

Ohio County Engineer Association Conference

Crowne Plaza North Hotel
6500 Doubletree Avenue
Columbus, Ohio

Drainage Law in Ohio



ATTORNEYS

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A. Enforcement of Wetland Regulations

1. Jurisdictional Waters of the State of Ohio/Waters of the United States
2. Violation of a term or condition of a permit
3. Conducting activity without a permit
4. Mitigation/Restoration/After-the-Fact Permit
5. Civil Penalty
6. Ohio EPA Inspection
7. Notice of Violation
8. Director's Final Findings of Facts and Orders
9. Referral to the Ohio Attorney General's office/Consent Order
10. U.S. Army Corps of Engineers
11. Cease and Desist Order/Notice of Violations
12. Temporary Restraining Order/Preliminary Injunction

Federal Water Pollution Control Act

- "Federal Water Pollution Control Act" means the "Federal Water Pollution Control Act Amendments of 1972," 86 Stat. 886, 33 U.S.C.A. 1251, as amended by the "Clean Water Act of 1977," 91 Stat. 1566, 33 U.S.C.A. 1251
- 33 U.S.C. § 1344(c) states in part:
 - (c) The Administrator [of U.S. EPA] is authorized to * * * deny or restrict the use of any defined area for specification * * * * as a disposal site, whenever he determines, * * * that the discharge of such materials into such area will have unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

Federal Water Pollution Control Act

- 33 CFR § 328.3
 - (b) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.
- 33 U.S.C. § 1344(f)(2) states:
 - Any discharge of dredged or fill material into the navigable waters * * * where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section.

Federal Water Pollution Control Act

- 33 CFR 323.4 (c) states in part:
 - Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraphs (a) (1) through (6) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced.
- 33 U.S.C. § 1344 (G) authorizes the Secretary of the Army, through the Chief of Engineers:
 - To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

Federal Water Pollution Control Act

- 33 U.S.C. § 1344 (s) states:
 - (4) Any person who violates any condition or limitation in a permit issued by the Secretary under this section, and any person who violates any order issued by the Secretary under paragraph (1) of this subsection, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Federal Water Pollution Control Act

- In order to disturb an area that is defined as jurisdictional wetlands, an applicant must obtain first
 - (1) a permit from the U.S. Army Corps of Engineers (under section 404 of the Clean Water Act) and
 - (2) a water quality certification from Ohio EPA (under section 401 of the Clean Water Act).
- Normally, a Section 404 authorization is not required for any incidental addition, including redeposit, or dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the United States.

Federal Water Pollution Control Act

- 33 CFR 323.2(4).
 - However, federal regulations also make clear that this exclusion does not apply to any person preparing to undertake mechanized land clearing, ditching, channelization unless the person demonstrates prior to commencing the activity that the activity would not have the effect of destroying or degrading any area of waters of the United States.
- 33 CFR 323.2(4).
 - In addition, the regulations require that the person proposing to undertake mechanized land clearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

Important Definitions under Ohio's Clean Water Act

- **"Waters of the state"** means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, irrigation systems, drainage systems, and other bodies or accumulations of water, surface and underground, natural or artificial, regardless of the depth of the strata in which underground water is located, that are situated wholly or partly within, or border upon, this state, or are within its jurisdiction, except those private waters that do not combine or effect a junction with natural surface or underground waters.
- **"Wetlands"** means those areas that are inundated or saturated by surface or ground water at a frequency and duration that are sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. "Wetlands" includes swamps, marshes, bogs, and similar areas that are delineated in accordance with the 1987 United States Army Corps of Engineers' wetland delineation manual.
- **"Bog"** means a peat-accumulating wetland that has no significant inflows or outflows and supports acidophilic mosses, particularly Sphagnum SPP.



Important Definitions under Ohio's Clean Water Act

- **"Fen"** means a carbon accumulating (peat, muck) wetland that is saturated, primarily by a discharge of free flowing ground water during most of the year. Fens are rarely inundated. Fens often have a sloped surface which prevents the accumulation of stagnant or ponded water. The water of fens is usually mineral rich and has a circumneutral pH (5.5 - 9.0). In calcareous fens, soil may be dominated by deposits of calcium carbonate rich sediments (marl). Characteristic indicator vegetation species may include, but are not limited to *Potentilla fruticosa*, *Solidago ohioensis*, *Lobelia kalmii*, *Cacalia plantaginea*, *Deschampsia cespitosa*, *Triglochin* spp., *Parnassia glauca*, *Gentianopsis* spp., *Rhynchospora* spp., and some *Eleocharis* spp.
- **"Forested wetland"** as a "wetland class characterized by woody vegetation that is twenty feet tall or taller."
- **"Vernal pools"** means shallow, temporarily flooded, depressional forested or forest edge wetlands that are typically dry for most of the summer and fall. These wetlands are generally inundated in the late winter and spring when they are subject to a burst of biological activity, including amphibian breeding. When flooded, vernal pools are often comprised of areas of open water that are not densely vegetated. They also tend to accumulate organic (woody) debris.
- **"Function"** means "processes occurring in or because of the presence of a wetland that contribute to a larger ecological condition such as water quality improvement, flood control and/or biodiversity maintenance."

Ohio Adm. Code Rule 3745-1-50.

Summary of Ohio EPA Regulations for Wetlands

Ohio regulations require that wetlands must be protected to prevent significant adverse impacts on:

- (1) water currents,
- (2) erosion or sedimentation patterns;
- (3) natural water temperature variations;
- (4) chemical, nutrient and dissolved oxygen regimes of the wetlands;
- (5) the movement of aquatic fauna;
- (6) the pH of the wetland; and,
- (7) water levels or elevations, including those resulting from ground water recharge and discharge.

Ohio Adm. Code Rule 3745-1-51(A)



Ohio regulations require that water quality to support existing habitats and the populations of wetland flora and fauna must be protected to prevent significant adverse impacts on:

- (1) food supplies for fish and wildlife;
- (2) reproductive and nursery areas;
- (3) dispersal corridors; and
- (4) to prevent conditions conducive to the establishment or proliferation of nuisance organisms

Ohio Adm. Code Rule 3745-1-51(B)



Summary of Ohio EPA Regulations for Wetlands

- Wetland designated use shall be maintained and protected such that degradation of surface waters through direct, indirect, or cumulative impacts does not result in the net loss of either wetland acreage or functions.

Ohio Adm. Code Rule 3745-1-54



Categories of Wetlands

Categories of wetlands are assigned based on the wetlands relative functions and values.

The functions include:

- (1) ground water exchange;
- (2) nutrient removal;
- (3) sediment and/or contaminant retention;
- (4) water storage;
- (5) sediment stabilization;
- (6) shoreline stabilization;
- (7) maintenance of biodiversity;
- (8) recreation;
- (9) education and research; and,
- (10) habitat for threatened or endangered species.



Ohio Adm. Code Rule 3745-1-54

Categories of Wetlands

- Category I
- Category II
- Category III (most pristine)

Ohio's Rapid Assessment Method Version 5.0 ("ORAM")



You must obtain a permit

Ohio Adm. Code Rule 3745-32-04(B) states:

- Any person filing an application for any other federal permit or license to conduct activity which may result in a discharge to waters of the state must submit an application to the director for a section 401 water quality certification. * * *



Punishment for Destruction of a wetland that has not been scored

Ohio regulations states if a wetland has been degraded or destroyed without prior authorization, the wetland will be deemed a category 3 wetland, unless the applicant demonstrates that a lower category is appropriate.

The information upon which an applicant may submit to the Director of Ohio EPA to demonstrate that a lower category is appropriate includes:

- (1) adjacent vegetation;
- (2) aerial photographs;
- (3) U.S. Fish and Wildlife Service national wetland inventory maps;
- (4) Ohio wetland inventory maps;
- (5) public information;
- (6) on-site inspections;
- (7) previous site descriptions; and,
- (8) soil maps.



Ohio Adm. Code Rule 3745-1-54(B)(6)(a).

Ohio regulations also state that the director may require compensatory mitigation at the same mitigation as required for impacts to category 3 wetlands.

See Ohio Adm. Code Rule 3745-1-54(B)(6)(d).

R.C. 3745.113(B) states that if a person conducts activities where an isolated permit is required without first obtaining such a permit, the person must pay twice the amount of the application and review fees that the person otherwise would have been required to pay.

Proposed Modifications to the 401 Water Quality Certification Standards for Nationwide Permits

- Draft rules were modified and re-issued in 2014
- Comments were due: September 11, 2014



For all Ohio Certified Nationwide Permits



Culverts



1. For intermittent and perennial streams:
2. Bottomless or buried culverts are required when culvert size is greater than 36" in diameter. [Note: Condition does not apply if culverts have a gradient of greater than 1% grade or installed on bedrock. A buried culvert means that the bottom 10% by dimension shall be buried below the existing stream bed elevation].
3. The culvert shall be designed and sized to accommodate bankfull discharge and match the existing depth of flow to facilitate the passage of aquatic organisms.
4. When practicable, culverts shall be installed at the existing streambed slope, to allow for the natural movement of bedload and aquatic organisms.
5. The conditions in this section apply only to the installation of new culverts regardless of which NWP is used to authorize the activity.

Best Management Practices

1. All best management practices for storm water management shall be designed and implemented in accordance with the most current edition of the NPDES construction general permit available at:

http://www.epa.ohio.gov/dsw/storm/construction_index.aspx#Construction%20General%20Permit, or any watershed specific construction general permit.

2. All avoided water resources and associated buffers/riparian areas shall be demarcated in the field and protected with suitable materials (e.g., silt fencing, snow fencing, signage, etc.) prior to site disturbance. These materials must remain in place and be maintained throughout the construction process.



Best Management Practices

3. Disturbance and removal of vegetation from the project construction area is to be avoided where possible and minimized when necessary. Entry to surface waters shall be through a single point of access whenever practicable to minimize disturbance to riparian habitat.

Unavoidable temporary impacts to forested riparian habitat shall be restored as soon as practicable after in-water work is complete using tree and shrub species native to the specific ecoregion where the project is located.

4. All dredged material placed at an upland site shall be controlled so that sediment runoff to adjacent surface waters is minimized to the maximum extent practicable.
5. Straw bales shall not be used as a form of erosion/sediment control unless used in conjunction with another structural control such as silt fencing.

Best Management Practices

6. Heavy equipment shall not be placed below the ordinary high water mark of any surface water, except when no other alternative is practicable.
7. Temporary fill shall consist of suitable non-erodible material and shall be stabilized to prevent erosion.
8. Cadmium chromium arsenate (CCA) and creosote treated lumber shall not be used in structures that come into contact with waters of the state.

Mitigation

1. Compensatory mitigation is required for the discharge of dredged or fill material into wetlands, whether temporary or permanent, for impacts exceeding one-tenth acre.
2. When required, compensatory mitigation shall be provided.
3. When compensatory mitigation will be provided wholly or in part at a mitigation bank, credit purchase shall only be authorized at those banks approved by the interagency review team and having an active instrument signed by the director of Ohio EPA.
4. Compensatory mitigation projects for stream impacts shall result in the preservation, restoration, or enhancement of stream habitat and/or biological functions.

Mitigation

5. Stream reconstruction activities shall maintain or enhance the habitat values of the stream as determined by an appropriate habitat assessment method and adhere to “natural channel design” principles.

[Natural channel design means a technique that integrates knowledge of natural stream processes to create a stable stream that maintains its form and function over time and achieves a targeted habitat or biological end point].



Miscellaneous



1. Nationwide permits cannot be combined to increase any of the special or general limitations and conditions of this certification.
2. Authorization under this certification does not relieve the permittee from the responsibility of obtaining any other federal, state or local permits, approvals or authorizations.
3. In the event that the issuance of a nationwide permit by the Corps requires individual state water quality certification for an activity that constitutes an emergency as defined in 33 CFR 325.2(e)(4), the limitation and/or condition requiring the individual water quality certification is not applicable and the project may proceed upon approval by the Corps provided all other terms of this certification, including mitigation, have been met.

Miscellaneous

4. In nationwide permits where the district engineer has been granted authority to waive certain requirements, the corresponding limitations and conditions of this certification as well as specific nationwide permit conditions shall apply unless written authorization from the director of Ohio EPA is obtained to authorize additional impacts.
5. For any project that does not meet one or more of the terms and conditions of this certification Ohio EPA may determine, on a case-by-case basis, that a project will have such a minimal impact on water quality that individual state water quality certification is not necessary provided all other terms and conditions of this certification, including mitigation, have been met.
6. Representatives from Ohio EPA, Division of Surface Water will be allowed to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of this certification. This includes, but is not limited to, access to and copies of any records that must be kept under the conditions of this certification; and, authorization to sample and/or monitor any discharge activity or mitigation site. Ohio EPA will make a reasonable attempt to notify the applicant of its intention to inspect the site in advance of that inspection.

Miscellaneous

7. Impacts as referenced in this certification consist of waters of the state directly impacted by the placement of fill or dredged material. Fill material does not include temporary swamp or timber mats.
8. For purposes of demonstrating eligibility for coverage under these certifications, if the project impacts more than 60 linear feet of each perennial and intermittent stream that does not have an aquatic life use designation pursuant to Admin. Code Chapter 3745-1, the applicant shall submit a qualitative assessment of the physical and biological characteristics for each stream and high quality photographs of the stream length assessed to Ohio EPA prior to PCN submittal for use in determining its existing aquatic life use (except for NWP 49).
9. Unless otherwise specifically addressed in a general certification, an applicant proposing to impact a wetland shall perform a wetland characterization analysis consistent with the Ohio Rapid Assessment Method to demonstrate eligibility for coverage under the specific Ohio certification requested. The ORAM results shall be coordinated with Ohio EPA prior to submittal of the PCN. Additionally, any proposed impacts to Category 3 wetlands under NWPs 3 or 14 shall be reviewed after the categorization is verified to determine if the proposed project meets the definition of “public need”.

Special Limitations and Conditions for Ohio EPA Certified Nationwide Permits

Nationwide Permit 1 (Aids to Navigation)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Temporary or permanent impacts to category 3 wetlands are not authorized under this certification.
3. Temporary or permanent impacts to category 1 and category 2 wetlands are limited to one-half acre.



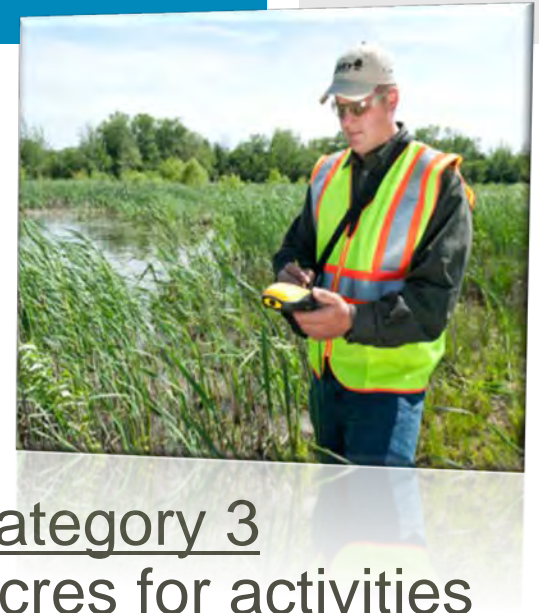
Nationwide Permit 2 (Structures in Artificial Canals)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Temporary or permanent impacts to category 3 wetlands are not authorized under this certification.
3. Temporary or permanent impacts to category 1 and category 2 wetlands are limited to one-half acre.



Nationwide Permit 3 (Maintenance)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Temporary or permanent impacts to category 3 wetlands are limited to less than 0.1 acres for activities involving the repair, maintenance, replacement, or safety upgrades to existing infrastructure that meets the definition of public need.
3. Temporary or permanent impacts to category 1 and category 2 wetlands are limited to 0.5 acres.
4. This certification does not authorize the replacement of existing structures that are open to the flow of water with structures that are not open to the flow of water.



Nationwide Permit 3 (Maintenance)

5. For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 500 linear feet of which no more than 300 linear may be new culvert.
6. Replacement vertical bulkheads shall not be placed more than an average of one foot waterward of the intersection of the ordinary high water mark of the waterbody and the existing shoreline.
7. Removal of accumulated sediment shall occur only once per year and shall be limited to low-flow conditions, except in cases of emergency situations that threaten life or property.
8. Upon the cessation of earth moving activities, any hydric topsoil removed from a trench shall be separate and saved for later placement as the topmost backfill layer when the trench is refilled

Nationwide Permit 5 (Scientific Measurement Devices)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;
 - d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;



Nationwide Permit 5 (Scientific Measurement Devices)

- e. e. state wild and scenic rivers;
 - f. f. national wild and scenic rivers;
 - g. g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
 - h. h. all other streams and lake shorelines when impacts exceed 300 linear feet.
3. For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 500 linear feet of which no more than 300 linear may be new culvert.

Nationwide Permit 6 (Survey Activities)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;
 - d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;



Nationwide Permit 6 (Survey Activities)

- e. state wild and scenic rivers;
 - f. national wild and scenic rivers;
 - g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
 - h. all other streams and lake shorelines when impacts exceed 300 linear feet.
3. For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 500 linear feet of which no more than 300 linear may be new culvert.

Nationwide Permit 7 (Outfall Structures and Associated Intake Structures)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Except for maintenance activities authorized under this nationwide permit, individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;
 - d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;



Nationwide Permit 7 (Outfall Structures and Associated Intake Structures)

- e. state wild and scenic rivers;
 - f. national wild and scenic rivers;
 - g. general high quality water bodies which harbor Federally listed threatened and/or endangered species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
 - h. all other streams and lake shorelines when impacts exceed 300 linear feet.
5. For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 500 linear feet of which no more than 300 linear may be new culvert.

Nationwide Permit 12 (Utility Activities)



1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Except for maintenance activities authorized under this nationwide permit, individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 or 2 wetland when impacts exceed one-half acre per crossing;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;
 - d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;

Nationwide Permit 12 (Utility Activities)



- e. state wild and scenic rivers;
 - f. national wild and scenic rivers; and
 - g. general high quality water bodies which harbor Federally listed threatened and/or endangered species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County.
3. Temporary or permanent impacts as a result of stream crossings shall not exceed a total of three-per-stream mile-per-stream.
 4. For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 500 linear feet of which no more than 300 linear may be new culvert.

Nationwide Permit 12 (Utility Activities)

5. All hydric soils up to 12 inches in depth within wetlands shall be stockpiled and replaced as the topmost backfill layer. Best management practices, such as silt fencing and soil stabilization, shall be implemented to reduce erosion and sediment run-off into adjacent wetlands.
6. Buried utility lines in waters of the United States shall be installed at a 90 degree angle to the stream bank to the maximum extent practicable. When a 90 degree angle is not possible, the length of any buried utility line within any single water body shall not exceed **twice** the width of that water body at the location of the crossing.
7. The total width of any excavation, grading or mechanized clearing of vegetation and soil shall not exceed a maximum of 50 feet within waters of the United States.
8. If horizontal directional drilling activities are to be used, the permittee shall develop and submit to Ohio EPA a Release Prevention and Emergency Response Plan ("the Release Response Plan) that identifies measures to protect the environment from inadvertent returns.

Nationwide Permit 13 (Bank Stabilization)

1. Unless otherwise stated, the certification conditions listed below apply to all bank stabilization projects.
2. Ohio state certification general limitations and conditions apply to this nationwide permit.
3. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid ;



Nationwide Permit 13 (Bank Stabilization)

- d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;
 - e. state wild and scenic rivers;
 - f. national wild and scenic rivers;
 - g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
 - h. all other streams and lake shorelines when impacts exceed 500 linear feet.
4. Bioengineering techniques shall be utilized, if practicable.

Nationwide Permit 13 (Bank Stabilization)

5. trace quantities, free of exposed rebar, free of debris and may consist of rock, stone, vegetative erosion control measures, broken concrete rubble and clean soil. Asphalt and tires are explicitly excluded as materials suitable for bank stabilization.
6. Vertical bulkheads shall not be placed more than one foot waterward of the intersection of the ordinary high water mark of the water body and the existing shoreline. Toe stone shall be placed at the base of the vertical bulkhead except in areas where the original shoreline is composed of bedrock and slopes are predominantly greater than 75 percent or where the placement of toe stone will interfere with shipping activity. When required, toe stone shall be placed at an average rate of one-third the total height of the exposed face of the vertical bulkhead at a 2:1 slope.

Nationwide Permit 14 (Linear Transportation Projects)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Except for maintenance activities authorized under this nationwide, individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands unless the impact is less than 0.1 acres for activities involving the maintenance of existing infrastructure that meets the definition of public need;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre per crossing;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;



Nationwide Permit 14 (Linear Transportation Projects)

- d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;
 - e. state wild and scenic rivers;
 - f. national wild and scenic rivers; and
 - g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County.
3. Temporary or permanent impacts as a result of stream crossings shall not exceed a total of three-per-stream mile-per-stream.
4. For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 500 linear feet of which no more than 300 linear feet may be new culvert.

Nationwide Permit 15 (U.S. Coast Guard Approved Bridges)



1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;
 - d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;

Nationwide Permit 15 (U.S. Coast Guard Approved Bridges)

- e. state wild and scenic rivers;
- f. national wild and scenic rivers;
- g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
- h. all other streams and lake shorelines when impacts exceed 300 linear feet.

Nationwide Permit 23 (Approved Categorical Exclusions)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. This certification only authorizes activities described in 23 CFR Part 771.117 of the Federal Highway regulations.
3. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;



Nationwide Permit 23 (Approved Categorical Exclusions)

- d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;
- e. state wild and scenic rivers;
- f. national wild and scenic rivers;
- g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
- h. all other streams and lake shorelines when impacts exceed 300 linear feet.

Nationwide Permit 25 (Structural Discharges)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;



Nationwide Permit 25 (Structural Discharges)

- d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;
- e. state wild and scenic rivers;
- f. national wild and scenic rivers;
- g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
- h. all other streams and lake shorelines when cumulative impacts exceed 300 linear feet.

Nationwide Permit 29 (Residual Developments)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;



Nationwide Permit 29 (Residual Developments)

- d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;
 - e. state wild and scenic rivers;
 - f. national wild and scenic rivers;
 - g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
 - h. all other streams and lake shorelines when cumulative impacts exceed 300 linear feet.
3. For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 500 linear feet of which no more than 300 linear may be new culvert.

Nationwide Permit 31 (Maintenance of Existing Flood Control Facilities)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. This nationwide permit shall only authorize projects constructed by the Corps of Engineers and maintained by the Corps or transferred by the Corps to a local sponsor.
3. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;

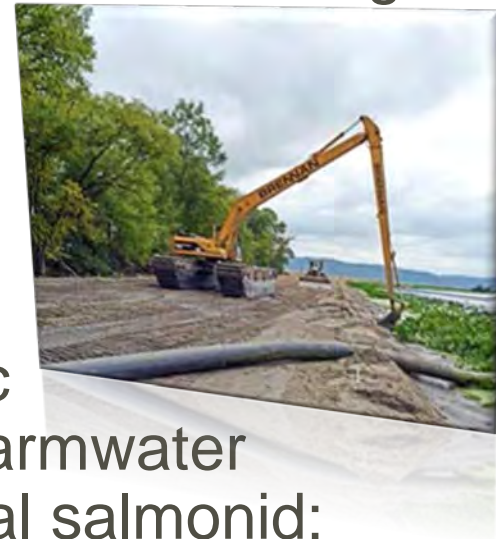


Nationwide Permit 31 (Maintenance of Existing Flood Control Facilities)

- d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;
- e. state wild and scenic rivers;
- f. national wild and scenic rivers;
- g. general high quality water bodies, which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
- h. all other streams and lake shorelines when cumulative impacts exceed 300 linear feet.

Nationwide Permit 33 (Temporary Construction, Access and Dewatering)

1. The Ohio State Certification General Limitations and Conditions apply to this nationwide permit.
2. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;



Nationwide Permit 33 (Temporary Construction, Access and Dewatering)

- d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;
- e. state wild and scenic rivers;
- f. national wild and scenic rivers;
- g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
- h. all other streams and lake shorelines when cumulative impacts exceed 300 linear feet.

Nationwide Permit 33 (Temporary Construction, Access and Dewatering)

3. For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 500 linear feet of which no more than 300 linear may be new culvert.
4. Temporary shall be defined as less than one year in duration.
5. This certification does not authorize construction or maintenance or modification of marina basins;
6. This nationwide permit shall not authorize temporary construction access and dewatering associated with mining activities.

Nationwide Permit 35 (Maintenance Dredging of Existing Basins)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Temporary or permanent impacts to category 3 wetlands are not authorized under this certification.
3. Temporary or permanent impacts to category 1 and category 2 wetlands are limited to one-half acre.



Nationwide Permit 39 (Commercial and Institutional Activities)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;



Nationwide Permit 39 (Commercial and Institutional Activities)

- d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;
 - e. state wild and scenic rivers;
 - f. national wild and scenic rivers;
 - g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
 - h. h. all other streams and lake shorelines when cumulative impacts exceed 300 linear feet.
3. For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 300 linear feet. New and replacement culverts shall be installed as required under part one, general condition B.

Nationwide Permit 41 (Reshaping Existing Drainage Ditches)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;



Nationwide Permit 41 (Reshaping Existing Drainage Ditches)

- d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;
- e. state wild and scenic rivers;
- f. national wild and scenic rivers;
- g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
- h. all other streams and lake shorelines when cumulative impacts exceed 300 linear feet.

Nationwide Permit 41 (Reshaping Existing Drainage Ditches)

3. This certification only authorizes impacts to existing maintained and channelized water conveyances that have been created or previously modified and maintained for the purpose of draining abutting existing agricultural land or **existing roadways** and meet the following criteria:
 - a. The ditch was man-made and is existing; or
 - b. The stream/ditch has existing entrenchment ratios that are less than 1.4 and the proposed dredging impacts do not reduce the sinuosity of the stream/ditch channel.
4. Prior to the commencement of the project, all drainage ditch reshaping projects must be certified in writing by either the Natural Resources Conservation Service or Soil and Water Conservation District or **County Engineer in the County where the project occurs**, or by a certified professional engineer, that the project complies with the above criteria. In order to be authorized under this paragraph, such certification shall be maintained by the person or entity engaged in the project and a copy shall be sent to: Ohio EPA, Division of Surface Water, Section 401 Unit, P.O. Box 1049, Columbus, Ohio 43216-1049.

Nationwide Permit 43 (Stormwater Management Facilities)

1. Ohio state certification general limitations and conditions apply to this nationwide permit.
2. Individual state water quality certification is required for use of this nationwide permit when temporary or permanent impacts are proposed on or in the following waters:
 - a. category 3 wetlands;
 - b. category 1 and category 2 wetlands when impacts exceed one-half acre;
 - c. streams that meet or have an aquatic life use designation of exceptional warmwater habitat, cold water habitat or seasonal salmonid;
 - d. streams with an antidegradation category of superior high quality water, outstanding national resource water or outstanding state water;

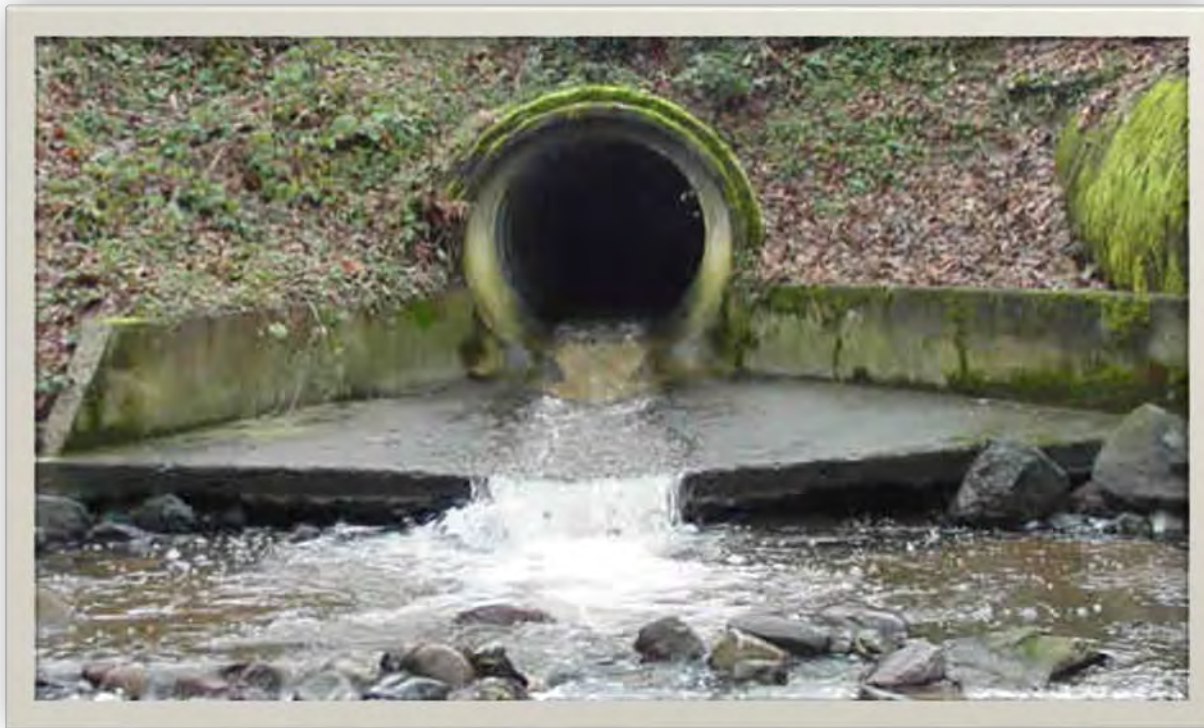


Nationwide Permit 43 (Stormwater Management Facilities)

- e. state wild and scenic rivers;
 - f. national wild and scenic rivers;
 - g. general high quality water bodies which harbor federal and/or state listed threatened and/or endangered mussel species, such as Killbuck Creek in Coshocton County and Pymatuning Creek in Ashtabula County; and
 - h. all other streams and lake shorelines when cumulative impacts exceed 300 linear feet.
3. For an individual stream, the combined length of an existing culvert and culvert extension shall not exceed 300 linear feet. New and replacement culverts shall be installed as required under part one, general condition B.

Nationwide Permit 46 (Discharges into Ditches)

- Individual State Water Quality Certification is required for the use of this nationwide permit.



Summary of Ohio EPA's Proposed Revisions to Section 401 Water Quality Certification Program

Ohio Adm. Code Rule 3745-32-05 “Criteria for decision by the Director”

- This Proposal is to amend the criteria the Director of Ohio EPA must use to issue, deny a section 401 Water Quality Certification to include the ability to:
 - Prohibit open lake disposal of dredged material from harbor or navigation maintenance activities in Lake Erie, particularly if the dredge material could result in higher levels of pollutants in fish that bioaccumulates through the food chain, such as Polychlorinated Biphenyls (“PCBs”).



Ohio Adm. Code Rule 3745-38-01, et seq.

- Normally, general NPDES permits cover:
 - a. stormwater point sources
 - b. water-borne wastes resulting from coal and reclamation
 - c. sewage sludge point sources
 - d. other “categories” of point sources



Ohio Adm. Code Rule 3745-38-01, et seq.

- However, under the Rule revision, the “other categories” must:
 1. involve the same or substantially similar type of operations
 2. discharge the same types of wastes
 3. require the same effluent limitations, operating conditions
 4. require the same or similar monitoring
 5. And, are more appropriate controlled under a general permit than an individual permit
- Notice of Intent for Storm Water must now also include:
- An 8.5 x 11 inch site map that located the project with the perimeter outlined and existing adjacent identifiable roads.



Ohio Adm. Code Rule 3745-1-01 thru 54, Ohio Adm. Code Rule 3745-32, Ohio Adm. Code Rule 3745-45

- The rules apply to anyone who wants to place “fill material” in “Waters of the State.”
- Common applicants include: real estate developers, coal mining companies, dredging operators, pipeline installers, the U.S. Army Corps of Engineers, and **County Engineers** and ODOT
- “Water Quality Standards” are state regulations that protect lakes, rivers, and other surface bodies from pollution.
- On June 5, 2012, Governor Kasich signed S.B. 294. The bill allows “in-lieu-fee mitigation.” This mimics the federal regulations. 33 C.F. R. Part 332.
- This rulemaking will ensure in-lieu-fee program sponsors are qualified.
- Once assigned, a wetland category will be valid for (5) five years



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Mitigation shall be conducted in the following order:

1. Approved mitigation bank in the same area of the proposed impact
2. Approved mitigation bank adjacent to watershed as the impact, provided the watershed is located within the same U.S. Army Corps of Engineer district as the area of impact
3. Through an approved in-lieu-fee program within the area of the proposed impact
4. Mitigation within the same watershed in which the impact is to occur

[If impact is greater than 3 acres of Category 2 or any Category 3, then, on-site mitigation becomes the preferred option].

5. For a linear project (like a Road or Highway), and where there are multiple impacts to multiple watersheds and there is not an acceptable mitigation bank in each of the watersheds, then, mitigation for the project may be consolidated in a single mitigation bank, in-lieu-fee program, or on-site mitigation project may be acceptable.
6. In rare circumstances, at the discretion of the Director of Ohio EPA, it may be acceptable for mitigation to occur concurrently with the impacts at the project site. See Ohio Adm. Code Rule 3745-1-54(E)(5)(a)(v).



Summary of Changes to Ohio Adm. Code Rule 3745-1-01 thru 54

Definitions



- “Jurisdictional ditch” = roadside ditch, excluding any captured streams determined to be a “jurisdictional water” because of “significant nexus” to “relatively permanent waters.” Ohio Adm. Code Rule 3745-1-02(A)(53)
- “Captured Stream” = a portion of an existing stream that lies or has been relocated to lie within a roadway right of way. Ohio Adm. Code Rule 3745-1-02(A)(18).
- “Lake” = standing body of open water that has a “significant nexus” to “relatively permanent waters”
- “Roadside ditch” = drainage feature adjacent to or within a right of way along public or private roads, railroads or other similar development feature that has been **constructed or modified** and **serves to collect and transport water** draining from the development feature.
- “stream” = water body having a channel with a well defined bed and banks, either natural or artificial, that confines and conducts continuous or periodical flow water (this includes “captured streams” but does not include “roadside ditches” or “temporary channel-like features”).

Beneficial Use Designations: (Ohio Adm. Code 3745-01-07)

A. Water Supply

1. Public Water Supply
2. Agricultural Water Supply
3. Industrial Water Supply



Beneficial Use Designations: (Ohio Adm. Code 3745-01-07)

B. Recreation Use Designations

1. Water-based recreation opportunities
2. Sport Fishing Recreation use
3. Body-contact recreation use
 - a. bathing waters (swimming)
 - b. primary contact recreation (wading, swimming, boating, water skiing, canoeing, kayaking, scuba diving)
 - c. Class A, B, C
 - d. secondary contact recreation (wading, sparsely populated areas, restricted access points, insufficient depth)



Beneficial Use Designations: (Ohio Adm. Code 3745-01-07)

C. Base Aquatic Life Designations

D. Tiered Aquatic Life Designations

1. Warmwater Habitat
2. Exceptional warmwater habitat
3. Modified warmwater habitat
4. Coldwater Habitat (trout)
5. Seasonal Salmonid Habitat
6. Limited Resource Water (acid mine drainage)
7. Limited Warmwater Habitat
8. Lake Habitat
9. Wetland



Individual 401 permit Applications under Consideration by Ohio EPA



1. Vrooman Road, Lake County
2. Vrooman Road Bridge, Lake County
3. Leroy Center Substation, Lake County
4. Canyon lakes Colony, Geauga County
5. Richmond Mining Area (Oxford), Jefferson
6. Ohio Christian University, Pickaway County
7. Kroger, Marysville, Union County
8. Semaan Reventment, Cuyahoga County
9. Cleveland Harbor Dredging, Cuyahoga
10. ALDI Hinckley, Medina County
11. Pincecrest, Pine Orange, LLC, Cuyahoga County
12. Fairport Harbor Dredge, Lake County

Individual 401 permit Applications under Consideration by Ohio EPA



13. Nobel Road Landfill, Rumpke, Richland County
14. Toledo Harbor Dredging, Lucas County
15. Henry County 109-10, ODOT, Henry County
16. Project Curie Manufacturing facility, Licking County
17. Fed Ex Ground Expansion, Wood County
18. Ashtabula Harbor Dredging, Ashtabula County
19. City of Green, Central Park, Summit County
20. Warren-23-0.26, **Warren County Engineer**
21. East Ohio Gas Line Replacement, East Ohio, Cuyahoga County
22. BEL-70-14.45, ODOT, Belmont County
23. Perry NPP Stream Relocation, First Energy, Lake County
24. Pike County, 104-10.64, ODOT, Pike County

A 401 Water Quality Certification includes Several Documents

1. Preferred plan
2. Preferred plan summary
3. Minimal degradation plan
4. Minimal degradation plan summary
5. Non-degradation
6. Application
7. Public Notice
8. Map
9. Estimated costs for mitigation
10. Road Development
11. Pre-application



Ohio EPA's Rule Making Process

1. Early Stakeholder Outreach
2. Draft Review (Interested Party Review—allows interested parties, stakeholders, and citizens to make comments regarding the rule, prior to adoption)
3. Formal submission of draft Rule to Joint Committee on Agency Rule Review
4. Final Adoption



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Formal JCARR Process and How to Challenge an amended Ohio Administrative Code Rule

The formal process to file a Rule is as follows:

Public Notice



1. Publish public notice in the “register of Ohio” at least 30 days prior to holding a public hearing.
<https://www.registerofohio.state.oh.us>
2. The public notice must include:
 - a. A statement of the agency’s intention to consider adopting, amending, or rescinding a rule;
 - b. A synopsis of the proposed rule, amendment, or a general statement of the matter to which the proposed rule relates;
 - c. A statement of the reason for adopting the rule;
 - d. The hearing, then, must occur no earlier than 31 days after, but no later than 40 days after the proposed rule is filed with the Joint Committee on Agency Rule and Review.

Where to File

1. The full text of the proposed rule and the public notice must be filed in electronic form with the Secretary of State and with the Director of the Legislative Service Commission at least 65 days prior to the date on which the agency issues an Order adopting the proposed rule.
2. If the proposed rule incorporates material by reference, the agency must explain in the rule how persons who reasonably can be expected to be affected by the rule can obtain copies of the text or other material. See R.C. 121.71, *et seq.*
3. The proposed rule must be available for at least 30 days prior to the hearing without charge to any person affected by the proposal.



Rule Summary and Fiscal Analysis

1. The agency must file a “Rule Summary” and a “Fiscal Analysis” with JCARR. See R.C. 119.03(H) , R.C. 127.18.



Common Sense Initiative

- If a proposed rule has an “adverse impact on businesses”, (defined as requiring a license, permit, or any other prior authorization to engage in or operate a line of business), then the agency must prepare a “business impact analysis” and file it, along with the Rule, with the Common Sense Initiative Office, which is a part of the Governor’s office. In such case, the agency must file a copy of the “business impact analysis,” any recommendations received from the common sense initiative office, and the agency’s memorandum of response, if any, in electronic form along with the proposed rule with the Secretary of State, the Director of the Legislative Service Commission, and JCARR. R.C. 111.15(D), R.C. 119.03(H).
- When the common sense initiative office receives a draft rule and business impact analysis, the office shall evaluate the rule and analysis and transmit recommendations to the agency on how the draft rule might be revised to eliminate or reduce any adverse impact the draft rule might have on business. R.C. 107.54. See also R.C. 121.83.
- Common Sense Initiative (“CSI”) prepares a Business Regulation Impact Analysis (“BRIA”)

Public Hearing by Agency

1. The agency must conduct a public hearing at which any person affected by the proposed action of the agency may appear and be heard in person, by the person's attorney, or both, may present the person's position, arguments, or contentions, orally or in writing, offer and examine witnesses, and present evidence on whether the Rule is unreasonable or unlawful. At the hearing, any testimony must be recorded.



Public Hearing by JCARR



1. JCARR must hold a public hearing. The hearing may be held any time 41 days after the Rule is filed with JCARR. JCARR can invalidate the Rule if it finds:
 - a. That the rule-making agency has exceeded the scope of its statutory authority in proposing the rule;
 - b. That the proposed rule, conflicts with another rule, adopted by the same or a different rule-making agency;
 - c. That the proposed rule, conflicts with the legislative intent in enacting the statute under which the rule-making agency proposed the rule;

Public Hearing by JCARR

- d. summary and fiscal analysis of the proposed rule; or if
 - e. That the rule-making agency has failed to demonstrate through the business impact analysis, recommendations from the common sense initiative office, and the memorandum of response that the regulatory intent of the proposed rule, justifies its adverse impact on businesses in this state.
- If JCARR does not invalidate the Rule, the Rule shall be effective no earlier than the 10th (tenth) day after the hearing and after the rule is filed in its final form with JCARR. R.C. 119.03(D).

Summary of Common Sense Initiatives (“CSI”)

Governor John Kasich's Common Sense Initiative Executive Order 2011-01K

Ohio Revised Code section 107.61, *et seq.*



Goals:

1. Measure and balance any regulations that are designed to protect Ohioans without harming competitive business opportunities in Ohio.
2. Eliminate excessive and duplicative rules and regulations which stand in the way of job creation.
3. Evaluate the economic impact of state agency regulations upon a business, with the authority to invalidate, amend, or rescind rules that are unnecessary, ineffective, contradictory, inefficient, needlessly burdensome, have negative consequences, or that don't otherwise meet the "common sense" test.

Case Examples

Permits

1. In order to construct a business development consisting of warehouses on a 222 acre site, Pizzuti Companies successfully completed a Phase I/Phase II environmental assessment and for pre-construction activity and obtained a Section 401 Water Pollution Control Act (P.L. 95-217) permit and an Isolated Wetland Permit (O.R.C. 6111) from Ohio EPA on March 7, 2008. These permits were necessary in order to complete construction activities which impacted a portion of the Big Walnut Creek (within the Upper Scioto River Watershed), and a portion of the abandoned former Ohio-Erie Canal. Pizzuti also successfully obtained a Section 404 Permit from the U.S. Army Corps of Engineers and agreed to perform certain environmental remediation, including obtaining a 50-foot conservation easement along the bank of the affected waterways, install silt fencing, replace affected trees with appropriate native species, control storm water, perform a flood plain enhancement project adjacent to approximately 900 linear feet of Walnut Creek, including the planting of one-inch caliper trees, install a groundwater recharge well, perform certain monitoring of the remaining avoided wetlands for the next three years, and purchase of 2.6 acres of forested Category 2 or 3 wetlands from the Little Scioto Mitigation Bank.

Case Examples

2. In order to construct a business development consisting of warehouses on a 181 acre site, the Columbus Regional Airport Authority ("CRAA") successfully obtained for pre-construction activity a Section 401 Water Pollution Control Act (P.L. 95-217) permit and an Isolated Wetland Permit (O.R.C. 6111) from Ohio EPA on July 12, 2007. These permits were necessary in order to complete construction activities which impacted a portion of the Big Walnut Creek (within the Scioto River Watershed), including 5.06 acres of wetlands and 6,300 linear feet of stream. CRAA also successfully obtained a Section 404 Permit from the U.S. Army Corps of Engineers and agreed to perform certain environmental remediation, including relocating and restoring 765 linear feet of stream on site; removal of an emergency interceptor, install silt fencing, replace affected trees with appropriate native species, and control storm water, and restore 11.2 acres of wetlands at the parcel known as the Mackey Ford Wildlife Area at the Little Scioto Mitigation Bank.

Case Examples

Don't Ignore the Government

Joel Claffey v. The National City Bank, Trustee of the Lynne Claffey Trust, Franklin County Probate Court, Judge Eric Brown, Case No. 518458A, Franklin County Common Pleas Court, Judge Beverly Pfeiffer, . Since 1990, National City Bank served as the Trustee of the Lynne Claffey Trust which owned property in Groveport, Franklin County, Ohio upon which one of the beneficiaries, Joel Claffey, resided. Mr. Claffey engaged in activities which resulted in an enforcement action being initiated by the U.S. Army Corps of Engineers, under their authority under the Clean Water Act for allegedly unlawfully filling jurisdictional waters of the United States. National City Bank, as Trustees, sought to remediate the allegedly unlawful activities taken by Mr. Claffey. Mr. Claffey filed a complaint in the Franklin County Probate Court seeking to dissolve the trust and seeking compensation from the Bank for breach of fiduciary duty. Case went to bench trial June 9, 2008, and the Court issued a decision favorable to the bank, dated December 30, 2010. Mr. Claffey filed an appeal, and on September 27, 2011, the Court of Appeals (3-0) held that the Bank did not violate its fiduciary duty, and “had no choice but to hire an environmental expert and retain capable legal counsel to avoid the huge fines and penalties which could have been assessed,” and held that the bank owes the beneficiary nothing. *Claffey v. Natl. City Bank*, 2011-Ohio-4926.

Case Examples

Enforcement

Atrium Medical Facility, Director's Final Findings and Orders, Ohio EPA. January 11, 2010.

Hospital was seeking to develop a 48.85 acre site east of I-75 in Middletown, Ohio, but because the project resulted in more than 1 acre of earth disturbance activities, it was required to obtain a construction storm water NPDES permit, and because the site impacted several wetlands and a stream, it was required to obtain 401 and 404 permits.

Site inspection on January 9, 2008 revealed that work had begun prior to issuance of necessary permits, and the facility was issued a NOV for failure to stabilize the area adjacent to the streams, develop drainage swales, failure to maintain a sediment settling pond and outlet, failure to perform and log inspection of sediment controls. It was determined that the construction activity impacted 918 feet of stream and 0.5 acres of Category 2 wetlands. Hospital was required to mitigate 7,602 linear feet of stream, 11.04 acres of on-site forested riparian corridors, and 26.29 acres of forested land outside the riparian corridors, to create 230 feet of stream using natural stream channel design methods, and create 0.7 acres of forested buffer along the newly created stream. Hospital paid a civil penalty of \$9,500.

Case Examples

State ex rel. Michael DeWine, Ohio Attorney General v. King's Crossing North, LLC,
Lucas County Common Pleas Court, Judge Jennings, July 23, 2012.

Kings Crossing North, LLC

Gary Grup, Charles Paas

Gleneagles Professional Builders & Remodelers, Inc.

Thomas J. Anderson dba T & J Excavating and Tree Clearing

Louisville Title Agency for N.W. Ohio, Inc.

Real Estate Developer destroyed wetlands without a prior permit. Defendants were required to donate a certain amount (valued at \$150,000) to an “acceptable donor” to preserve, maintain and restore, in perpetuity, wetlands located on the land, install a 30 foot buffer around all wetlands, and cannot fill Zink ditch without prior written approval from Ohio EPA. Louisville Title agreed to perform all title work, at no cost and to include specific language in the real estate title holding trust agreement assuring compliance with laws governing jurisdictional and isolated wetland, including the obligation to assess for the presence of wetlands. T & J Excavating and Tree Clearing was ordered to construct a fence to mark the boundary of the wetlands. Kings Crossing was required to pay a civil penalty of \$250,000, plus \$25,000 in a trust or escrow account for the purpose of restoring, maintaining, and preserving the wetlands.

State ex rel. Betty Montgomery, Attorney General of Ohio v. Heritage Land Development, Geauga County Common Pleas Court, Judge Forrest Burt.

January, 2002, Court entered a settlement entry which required to pay:



1. \$500,000 to the Geauga Park District to purchase Bass Lake basin,
2. \$250,000 to the Ohio Environmental Education Fund,
3. \$125,000 to the Ohio EPA, Division of Surface Water
4. purchase 30 acres of wetlands in Twinsburg and donate the land to the Tinkers Creek Land Conservancy,
5. purchase 2.6 acres of land in the Grand River lowland as mitigation for the 2.5 acres of low-quality wetlands that were destroyed by the shopping center
6. create 5.0 acres of high quality forested wetlands on its site, with monitoring for 12 years

Total civil penalty: \$1 Million



Examples of Ohio EPA Enforcement against ODOT

Director's Final Finding and Orders, dated June 7, 2005

1. ODOT held multiple stormwater general permits for the development of the Lancaster Bypass (around the city of Lancaster, Fairfield County, Ohio). ODOT failed to submit a Notice of Intent to obtain coverage under Ohio EPA's NPDES General Permit for Storm Water Discharges associated with construction activity, and failed to comply with the Storm Water Pollution Prevention Plan (SWP3). Neighbor filed a veriflicated complaint in October, 2004, Ohio EPA investigated and found violations including (1) failure to stabilize the site within 7 days of the most recent disturbance, when the site will remain dormant for more than 45 days, (2) failure to stabilize areas of disturbance within 50 feet of a stream within 2 days of the most recent disturbance, (3) failure to maintain functional sediment control structures during earth disturbing activity and within 7 days from the start of grubbing, (4) failure to require that concentrated storm water runoff pass through a sediment settling pond, (5) failure to maintain sediment settling ponds with a capacity of 67 cubic yards per acre of total drainage area, (6) conducting dewatering activities that discharged sediment laden water directly into a tributary of the Big Walnut Creek without proper treatment to prevent turbid discharges, and (7) failure to install erosion control practices to stabilize channels from erosive flow. Ohio EPA issued 17 separate Notice of Violation Letters from June, 2011 through September, 2004.
2. ODOT was required to inspect and repair all sediment control structures within 10 days, and within 14 days submit an amended SWP3, within 90 days submit an Environmental Compliance Response Plan, and to pay \$21,500 to the Franklin County Metro Parks to purchase land to be used as parkland or wetland mitigation within the Hocking River watershed.

Director's Final Findings and Orders, dated June 7, 2005

1. ODOT was co-permittee of a Storm Water General Permit of a 158.49 acre construction project along State Route 161 and Interstate 270 meant to increase road capacity in northeast Franklin County, Ohio. Ohio EPA issued 6 Notice of Violation letters to ODOT between August, 2004 and January, 2005, for similar violations. ODOT was ordered to inspect and repair all sediment control structures within 2 days, within 7 days to implement best management practices (BMPs) with regard to erosion and sediment control practices, submit a revised SWP3 within 14 days, and submit an Environmental Compliance Response Plan within 90 days, and then to Ohio EPA a civil penalty of \$46,280 or to fund a Supplemental Environmental Project worth \$30,855 to the Franklin County Metro Parks to purchase land for park or wetland mitigation in order to address impairments to the Big Walnut Creek outlined in Ohio EPA's 2004 Total Maximum Daily Load Report. In addition, ODOT was required to fund \$15,425 to the city of Westerville to purchase land for the purpose of stream bank stabilization project along Spring Run, including regarding activities, vegetative restorative practices, and natural stream bed restoration activities.

Director's Final Findings and Order, dated August 11, 2006.

1. ODOT owned and operated wastewater treatment plants at several rest areas in Ohio: Rest Areas 1-25 and 1-26, along Interstate 75 in Hancock County, Rest Areas 1-29 and 1-30 along U.S. Route 23 near Carey, Wyandot County, Ohio, Rest Area 1-27, located on U.S. Route 30 in Van Wert County, Rest Area 7-25 and 7-27, and 7-33 along I-75 in Auglaize County, Safety Rest Area OTT-2-16.65 along State Route 2 in Ottawa County. ODOT was required to submit NPDES permit renewals, make upgrades to wastewater treatment plants, comply with final effluent limits, install dechlorination units, and submit annual sludge reports. In some cases, ODOT was required to abandon the WWTP and connect to public sewers, hire a Class I Operator to inspect the system at least three times per week for a minimum of 30 minutes, and pay to Ohio EPA a civil penalty of \$150,000 (\$60,000 went to the Automotive Mercury Switch Program). [Gordon Proctor and Joe Koncelik].

Summary of Flood Cases against Ohio Department of Natural Resources

Background Facts

1. Grand Lake St. Mary's ("GLSM") is a man-made lake built between 1837-1841, by damming the headwaters of the Wabash and St. Mary's rivers and flooding the area in between. The lake has always been very shallow and trees and other debris were not removed. It was created to feed water to the Miami-Erie Canal.
2. In 1914, a 39.4-foot curved spillway was constructed on the western shoreline of the lake that feeds Beaver Creek, which discharges to the Wabash River.
3. Canal traffic declined, the purpose of the lake changed to recreation, and GLSM became a state park in 1949. It is 8.2 miles long and occupies 13,500 acres. (At one time, it was the largest man-made lake in the United States).
4. Congress passed the Dam Inspection Act of 1972.

Summary of Flood Cases against Ohio Department of Natural Resources

Engineering Facts

5. Ohio Department of Natural Resources (“ONDR”) has regulated the construction and maintenance of dams since 1963, pursuant to R.C. 1521.06-1521.99. As a Class I dam, the GLSM dam must be able to pass 100% of the probable maximum flood (“PMF”).
6. The dam at GLSM had an earthen embankment of 5,540 feet long and 22 feet high, with a 39.4-foot long concrete overflow spillway, which included four 30-inch gates outlet conduits, only two of which were operational from 1985-1997. The top of the dam was at 877 feet, and the normal pool was about 870.6 feet, leaving less than 7 feet of “free board.”
7. In 1978, Burges and Niple issued a report to the U.S. Army Corps of Engineers on GLSM dam, pursuant to the Dam Inspection Act of 1972, which revealed that the west spillway could not pass the probable maximum flood without overtopping, and the report predicted that the overtopping would last 48 hours and result in the “failure” of the dam, which was deemed an “unacceptable risk to people and property” downstream of the spillway.
8. In 1988, ODNR raised the crest elevation of the spillway to 870.6 feet by placing four-inch wooden boards at the crest of the old spillway. This was meant to increase recreational value to boaters.
9. In 1990, the State Controlling Board allocated funds to replace the spillway, which was designed by Jones/Stuckey of Columbus, and a hydrologic investigation was performed by BBC & M of Columbus, which determined that a 500-foot spillway was needed to “pass the required flood.”

Summary of Flood Cases against Ohio Department of Natural Resources

Design Change

10. In the fall of 1990, ODNR decided to change the BBC & M design to include a 50-foot notch that was 0.9 feet lower. Construction began in 1996, and was completed in 1997.
11. The Mercer County Soil and Water Conservation District advised ODNR that ODNR should study the effect on the new spillway on croplands and that the District believes ODNR “has forgotten the farmer, as the * * * design of the spillway will put four feet in Beaver Creek itself.” A similar warning was issued by the Mercer County Commissioners.
12. September, 1991, Richard Goettemoeller, Chief of the Division of Water, wrote a memorandum addressed to ODNR Frances Bucholzer that analyzed the decision whether or not to build a new spillway. The memorandum explained that a number of people raised concern about potential flooding as a result of the new spillway, particularly from farmers who own land along Beaver Creek. But, the memorandum concluded that the 50-foot notch in the weir would provide storage and would “minimize” flooding.
13. Keith Earley, the Mercer County Engineer, wrote a letter to the Ohio Department of Natural Resources in November, 1991, based upon information he read by ODNR and a 1981 “Survey Report for Flood Control and Allied Purposes” prepared by the Louisville, Kentucky U.S. Army Corps of Engineers. Earley warned ODNR that the two sources of data contained wide discrepancies that warranted additional analysis. Specifically, that the Corps estimated peak stage lake levels were one foot higher than ODNR’s estimates, based upon 51 years of record measurements.
14. Earley ultimately opined that enlarging the spillway crest would “cause more harm than good.” Instead, he suggested that the upper three miles of Beaver Creek be widened by six feet in order to accommodate increased flows.

New Spillway Construction completed in 1997

15. The redesigned spillway permanent established a four inch increase in the lake level to replace the four-inch wooden boards which had been installed in 1988. The new spillway has two 60-inch outlets near the bottom of the structure. Prior to 1997, ODNR had a policy of lowering the lake by 12 inches in the winter. But, after the new spillway was constructed, it was to be “self-regulating” so ODNR no longer released water in the winter. At the same time that ODNR finished building the new spillway, ODNR modified the eastern outlet of GLSM with a structure that has no flood-management capacity.





First Lawsuit

State ex rel. Leo Post v. Samuel W. Speck, Director, Ohio Department of Natural Resources, Third District Court of Appeals, 2006-Ohio-6339.

Decided December 4, 2006.

Testimony

Plaintiff's expert witness, John Warns, P.E., testified on behalf of the plaintiffs, from Poggemeyer Design Group, who specialized in civil engineering, hydrology, and open channel hydraulics. He prepared a report dated April 23, 2002, which concluded there would be an increase in downstream flooding because of the new spillway design because the spillway was significantly wider. The new spillway was 450 feet + a 50-foot notch that was longer than the prior, 39.4 foot spillway. He visited the area, performed field inspections, reviewed 20 years of data, and historical documents, and concluded that the water from the new spillway discharged faster, and "considerably more water would flow over the new spillway." Engineer Warns also evaluated lowering lake levels in the fall and determined that this would favorably affect the discharge from the spillway, and that ODNR's decision to change the drawdown policy increased the flooding downstream.

Doyle Hartman, a civil engineer, who testified as ODNR's expert witness said that he did not "dispute Warns' conclusions," but he believe his analysis was more "comprehensive." Hartman created a report dated March, 2004, and created a model of the entire watershed of the downstream area. Hartman focused on rain events, how much water was coming into the lake, and how water can be passed through without damaging the dam. Hartman testified that he believed it was possible to design a spillway that would not alter the overflow into Beaver Creek, but that such an option was not "practical" because it would require raising the height of the dam.

Warns criticized Hartman's model because Hartman failed to admit that at the area near the spillway, the flood stage at day 7 of the storm peaked five (5) feet higher than it would have under the old spillway, and that the area remained at flood stage for 11 days, 7 days longer than under the old spillway.

Michelle Hoffer, Assistant to the Director of Special Projects, testified that she reviewed the letter that was sent in response to the letter sent by Mercer County Engineer Keith Earley. She testified that the dam had to be modified in order to meet the safety standards and avoid failure of the dam. But, the Court pointed out that in her memorandum to Bruce Pickens, ODNR's Chief Engineer, she criticized the response letter to Engineer Earley since it did not address his concerns that the duration of the flooding would increase from 30 hours to 110 hours, and suggested that perhaps ODNR should widen the channel.

Glen Cobb, Park Manager at GLSM from 1991 to 1999, testified that he kept daily records of the lake levels. He testified that there was a previous policy that lake levels would be draw down one foot in the fall and winter months for flood control, dock maintenance, and to prevent dock damage. He said that the plan under the new spillway was to design a spillway that was self-regulating.

The Law

The Court of Appeals stated that the central issue was whether or not the property was, in fact, physically appropriated, and that this determination depends on (1) the frequency (2) the predictability, and (3) the cause of the flooding, as determined by expert witness testimony.

Conclusions of Law

The Court concluded that there was evidence from the landowners, including photographs that depict excessive flooding. The Court also recognized that Warns' testimony was that the increase of flow after installation of the new spillway was so significant that it caused the downstream flooding. The Court noted that "all of the Appellees testified that after the new spillway was constructed, that flooding along the Beaver Creek and Wabash River was more frequent, more extensive, and did not recede as quickly. As such, the court of appeals affirmed the decision of the trial court which concluded a "taking of land" had occurred.



Summary of Flood Cases against Ohio Department of Natural Resources

State ex rel. Wayne T. Doner, et al. v. Scott Zody, Interim Director, ODNR,
130 Ohio St.3d 446, 2011-Ohio-6117

Decided December 1, 2011.



Procedural History

On July 17, 2009, 86 landowners (owning 200 parcels) filed a Writ of Mandamus in the Ohio Supreme Court to compel respondents, ODNRs, to initiate appropriation proceedings for the “taking” of property.

A Master Commissioner was appointed to receive evidence and make evidentiary rulings. 125 Ohio St. 3d 1504, 2010-Ohio-3268.

Expert Witnesses

Pressley L. Campbell (who was also an expert witness in the *Case Leasing* case). Campbell predicted that if ODNR built the new spillway in 1927 (instead of 1997), there would have been 15 storms between 1927 and 2006 that would have resulted in flooding (an average of once every five years). In the same time period using the old 1916 spillway combined with the lake-level management practices, he testified that only one storm event would have caused flooding.

Campbell also calculated that since 1997, 73.3% of the daily measurements taken by ODNR reflect water level elevations above 870.6 feet (the level at which water overflows the spillway and enters Beaver Creek). Before 1997, he testified that only 26.3% of daily measurements were above the spillway.

Keith Earley, former Mercer County Engineer, testified that he had tried to warn ODNR that its planned redesign would result in flooding to downstream farmers on the western side of the lake.

Stantec was the State's Expert. (Interestingly, the Court does not identify the individual at Stantec by name). Stantec developed hydraulic models using computer programs developed by the U.S. Army Corps of Engineers. Stantec issued a report, dated March, 2010. This report confirmed "greater peak spillway flow" from the new spillway for the 24-hour, 100-year storm events and the 96-hour, 5- years, 10-year, and 100-year storm events.

Stantec concluded that some properties have increased duration of flooding, up to 2 additional days of flooding more than they did before the new spillway was constructed.

The Court criticized Stantec's modeling for two reasons (1) the model underestimated the infiltration, antecedent moisture of the soil, and therefore the runoff calculation was not accurate, and (2) Stantec attempted to show that the flooding was the result of increased rainfall, but a senior associate could only point to a "slight increase in the average number of severe rainfall days" after 1997. *Id.* at 11.

Statute of Limitations

The Ohio Supreme Court held that (1) the flooding and (2) the failure to exercise lake-level management was a “continuing violation.” Moreover, the Court relied upon the testimony from the State’s expert witness, Stantec, which opined that 10 to 15 years or more of records are needed in order to produce “meaningful hydrological statistics.” The Court used this statement to support a conclusion that the normal 4-year statute of limitations did not bar these claims.



Conclusion

The Court observed:

There is some evidence here that respondents made an intentional choice to favor recreational users of the lake and south-side lakefront owners over landowners and farmers on the western side of the lake. But, there is no credible evidence that ODNR and its director intended to flood relator's land. In fact, it appears that the intent of the respondents in constructing the new spillway was to prevent flooding—to prevent the dam at GLSM from failing and causing a catastrophic flooding event—and not to create or exacerbate it. *Id.* at 21.

Nevertheless, the Court held:

Based on the foregoing, this case is not barred by the four-year statute of limitations of R.C. 2305.09(E), and relators have established that respondents' construction of the spillway and concomitant refusal to lower the lake level at GLSM caused flooding with the requisite frequency to constitute a taking. * * *

Respondents were free to determine that the old spillway needed to be replaced for the dam at GLSM to survive a probable maximum flood. And they were also authorized to determine that redesigning the spillway and abandoning lake-level management were the preferable ways to remedy the probable-maximum-flood problem and to appeal to both recreational users of the lake and homeowners on the southern shore of the lake. Once they made that decision, however, they were liable for the damage to downstream landowners caused by the intermittent, but inevitably recurring, flooding that resulted from the new western spillway.

The Court held:

Therefore, we grant a writ of mandamus to compel respondents to commence appropriation proceedings to determine the amount of their taking of the property. * * * The determination of the extent of the taking [how much flooding, how long, over what area] will be made by the court presiding over the appropriation proceeding. See R.C. 163.05 (requiring that a petition for appropriation of property interests less than a fee be in sufficient detail “to permit a determination of the nature, extent, and effect of the taking”).



Questions?

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