planning area designated to receive water and wastewater utilities (e.g., a Section 201 Facility Planning Area).**

**These cases do not result in a net positive environmental mitigation when the area designated for mitigation could not have been developed anyway. Even when “the mitigation ratio of the WQv is 1.5 to 1 or the WQv at the point of retrofit, whichever is greater” is used, there is a net loss since the protected area (e.g., floodplain, wetlands) could not have been developed.**

**In this permit, any mitigation should only be allowed in areas that could have been developed and are zoned and designated as developable. Areas that could not be developed (e.g., floodplains, steep slopes, etc., do not provide a net gain when mitigation is allowed on them, since they could not have been developed. (*The Nature Conservancy*)**

**Response 101:** Offsite mitigation is a rarely used action, that receives Ohio EPA review before approval. The agency recognizes the value of the offsite mitigation to achieve greater implementation of water quality services and acknowledges the concern of the commenter. These concerns have been applied during review of potential offsite mitigation. If the commenter has examples where those concerns were ignored, please share these (so that future issues may be avoided).

### **Previously Developed Areas**

**Comment 102:** **Part III.G.2.e. Increase in Redevelopment Requirements. The proposed increase in redevelopment requirements may stifle revitalization of economically depressed areas. Redevelopment projects are submitted by a wide variety of applicants with varying levels of storm water compliance sophistication. The requirements in the proposed GCP renewal lack clarity and seem over-burdensome for redevelopment projects. (Franklin County Engineer’s Office)**

**Part III.G.2.e. In the Previously Developed Areas (“redevelopment projects”) section of the draft permit, we suggest adding clarity that Equation 3 in the permit is for use when the runoff coefficient (Rv) increases. We recommend replacing the paragraph immediately preceding Equation 3 with the following: “For a previously developed area, if the post-project Rv for the disturbed area is greater than the pre-project Rv for the disturbed area, a weighted approach shall be used with the following equation:” (*City of Delaware*)**

**Part III.G.2.e. Requiring all proposed projects on previously developed sites (redevelopment) to have a post-construction BMP from Table 5 will be an undue burden on the site owner. Due to the existing impervious nature of such a project, it does not need its own detention basin (which could be used under the proposed permit as a post-construction BMP since the detention requirement is not applicable). As such, more feasible and cost-effective options (such as hydrodynamic separators) should be allowed for such sites. The increased requirements for these sites may actually hinder redevelopment of sites and incentivize developers to build on undeveloped sites, which would be counterproductive to improving water quality and promoting redevelopment.**  
*(Choice One Engineering)*

**Part III.G.2.e. “Ohio EPA encourages the redevelopment of previously graded, paved or built upon sites through a reduction of the WQv treatment requirement.”**

**The OMA is concerned with how Ohio EPA will treat the various regulated entities in these instances. What will be Ohio EPA’s process for evaluating sites and applying this new permit term?** *(The Ohio Manufacturing Association)*

**Part III.G.2.e. On page 25 of the red line draft, the agency makes reference to "soil restoration" among the three conditions that need to be met relative to previously developed areas. Details as to what is meant by "soil restoration" ought to be provided. For instance see, Seattle's Stormwater Code requirement for Post-Construction Soil Quality and Depth. Last viewed at [www.seattle.gov/DPDIPublications/CAMlcam531.pdf](http://www.seattle.gov/DPDIPublications/CAMlcam531.pdf).** *(City of Columbus)*

**Response 102:**

Based on comments received, Ohio EPA has changed the final permit’s “Previously Developed Areas” requirement to be consistent with OHC000004. The intent of the draft permit’s requirement was to incentivize green infrastructure practices. Ohio EPA will evaluate and study the redevelopment requirement over the upcoming permit term.

What is meant by “soil restoration” is the set of steps that restore previously impervious areas to areas that will allow some infiltration and vegetative growth. Guidance for soil restoration is expected to be developed in upcoming Rainwater and Land Development manual materials. Until that point, applicants may propose suitable methods or utilize other standards such as what you’ve referred. Steps are expected to include measure remove pavement, and rock fill, reduce compaction, replace soil and amend with compost as needed to prevent resettling into a compacted state and to grow vegetation and to plant vegetation.

### **Runoff Reduction Practices**

**Comment 103:** **Part III.G.2.e.** This section needs more detail and explanation. While we applaud OEPA's inclusion of alternative avenues to reduce reliance on structural BMPs, there needs to be more guidance provided to increase the regulated community's knowledge of how and when to implement and credit runoff reduction strategies. We encourage OEPA to provide training on the proper design, installation and management of non-structural BMP's. Members of the coalition could work with OEP A to coordinate training sessions. *(Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio)*

**Response 103:** OEPA appreciates the offer of assistance. OEPA intends to provide design guidance on the runoff reduction practices (and entire updated permit) through local training sessions, webinars and within the Rainwater & Land Development manual. OEPA will reach out to interested parties when planning these events. John Mathews (614-265-6685) and Justin Reinhart (614-705-1149) are the primary contact for storm water technical assistance.

### **Alternative Post-Construction BMPs**

**Comment 104:** **Part III.G.2.e.** On page 27, general discussion is about permittees requesting approval from OEPA to use alternative post-construction BMPs on a case-by-case basis. The City requests OEPA add language stating that MS4s *have* the right to reject alternative BMPs in their jurisdiction that *have* been approved by OEPA. *(City of Columbus)*

**Response 104:** This is assumed by Part III.B. which requires submittal to the MS4 prior to submission of the NOI to Ohio EPA. Ohio EPA recognizes this authority incumbent in the review process by the MS4, as such, change to the permit is not necessary.

**Comment 105:** **Part III.G.2.e.** On page 28, testing protocols are outlined. However, it is unclear whether all the alternative BMPs presented in the first paragraph on page 31 will *have* to undergo testing in accordance with the testing protocols? *(City of Columbus)*

**Response 105:** The paragraph gives examples of potential practices for clarification. All practices not included in Tables 4a or 4b require testing demonstrating their ability to capture 80% of TSS to be approved for use.

**Comment 106:** **Part III.G.2.e.** On page 27, second paragraph of the redline draft the agency has added the sentence "*Where the development project is located within a regulated municipal separate storm sewer system (MS4) community, the use of an alternative practice requires pre-approval by the MS4 before submittal of the Ohio EPA permit application*", the City suggests changing the sentence to "Where the development project is located within a regulated municipal separate storm sewer system (MS4) community, the use of an alternative practice requires pre-approval by the Ohio EPA before submittal of the SWP3 to the MS4 for review." (*City of Columbus*)

**Response 106:** Please see Response 104.

**Comment 107:** **Part III.G.2.e.** "Use of Alternative Post-Construction BMPs". The first paragraph on page 28 of redline/strikeout version, the permit states that discharge rate is considered to have negligible impact if the permittee can demonstrate that one of the following three conditions exist:

- i. The entire WQv is recharged to groundwater;
- ii. The larger common plan of development or sale will create less than one acre of impervious surface;
- iii. The storm water drainage system of the development discharges directly into a large river with drainage area equal to 100 square miles or larger upstream of the development site or to a lake where the development area is less than 5 percent of the watershed area, unless a TMDL has identified water quality problems into the receiving surface waters of the state.

Regarding iii, clarification is requested on whether the requirements in this section include the proposed development site. (*Northeast Ohio Regional Sewer District*)

**Response 107:** Yes, the site must be tributary to the watershed and should be considered in its sizing of the drainage area.

**Comment 108:** **Part III.G.2.e.** Pre-treatment is required for all underground detention systems in Tables 5a and 5b. Although underground extended detention and infiltration are accepted as standard BMPs, associated pretreatment BMPs require case-by-case approval by the MS4 and OEPA. This seems inefficient if underground detention is to be classified as a standard BMP, particularly as it is likely these systems will be used on a relatively frequent basis as is the case today. Using case-by-case approval also leaves review and approvals of manufactured treatment devices open to interpretation which can easily lead to inconsistencies in the

**performance and implementation of such BMPs. We strongly suggest standard approvals of products certified through the referenced lists for which OEPA will provide reciprocity (NJDEP, TAPE). (Contech)**

**Response 108:** OEPA does not intend for pretreatment practices to require case-by-case approval by MS4s or OEPA. Designers should select pretreatment practices based on tested efficiency and demonstrate that in a SWPPP. It is expected designers will rely on NJDEP and Washington TAPE for these test results in many cases.

**Comment 109:** **Part III.G.2.e. The Use of Alternative Post-Construction BMPs is referenced in determining which pretreatment BMP is appropriate for underground extended detention (50% credit) versus underground infiltration (80% credit). However, nowhere in this section does it define what BMPs get 50% credit versus those that get 80% credit. It is assumed that 50% credit references hydrodynamic separators on the NJDEP approval list, while 80% references filtration on NJDEP or TAPE. Are other options available for 50% pretreatment credit? There is currently no further mention or discussion of approving or testing 50% alternative BMPs in the alternative testing protocol section. Please provide clarification. (Contech)**

**Response 109:** The 50% and 80% minimum effectiveness goals are set to assure performance of the primary BMP. OEPA intends that the Alternative Post-Construction BMP testing protocol will be followed to demonstrate either 50% or 80% effectiveness as needed. the Alternative Post-Construction BMP Testing section only references 80% to reduce confusion.

**Comment 110:** **Part III.G.2.e. Tables 5a and 5b both allow for underground storage to meet the water quality treatment and infiltration requirements of the permit. Including these as “standard BMPs approved for general use” provides greater flexibility and more options for designers particularly as they face site obstacles like space constraints. (Contech)**

**Response 110:** Thank you for your comment.

**Comment 111:** **Part III.G.2.e. Based on the current pretreatment requirements for underground extended detention in Table 5a, it is assumed that hydrodynamic separation will be allowed for pretreatment. NJDEP certifies hydrodynamic separators at 50% TSS removal based on the specified lab testing protocol. However, TAPE only references hydrodynamic separators as part of its Pretreatment Program. TAPE’s pretreatment recognition does not require field testing or third-party approvals like the other categories**

**(Basic, Enhanced, Phosphorous, etc.); it is simply based upon data previously collected from manufacturers. NJDEP sizing of HDS units is also more conservative than that of TAPE. For this reason, it's important that only NJDEP is referenced for hydrodynamic separator approvals. (Contech)**

**Response 111:** The permit provides alternative post-construction testing protocol which must be followed to equitably demonstrate TSS removal efficiency. The permit also recognizes testing performed by the New Jersey DEQ and the Washington, Dept. of Ecology (TAPE) as equal or exceeding that protocol and expresses non-conditioned acceptance of TEST results by those agencies and not reciprocity of that agency's "certification" or "approval" of a BMP.

Footnotes in Table 4a and 4b cross-reference the Alternative Post-Construction Testing Protocol section with respect to the required 50% (extended detention) or 80% (infiltration) TSS removal efficiency for pretreatment. Pretreatment practices utilized with Standard BMPs in Table 4a and 4b are not typically reviewed or evaluated by Ohio EPA. Therefore, OEPA expects that designers will rely on the New Jersey and TAPE certification programs for verification of a BMP's efficiency. OEPA understands that TAPE does not provide for testing at the 50% "pretreatment" level. In response to comments, OEPA has clarified the pretreatment effectiveness requirement footnotes.

**Comment 112:** **Part III.G.2.e. As acknowledged by the draft permit, NJDEP utilizes lab testing protocol for both hydrodynamic separation and filtration units. TAPE is a field-based testing program. Because one protocol is lab-based and one is field-based, it can be difficult to effectively compare units approved on each list and for designers to decipher how to size/scale units that are approved on both lists. Since NJDEP no longer contains a field-testing component, several communities have moved toward referencing one program or another. If wanting to reference both TAPE and NJDEP, consider referencing NJDEP for 50% certification for hydrodynamic separation and referencing TAPE certification for 80% certification for filtration. Lab testing is appropriate for hydrodynamic separators, but field testing is typically recommended for filters since they are more sensitive to field pollutant loading conditions. (Contech)**

**Response 112:** Please see Response 111.

**Comment 113:** **Part III.G.2.e. As performance protocol and acceptance criteria is currently written for alternative BMPs, it is very open-ended leaving much room for interpretation by manufacturers, designers, and plan reviewers. This leaves the potential for inconsistent implementation, particularly as**

the program progresses. More open-ended protocol has proven to result in deviations from the performance criteria and exceptions being made as more products seek approval. Requirements for alternative BMPs should clearly reference the programs that testing must comply with. If providing reciprocity for NJDEP and/or TAPE, why not just reference these programs? Any alternative pathway for approvals that do not follow the referenced programs are likely to result in inequality between units leading to inconsistent performance and inequitable market conditions. (Contech)

**Response 113:** Please see Response 111.

**Comment 114:** **Part III.G.2.e.** Requiring testing of manufactured treatment devices by a third-party testing organization is not common. NJDEP and TAPE, for example, do not mandate this; they only require that testing is overseen by an independent party. Several manufacturers perform test of units in their own lab with oversight and analysis performed by an independent party. Consider requiring independent, third-party observation and analysis versus actual testing. (Contech)

**Response 114:** In response to comments, the permit has been updated to allow for third-party testing or oversight of testing.

**Comment 115:** **Part III.G.2.e.** Alternative BMP testing protocol requires demonstration of the maximum volume of sediment and floatables that can be collected in the BMP. Performance testing will not necessarily reveal these maximum amount of material that can be captured. Performance testing typically indicates, for example, the maximum treatment flow rate that a unit can operate before scour occurs, but it does not necessarily indicate maximum sediment storage capacity. These attributes are typically outlined in product specifications. (Contech)

**Response 115:** It is expected that the manufacturer's recommendations regarding volume of sediment and floatables allowed to accumulate before cleanout is necessary to maintain the expected long-term performance of all manufactured treatment devices will be provided in the Operation and Maintenance Plan and followed by the owner.

**Comment 116:** **Part III.G.2.e.** We believe that requiring the approval of each individual application of an alternative practice may prove to be cumbersome. Furthermore, if a design is completed with an alternative practice, waiting until an NOI and SWPPP is submitted to OEPA to know whether the alternative practice will even be approved introduces a great deal of uncertainty into the approval process. We suggest modifying the language of the permit to make it clear that the alternative

practices listed in the permit *will* be approved if applied correctly. We suggest that manufactured water quality units always be approved if the manufacturer certifies its compliance with the total suspended solids removal criteria. *(City of Delaware)*

**Part III.G.2.e.** The change in language to require OEPA approvals to be finalized for alternative post-construction approvals before permittees submit an NOI for permit coverage is unreasonable. For design-build type contracts in particular, post-construction controls may be evaluated much further into a project rather than well before commencement. This has the potential to cause undue delays in starting a project. GM requests that Ohio EPA establish a timeline and providing resources for reviewing NOIs, SWP3s and request for alternative BMPs in a timely manner within the language of this subsection. As indicated above, forcing project design to be 100% complete has the potential to impact the costs and siting decisions of such projects as it significantly increases the time to execute a project. *(General Motors)*

**Part III.G.2.e.** The new proposed requirement in G.2.e for OEPA approval of alternative post-construction BMPs before submitting an NOI also is unduly restrictive, could significantly increase the time required to execute a project in Ohio and potentially could negatively impact future siting determinations for construction projects. *(General Motors)*

**Part III.G.2.e.** *“Permittees shall request approval from Ohio EPA to use alternative post-construction BMPs on a case-by-case basis. To use an alternative post-construction BMP, the permittee must demonstrate that a BMP listed in Table 5 is not feasible and the proposed alternative post-construction BMP meets the minimum treatment criteria as described in this section. The permittee shall submit an application to Ohio EPA for any proposed alternative post-construction BMP. Where the development project is located within a regulated municipal separate storm sewer system (MS4) community, the use of an alternative practice requires pre-approval by the MS4 before submittal of the Ohio EPA permit application. Ohio EPA requires that approvals for alternative post- construction BMPs are finalized before permittees submit an NOI for permit coverage.”*

Manufacturers are concerned with this new requirement for both Ohio EPA and MS4 approval for alternative post-construction BMPs. How will Ohio EPA guarantee that these two additional approvals will not slow down projects? Will Ohio EPA and the MS4 commit to acting within a specified time period? The extra time and lack of certainty that these additional hurdles pose could prove very problematic and

**simply not feasible for the permittee.** (*The Ohio Manufacturing Association*)

**Response 116:** It should not be routine that approval of an alternative practices would need to be requested as additional flexibility has been provided to small sites disturbing less than 2 acres. This should reduce the need as well as the additional options to the tables of acceptable practices. But Ohio EPA is committed to and is preparing for a quick response to requests for approval of alternatives BMP. This will be helped by applicants using the referenced programs that have provided testing results. Ohio EPA does not control local government processes and therefore cannot speak regarding MS4 communities' commitments.

**Comment 117:** ***Part III.G.2.e. "The alternative post-construction BMP testing protocol described in this section is similar to testing requirements specified by the New Jersey Department of Environmental Protection (NJDEP) for storm water Manufactured Treatment Devices (MTD) and therefore testing results certified by NJDEP shall be accepted by Ohio EPA. For examples of BMPs that have been tested using New Jersey Department of Environmental Protection's procedures, see the website: [www.njstormwater.org](http://www.njstormwater.org). Another nationally recognized storm water product testing procedure is the Technology Assessment Protocol – Ecology (TAPE) administered by the State of Washington, Department of Ecology. The TAPE testing procedure describes testing to achieve 80% TSS removal using a sediment mix with a particle size distribution with approximately 75% of the mass of the aggregate with particle diameters less than 45 microns. Overall, this particle size distribution is finer than the distribution in Table 6. Therefore, if TAPE testing results are available for a proposed alternative post-construction BMP, those results shall be accepted by Ohio EPA. The State of Washington, Department of Ecology website is [www.ecy.wa.gov](http://www.ecy.wa.gov)."***

**The OMA would appreciate an explanation of Ohio EPA's rationale for selecting New Jersey and the state of Washington as standards to cite to and emulate. Were other states' protocols reviewed, and why were these two selected over other states?** (*The Ohio Manufacturing Association*)

**Response 117:** A white paper prepared by the Water Environment Federation may be helpful here: [http://wefstormwaterinstitute.org/wp-content/uploads/2016/08/WEF-STEPP-White-Paper\\_Final\\_02-06-142.pdf](http://wefstormwaterinstitute.org/wp-content/uploads/2016/08/WEF-STEPP-White-Paper_Final_02-06-142.pdf). There are no currently active national programs or actively maintained national standards for testing. Both New Jersey and Washington TAPE have specified high-quality protocol for testing. New Jersey's particle size distribution has been

evaluated as appropriate for Ohio. It is for these reasons these two were selected.

**Comment 118:** **Part III.G.2.e.** That the EPA have their list completed including the BMPs to be grand-fathered in prior to issuing the permit and update the list as additional BMP's are approved for use. Clarify EPA's intent regarding the New Jersey list: <http://www.njcat.org/verification-process/technology-verification-database.html> (BIA of Central Ohio)

**Response 118:** Please see Response 111. OEPA intends to provide assistance to designers as well as local reviewers with the determination of acceptable pretreatment devices. OEPA intends to keep record of pretreatment practices found acceptable as they are approved for use. Currently used pretreatment practices that have not completed required testing may be conditionally approved based on OEPA's past evaluation until testing can be verified. OEPA has pointed to the New Jersey certification program as a quick source of verification that a pretreatment practice meets the 50% (extended detention) or 80% (infiltration) pretreatment requirement. Other sources of verification, including in certain cases Washington TAPE, may also be utilized provided they meet the protocol established for testing.

### **Water Quality Flow Rate and Pretreatment**

**Comment 119:** **Part III.G.2.e.** Specifying a method to calculate the water quality flow for flow-based BMPs, including manufactured treatment devices, will provide a clear sizing methodology and help create equitable market conditions for manufacturers. This addition will provide value to designers, plan reviewers, and manufacturers. (Contech)

**Response 119:** Thank you for your comment.

**Comment 120:** **Part III.G.2.e.** The proposed Water Quality Flow Rate Rainfall Intensity table provides the rainfall intensities developed with the intent to provide 90% treatment of average annual runoff. Since the 2/5/18 "Intensity-Duration Curve for Water Quality Flow" memo indicates that alternative practices must only achieve 50% TSS removal if used as pretreatment for underground detention facilities (as opposed to 80% removal). We believe the permit itself should include the separate criteria for pretreatment applications, whether that's treating a lower amount of total suspended solids for the given water quality flow rate formula, or if it's a separate rainfall intensity that should be used to obtain a lower water quality flow rate (that would represent a lower percent

**treatment of annual average runoff leading to a 50% TSS removal). If it's a separate water quality flow rate, a separate set of rainfall intensities should be provided. (City of Delaware)**

**Response 120:** To clarify, the Water Quality Flow Rate Rainfall intensity table is developed with the intent to capture 90% of runoff, not treat 90% of runoff. The treatment rate is the runoff capture rate reduced by the efficiency of the practice. Additionally, the pretreatment requirement for 50% TSS removal in the permit applies only to Extended Detention versions of permeable pavement or underground detention. The pretreatment criteria is raised to 80% for infiltrating versions of permeable pavement and underground detention due to the risk of clogging the infiltrating surface. Therefore, a designer may choose to apply a lower efficiency practice than the table 4a/4b practices at the 90% capture rate to obtain the required 50% or 80% pretreatment treatment rate.

**Comment 121:** **Part III.G.2.e. Consistent with the current Construction General Permit, an additional volume equal to 20% of the water quality volume is required to be incorporated into the BMPs listed in Tables 5a and 5b for sediment storage. For volume-based BMPs such as underground detention, incorporation of this additional volume is relatively straightforward. However, does this have any impact on sizing of the flow-through practices such as alternative BMPs used for pretreatment? (Contech)**

**Response 121:** Please see Response 115. The 20% sediment storage applies only to the primary treatment practice.

**Comment 122:** **Part III.G.2.e. Requiring pretreatment for underground detention practices as outlined in the footnotes of each of these tables is a best practice that is encouraged. Pretreatment requirements are outlined in the permit section titled "Use of Alternative Post-Construction BMPs" on page 24. This section requires that permittees request approval from OEPA to use alternative BMPs on a case-by-case basis. This section further states that to use an alternative BMP, the permittee must demonstrate that a BMP listed in Table 5 is not feasible. This seems contradictory and confusing given that underground detention/infiltration solutions are considered standard BMPs for general use in Table 5. If underground detention is utilized, will the pre-treatment device need to be approved on a case-by-case basis? This seems inefficient and defeats the purpose of listing underground detention as a Table 5 option. We suggest including a section that clearly outlines accepted pretreatment practices, such as a pre-approved product list, so these pretreatment BMPs may be accepted without case-by-case approval. (Contech)**

**Response 122:** Because of the variability and rapid development in this arena, OEPA chose not to lock in a table of pre-approved pre-treatment practices at this time. OEPA will evaluate this over the next permit cycle and provide guidance in the RLD manual.

**Comment 123:** **Part III.G.2.e.** This section clearly sets forth the portion of a site's water quality volume that requires treatment/infiltration based on the type of BMP utilized. However, it does not specify sizing impacts to flow-through practices. For example, if underground extended detention provides treatment for 40% of the water quality volume for the previously developed area, pretreatment will be required as noted in Table 5a. However, there is no direction for how flow-based pretreatment BMPs should be sized for redevelopment. Should the water quality flow still be calculated for the entire site, or should a reduced water quality flow also be calculated similar to the reduced water quality volume? Please provide clarification. (*Contech*)

**Response 123:** Post-construction practices must be sized to meet 100% of the Water Quality Volume, or the Water Quality Flow, associated with their contributing area. Previously Developed Areas (Redevelopment) would be expected to have practices sized to the full WQv or full WQf for a contributing area equal to or greater than 20% of the site area. This area should be target to the most likely to contribute pollutants.

### **Post-Construction BMP Operation and Maintenance**

**Comment 124:** **Part III.G.2.e.** On page 20 of redline/strikeout version, when designed correctly, extended detention basins (both wet and dry) include specific storage volumes and associated elevations. This includes the required additional 20% sediment storage volume, which should be utilized as an indicator to remove accumulated sediments. When sediment accumulates to the elevation associated with the 20% sediment storage volume, the sediments must be removed to restore original storage volumes. Owners of these practices should not have to guess how frequently sediments must be dredged (e.g., dredge sediments every 5-7 years) when there are absolutes built into the design. As such, the District requests that Ohio EPA includes the following language (underlined) in the second paragraph:

**"...maintenance easements; (7) For extended detention post-construction practices (Table 5a), provide relevant elevations and associated volumes that dictate when dredging of**

**accumulated sediments must occur.** (Northeast Ohio  
Regional Sewer District)

**Response 124:** Ohio EPA considered the comment and similar language has been added to the permit.

**Comment 125:** **Part III.G.2.e.** ***“Permittees are responsible for assuring all post-construction practices meet plan specifications and intended post-construction conditions have been met (e.g., sediment removed from, and sediment storage restored to, permanent pools, sediment control outlets removed and replaced with permanent post-construction discharge structures, and all slopes and drainageways permanently stabilized), but are not responsible under this permit for operation and maintenance of post-construction practices once coverage under this permit is terminated.”***

**Manufacturers have serious concerns with this provision. As discussed above, imposing requirements to make permittees responsible for perpetual post-construction storm water management is a big issue and significantly expands the permitting obligation. Further clarity is needed. (The Ohio Manufacturing Association)**

**Response 125:** Please see Response 33 regarding the change of “in perpetuity”. Other issues described above are issues that considered normal concerns within site development and long-term maintenance.

**Comment 126:** **Part III.G.2.e.** ***“a legal agreement is established through which the regional BMP owner or operator agrees to provide this service in perpetuity.”***

**The OMA reiterates its opposition to such broad long-term language requiring obligations to be met “in perpetuity.” Requiring perpetual management of runoff is unreasonably onerous for the reasons discussed above, and the additional requirement that this be memorialized via a legal agreement adds an entirely new regulatory and procedural hurdle for permittees to jump through. More clarity is needed regarding both Ohio EPA’s justification for, and expectations for, these legal agreements. (The Ohio Manufacturing Association)**

**Part III.G.2.e.** **The proposed permit states that post-construction controls shall be implemented, “so that receiving stream’s physical, chemical and biological characteristics are protected, and stream functions are maintained, post construction storm water practices shall provide perpetual management of runoff quality and quantity.” Operators of active construction sites cannot be held liable for post-construction flows in perpetuity. The proposed permit later states that operators “are not**

responsible under this permit for operation and maintenance of post-construction practices once coverage under this permit is terminated." (redline, page 20). What assurance will be required for approval of such perpetual maintenance? We strongly urge the agency to remove the perpetual language and replace it with a more reasonable long-term standard. (Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio)

**Part III.G.2.e.** We are concerned there is not enough detail in the long-term maintenance provision within this section to adequately describe how permittees may ensure lasting maintenance of features. We suggest looking to other states NPDES permit language, such as Massachusetts, New Hampshire, and West Virginia. Simply requiring "in perpetuity" is not appropriate or reasonable. (Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio)

**Response 126:** Please see Response 33 regarding "in perpetuity". In response to comments, the term has been changed to long-term in the final permit.

**Comment 127:** **Part III.G.2.e.** Post-construction BMPs that are subject to the maintenance plan should be those designed and engineered such as underground storage, sandfilters, and other unique engineered facilities that do need extra care. However, post-construction BMPs such as vegetated swales, grass swales, filter strips, and similar post-construction BMPs should not be included in a maintenance plan as the only maintenance warranted or required to maintain function would be normal maintenance such as mowing. A maintenance plan on general maintenance practices is unreasonable and provides no added value or assurance of a better facility. (Ohio Utilities Group)

**Response 127:** Ohio EPA has some agreement with the commenter that some BMPs need more care and therefore a maintenance plan is critical to their continued function but disagrees that a maintenance plan is unreasonable for other less engineered BMPs. The latter will have simpler requirements such as checking for erosion and providing maintenance of vegetation as needed to assure continued performance.

**Comment 128:** **Part III.G.2.e.** Section E and G Post Construction Storm Water Management. The draft rules state: "So that receiving stream's physical, chemical and biological characteristics

are protected, and stream functions are maintained, post-construction storm water practices shall provide perpetual management of runoff quality and quantity.” OUG members interpret that this would be required where there is a post-construction maintenance plan or in instances where there is a stream on a station site with only vegetated swales but no vault or other designed post-construction BMP. OUG members do not think this should be required for those BMPs that require normal maintenance. *(Ohio Utilities Group)*

**Response 128:** This purpose statement has been included in the permit since its inclusion in 2003 and provides the overall purpose of providing post-construction practices that treat pollutants and curb the erosive effect of runoff before leaving the site. It does not imply obligations not listed elsewhere in the permit.

**Comment 129:** Part III.G.2.e. The term “perpetual management” is a loaded statement. OUG members recommend that this language be revised. OUG members suggest that the post-management storm water management controls should take into consideration stream characteristics and design accordingly. Further, in regard to the requirement of “perpetuity,” there are some local entities that are now requiring a conservation easement and deed restriction. OUG members are concerned the perpetual management is leading to something more involved, burdensome, and unreasonable. *(Ohio Utilities Group)*

**Response 129:** Please see Response 33 regarding that term being changed to long-term.

**Comment 130:** Part III.G.2.e. Of concern to the CDAO include any reference to “perpetual care/management” or any reference to undefined terms like the term “Contaminated Soil” in the proposed general permit. Terms as such, create ambiguity that can influence other permits and create waste streams that the waste industry may not be capable of handling. *(Construction and Demolition Association of Ohio)*

**Response 130:** Please see Response 51.

**Comment 131:** Part III.G.2.e. Post-construction maintenance plans are normally required for MS4 areas. OUG members are not concerned with maintenance plans for active MS4 areas. However, there are some MS4s listed but are inactive and do not have regulations. For these MS4 areas, OUG members have serious concerns with developing post-construction maintenance plans without any guidance from a MS4. OUG members are also concerned with developing a post-construction maintenance plan for areas outside of a MS4

**under some circumstances.** (*Ohio Utilities Group*)

**Response 131:** Developing a maintenance plan has been a requirement since 2003 and Ohio EPA will try to develop examples that will assist MS4 communities and designers in having a similar approach to maintenance plan development and review.

### **Surface Water Protection**

**Comment 132:** **Part III.G.2.f. Surface Water Protection.** On page 32 of the red line draft, reference is made to the Louisville District as the appropriate US Army Corps of Engineers District Office for Ohio. Please remove reference to the Louisville District as the Huntington District Office is the one that has jurisdiction over 404 permitting in areas previously regulated by Louisville. [See <http://www.lrh.usace.army.mil/Portals/38/docs/regulatory/publicnotices/Huntington%20Regulatory%20Boundaries%20Map%201%20.pdf> for current boundaries.] (*City of Columbus*)

**Response 132:** The Louisville, KY District Office does retain jurisdiction over portions of the Ohio River. No changes to the final permit were made.

**Comment 133:** **Part III.G.2.g.i. Non-sediment Pollutant Controls.** Many MS4s reference OEPA's CGP in their erosion and sediment control regulations to avoid duplicative regulations and potential inconsistencies as CGP requirements change. The City suggests adding "an MS4" to the second sentence of the paragraph to read: "The permittee must implement all necessary BMPs to prevent discharge of non-sediment pollutants to the drainage system of the site or surface waters of the state, or an MS4." The addition of such language will facilitate support of local regulations. (*City of Columbus*)

**Response 133:** Ohio EPA agrees with this suggestion and the suggested language has been added to the final permit.

**Comment 134:** **Part III.G.2.g.iv. Trench and Groundwater Controls.** The City suggests adding well-point drilling and discharge to the paragraph on dewatering activities.

**The City suggests that OEPA provide guidance, or reference to guidance, that defines when groundwater is not considered to contain "pollutants".** (*City of Columbus*)

**Response 134:** If there are any pollutants of concern other than sediment, the NPDES construction storm water discharge permit does not allow

the discharge. If the groundwater is clear (not turbid), then the general permit allows for its discharge as long as the pump does not cause the water to be turbid and the groundwater is not discharged directly onto exposed soil. The operator must keep the discharge clean. If the groundwater is sediment-laden (turbid), the discharge must be treated by a filter bag or a settling pond. Due to the very high level of sediment in well-point drilling water, this discharge cannot be treated by a filter bag and must first be discharged to a settling basin.

### **Inspection Requirements**

**Comment 135:** **Part III.G.2.i.** For the purposes of reflecting the definition provided in Part VII, it is suggested the following clarifying edit (underlined) to this language:

**“Once a definable area has achieved final stabilization, the area may be...”** *(Northeast Ohio Regional Sewer District)*

**Response 135:** The final permit was revised to include the proposed language.

**Comment 136:** **Part III.G.2.i.** In the second full paragraph of page 35 of the redline draft, the CGP states that a permittee shall maintain for three years following the submittal of a NOT, a record summarizing the results of the inspections, etc .... The City requests an answer to the question: If the permit terminates upon approval of the NOT, is there a penalty for a permittee that fails to maintain records as indicated, and if so what is it? *(City of Columbus)*

**Response 136:** 40 CFR Section 122.41 identifies standard permit conditions that are applicable to all NPDES permits. Specifically, Section 122.41(j) includes standard conditions applicable to “Monitoring and Records” that must be included within an NPDES permit. The 3-year timeframe is to satisfy this federal requirement. Regarding penalties, Ohio EPA can assess maximum penalties of \$10,000 per day per violation but enforcement discretion is utilized on a case-by-case basis.

**Comment 137:** **Part III.G.2.i.** In this Inspection section, on pages 34 - 35 there are four references to the lower case "i", "ii", etc ... in addition to the initial reference to Part III.G.i -Inspections. This is confusing, and the outline should be reformatted in a way that allows for direct reference to the 4 sub-lists contained in the section. *(City of Columbus)*

**Response 137:** Ohio EPA agrees that the outline of Part III.G.2.i needs to be improved for less confusion. Ohio EPA has made this correction in the final permit.

**Comment 138:** Part III.G.2.i. The paragraph preceding items i, ii and iii at [the] bottom of page 35 is unclear whether these items are relevant before or after the NOT is submitted. (*City of Columbus*)

**Response 138:** Ohio EPA agrees. The paragraph preceding i, ii, & iii will be moved to the end of Part III.G.2.i.

**Comment 139:** Part III.G.2.i. We support the change to Part III.G.2.i. of the draft permit which allows inspections to take place after a rainfall event by the end of the next work day (i.e., excludes weekends and holidays unless work is scheduled). We also request this exclusion be applicable to the inspection provisions of that section for "*When practices require repair or maintenance,*" "*When practices fail to provide their intended function,*" and "*When practices depicted on the SWP3 are not installed.*" (*American Electric Power*)

**Response 139:** Ohio EPA contends that the 3/10 calendar days is sufficient response time to repair silt fence and sediment basins respectfully.

#### Notice of Termination Requirements

**Comment 140:** Part IV.B.1 and Part IV.B.2.c. *A maintenance agreement is in place to ensure all post construction BMPs are adequately maintained in perpetuity;*"

Uncertainty abounds, and concern remains over new proposed permit terms requiring maintenance in perpetuity. What does Ohio EPA envision in terms of these maintenance agreements? Does Ohio EPA have any guidance on the establishment of this type of agreement maintained in perpetuity? What is the procedure, if any, that Ohio EPA will require for the substance, execution, submittal, and approval of such agreements? (*The Ohio Manufacturing Association*)

Part IV.B.2.c. The Draft CGP states, "*A maintenance agreement is in place to ensure all post construction BMPs are adequately maintained in perpetuity*" First of all, the operator's regulatory obligations end at the time the site is stabilized and no further "active construction operations" generate regulated stormwater. To attempt to extend the state's regulatory authority over a site by including this type of provision is illegal because the state is essentially attempting to contract with the permittee before filing an NOT that it will be responsible for ensuring BMPs forever. This

**provision must be deleted or revised. (General Motors)**

**Response 140:** Please see Response 33 regarding the change of “in perpetuity” to “long-term”.

### Definitions

**Comment 141:** **Part VII. "Streamway" was a definition added to the draft permit but is not used anywhere throughout the permit. Therefore, we recommend the definition be removed. (American Electric Power)**

**Response 141:** Ohio EPA agrees. Since the word “Streamway” is not used in the NPDES construction storm water general permit, it will be removed from the final general permit.

**Comment 142:** **Part VII. The City suggests adding "Skimmer" to the list of definitions. (City of Columbus)**

**Response 142:** Ohio EPA evaluated this comment, but no changes were made to the final permit as the permit text on the type of discharge is sufficient.

**Comment 143:** **Part VII.V. Definition of Operator. Operator is used interchangeably with owner throughout this draft. The definition Part VII. DEFINITIONS w. is “Owner or operator” means the owner or operator of any “facility or activity” subject to regulation under the NPDES program. The problem with using operator is for requirements into perpetuity, such as maintaining post construction facilities, inspection of facilities, and maintenance of facilities. An example of a facility ranges from detention or retention basins to engineered components such as outlet or drop structures, outlet protections such as rock chutes, vegetated swales, and other similar structures. This is clearly an Owner responsibility, not that of a construction contractor. (Envi-Environmental)**

**Part VII.V. “V. Operator” means any party associated with a construction project that meets either of the following two criteria: 1. Property owner and has operational control over construction plans and specifications, including the ability to make modifications to those plans and specifications; in most cases this is the owner of the site;”**

**This permit appears to now require the property owner to become involved in running the day-to-day operations of the permit. Is this Ohio EPA’s intent? This is problematic, as most property owners hire general contractors to handle**

construction issues, to allow owners to attend to their manufacturing core competencies. The OMA shares the concerns more fully articulated by GM in its comment letter to Ohio EPA regarding the draft permit's change to the definition of "operator." What is Ohio EPA's reasoning and justification for this change? The OMA requests that Ohio EPA reinsert the "operator" definition used in the current permit. (*The Ohio Manufacturing Association*)

**Part VII.V. Owner/Operator Permit Coverage Issues.** The NPDES regulations are clear and indisputable, "when a facility is owned by one person but operated by another, then it is the duty of the operator to apply for the permit." 40 CFR § 122.21(b). In the case of regulated, active construction operations that meet the definitions of 40 CFR § 122.26(b)(14)(x) or (b)(15) depending upon the size of the disturbed land, the "facility" is the active construction area that requires and is subject to an NPDES permit. The property owner that includes the "construction site" often owns a larger parcel of land than the area subject to active construction needing the NPDES permit and that owner rarely conducts the operations associated with land-disturbing construction activities that are subject to permitting.

Instead, the owner – who likely will benefit from the final construction project and is intimately involved in hiring architects, consultants, and general contractors – most often delegates the overall daily responsibilities for that construction to a general contractor. This occurs through normal contracting procedures in which the general contractor is compensated to ensure compliance with environmental laws and regulations and often indemnifies the owner for such compliance.

U.S. EPA has long recognized these realities and originally structured its CGP permitting processes to provide such flexibility, while requiring appropriate permitting from the appropriate "operator" of the activity being regulated. In its original stormwater rulemaking, EPA explains clearly:

*In response to these comments, EPA would clarify that the operator will generally be responsible for submitting the permit application. Under existing regulations at §122.21(b), when a facility is owned by one person but operated by another, then it is the duty of the operator to apply for the permit. Due to the temporary nature of construction activities, EPA believes that the operator is the most appropriate person to be responsible for both short and long term best management practices included on the site. EPA considers the term "operator" to include a general contractor, who would generally be familiar enough with the site to prepare*

***the application or to ensure that the site would be in compliance with the permit requirements. General contractors, in many cases, will often be on site coordinating the operation among his/ her staff and any subcontractors. Furthermore, the operator/general contractor would be much more familiar with construction site operations than the owner and should be involved in the site planning from its initial stages. 55 Fed. Reg. at 48,034 (Nov. 16, 1990); see also EPA's current NPDES Permit Writer's Manual at 4-1 [link].***

**Problems arise in this permitting scheme when permitting authorities, such as Ohio EPA, attempt to expand the concept of "operator" to any party that has any "ability" to modify any construction plans or specifications. See proposed permit definition of "operator" at Page 46 of 69. The notion that the property owner, merely by its authority to make final decisions, is an "operator" of the active construction areas subject to permitting is unnecessary, creates confusion, and interferes unreasonably with the CGP permit compliance and enforcement. Ohio EPA does not gain any additional enforcement authority through this process but, rather, causes confusion among enforcement staff and regulated parties, while adding unnecessary and wasteful paperwork through requiring multiple NOIs from various entities that are most often not engaged in any of the active construction operations being permitted.**

**The most likely case in which there will be multiple "operators" at a large construction site is in the case of new housing developments. In those cases, a developer typically installs the infrastructure for the development and, as the owner typically, also is the operator. Once the infrastructure is completed, typically at least some of the individual housing lots are then sold to other vertical homebuilders for actual home construction. At that time, the developer may still be responsible for various parcels of the property while other homebuilders operate on subparcels.**

**But, Ohio EPA addresses these concerns and issues in Part 1. D. of the draft permit. No further discussion or provisions are needed for those scenarios. However, OEPA's expanded definition of "operator" could impact that process negatively. Assume that an individual bought a single lot from a developer and then hired a general contractor to build a house. OEPA would then have that individual also file an NOI since they might be able to affect site plans. That individual has no basis from which to assess stormwater permit compliance, but the builder that they hired is the party that must be responsible for obtaining a permit and permit compliance. In fact, that obligation is addressed in the general contractor's agreement and is an essential element of**

the general contractor obtaining a building permit (and soil and erosion control plan) as a condition precedent to initiating the home construction.

If OEPA is concerned that general contractors will not be provided sufficient resources or authorization to ensure full environmental compliance through the contracting process, or that the property “owner” will somehow work to thwart complete stormwater permit compliance, there is a much easier fix than requiring multiple NOIs. The simple fix is to modify the NOI to include information about the permittee, the role that permittee has relative to the construction, and who “owns” the property if different than the permittee. OEPA could add a few simple questions to the NOI after the “applicant” identifies itself. “Are you the owner of the property, the operator, or both?” “If not the owner, identify the owner and confirm that the owner has authorized you to be the responsible individual for permit compliance.” Ohio could obviously add boxes to be checked or filled-in as appropriate.

GM has seen the confusion created by Ohio EPA’s owner/operator approach and has witnessed/experienced the misuse of time and resources related to attempting to address how a party, on the one hand, might be required to file an NOI even though they are not involved in day to day operations, while on the other hand must “comply” with a permit that requires compliance based on being involved in day to day operations. This concern clearly is not unique to industrial manufacturers in Ohio as evidenced by ongoing litigation over this issue (and others) regarding U.S. EPA’s 2017 CGP, which GM understands is in settlement discussions between homebuilders and U.S. EPA. While the outcome of that case will be instructive, GM asserts that there are more efficient and effective ways of protecting state interests and those of the regulated community, such as the suggestions above. Ohio EPA’s proposed revisions to the definition of “Operator” could hinder construction projects, particularly design-build projects, and cause parties to consider siting projects outside Ohio. OEPA should delete its proposed revisions to “Operator,” and retain the language currently in place supplemented with the suggested fix provided in the paragraph immediately above, if needed.  
(General Motors)

**Response 143:** In response to comments, Ohio EPA has changed the definition of operator(s)

**Comment 144:** Part VII.V. Requirements for becoming a co-permittee of the site Owner’s NOI need to be clearly defined for situations where the site will have post-construction care required into

**perpetuity so that there are not post-construction requirements of a construction contractor into perpetuity when the intent is for the owner to have those perpetual responsibilities. (Envi-Environmental)**

**Response 144:** Once the NPDES construction general permit coverage is terminated, the contractor is no longer responsible for the activities on the property. Only the land owner will be responsible to maintain the post-construction best management practice. The intent of the language is to have the design and implementation of the practices so that they will continue to function after permit coverage has ceased. The terms in perpetuity and perpetual have been changed to in the long term and long-term when referencing storm water practices.

**Appendix A (Big Darby Creek Watershed) Appendix B (Olentangy River Watershed)**

**Comment 145:** **Appendix A. We object to the continued use of this requirement in its current form. We agree that buffers are important and are effective at reducing sediment and nutrient loading to surface waters. However, a large body of published, peer-reviewed research on vegetative buffers for water quality indicate that relatively narrow buffers (< than 50-feet) yield extensive water quality benefits. The primary focus of the CGP is to prevent/minimize sediment loading of surface waters during construction of jobsites. Therefore, we strongly believe that a minimum buffer width of 50-feet should be specified rather than the greatest of the three options specified. If the intent is to remove development from the floodplain, we believe that this provision in the CGP is not necessary since floodplains are already regulated by FEMA as well as by the Ohio Department of Natural Resources Division of Water Resources and by county floodplain administrators across the state. Furthermore, the use of the formula provided ( $W=133DA^{0.43}$ ) can yield buffer widths substantially greater than 50-feet (and greater than the 100-year floodplain). Prior to continuing with the use of the current buffer requirements, OEPA should be required to provide detailed justification, including cost benefit analysis, as to why a riparian buffer greater than 50-feet is necessary to achieve the goals of the Darby and Olentangy CGP. Furthermore, OEPA should be prepared for the legal challenges that are likely due to impacts to private property rights. The proposed CGP for the Darby and Olentangy both require mitigation for impacts to the riparian setback. Once the buffer width criteria are adjusted (as suggested above), we believe**

**that the zones for mitigation should also be revised. Additionally, the location of any mitigation should not be required to take place in the same 12-digit HUC. Rather we believe that locating mitigation within the same 10-digit HUC as the impact should be sufficient and that exceptions to this requirement should be provided in cases when suitable mitigation cannot be located within the 10-digit HUC (e.g. in an adjacent 10-digit HUC). Details should be developed by OEPA on how an applicant may be allowed to complete a mitigation project. Currently, applicants are left scrambling to locate options and this places an undue burden on applicants as well as watershed groups and local agencies and park districts to identify potential mitigation options. We are unaware of any in-lieu fee sponsors that exist that were established to provide riparian buffer mitigation. Lastly, we are unaware of any criteria that allow for the establishment and operation of an in-lieu fee sponsor. Until these details are addressed by OEPA this provision should not be included in the CGP. (Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio)**

**Response 145:**

Thank you for your comments. Please note that the riparian setback requirements were not proposed for any change during this permit renewal. In the case of a hardship that would make the application of the setbacks infeasible for a construction project, these situations can be presented to the agency for potential alternatives. The setbacks do not prohibit construction in the floodplain. Should the permittee find it necessary to intrude on the setbacks, it is permissible under the permit conditions, however mitigation is required. The mitigation is generally served in placing the remainder of the setback in preservation in accordance with the mitigation ratios. As a result, this option does not serve as a significant economic hardship.

We recognize that the permit's riparian corridor considers additional benefits due to floodplain form than many literature sources. Namely, these areas are considerable natural sediment sinks as well as the area natural occurring meander migrations occur. The equations were developed by ODNR with reference to empirical stream measurements for each watershed. While FEMA and local floodplain control programs do curtail the amount of rise of flood flows, these programs do not meet the same water quality objectives as the riparian setbacks contained within the Big Darby Creek and portions of the Olentangy river watershed requirements. Regarding mitigation, this permit did not consider enlarging the possible mitigation areas changing the mitigation ratios.

**Comment 146:**        **Appendix A. The Darby Creek is a state and national scenic river and should be protected. However, we believe that the groundwater recharge requirements are onerous and unjustified. The Darby Accord (adopted in June 2006) went to great lengths to help ensure that urbanization of the watershed is abated through the adoption and implementation of a thorough land management plan. To add the requirement for groundwater recharge places additional burdens on landowners of the watershed with regulations that depress land values, in addition to the burdens required by the Darby Accord. Furthermore, the dominant soil types in this watershed are clay and silty-clay soils such as Kokomo, Crosby and Lewisburg. The Crosby and Lewisburg soils are included in the "C" hydrologic soil group while Kokomo soils are in the "BID" hydrologic soil group. Most of these soils are in crop production and are systematically drained with surface and subsurface drainage systems. Therefore, it is unlikely that a substantial amount of groundwater recharge is currently taking place in the watershed (precipitation and snow melt are intercepted by the systematic drainage systems before recharge takes place). When considering the Darby Accord, the physical attributes of the dominant soils in the watershed, and existing systematic drainage systems, it is unclear why OEPA is requiring CGP applicants to provide for mitigation of losses groundwater recharge, especially when its scale and extent is questionable due to current land use. Due to these reasons, we believe that mitigation for groundwater infiltration should be removed from the CGP until OEP A can provide a detailed hydrogeologic analysis that supports any mitigation program for loss of groundwater recharge. (Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio)**

**Response 146:**        This section was already established in the previous permit cycle and was not considered for removal. Additional options for on-site mitigation was provided with the additional calculation method for groundwater recharge. It is important to note the diversity of Big Darby Creek is significantly attributed to interaction between ground water, Big Darby Creek, and the associated tributaries. In many areas the flow is largely contributed from shallow groundwater contributions. This was identified in the TMDL for the Big Darby. To preserve this significant water quality benefit, the groundwater recharge requirements were included. There are many options in meeting this requirement from land conversions to structural controls based on the location of the proposed site.

- Comment 147:** **Appendix A and B.** The conditions of the Big Darby Creek and Olentangy River watersheds in Appendices A and B of the draft permit include riparian setback distance calculations in Equation 1 of each appendix, respectively. A review of these equations identifies their constant and exponent values are different. While there are no changes proposed for these calculations, we are unclear on the difference and request Ohio EPA provide guidance on how the riparian setback distance calculations were derived. *(American Electric Power)*
- Response 147:** The formulas were developed by ODNR from different empirical measure in each watershed.
- Comment 148:** **Appendix A.** New Jersey BMP's also require groundwater recharge in most areas, unless it can be proven that in-situ infiltration rates are less than 0.2 inches/hour. In this case, the requirement is waived. Inclusion of a similar provision for Ohio should be considered. More information here: <http://www.njstormwater.org/bmpmanual/NJSWBMP6%20print.pdf> *(BIA of Central Ohio)*
- Response 148:** The inclusion of this will be considered over the next permit term.
- Comment 149:** **Appendix A.4. Riparian Setback Requirements. 4. ii. Stream Restoration with 100 feet (each side) Riparian Setback.**
- The Conservancy supports the change in paragraph i.2. (Page 51) from “centerline of the stream” to “top of the streambank” as a much-appreciated improvement. *(The Nature Conservancy)*
- Response 149:** Thank you for your comment.
- Comment 150:** **Appendix A.4. i.1.** “W shall be centered over the meander pattern of the stream such that a line representing the setback width would evenly intersect equal elevation lines on either side of the stream.”
- This is an existing section, not proposed for changes. But it is one that needs to be significantly improved, as the revision is less protective than the original 2006 Big Darby Creek watershed stormwater permit and results in significant reductions of the riparian setback. The proposed permit in section i.1. reduces part of the protection provided by riparian setbacks that was in the 2006 permit. The present option (2013 permit) centers the setback along the midline of the meander belt. However, when this is used, the outer portion of this meander belt is inadequately protected by this option, as the stream would

**have less riparian protection near the margins of the meander belt, even though the stream might be as close as a few feet away.** Therefore, we ask that for all streams the outer portion of the riparian setback be drawn such that those areas near the meander belt margin are not reduced in riparian setback protection compared to the 2006 permit. By “outer portion,” we mean the part of the meander belt that approaches the outer limits of this belt. Streams are not protected with an adequate setback distance by this present rule, in particular as the stream meanders toward the edge of the meander belt and approaches the outer margin.

The present riparian setback width is less than the pre-2006 Big Darby Scenic Rivers program setback recommendation of 120 feet from the ordinary high-water mark. When local governments adopted this Scenic Rivers riparian setback, it typically stated a 120-foot setback. If they adopt the 2013 permit (e.g., which Franklin County did), this might reduce the distance protected in the cases where the stream meanders toward the edge of the meander belt and approaches the outer margin.

There should be additional distance when steep slopes are within the setback. The steep slope should not be counted as part of the setback, as they provide little groundwater recharge or absorption of pollutants as water travels to the receiving stream. (*The Nature Conservancy*)

**Response 150:** Ohio EPA considered your comment. As stated there are no proposed changes to pre-existing conditions. The agency’s intent is to provide protection of areas which are more prone to interactions between the stream and floodprone areas providing significant water quality benefits. As such the agency contends the protection of the setbacks as defined in the permit are sufficient in the protection of water quality.

**Comment 151:** **Appendix A.5. Riparian Setback Mitigation.** “linear transportation projects which result in total new right-of-way greater than one acre and less than two acres, ... shall provide Riparian Setback Mitigation at a ratio of 1.5 to 1.”

Because they have the same impacts, these projects should be subject to the same mitigation ratios as other projects under A.5 Riparian Setback Mitigation.

“Mitigation shall be protected in perpetuity by binding conservation easements or environmental covenants which must be recorded within 6 months of receiving permit authorization.”

We strongly support the proposed language above requiring conservation easements or environmental covenants. These should include a third party in the legal documents to better assure the requirements are adhered to. Other approaches, such as deed restrictions, are too easy to modify and therefore do not provide adequate protection and therefore should always be avoided.

We recommend that Ohio EPA maintain a list of sites with any type of easements or covenants (or any type of long-term legal restrictions), that this list be made public, and the Agency regularly check compliance. Making these lists public will more likely result in long-term compliance.

“Mitigation may also be satisfied by approved pooled mitigation areas and in-lieu fee sponsored mitigation areas.”

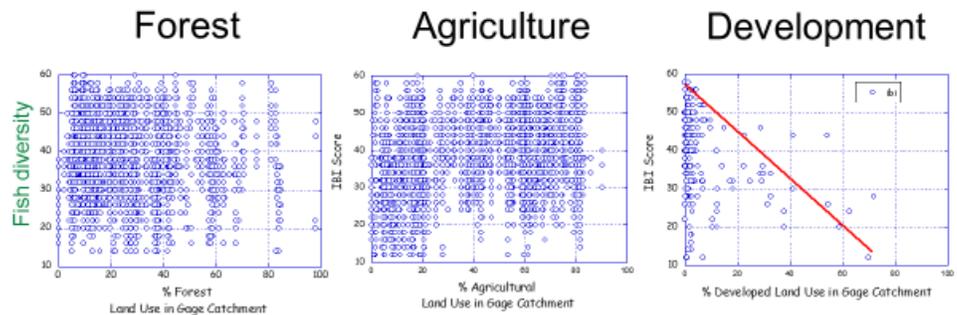
We do not support this proposed language and strongly encourage it be significantly modified. Because pooled mitigation areas will result in local impacts at the site of the project, they should be avoided whenever possible. A case in point is The Nature Conservancy’s Agnes Andreae Preserve in Madison County. A recent adjacent development resulted in a significant increase in impervious area and stormwater management, yet no mitigation was provided at the site, and stormwater management resembled, and might be identical to, other stormwater management in the statewide permit found across Ohio. The above development provided no groundwater recharge BMPs, and therefore the result is likely detrimental to the natural flow regime and likely to result in low flow, among other (e.g., thermal), impacts.

The permit applicant should demonstrate that to have an alternative selected, they must demonstrate that on-site mitigation is not possible. (*The Nature Conservancy*)

**Response 151:** Thank you for your comments and the agency is responding by internally tracking all establish mitigation easements or covenants. We have not required the discussed demonstration that onsite mitigation is not possible as there is a significant onsite economic incentive to mitigate onsite. The utilization of a 3<sup>rd</sup> party was considered; however, the agency has found there were several sites where no third party was interested in participating.

**Comment 152:** Appendix A.6. Groundwater Recharge Requirements. Tables 1 and 2, (Appendix A) Annual Average Expected Total Groundwater Recharge/Annual Average Expected Baseflow Recharge

These tables set a “predevelopment” recharge amount that is too high to be comparable between Residential and Row Crop land uses in terms of stream health impacts. Here is a comparison of how “predevelopment” is not comparable to agricultural results in terms of the recharge amount, the flow regime and resultant stream quality. For example, in this draft permit’s Table 2, (Appendix A) Annual Average Expected Baseflow Recharge, Row Crop agriculture in Class D soils has a value of only 6.2 inches of Recharge assigned. Medium Density Residential has a recharge value of 6.5 inches assigned, with 38% imperviousness. Yet, the environmental outcomes of developed areas with 38% imperviousness do not perform as well as areas with less imperviousness and a preponderance of agricultural soils. See the graphs of Ohio EPA data in Figure 2 that illustrate that agriculture has less impact than moderate to high levels of development.



Urban impact is additive (not mitigated or “cancelled out” by natural area); decline is very likely

MBI



## Fish Diversity vs. Land Use in Ohio

Figure 2. Fish diversity versus land use in Ohio, based on Ohio EPA data. The key points of this set of graphs is that: 1) there are no urban high scores, therefore, other land uses like forest do not appear to adequately mitigate development, and 2) development does not show it supports high diversity to the right of the diagonal bar. It is very rare to have scores above 40 (WWH) and no EWH scores are seen. As shown by the middle graph, agriculture, while it does have impacts, still can allow high

biodiversity at high levels of agriculture (i.e., above 50 or 60 %).

Therefore, “predevelopment” needs to be set at a higher rate of recharge to be comparable to the overall stream quality impacts related to agriculture. Clearly, other factors are responsible for degradation, and using the recharge rates from row crop agriculture leads to higher levels of residential development than can be justified based on stream impacts that have been measured by Ohio EPA. (*The Nature Conservancy*)

**Response 152:** Thank you for your comments. Ohio EPA established the levels of groundwater recharge and did not propose changes to these land use tables.

**Comment 153:** Appendix A. Attachment B. This section exempts “restored” streams from riparian setbacks. The option and section should be removed, as the Agency has not provided evidence that not providing a riparian setback does not lead to degradation, even with a “restored” stream. In addition, these streams might not be “restored” since the project could fail to provide significant ecological lift; see “Part 2 Restoration, item b. below, and Figure 1 of these comments, where “restoration” failed.

Paragraph 1, Line 2  
“(a drainage ditch)”

This implies that “a previously channelized, low-gradient headwater stream” is only a drainage ditch. Instead, it should be recognized as a modified stream, not a ditch. We recommend that this be changed to “a stream that has been managed as a drainage ditch.”

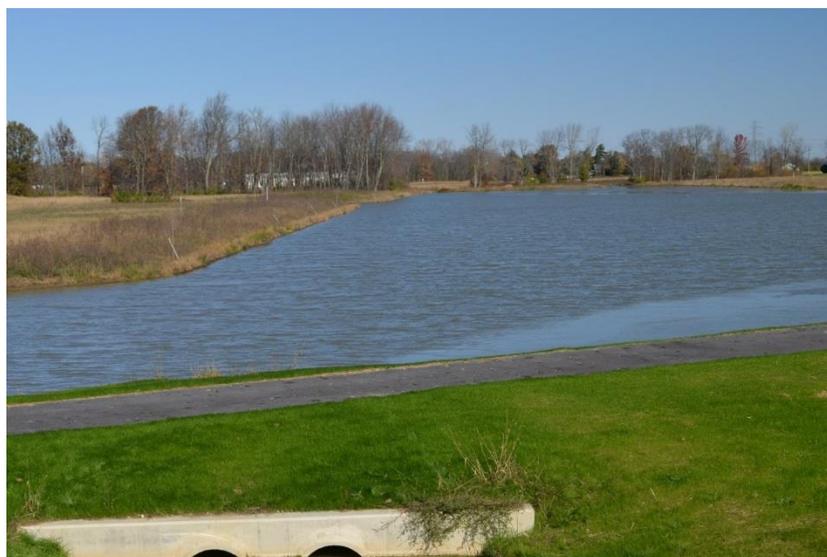
Paragraph 3  
Line 1: “drainage ditches” – Same comment as above for paragraph 1, line 2.

“Less than 10 square miles of drainage area” – This is a very large area of drainage area at over 6000 acres, and should not be exempt from setbacks. In many cases, this would cover most streams and a watershed’s drainage area. A drainage area of this size would clearly have formed a stream and should be assigned at least a Warmwater Habitat use designation, if not Exceptional Warmwater Habitat and Coldwater Habitat (e.g., Big Darby Creek in Logan County, or many tributaries, including those unnamed, through this and other watersheds).

## Part 2 Restoration

- a. ~~“Over-wide channel design by excavation down to the elevation of the stream bed uniformly across the entire frequently flooded width (Figure 1)”~~

We strongly agree that this section should be stricken, i.e., the over-wide channel design is not appropriate for stream restoration and should not be an option, as it does not provide adequate improvements in habitat design and results to attain the Warmwater Habitat (WWH) use designation, or better. In the case of one such design that was used on the upper Hamilton Run in Franklin County (see Figure 1, photo below), the site is a detriment to stream quality, providing a wide, long surface resembling a “detention pond” instead of a stream channel. The wide, shallow waterbody is continually exposed to the sun. Therefore, this site contributes to thermal impacts to the channel downstream. Such designs cannot be “self-forming” channels, as today’s geologic conditions do not resemble those of the Pleistocene Epoch, when Ohio’s present-day streams and valleys were first formed, had extended periods of significant runoff that formed stream valleys, and upstream channel and floodplain-forming materials are not being significantly supplied from upstream in today’s environment. In today’s environment, with its low gradient, this site does not have the stream energy or flow to form a channel.



**Figure 1. *Hamilton Run above Muir Parkway, west of Alton-Darby Road, over-wide channel design result, 11/2/2014. This condition remains in 2018. We also note that the “restoration’s” water exits through the culvert in the foreground, which might not provide adequate aquatic***

***organism passage due to its design without an apparent natural substrate bottom.***

**All stream restorations with associated culverts allowing for aquatic organism passage and should comply with Ohio EPA's 401 certification (2017 Nationwide Permit Reauthorization of 3/17/2017). (*The Nature Conservancy*)**

**Response 153:** Thank you for your comments. Requirements for setbacks on restored channels are less to incentivize the restoration. The agency contends restored channels provide a water quality improvement. The suggested changes were not incorporated.

**Comment 154:** **Appendix B. Olentangy River Watershed, references Sections B.5., Groundwater Recharge Requirements, and B.6., Groundwater Recharge Mitigation, but these sections were not included in the draft permit for review. (*American Electric Power*)**

**Response 154:** Thank you for your comment, the error was corrected by removing Groundwater Recharge Requirements and Groundwater Recharge Mitigation from the Contents Outline on page 54.

**Comment 155:** **Appendix B. To alleviate our significant concerns over riparian setbacks being introduced in the first generation of the Olentangy River permit in the 2007 to 2009 timeframe, Ohio EPA indicated to City staff that the riparian setback requirements would eventually be expanded across the state. The riparian setback requirements are associated in part with the total maximum daily load (TMDL) developed for the Olentangy River. According to OEPA's website there are 56 United States EPA approved TMDLs in the state of Ohio as of 2015. Twenty-six of these TMDLs were in place prior to the Olentangy River TMDL. Twenty-nine TMDLs have been put in place since the Olentangy River TMDL. Since only two watersheds out of the 56 TMDL watersheds in the state have additional riparian setback requirements, it is apparent that OEPA is not moving forward with statewide implantation of the more restrictive riparian setback requirements. Furthermore, there are 14 rivers and streams in Ohio with a "scenic designation" including the Olentangy River. What is the reasoning for requiring additional riparian setback and mitigation rates on the Olentangy River watershed and not the others with a scenic designation or a TMDL? (*City of Delaware*)**

**Response 155:** The Olentangy River TMDL report specifically identifies construction storm water as a concern. Not all watersheds or TMDL project areas have the same concerns. Watersheds with high rates of development expected may be more likely to have recommendations in a TMDL report to address construction storm

water. While Ohio has 56 final TMDL reports approved by U.S. EPA, there are approximately 49 additional TMDL reports in progress. The potential remains for additional TMDL projects to include specific riparian setback requirements for a given watershed. In addition, as Ohio EPA re-assesses watersheds with existing TMDL reports, the Agency may find the need for additional storm water controls where the statewide permit is not protective enough and local requirements are not in place to restore the water quality impairments. Any recommendations, if applicable, will be included in the next construction storm water general permit renewal.

**Comment 156:** **Appendix B.** We believe that Ohio EPA should “level the playing field” across the state with respect to environmental regulations contained in the Olentangy permit. We propose that the Olentangy River specific requirements not be included as an appendix to the statewide permit at this time. Additionally, we propose that the current Olentangy River permit be allowed to expire on May 31, 2019 without being renewed, after which time construction activities in the Olentangy River watershed would be permitted under the statewide permit without the riparian setbacks. It should be noted that the City of Delaware has similar stream buffering requirements in its codified ordinances that predate the first generation of the Olentangy River permit that would remain in place without special conditions of the Olentangy River permit. (City of Delaware)

**Response 156:** In addition, to response 155, The Ohio EPA has previously agreed to allow the City’s requirements to apply on developments within its jurisdiction (see Appendix B, Part B.2) and has chosen to leave the existing requirements in place.

**Comment 157:** **Appendix B.** The Olentangy River permit only includes the watershed area north of Interstate 270. It is not clear why the more restrictive permit conditions begin at this location. If due to the area south of 270 being heavily developed, why does these criteria not also apply to southern Delaware County and the City of Delaware? (City of Delaware)

**Response 157:** The selected area was based on the scenic river designation and TMDL study results.

### Legal/Authority Comments

**Comment 158:** **Post Construction Mandates are Misplaced and Unauthorized**

There are many new and expanded post construction mandates in the Draft CGP, including, for example: Part II.G. –

**Non-Numeric Effluent Limitations: Post-Construction Stormwater Management Controls (pp. 10 of 69), a new subsection that incorporates post-construction stormwater management control requirements; and Part III. G.2.e Stormwater Pollution Prevention Plans: SWP3 Requirements: Post-Construction Stormwater Management Requirements (pp. 19-31 of 69), (1) providing conservative volume and flow values, and resulting calculations for stormwater management units, (2) establishing new criteria for changes to previously developed areas within a construction site, and (3) adding requirements to have all alternative post-construction alternate BMPs approved prior to the NOI and SWP3 package being submitted to OEPA.**

**GM will provide limited comments on these particular provisions below, but as an initial matter, GM asserts that Ohio lacks legal authority to mandate post-construction requirements in any CGP or NPDES permit program.**

**Limited Federal/State Authority to Regulate Stormwater Discharges**

**Under CWA Section 301, EPA must develop effluent limitations for “pollutants.” 33 U.S.C. § 1311. “[P]ollutant” means dredged spoil, solid waste,...chemical wastes, biological materials,...heat,...rock, sand, cellar dirt and industrial...waste discharged into water.” 33 U.S.C. § 1362(6). The Supreme Court has held that the term “means” in a definition is restrictive; it excludes anything unstated. *Colautti v. Franklin*, 439 U.S. 379, 393 n.10 (1978); *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 172 (D.C. Cir. 1982). Therefore, EPA cannot add to the CWA list of pollutants.**

**CWA Section 402 provides an exception to CWA Section 301’s prohibition by allowing certain pollutant discharges to be authorized by a NPDES permit, provided that the discharges meet appropriate “effluent limitations” contained in the permit. 33 U.S.C. § 1342(a). Thus, the CWA, through the NPDES permit program, limits the discharge of pollutants from “point sources” into waters of the United States based upon the capabilities of the practices or technologies available to control such discharges. 33 U.S.C. §§ 1311(b)(2), 1314(b), 1316(b)(1)(B).**

**In 1987, Congress added CWA Section 402(p), which established a phased approach to regulating stormwater discharges, as needed. In Phase I, Congress required NPDES permits for stormwater discharges “associated with industrial activities” and “from” certain large and medium municipal separate storm sewer systems (MS4s). 33 U.S.C. § 1342(p)(1)-**

**(4). The industrial permit program was intended to more-or-less mirror the existing NPDES permit program for industrial and sanitary wastewaters. The new MS4 program was intended to have a more limited scope than traditional NPDES permits. For Phase II, Congress instructed EPA to study all remaining stormwater discharges to determine the nature of pollutants in those discharges, and establish “procedures and methods to control stormwater discharges to the extent necessary to mitigate impacts on water quality.” *Id.* §1342(p)(5). Based on that study, EPA was required to promulgate regulations designating any additional sources of stormwater discharges to be regulated and to establish a “comprehensive program to regulate such designated sources.” *Id.* §1342(p)(6).**

**To implement CWA Section 402(p)’s Phase I stormwater program, EPA promulgated new regulations that defined the term “associated with industrial activity” to identify 11 categories of industrial operations that must obtain NPDES stormwater permits. The industrial stormwater program regulates only those discharges specifically enumerated as associated with industrial activity, and other non-industrial stormwater discharges that commingle with regulated industrial stormwater discharges. Purely administrative buildings, administrative parking lots, and stormwater discharges from “non-industrial” areas are not covered by the industrial stormwater program unless they are commingled with industrial stormwater.**

**U.S. EPA defined “industrial stormwater” to also include discharges from construction activities that disturb at least five acres of land or are part of a larger common plan to disturb at least five acres. 40 CFR § 122.26(b)(14)(x).<sup>1</sup> During its Phase II stormwater program expansion, EPA expanded the active construction stormwater permit program to include sites that disturb one or more acres of land or are part of a common plan of development that disturbs that amount. For all regulated construction sites, the operator must file a Notice of Termination to end permitting obligations once the disturbed land has been stabilized. In other words, the NPDES permit obligations and requirements are relevant to construction sites only during active land-disturbing operations. Importantly, once stabilized and a Notice of Termination is filed, the developed property is not subject to the NPDES permit program unless the final developed property meets EPA’s industrial categories.**

**In 1999, EPA put forth a comprehensive 12-year plan to address post-construction stormwater discharges through its MS4 permitting program. This plan included evaluating a number of research initiatives, pilot projects, two rounds of**

**MS4 permits since EPA's Phase II stormwater program was promulgated, and other related supporting efforts. In the preamble to EPA's 1999 Phase II stormwater rulemaking, EPA explained that it had developed a long-term strategy for assessing and improving municipal stormwater regulations over two permit terms (at least 10 years). Essentially, EPA promised in 1999 to assess progress under its permitting program, stating that:**

**Gathering and analyzing data related to the stormwater program, including data regarding the effectiveness of BMPs, is critical to EPA's stormwater program evaluation. EPA does not intend to change today's NPDES municipal stormwater program until the end of this period, except under the following circumstances: a court decision requires changes; a technical change is necessary for implementation; or the CWA is modified, thereby requiring changes. 64 Fed. Reg. 68,771 (Dec. 8, 1999)**

**To codify that promise, EPA included the following regulatory language in its final Phase II stormwater rulemaking (codified at 40 CFR § 122.37):**

**EPA will evaluate the small MS4 regulations at §§ 122.32 through 122.36 and § 123.35 of this chapter after December 10, 2012 and make any necessary revisions. (EPA intends to conduct an enhanced research effort and compile a comprehensive evaluation of the NPDES MS4 stormwater program. EPA will re-evaluate the regulations based on data from the NPDES MS4 stormwater program, from research on receiving water impacts from stormwater, and the effectiveness of best management practices (BMPs), as well as other relevant information sources.)**

**Elsewhere, EPA provided that:**

**Guidance: EPA strongly recommends that until the evaluation of the stormwater program in § 122.37, no additional requirements beyond the minimum control measures be imposed on regulated small MS4s without the agreement of the operator of the affected small MS4, except where an approved TMDL or equivalent analysis provides adequate information to develop more specific measures to protect water quality. See 40 CFR § 122.34(6)(e)(2).**

**However, EPA has not been consistent in this matter. It has not provided for planned research, pilot projects, nor other important steps that would generate the information and technology necessary to support or justify any final standard. Despite a limited foundation upon which to base a difficult two-part stormwater program expansion effort, on October**

30, 2009, EPA began developing new stormwater discharge regulations under the NPDES for newly constructed and re-constructed properties. EPA's intent was to significantly expand the scope of its existing stormwater program to regulate "post-construction" stormwater discharges; namely to regulate the amount of impervious surface at a newly or re-developed site and the stormwater "flow, velocity or volume" leaving such a site.

Over the following five years, EPA issued Information Collection Requests to developers and other "target" groups, requested comments through various *Federal Register* notices, and pursued all of the regulatory procedures expected to inform a new regulatory scheme targeting newly and redeveloped properties. EPA had agreed with environmental groups through unrelated settlement agreements to promulgate final post-construction regulations no later than June 2013; however, it missed that deadline and in early 2014, EPA announced that it was "reallocating" resources away from the post-construction rulemaking effort.

EPA's failure to pursue its planned rulemaking to expand its permitting authority to include "post-construction" discharges otherwise precludes OEPA from now attempting to regulate such discharges, particularly through its CGP, in which the entire focus and need for that permit is the presence of active construction activities that are required by existing regulations to obtain NPDES permits.

**Neither EPA Nor States Can Regulate Stormwater "Flow"**  
**Pursuant**  
**to the NPDES Program**

***Stormwater Permitting Program Expansion Requires Studies, Reports to Congress, and Formal Rulemaking***

U.S. EPA (and Ohio EPA) has no authority to regulate developed sites that are otherwise exempt from permitting pursuant to CWA Section 402(p)(1). Section 402(p)(1) is a broad exemption from NPDES permitting for all stormwater discharges except those identified in Section 402(p)(2). Developed sites and impervious surfaces are not listed in Section 402(p)(2) or in EPA's Phase I or Phase II regulations implementing the stormwater permitting program. Active construction activities that disturb at least five acres of land have been subject to permitting under EPA's industrial stormwater permit program (40 CFR § 122.26(b)(14)(x)) since 1990 and those disturbing at least one acre of land pursuant to 40 CFR § 122.26(b)(15) since 1999. In each instance, the permittee may terminate permit coverage when the site is

stabilized. *Id.* Currently, EPA does not have authority or regulations to control stormwater discharges from developed sites that are not “associated with industrial activity.” 40 CFR § 122.26(b)(14).

The CWA sets forth specific processes that allow EPA to designate new sources or categories of sources for NPDES permitting. It may designate an individual site (“a discharge”) that contributes to a violation of a water quality standard or is a significant pollutant discharger on a site-specific basis. Or, as it did for the Phase II expansion, EPA may designate classes or categories of pollutant discharges for permitting through a process Congress laid out in CWA § 402(p)(5)-(6) that requires EPA to study stormwater discharges or classes of stormwater dischargers that currently are not regulated by the NPDES stormwater permit program. To the extent that EPA identifies any such dischargers that it believes should be included in the NPDES permitting program, Congress required EPA to submit a report to Congress containing the results from its study. In CWA Section 402(p)(6), Congress granted EPA authority to develop a regulatory program for those designated dischargers based on the results of the studies and the report it submitted to Congress.

During its now discontinued post-construction national rulemaking, EPA claimed that it had drafted a Report to Congress, but has never released a copy of that draft or provided specific information to support a Phase II-like program expansion. More significantly, without a formal rulemaking process, EPA should be prohibited from attempting on a permit-by-permit basis that which it otherwise is prohibited from doing without a rulemaking – establishing post-construction retention standards though its MS4 permitting powers.

***Flow Cannot Be Regulated Because it is Not a Pollutant.***

***In Virginia Department of Transportation v. U.S. Environmental Protection Agency, 2013 U.S. Dist. LEXIS 981 (E.D.Va. Jan. 3, 2013) (hereafter referred to as “Accotink,” the name of the creek at issue in that case) the federal district court held that the CWA did not confer authority to regulate stormwater flow because stormwater is not a “pollutant,” under that term’s statutory definition. Id. at 5. The court rejected EPA’s argument that stormwater flow could be regulated as “proxy” or “surrogate” to effect levels of pollutants already present within a waterbody, while acknowledging that it may be appropriate, in different circumstances, to impose stormwater flow restrictions as a means to regulate specific pollutant levels demonstrated to be discharged into a waterway within the stormwater flow. Id.***

at 5-6.

U.S. EPA has responded to *Accotink* by attempting to limit its applicability to the development of Total Maximum Daily Loads (TMDLs) under CWA §303(d). That argument is unavailing. The *Accotink* court's logic – based upon the CWA's explicit focus on controlling pollutant discharges into waters of the U.S. – applies with equal force in the context of the NPDES permitting program. Both the NPDES permit program and TMDLs that are incorporated into NPDES permits are expressly limited to the authority conferred by the CWA to regulate the “discharge of pollutants.” EPA improperly attempts to confuse the central issue in *Accotink* by framing it as a TMDL controversy that is somehow unrelated to NPDES permitting. The critical issue in *Accotink* relates to the discharge of pollutants (of which “flow” is not one), which is equally and directly applicable to NPDES permitting as it is to setting TMDLs that must be implemented through effluent limitations in those permits. 33 U.S.C. §§ 1311(a), 1313(d), 1314, 1342(a).

In other instances, EPA has attempted to argue that stormwater flow causes stormwater “pollution,” attempting to skirt the precise definition of “pollutant” that served as the basis for the *Accotink* decision. In fact, the CWA definition of “*pollution*” is broader than the definition of “pollutant,” but EPA cannot substitute the term “pollution” for “pollutant” to expand its authority.

Congress defined “pollution” as “the man-made or man-induced alteration of the chemical physical, biological and radiological integrity of water.” 33 U.S.C. § 1362(19). The Supreme Court of Washington, in a case affirmed by the U.S. Supreme Court, succinctly provided that under CWA § 1362(19) “man-induced alteration of streamflow level is ‘pollution.’” *State of Washington, Dept. of Ecology v. PUD No. 1 of Jefferson County*, 121 Wash.2d 179, 187 (1993), *aff'd* 511 U.S. 700 (1994); *see also United States v. Tennessee Water Quality Control Board*, 717 F.2d 992, 998-99 (6<sup>th</sup> Cir. 1983) (“Although alterations in the properties of the water are ‘pollution’... all alterations do not fit the narrower definition of ‘pollutants’...”).

The Supreme Court has affirmed the importance of the distinction between “pollutants” added to a waterbody versus “pollution” already contained therein. In *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, the Supreme Court described the difference between the discharge (addition) of pollutants to a water body and the

movement of pollutants within a waterbody. 568 U.S. (2013)(Slip Opinion at 3)(further explaining the Court's decision in *South Florida Water Management Dist. v. Miccosukee Tribe* 541 U.S. 95, 109-112 (2004)).<sup>3</sup>

Thus, when substances redistribute within a waterbody, that substance is not being "added" to the waterbody under the CWA. In light of the Court's holding that the movement of pollutants within a waterbody does not constitute an "addition" or discharge, U.S. EPA (and Ohio EPA) cannot now credibly take the position that it can regulate flow to prevent streambank erosion down-stream or the impacts of sediment already contained in the streambanks.

### ***Impervious Surfaces Are Not Point Sources.***

EPA's desired stormwater retention standards are based in part on its authority to specifically regulate impervious surfaces. But impervious surfaces such as roofs, parking lots, and roads do not meet the definition of "point source." Impervious surfaces do not channelize water. Instead, sheet flow that travels across impervious surfaces is considered non-point runoff, which cannot be regulated under the NPDES stormwater permitting program. *Id.*

Congress did not provide EPA with unbridled authority. Rather, the CWA "authorizes the EPA to regulate, through the NPDES permitting system, *only* the discharge of pollutants." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 504 (2d Cir. 2005) (emphasis added)." As the D.C. Circuit has explained, "[t]he statute is clear" and contains no language that "undercuts the plain meaning of the statutory text;" EPA may not "meddl[e] inside a facility" because it only has authority over the discharge of pollutants from a point source, and "Congress clearly intended to allow the permittee to choose its own control strategy." *American Iron and Steel Institute v. EPA.*, 115 F.3d 979, 996 (D.C. Cir. 1997). EPA "is powerless to impose conditions unrelated to the discharge itself." *N.R.D.C. v. EPA.*, 859 F.2d 156, 170 (D.C. Cir. 1988) (EPA cannot regulate point sources themselves, only the discharge of pollutants); *Service Oil, Inc. v. EPA*, 590 F.3d 545, 551 (8<sup>th</sup> Cir 2009) ("the Clean Water Act gives EPA jurisdiction to regulate... only *actual* discharges—not potential discharges, and certainly not point sources themselves.") (emphasis in original).

In fact, the CWA focuses on point sources rather than nonpoint sources because "differences in climate and geography make nationwide uniformity in controlling non-point source pollution virtually impossible. Also, the control of nonpoint source pollution often depends on land use

controls, which are traditionally state or local in nature.” *Oregon Natural Desert Assoc. v. United States Forest Service*, 550 F.3d 778, 785 (9<sup>th</sup> Cir. 2008) (quoting Poirier, *Non-point Source Pollution*, § 18.13); see also *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (recognizing that the “[r]egulation of land use . . . is a quintessential state and local power.”).

If EPA now interprets “point source” to include impervious surfaces, it renders that term meaningless and clearly contradicts congressional intent to define the term and differentiate “point sources” from “nonpoint sources.” As noted by the Second Circuit Court of Appeals, “the phrase ‘discernible, confined, and discrete conveyance’ cannot be interpreted so broadly as to read the point source requirement out of the statute.” *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 219 (2d Cir. 2009). Such a broad interpretation would be contrary to the text and structure of the CWA. The Act defines the term “point source,” and leaves all other flows of water to be considered “nonpoint sources,” the regulation of which is left to the states. *Id.* At 219-220.

EPA’s NPDES regulations define the extent to which surface runoff can in certain circumstances constitute point source pollution. The definition of “[d]ischarge of a pollutant” includes “additions of pollutants into waters of the United States from: surface runoff *which is collected or channeled by man.*” 40 CFR § 122.2 (emphasis added). By implication, surface water runoff which is neither collected nor channeled constitutes nonpoint source pollution and, consequentially, is not subject to the CWA permit requirement. See *Hardy v. N.Y. City Health & Hosps. Corp.*, 164 F.3d 789, 794 (2d Cir. 1999) (relying on “the familiar principle of *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of the other”).

***EPA’s MS4 Permitting Authority is Limited to Discharges From the MS4, Not Into the MS4.***

EPA’s authority to issue NPDES permits to MS4s also cannot be interpreted to provide authority over discharges that enter the MS4. Congress specifically limited that authority to the discharges from MS4s into navigable waters. Managing stormwater to restore a site to its predevelopment hydrology exceeds EPA’s CWA authority because it goes beyond the regulation of a point source discharge by regulating “site design” and EPA’s limited authority to mandate control strategies. See Section I.A.1. above. It also raises questions about federal usurpation of local land use planning in violation of constitutional protections.

The Supreme Court has repeatedly rejected assertions of federal authority under the CWA that usurp the “quintessential state and local power” found in the “[r]egulation of land use.” *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006) (Scalia, J. plurality) (citations omitted). See also *Solid Waste Agency v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 174 (2001) (rejecting expansive reading of CWA jurisdiction because of “significant constitutional questions raised” by “impingement of the States’ traditional and primary power over land and water use”).

These cases turned on the interpretation of the jurisdictional phrases “the waters of the United States” and “navigable waters,” and held that even by using those terms to broadly define the proper subject matter of federal jurisdiction under the CWA, Congress did not authorize federal regulators to supplant local land use decision-making. *Rapanos*, 547 U.S. at 738-39 (“We ordinarily expect a ‘clear and manifest’ statement from Congress to authorize an unprecedented intrusion into traditional state authority. The phrase ‘the waters of the United States’ hardly qualifies.” (citation omitted)); *Solid Waste Agency*, 531 U.S. at 174 (“We thus read the statute as written to avoid the significant constitutional and federalism questions raised by respondents’ interpretation.”). EPA’s current permit-by-permit strategy to compel certain MS4s to make specific choices with regard to post-construction performance standards is arguably a more direct and unauthorized affront on local land use mandates than the waters of the U.S. cases cited above.

As demonstrated above, the Draft CGP is not an appropriate “vehicle” for regulating post- construction stormwater discharges. OEPA should rely upon voluntary programs or local building permit processes for ensuring that final, “as built” structures do not have unreasonable environmental impact. Ohio’s CGP program is an inappropriate conduit to achieving those results. (*General Motors*)

**Response 158:**

Pursuant to Ohio Revised Code (ORC) Chapter 6111, the Director of Ohio EPA has the authority to develop permit conditions to be protective of Ohio Water Quality Standards. Given, most of our studies, i.e., TMDL and Total Support Documents (TSD’s), show impacts from construction and urbanization is a leading contributor to the impairment of Ohio surface waters, Ohio EPA contends the Construction Storm Water General Permit and the conditions therein is a lawful action by the Director in the protection of Ohio Water Quality Standards from impacts associated with urbanization. The Clean Water Act inherently recognizes and protects the right of the state to prevent, reduce and eliminate pollution that go beyond federal requirements.

**Comment 159:** **Part II.** The text on minimum BMPs reflects USEPA's original Construction and Development ELG, not the revised current version. We recommend replacing this section with a copy of USEPA's 2014 ELG's for construction stormwater. The regulated community worked for many years to negotiate a simple, baseline list of best management practices. Adopting the USEPA A ELG language would increase clarity and legal defensibility to the permit. The lack of a list of approved BMPs causes confusion and re-design, if perceived solutions are not then approved by the EPA. We would request a completed list prior to issuing the permit, as well as request that the list be updated as additional BMPs are approved for use. (*Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio*)

**Part III.** OEPA Must Clarify that Construction Site Pollution Prevention Plans are not Enforceable. In USEPA's 2017 CGP, the agency acknowledged that individual details of a SWPPP are not directly enforceable. If a SWPPP ceases to reflect activity on a site, it must be modified within a certain timeframe. It follows that USEPA enforcement by law can only hold site operators accountable for permit requirement violations, not specific details contained within daily compliance plans. The SWPPP itself does not create new permit terms or conditions but is used as a tool to help carry out permit responsibilities. We would urge OEPA include a similar clarification in the final permit to help inspectors focus on violations causing real environmental harm, as opposed to paperwork issues. (*Ohio Home Builders Association, Inc., The Associated General Contractors of Ohio, Ohio Contractors Association, Ohio Chamber of Commerce, The Ohio Manufacturers' Association, NAIOP of Ohio*)

**Part III.G** of the Draft CGP contains the specific SWPPP details and minimum requirements being proposed. As a general note, this Part attempts to implement the Construction & Development Effluent Limitations Guidelines (40 CFR Part 450), but improperly relies upon an old version of those ELGs that subsequently were modified pursuant to litigation. That litigation and resulting settlement helped to clarify EPA's authority to regulate only active construction operations that generate point source discharges to U.S. waters, and not otherwise unlawfully regulate non-point source discharges that are unrelated to active construction. See Preamble for Final Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category (79 Fed. Reg. 12,661 (March 6, 2014)).

Likewise, Ohio EPA cannot exceed its authority by mandating BMPs that improperly restrict the internal processes within the construction site. Courts have rejected EPA's regulation of internal processes that exceed its authority. *AISI v. EPA*, 115 F.3d 979, 996 (D.C. Cir. 1997); *NRDC v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) (invalidating NPDES permit conditions based on NEPA review findings rather than effluent limitations). For example, in *AISI*, the D.C. Circuit vacated EPA's "Final Water Quality Guidance for the Great Lakes Systems" because it imposed water quality-based effluent limitations on internal facility waste streams. *AISI*, 115 F.3d at 996 (declining to vacate the monitoring and reporting requirements on internal waste streams). The D.C. Circuit found that EPA's authority is limited to controlling pollutant discharges from a point source, not internal processes, and that Congress intended to give permittees the flexibility to select their own internal control strategies. *Id.* (internal facility restrictions constituted impermissible regulatory "meddling inside a facility" and unlawfully imposed "effluent limitations upon non-point-source discharges."). Because both water quality-based and technology-based limits are constrained by the definition of "effluent limitation," *AISI* applies with equal force here.

Exposed soil, steep slopes, soil compaction, and topsoil are not necessarily point sources at a construction site; they are merely conditions within a site that may or may not contribute to a point source pollutant discharge to U.S. waters. As discussed, "the CWA does not empower the agency to regulate point sources themselves; rather EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants" from a point source. *NRDC v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) (emphasis added). The CWA requires that an "effluent limitation" must control "discharge[s] from point sources." See e.g., *Citizens Coal Council*, 447 F.3d at 895-97 (interpreting the meaning of "restriction" but not addressing whether the "effluent limitation" controlled "discharge[s] from point sources into navigable waters"). EPA cannot impose effluent limitations – numeric or otherwise – except to control "discharge[s] from point sources into navigable waters . . ." 33 U.S.C. § 1362(11).

By contrast and consistent with the revised C&D ELGs, EPA lawfully may impose BMPs that control point source discharges, including for example:

- "Minimize sediment discharges from the site."
- "Discharges from dewatering activities, including discharges from dewatering of trenches and

excavations, are prohibited unless managed by appropriate controls;” and

- “Minimize the discharge of pollutants from equipment and vehicle washing, wheel wash water, and other wash waters.”

EPA specifically recognized these limitations in the revised 2014 Final C&D ELGs. EPA was forced to focus minimum BMPs specifically on the discharge of pollutants through point sources to waters of the U.S. In explaining its limited authority, EPA states:

EPA has authority to promulgate non-numeric effluent limitations that regulate internal processes at construction sites in order to control and minimize the discharge of pollutants to surface waters. See EPA–HQ–OW–2008–0465–2124 through EPA–HQ–OW–2008–0465–2134 for discussion linking up-slope/on-site activities to controlling or minimizing the discharge of pollutants from the site to surface waters. See also *Citizens Coal Council, et al. v. EPA*, 446 F.3d 879, 895 (6th Cir. 2006) (“under the [Clean Water] Act, effluent limitations are not limited to numeric discharges but encompass ‘any restriction’ on discharges”); *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 502 (2nd Cir. 2005) (“rather than setting forth numerical effluent limitations for land application of manure, the CAFO Rule establishes nonnumerical effluent limitations in the form of best management practices”); *Texas Municipal Power Agency v. EPA*, 836 F.2d 1482, 1488 (5th Cir. 1988) (“it is sometimes necessary to regulate discharges within the treatment process to control discharges at the end . . . [t]his position has support in the language of the CWA, its legislative history, and common sense.”); *Public Service Company of Colorado, Fort St. Vrain Station v. EPA*, 949 F.2d 1063, 1065 (10th Cir. 1991) (“We find no clear Congressional or Presidential intent expressly forbidding EPA from imposing internal waste stream effluent limitations when such limitations would be impracticable to monitor at the end of the pipe.”)....In general, stabilization represents sound industry practice to minimize discharges from an active construction site. 79 Fed. Reg. at 12,663-4.

**Ohio EPA's final CGP must be consistent with EPA C&D ELGs and must make appropriate revisions to reflect the final version from 2014 and not prior iterations. (*General Motors*)**

**Response 159:**

Part III of the permit contains the specific design criteria to meet the objectives of the Part II. Non-Numeric Effluent Limitations. The permit requires the permittee to develop and implement the SWP3 in accordance with Part III of the permit to satisfy these

non-numeric effluent limitations. The agency understands the SWPPP may be an ever-changing document and updated frequently to reflect the dynamics of construction. Compliance is based on the development of the plan in contrast to current conditions at the site.

**End of Response to Comments**