

BY SCOTT DORAN



Efforts to Simplify Ohio's Stream and Wetland Permitting Affect Central Ohio Development

With the Trump Administration came a host of statements regarding wholesale changes to environmental regulatory programs. It remains to be seen whether Congress and the public will actually support these changes. Nevertheless, it is important to keep in mind that most environmental regulation is imposed at the state level through programs established by the Ohio EPA and other state and local regulatory agencies. There is little indication of sufficient political will or public desire to back away from these programs. In response, regulated entities continue to work with Ohio EPA to press for more cost-effective and

predictable regulatory processes within the existing regulatory programs. As described below, these efforts sometimes lead to unanticipated results.

Projects which propose to fill streams or wetlands must be authorized through both the federal Clean Water Act Section 404 program and Ohio EPA's Section 401 Certification program. Most builders and developers are familiar with the Nationwide Permit ("NWP") program which provides for a less cumbersome review by the US Corps of Engineers of "minimal" impacts to streams and wetlands associated with the construction of residential developments

("NWP 29"). Ohio EPA is required to separately authorize these projects through its Section 401 Certification program. On March 17, 2017, Ohio EPA issued its Section 401 Certification for the Nationwide Permit program. This action established new permitting requirements for projects located in designated watersheds of high quality streams, including a number of streams in central Ohio.

Historically, stream and wetland fill permit applicants often struggled to provide Ohio EPA with sufficient information to confirm to the agency that the proposed project would impact only relatively low quality

streams and thereby qualified for coverage under NWP 29 without additional Ohio EPA involvement. Permit applicants were often required to provide additional data on stream quality and arrange for Ohio EPA field inspections. These requirements imposed substantial cost and delay. The industry pressed for more predictability.

In response, Ohio EPA used existing water quality data to identify specific watersheds and sub-watersheds where a project could adversely affect a high quality stream or its tributaries and thus required individual review and approval by Ohio EPA in the form of an individual Section 401 Certification. The result of this multi-year effort was a map of Ohio precisely identifying "sensitive" watersheds where any stream impact would require an individual Ohio EPA authorization. Additional watersheds were designated for which screening data on stream quality was required. For the remaining watersheds (a slim majority of the state), a nationwide permit from the Corps authorizing the project was sufficient with no further Ohio EPA involvement. These areas are identified on an interactive GIS map on Ohio EPA's website at <http://epa.ohio.gov/gis.aspx>.

Large areas of the state (predominantly in northwest Ohio) with lower quality streams are eligible for nationwide permit authorization without Ohio EPA involvement. Central Ohio, on the other hand, is blessed with a number of high quality streams (including the Big Darby Creek, the Upper Olentangy River and Big Walnut Creek) and projects impacting ephemeral, intermittent or perennial streams in any portion of the designated watershed are now subject to individual Section 401 Certification review and authorization by Ohio EPA. Thus, an effort to streamline the program was effective in the aggregate, but it created additional burdens for some areas of the state, including certain watersheds in central Ohio which also happen to host growing communities.

Even if a project is in a sensitive watershed, the resulting permitting challenges remain manageable. Identify the permitting constraints (and costs) before purchasing property for development. If the development is in a sensitive watershed, plan ahead to provide adequate time for the rather lengthy Ohio EPA review process. Work closely with environmental consultants

with substantial experience with Ohio EPA's Section 401 Certification program. When appropriate, consult with Ohio EPA early in the process to work through problematic issues. Evaluate whether the project is eligible for a Director's Authorization rather than the more involved individual Section 401 Certification process. Understand the options and cost to mitigate for any proposed stream or wetland impacts.

The Nationwide Permits and Ohio EPA Section 401 Certification will be effective until March of 2022. Accordingly, it is essential to understand the requirements of these interlocking state and federal programs. In the meantime, efforts will continue to minimize the cost and delay. ●

Scott Doran is a Director with the Kegler Brown law firm in Columbus, Ohio. He is a long time member of the BIA and has represented residential and commercial builders and developers on environmental issues for over 30 years. Scott also assists clients with the redevelopment of brownfield properties and in the defense of federal and state environmental enforcement actions. Contact him at (614) 462-5412 or SDoran@keglerbrown.com