



September 11, 2014

Attn: Modification of the 401 WQC for the NWP's  
Ohio Environmental Protection Agency  
Division of Surface Water – Permit Processing Unit  
50 West Town Street, Suite 700  
P.O. Box 1049  
Columbus, Ohio 43216-1049

Ohio EPA ID #113742 and 123911

Submitted via: [dsw\\_rulecomments@epa.ohio.gov](mailto:dsw_rulecomments@epa.ohio.gov) and hand delivery

**Comments of OEC, OWA, and Sierra Club RE:  
Ohio EPA's 2014 Modification of the 401 WQC for the NWP's**

The Ohio Environmental Council (OEC), the Ohio Wetlands Association (OWA), and the Sierra Club submit the following comments regarding Ohio EPA's 2014 proposed modifications of the 401 WQC for the NWP's.

**I. Proposed NWP's 12 and 49 Improperly Sacrifice Water Quality.**

Ohio EPA has reserved its most far-reaching changes for Nationwide Permits 12 and 49 – permits that apply to the oil and gas pipeline and coal mining industries, specifically. Per Ohio EPA's proposal, many oil and gas pipelines and most coal remining projects will now be approved under Nationwide Permits with no state water quality review, and will result in serious irreversible water quality impacts statewide.

Ohio EPA's proposed modifications to NWP's 12 and 49 will effectively create an end-run around Clean Water Act state anti-degradation review that is meant to ensure stream and wetland water quality is not lowered. Many projects will avoid requirements for impact avoidance and minimization. Ohio EPA is also surrendering state oversight and enforcement authority over the mitigation of pipeline and mining impacts.

Furthermore, OEPA has failed to provide any scientific justifications for its proposed elimination of individual review thresholds. Nor has the agency provided any factual support for a finding that the lowering of water quality resulting from its proposal is "necessary."

Ohio EPA's proposed changes will also 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.

Per Corps policy, Nationwide Permits are intended for “minor” projects. By eliminating so many individual review thresholds from NWP 12 and 49, Ohio EPA is unreasonably opening the floodgates to large and major projects that have no business receiving the reduced scrutiny associated with general permits.

Specifically, under NWP 12, OEPA proposes eliminating the following individual review thresholds:

- Crossing more than 500 LF of forested wetlands (now unlimited)
- Crossing more than 1500 cumulative LF of all surface waters (now unlimited)
- Crossing more than two 8-digit HUCs (now unlimited)

Under NWP 49, OEPA proposes eliminating:

- Impacts of more than 300 linear feet (LF) to intermittent and perennial streams in un-mined areas (now unlimited)
- Impacts of more than 1000 LF to intermittent and perennial streams in previously-mined areas (now unlimited)
- Impacts to more than 6 acres of category 1 wetlands (now unlimited)
- Impacts to more than 1 acre of category 2 wetlands (now unlimited)
- Removes prohibition on permanent in-stream ponds and haul road crossings
- Removes prohibition on valley and hollow fills

Per Ohio EPA’s proposal, NWP 49 will be virtually devoid of individual review thresholds. Moreover, the 60/40 rule will allow impacts to substantial amounts of virgin wetlands and streams without individual review. Ohio EPA should require that NWP 49 only be available on 100% previously mined land. A general permit for projects with up to 40% virgin land is unreasonable and unacceptable.

## **II. The Proposed Modifications Will Put Ohio Well Behind Neighboring States.**

Many of Ohio’s current individual review thresholds for NWP 12 and 49 are already weaker than those of West Virginia and Kentucky – two neighboring states that have a good deal of coal mining and pipeline activity. Ohio EPA’s proposed changes will therefore put Ohio even further behind West Virginia and Kentucky in state’s protection of our streams and wetlands.

West Virginia’s NWP 12 requires individual state review for all perennial and intermittent stream impacts greater than 300 linear feet. Kentucky’s NWP 12 requires individual review where impacts exceed ½ acre of wetlands or 300 linear feet of surface water. Under NWP 49, West Virginia requires individual review for impacts to intermittent and perennial streams, generally, and for wetland impacts equal to or exceeding ½ acre. Kentucky requires individual review for wetland impacts of 1 acre or more.

## **III. The New Qualitative Assessment Requirements Are Patently Unreasonable.**

A poorly drafted portion of Ohio EPA’s proposal, and one that could have significant effects for all NWPs, is the ambiguous and undefined requirement for submission of a “qualitative assessment” of the physical and biological characteristics of streams without aquatic life use

designations. See Part 1, Section D.8. Ohio EPA, regulated parties, and the public cannot expect to have any idea what this newly proposed and completely undefined “qualitative assessment” means and requires.

Moreover, Ohio EPA fails to provide language that clearly requires the agency to take appropriate action on qualitative assessment information that is submitted. The public is left wondering what Ohio EPA will do with the information it receives.

Ohio EPA needs to replace the ambiguous “qualitative assessment” language with a very clear and robust methodology for what information regulated parties must submit. At a minimum, the required information should include HHEI and biological sampling similar to a use-attainability analysis.

It should be noted that the qualitative assessment language is even weaker for NWP 49, which is specifically singled out in Section D.8. While this already inadequate submission requirement applies to both perennial and intermittent streams for all other NWPs, it applies only to perennial streams for coal remining activities under NWP 49.

The proposed “qualitative assessment” provision will create a situation where existing aquatic life uses of many undesignated streams will be lost, thus resulting in a conflict with the requirements of the Clean Water Act and state antidegradation rules and policy.

#### **IV. The Section D.5. “Director’s Authorization” Is an Unacceptable Loophole.**

Located under “Miscellaneous,” the Section D.5. provision allows Ohio EPA to exempt projects from individual review requirements when they would not otherwise fall under nationwide permit eligibility. The undersigned were opposed to this language when it first appeared in 2012. However, it is now even worse when coupled with Ohio EPA’s severe rollback of individual review requirements in NWPs 12 and 49. This provision gives far too much discretion to Ohio EPA and undermines the purposes of the Clean Water Act. The Section D.5. director’s authorization loophole should be eliminated in its entirety.

#### **V. OEPA Proposes to Substantially Weaken NWP 21 (Surface Coal Mining Activities).**

OEPA proposes to add an entire class of streams, warmwater habitat, as eligible for coverage under NWP 21. OEPA also proposes eliminating the requirement that applicants submit ORAM wetland characterization analyses and use-attainability analyses with results of appropriate biological sampling data. OEPA’s proposed changes to NWP 21 undermine state antidegradation review requirements.

#### **VI. Nationwide Permit Eligibility Is Inappropriate for Projects that Impact Category 3 Wetlands.**

Section D.9. under “Miscellaneous” attempts to use assessment methods other than ORAM for wetland category assignment, authorizes impacts to category 3 wetlands under NWPs 3 and 14,

and allows a determination that there has been a demonstration of "public need" through the general permit (NWP) process.

All wetland categorization determinations for all Nationwide Permits should be made using the Ohio Rapid Assessment Method for Wetlands (ORAM). In cases, where the ORAM score falls into the range between categories of wetlands a Vegetation Index of Biotic Integrity (VIBI) or an Amphibian Index of Biotic Integrity (AmphIBI), depending on which is most appropriate for the characteristics of the wetland in question, should be performed to determine the appropriate category of the wetland. In the absence of performing a VIBI or AmphIBI assessment in these situations, the higher, more protective category for the wetland should be used for permitting purposes.

Further, a nationwide permit is an inappropriate process for allowing impacts to category 3 wetlands and for determining a demonstration of "public need" has been met. All proposed category 3 wetland impacts and the assessment of any proposed "public need" should be reviewed under an individual Section 401 Water Quality Certification application.

Authorization for these impacts under NWPs 3 and 14 is unwarranted. Proposals of impacts to category 3 wetlands and the corresponding demonstration of "public need" has historically been a rare occurrence in applications for Section 401 Water Quality Certifications. Further, the NWP review process does not allow the type of review time and public input appropriate to determine if degradation of category 3 wetlands, which are high quality waters, and the demonstration of "public need" can be met. Any proposals to impact a category 3 wetland and determine if "public need" is met demand the time afforded through the individual permit process to assure a proper and in-depth evaluation has been given to the weighty factors under consideration.

## **VII. Conclusion.**

The undersigned parties request that Ohio EPA retain the individual review thresholds for NWPs 12 and 49 as they appear in the current 2012 certification. We also request that NWP 49 be revised to restrict eligibility to only those operations occurring on 100% previously mined land. We request that Ohio EPA eliminate all proposed changes to NWP 21. The undersigned further request that Ohio EPA replace its ambiguous and undefined "qualitative assessment" proposal with specific language requiring submission of HHEI and biological sampling similar to a use-attainability analysis, as well as with clear directions for Ohio EPA's use of that information. We request that projects that impact category 3 wetlands be categorically removed from eligibility for NWP coverage, and that all wetland categorization determinations for all NWPs be required to use ORAM, as well as VIBI and AmphIBI where appropriate. We further request the elimination of the Section D.5. Director's Authorization exemption language.

Lastly, the undersigned parties request an extension of the public comment period beyond the current September 11, 2014 deadline. The public has not been given a fair opportunity to comment on these modifications due to the considerable ambiguity present in the far-reaching "qualitative assessment" proposals. It should be noted that, although OEC was the only party to testify at the September 4, 2014 public hearing associated with this proposed rulemaking, OEPA allotted OEC only five minutes to speak and cut OEC's testimony short.

Sincerely,



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Nathan G. Johnson  
Attorney  
Ohio Environmental Council  
1207 Grandview Avenue, Suite 201  
Columbus, Ohio 43212  
(614) 487-7506  
[NJohnson@theOEC.org](mailto:NJohnson@theOEC.org)



Ray Stewart, President Ohio Wetlands Association

Dan Sawmiller  
Senior Campaign Representative  
Sierra Club  
131 N. High Street  
Columbus, Ohio 43215  
[daniel.sawmiller@sierraclub.org](mailto:daniel.sawmiller@sierraclub.org)