Division of Surface Water
Response to Comments

Project: Modification to Section 401 Water Quality Certifications for Nationwide General Permits
Ohio EPA ID #: 113742 and 123911

Agency Contacts for this Project

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Ohio EPA held a public hearing on Sept. 4, 2014 regarding Ohio EPA's modification to the Section 401 Water Quality Certification for the 2012 U.S. Army Corps of Engineers' Nationwide Permits. This document summarizes the comments and questions received at the public hearing and during the associated comment period, which ended on Sept. 11, 2014.

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 may follow the comment in parentheses.

General Concerns

Comment 1: **Ohio EPA received many comments that expressed a general opposition to the proposed modification.**

Response 1: In response to the opposition expressed in the previously proposed modification, which included an ambiguous qualitative assessment method, Ohio EPA held two open forums for all interested parties and stakeholders. The first forum, held in October 2014 was scheduled specifically to hear all ideas and thoughts on the subject matter. The second forum, held in February 2015, was held to present Ohio EPA's new proposal for stream assessment after reviewing and considering all stakeholder input. Ohio EPA

believes the new proposed modification clarifies the requirements for coverage under the 401 water quality certification (WQC) for the nationwide permits (NWPs). The new language regarding stream eligibility was developed specifically to ensure the protection of high quality watersheds in Ohio.

Comment 2: **Ohio EPA received several comments in support of the proposed modification.**

Response 2: The statements of support are noted. The newly-proposed modification to the 401 WQC for the NWPs attempts to make certain conditions more consistent with the Corps NWP conditions. For example, the modification of the 401 WQC clarifies that a pipeline crossing is considered a single pipeline project rather than the entire pipeline project. This is consistent with the Corps' interpretation of a single and complete linear project.

Specific Comments

Part One: General Limitations and Conditions for All Ohio EPA Certified Nationwide Permits

B. Best Management Practices

Comment 3: **Part I(B)(8): CCA is typically the acronym for chromated copper arsenate. It was recommended that the name associated with CCA be reviewed by Ohio EPA.**

Response 3: Ohio EPA has changed the name associated with CCA to the above suggestion.

D. Miscellaneous

Comment 4: **Several commenters requested the director's authorization language from this section be removed, and one commenter supported broadening the coverage for director's authorizations.**

Response 4: Ohio EPA carefully reviews all director's authorization requests to ensure that projects authorized under this process have minimal adverse effects and have appropriate mitigation for approved impacts. This modification allows Ohio EPA greater flexibility to expeditiously review and approve projects that do not necessarily require an individual

401 WQC, even though they trigger an individual 401 WQC under the limitations contained in specific NWPs.

Comment 5: **A commenter expressed appreciation the clarification that fill material does not include temporary swamp or timber mats.**

Response 5: Noted.

Comment 6: **Several commenter expressed concern about the 60 linear feet threshold and qualitative assessment language.**

Response 6: The 60 linear feet threshold and qualitative assessment language have been removed and replaced with the new stream eligibility condition. Please refer to the revised proposed modification.

Comment 7: **Several comments were received regarding the ORAM coordination process that requires applicants to coordinate their ORAM scores with Ohio EPA prior to submittal of the pre-construction notification to the Corps.**

Response 7: The language requiring the wetland assessment to be performed and verified prior to pre-construction notification (PCN) submittal was added to the 401 WQC modifications at the Corps' request. The Corps would like to avoid any unnecessary delays in their permitting process due to ORAM coordination with Ohio EPA. If this is not done by applicants prior to submittal of the PCN, procedures outlined in the Local Procedures Agreement between Ohio EPA and the Corps will be implemented. The stream eligibility determination is built so that applicants can make their own determination and submit the information with the PCN. This was designed to reduce any unnecessary delays for Ohio EPA to verify the stream assessment. Please refer to the revised proposed modification.

Comment 8: **Several commenters raised concerns about the inclusion of allowable impacts to Category 3 wetlands in NWPs 3 and 14.**

Response 8: Ohio EPA has modified the 401 WQC for the NWPs to allow for the Agency to make the determination whether a project meets public need. The 2012 version of the 401 for the NWPs allowed up to a one-tenth of an acre of impact to

Category 3 wetlands with no Ohio EPA oversight. This modification provides Ohio EPA oversight.

Part Two: Special Limitations and Conditions for Ohio EPA Certified Nationwide Permits

Nationwide Permit 3 (Maintenance)

Comment 9: **Trenching is not applicable to NWP 3, so a commenter questioned why this condition was present.**

Response 9: This condition has been altered to remove the term "trench." Please refer to the revised proposed modification.

Comment 10: **One commenter asked that the conditions for NWP 3 and NWP 12 apply on a per-crossing basis instead of the entire project.**

Response 10: The NWPs have been revised to clarify that the conditions will be applied independently to each single and complete linear project. Please refer to the revised proposed modification.

Nationwide Permit 12 (Utility activities)

Comment 11: **A commenter appreciated the removal of items 2, 5, 7, 9 and 11. They believed the removal of these items would ease the regulatory burden on construction and maintenance of pipelines by OGA member-companies without compromising environmental protection.**

Response 11: Noted.

Comment 12: **Several commenters asked for the existing condition that allows up to one-tenth of an acre of impacts to Category 3 wetlands in situations involving the repair, maintenance, replacement, or safety upgrades to existing infrastructure that meets the definition of public need be added back into the proposed modification.**

Response 12: The language regarding allowable impacts up to one-tenth of an acre to Category 3 wetlands under this NWP has been added back into the 401 WQC. Ohio EPA will make the determination about whether a project meets "public need" during the ORAM verification process.

Comment 13: **Several commenters said Ohio EPA failed to provide any scientific justifications for its proposed elimination of individual review thresholds. They also indicated that the proposed changes would eliminate the public's ability to review and comment on individual coal mining and shale pipeline projects that could harm or destroy streams and wetlands throughout the state.**

Response 13: Ohio EPA has modified the 401 WQC for NWPs 12 and 49 to ensure better consistency with the NWPs issued by the Corps. Ohio EPA believes the modification, as designed, will not allow projects that have more than minimal adverse effects on the physical, chemical and biological aspects of water quality to receive coverage under the 401 for the NWPs. Specifically, projects generally issued under NWPs 3, 12 and 14 are either pipeline projects or roadway projects.

If the installation or maintenance of a pipeline project impacts a stream or wetland, it is generally a temporary impact and the area is restored within 48 hours. Additionally, pipeline projects generally impact a very small portion of a much larger stream and/or wetland system. These projects by their nature are generally de minimis. This newly-proposed modification also includes the new stream eligibility condition which is designed to protect high quality streams.

Comment 14: **For the proposed Special Limitation and Condition NWP 12, No. 7, two commenters suggested that the total width of excavation, grading and mechanized clearing of vegetation and soil within waters of the U.S. should be increased from 50 feet to 75 feet.**

Response 14: Ohio EPA considered this comment and the condition will remain unchanged in order to minimize the extent of clearing eligible for coverage under the NWP. If larger areas of clearing are necessary, then an individual 401 WQC would be required.

Comment 15: **Several comments were received about the proposed Special Limitation and Condition 8 for NWP 12 which required that permittees who proposed using horizontal directional drill (HDD) technology to prepare and submit to Release Prevention and Emergency Response Plan (Plan).**

Response 15: Ohio EPA has removed this condition from the newly proposed modification because this condition was beyond the regulatory authority of Ohio EPA.

Nationwide Permit 13 (Bank stabilization)

Comment 16: **A commenter asked that the language for NWP 13 that requires biotechniques for bank stabilization, if practical, be changed to ensure that bank stabilization is ecologically based.**

Response 16: This condition will remain as it is currently written in order to remain consistent with the Corps general conditions that also speak to this requirement.

Nationwide Permit 14 (Linear transportation projects)

Comment 17: **Several commenters supported the changes made to the state water quality certification of this permit.**

Response 17: Noted.

Comment 18: **A commenter stated that the permit language has been weakened due to paragraph 2a which now allows impacts to Category 3 wetlands with the potential to allow filling of 0.1 acres per permit, and that paragraph 2b weakened the protection by allowing impacts to Category 1 and Category 2 wetlands with impacts up to one-half acre per crossing.**

Response 18: The condition in NWP 14 allowing up to one-tenth of an acre of impact to Category 3 wetlands was not modified but was part of the original 401 WQC issued in 2012. As part of the new ORAM verification process, Ohio EPA will determine whether a project meets public needs if the wetland categorization shows the wetland meets a Category 3.

Comment 19: **A commenter said that applicants typically only evaluate the quality of the wetland within the existing right-of-way (that has been impacted by previous construction, road salt and other runoff), lowering the potential quality of the portion of the wetland adjacent to the road. The commenter recommended that the applicant evaluate the entire wetland as required by the ORAM process. If access to other portions of the wetland is not authorized**

by adjacent land users, the applicant should assess the quality via the web soil survey, aerial photography, and historical aerials photographs. This would ensure that the correct classification of wetland quality is assigned and that the correct mitigation ratio is applied.

Response 19: Ohio EPA requires a wetland to be assessed in accordance with the ORAM manual. The manual requires that the entire wetland boundary be identified and artificial boundaries such as roads and rights-of-way are not to be used.

Comment 20: **Numbering of conditions appears incorrect. Paragraph 2 appears twice.**

Response 20: Noted and corrected.

Comment 21: **A commenter said the change proposed within NWP 14, Paragraph 2b, which would authorize impacts up to "one-half acre per crossing," from the previous limit of total impacts of one-half acre for Category 1 and Category 2 wetlands, substantially increases the potential for large cumulative wetland impacts in this permit. The commenter recommended that the language remain limited to one-half acre because transportation agencies have the ability to plan and permit sites that would have larger impacts and this change seems to allow cumulative environmental impacts without outside review or opportunity for mitigation.**

Response 21: Ohio EPA has modified this specific limitation of one-half acre per crossing to be consistent with the Corps' interpretation of a single and complete project for linear projects.

Nationwide Permit 21 (Surface coal mining activities)

Comment 22: **Several commenters expressed concern about eliminating the requirement that applicants submit ORAM analyses and use-attainability analyses with results of appropriate biological sampling data. They also recommended that Ohio EPA reconsider removing the Ohio Department of Natural Resources Division of Mineral Resource Management (ODNR DMRM) stream reconstruction guidelines and the inclusion of warmwater habitat streams as eligible for impact under this NWP.**

Response 22: The language regarding submitting an ORAM and a stream use attainability analysis was removed from the Special Conditions of the 401 WQC for NWP 21 because they are now addressed in Section D of the General Conditions and Limitations. Ohio EPA will still require an ORAM wetland characterization be performed on every wetland proposed for impact.

In the initial proposed modification, warmwater habitat was removed in order to be consistent with the other 401 WQC for the NWPs. This condition has been removed and replaced with the new stream eligibility condition. Please refer to the revised proposed modification. ODNR DMRM always requires the use of their stream reconstruction guidelines on coal surface mining sites. Therefore, requiring these methods in the 401 WQC for the NWPs would be redundant.

Nationwide Permit 34 (Cranberry production activities)

Comment 23: **A commenter said that this permit was not used in 2012 and questioned the need to authorize this activity in Ohio.**

Response 23: The conditions for this NWP have been modified to include the stream eligibility condition. Not using the permit was not during one year does not justify removing the 401 WQC from this permit.

Nationwide Permit 37 (Emergency watershed protection and rehabilitation)

Comment 24: **A commenter said that no limits had been set for impacts to lakes and could allow extensive impacts under this NWP.**

Response 24: The conditions for this NWP have been modified to include the stream eligibility condition. To remain consistent with other NWPs, limits are included for wetlands but no limits for stream and lake shoreline length are included. The condition for stream and lake shoreline length was removed from all NWPs in order to more closely align the 401 WQC with the NWP and to avoid duplication where they already exist as a Corps condition.

Nationwide Permit 38 (Cleanup of hazardous and toxic waste)

Comment 25: **A commenter asked that the allowable wetland impacts be increased to greater than one-half acre of wetlands in order to encourage cleanups.**

Response 25: This condition will remain as written to be consistent with the other NWPs. If a project exceeds the wetland threshold, an applicant can apply for an individual 401 WQC or a director's authorization.

Nationwide Permit 44 (Mining activities)

Comment 26: **A commenter said that specific conditions or limits for non-coal mining activities were not included and that Category 3 impacts were allowed under the new language.**

Response 26: Coverage under the 401 WQC for the NWPs was not granted to NWP 44 in Ohio. An individual 401 WQC is required by Ohio EPA for all projects permitted under this NWP by the Corps.

Nationwide Permit 48 (Existing commercial shellfish aquaculture activities)

Comment 27: **A commenter said that this permit was not utilized in 2012 and questioned the need to authorize this activity in Ohio.**

Response 27: Coverage under the 401 WQC for the NWPs was not granted to NWP 48 in Ohio. An individual 401 WQC is required by Ohio EPA for all projects permitted under this NWP by the Corps.

Nationwide Permit 49 (Coal remining activities)

Comment 28: **Several groups commented on the removal of thresholds from NWP 49, including:**

- **impacts of more than 300 linear feet (LF) to intermittent and perennial streams in unmined areas (now unlimited);**
- **impacts of more than 1,000 LF to intermittent and perennial streams in previously-mined areas (now unlimited);**

- **impacts to more than six acres of Category 1 wetlands (now unlimited);**
- **impacts to more than one acre of Category 2 wetlands (now unlimited);**
- **removal of prohibition on permanent in-stream ponds and haul road crossings; and**
- **removal of prohibition on valley and hollow fills.**

The commenters also stated that the 60/40 rule would allow impacts to substantial amounts of virgin wetlands and streams without individual review, and suggested that Ohio EPA require that NWP 49 only be used on 100 percent previously-mined land.

Response 28: The Corps, during their review of projects to be covered under NWP 49, must determine that the applicant has demonstrated to the district engineer that the overall mining plan will result in a net increase in aquatic resource functions.

Additionally, the remining of such previously-mined areas could potentially improve water quality in a watershed, particularly if the site contains high amounts of acid mine drainage or high sediment loads, both of which can have a detrimental impact downstream. In the revised modification, Ohio EPA has included a condition that requires that 80 percent of the project area be on previously-mined land.

Comment 29: **A commenter recommended that the requirement for assessment be required in a consistent manner (to intermittent streams as well) and that the word "any" be used rather than "each" in order to prevent many stream impacts from bypassing review.**

Response 29: Noted and changed.

Comment 30: **A commenter recommended that the characterization requirements for wetlands and streams be maintained (ORAM) or, in the case of streams, be given a scientific basis to relate stream characteristics to other stream services (potentially lost or provided) beyond habitat. In the case of streams, the commenter recommended additional measures to incorporate fluvial geomorphic measures and parameters found in the stream functions pyramid and other stream assessment approaches. The commenter also recommended that removal of the**

ODNR DMRM stream reconstruction guidelines be reconsidered.

Response 30: ORAMs are still required to be submitted to determine wetland category for every wetland impact over one-tenth of an acre for every NWP. The new stream eligibility condition also has been added to NWP 21 and 49. Please refer to the revised proposed modification.

Lastly, ODNR DMRM requires that applicants applying for a coal mining permit use the stream reconstruction guidelines titled, "A Natural Channel Design Procedure for Reconstructed Small Headwater Streams within Coal Mine Operations in the Western Allegheny Plateau Ecoregion of Ohio." Therefore, to include such a condition in the 401 WQC for the NWPs is redundant.

Comment 31: **A commenter said that NWP 49, Paragraph 4, states that, "For purposes of demonstrating eligibility for coverage under these certifications, if the project impacts more than 60 linear feet of each perennial stream…." The commenter questioned whether this means if the applicant does not impact all of the streams in the 40% of virgin land, they do not have to submit the required biological assessments.**

Response 31: This condition has been removed and replaced with the new stream eligibility condition. Please refer to the revised proposed modification.

Comment 32: **A commenter recommended keeping the language in the current Ohio WQC to NWPs that states "Impacts to any waterways with a slope greater than two percent authorized under this nationwide permit shall be reclaimed and/or reconstructed using natural stream channel design standards identified in the ODNR/DMRM-Ohio EPA Joint Stream Reconstruction Guidelines, when appropriate. Reclamation of streams with less than two percent slope will be completed using natural channel design techniques."**

Response 32: See Response 22 above.

Nationwide Permit 50 (Underground coal mining activities)

Comment 33: **A commenter asked why Paragraph 3, requiring stream mitigation, had been removed since it will cause cumulative and direct impacts on downstream users.**

Response 33: Ohio EPA has not removed a condition requiring stream mitigation. The condition that the commenter referenced required that coal-mining companies applying for coverage under the 401 WQC for the NWPs use stream reconstruction guidelines titled, "A Natural Channel Design Procedure for Reconstructed Small Headwater Streams within Coal Mine Operations in the Western Allegheny Plateau Ecoregion of Ohio." ODNR DMRM requires that all streams reconstructed on mine sites use these procedures.

Comment 34: **A commenter recommended keeping the language in the current Ohio WQC to NWPs that states "Impacts to any waterways with a slope greater than two percent authorized under this nationwide permit shall be reclaimed and/or reconstructed using natural stream channel design standards identified in the ODNR/DMRM-Ohio EPA Joint Stream Reconstruction Guidelines, when appropriate. Reclamation of streams with less than two percent slope will be completed using natural channel design techniques."**

Response 34: Please see Response 22 above.

Multiple Nationwide Permits

Comment 35: **A commenter asked why the use of the term cumulative had been removed from NWP 4, 12, 44, 46 and 49. The commenter stated that the Clean Water Act gives authority to states to make decisions based on cumulative and indirect water quality impacts. The commenter also stated that the word "cumulative" was not removed from the stream clauses in NWP 21, 25, 29, 30, 31, 33, 34, 36, 39, 40, 41, 42, 43, 45, 50 and 51 and asked for an explanation.**

Response 35: Ohio EPA has modified the 401 WQC for the NWPs to be consistent with the Corps with regard to the interpretation of a single and complete linear project. This is considered to be a crossing, not an entire "cumulative" project. NWPs 21, 25, 29, 30, 31, 33, 34, 36, 39, 40, 41, 42, 43, 45, 50 and 51 are not linear projects. The condition referenced in the above comment has been removed from all NWPs in order to be

consistent with the Corps and reduce redundancy where the Corps already has similar limitations in the NWP conditions. Please refer to the Corps' definitions of *single and complete linear* and *single and complete non-linear projects*, and the conditions for each NWP contained within the Nationwide Permits for Ohio. This is available at: *www.lrh.usace.army.mil/Portals/38/docs/regulatory/nationwide/2012%20Nationwide%20Permits%20for%20the%20State%20of%20Ohio%20%28with%20OEPA%20401%20Water%20Quality%20Certifications%29.pdf*

End of Response to Comments