

NAIOP NEWS

Commercial real estate happenings



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Stream & Wetland Permitting – A Moving Target

On January 6, 2017, the United States Army Corps of Engineers (“Corps”) announced its revised and renewed Nationwide Permits (“NWP”) necessary for work in streams, wetlands and other waters of the United States under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. On January 17, 2017, the Ohio Environmental Protection Agency (“Ohio EPA”) made available for review a copy of its draft Section 401 Water Quality Certification (“401 WQC”) for the NWP program.

A review of the draft 401 WQC in question reveals that the NWP program in Ohio is about to experience a major overhaul that could have significant ramifications for permit applicants going forward. In most cases, when a party needs to impact streams and/or wetlands in order to develop a site, Clean Water Act permits are often required from the Corps and the Ohio EPA. In such instances, some form of Section 404 Permit (“404 Permit”) is needed from the Corps, and a Section 401 WQC is needed from the Ohio EPA.

Generally speaking, there are two different types of 404 Permits: NWP, which are a type of general permit for projects

with minimal water quality impacts (i.e., typically less than 1/2 acre of wetland impact); and Individual Permits, for projects with more than minimal impacts to water quality resources. General permits such as NWP are typically issued and remain effective for a period of no more than five years. In the case of the NWP program, the Corps issues NWP every five years, which issuance triggers the need for the Ohio EPA to promulgate a new 401 WQC for the implementation of the NWP program in Ohio.

The NWP that are currently in effect were issued in 2012. The Corps’ revised and renewed NWP will take effect on March 19, 2017. As such,



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between now and March 19, the Ohio EPA will be issuing its new 401 WQC for the implementation of the NWP program in Ohio.

Notably, Ohio's wetland permitting rules have historically required permit applicants to characterize wetlands to be impacted pursuant to the Ohio Rapid Assessment Method ("ORAM"). Conversely, however, because Ohio still does not have stream-specific permitting and mitigation rules for the 401 WQC program, stream impacts resulting from proposed projects have traditionally been evaluated using numerous different methods on a case-by-case basis. If the Ohio EPA's draft 401 WQC for the NWP program is ultimately enacted in its current proposed form, the old way of doing business will soon come to an abrupt halt.

Pursuant to the draft 401 WQC that was recently circulated by the Ohio EPA, when an applicant submits an application for a NWP for a project that will result in stream impacts, the applicant will be required to demonstrate that the stream impacts are eligible for NWP coverage pursuant to very specific protocols outlined by the agency in its draft 401 WQC for the NWP program. In order to assist applicants with this eligibility determination, the Ohio EPA has prepared a GIS map of the various watersheds across the state. Notably, the GIS map in question divides the state into three distinct areas: areas ineligible for coverage under the 401 WQC for the NWP program in Ohio; areas that are possibly eligible for NWP coverage; and areas that are eligible for coverage provided that all NWP criteria are met. Roughly speaking, the ineligible watersheds constitute approximately 18% of the state, the possibly eligible watersheds consist of approximately 19% of the state, and the eligible watersheds comprise approximately the remaining 63% of the state.

If the proposed stream impacts fall within an ineligible area, the applicant will be required to apply for either an Individual 401 WQC or a Director's Authorization (an exemption extending NWP coverage to projects that are



demonstrated to result in minimal water quality impacts). If the proposed stream impacts fall within a possibly eligible area, the applicant will be required to evaluate the quality of the streams to be impacted pursuant to the specific protocols identified by the agency in order to determine if the project is eligible for coverage under the NWP program or if an Individual 401

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WQC will be required from the Ohio EPA. If the proposed stream impacts fall within an eligible area, the project is eligible for NWP coverage and no further assessment of stream impacts is necessary.

Without question, this new approach constitutes a major change in the manner in which the NWP program is implemented in Ohio. As a result, many segments of the regulated community are gravely concerned about the manner in which this new approach will impact the ability to obtain permits for a wide variety of projects in the future.

NAIOP of Ohio has, on two separate occasions, previously submitted comment letters to the Ohio EPA expressing its concerns with previous drafts of the 401 WQC for the NWP program in Ohio. The Ohio EPA's latest draft 401 WQC for the NWP program is currently out for public comment at this time. The Ohio EPA will accept comments regarding the draft 401 WQC until March 10, 2017.

At this point, numerous segments of the regulated community are anxiously waiting to see whether the 401 WQC for the NWP program in Ohio will ultimately be issued in its current form. If the 401 WQC ends up being issued as it is currently drafted, it will be equally interesting to see whether any party appeals the issuance of the 401 WQC to the Environmental Review Appeals Commission, and if such an appeal is filed, whether the appeal results in any additional changes to the 401 WQC for the NWP program in Ohio. **P**

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