

Scalia Opinion and USEPA/OEPA Questions  
ODNR, Division of Mineral Resources Comments  
June 13, 2017

The following are the ODNR, Division of Mineral Resources Management (Division) comments on Scalia's opinion and what effects this may have on our program.

- **Relatively Permanent:** The Division's opinion of defining relatively permanent water would *exclude* all ephemeral streams, but would include some level of intermittent (intermittent would need to be defined) and all perennial streams.
- **Continuous Surface Connection:** Isolated wetlands are under the jurisdiction of the OEPA. If adjacent wetlands are considered waters of the U.S., it would not change how/what the Division requires. In the instances where wetlands may not require mitigation/restoration by the Army Corps of Engineers (ACOE) and/or OEPA, the Division still requires the wetlands to be addressed. The information required is:
  - A narrative discussing the presence of any state and/or federally listed threatened or endangered species, as well as the presence of high value fish and wildlife habitat associated with the wetland. If present, describe measures to protect the species.
  - A description of how the wetland influences the overall hydrologic balance. Provide a plan for restoration of the wetland to maintain the hydrologic balance.
- **"Consistent with" Scalia:** Perennial streams would be waters of the U.S. However, it could be interpreted to include intermittent streams that have longer flow periods. Here is some of the language which was pulled from the Scalia opinion:
  - *Waters of the US "include only relatively permanent, standing or flowing bodies of water."*
  - *"The definition refers to water as found in 'streams,' 'oceans,' 'rivers,' 'lakes,' and 'bodies of water 'forming geographic features.'"*
  - *"All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows."*
  - *"Even the least substantial of the Definition's terms, namely 'streams,' connotes a continuous flow of water in a permanent channel, especially when used in company with other terms such as 'rivers,' 'lakes,' and 'oceans.' None of these terms encompasses transitory puddles or ephemeral flows of water."*
  - *"The restriction of 'the waters of the United States' to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term."*
  - *"In addition, the Act's use of the traditional phrase 'navigable Waters' (the defined term) further confirms that it confers jurisdiction only over relatively permanent bodies of water."*

- *“By describing ‘waters’ as ‘relatively permanent,’ we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by JUSTICE STEVENS’ dissent...”*
- *“...we have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a ‘wate[r] of the United States.’”*
- *“In sum, on its only plausible interpretation, the phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water ‘forming geographic features’ that are described in ordinary parlance as ‘streams[,] . . . oceans, rivers, [and] lakes.’ See Webster’s Second 2882. The phrase does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.”*
- *“It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent’s ‘intermittent’ and ‘ephemeral’ streams, post, at 16 (opinion of STEVENS, J.)—that is, streams whose flow is ‘[c]oming and going at intervals . . . [b]roken, fitful,’ Webster’s Second 1296, or ‘existing only, or no longer than, a day; diurnal . . . short-lived,’ id., at 857—are not.” Note: On the referenced page, the dissent describes intermittent or ephemeral streams as “flowing for only part of the year.”*

- Thus it would seem, based on the above, that:

“Relatively Permanent” includes:

- “channels containing permanent flow” (perennial streams)
- “seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months.” (some intermittent streams).  
Note that the Scalia Opinion does not require a flow amount, but only requires that there be flow of more than very short duration.

Relatively Permanent excludes:

- ephemeral streams
- intermittent streams whose flow is short-lived.

- The Scalia Opinion therefore calls for a determination on where to divide intermittent streams. In discussing “seasonal rivers,” which are included, Scalia references Stevens’ “streams.” Therefore, some intermittent “streams” can be included; however, according to the above, the flow must be more than “intermittent or ephemeral flow...” Intermittent streams that contain flow in more than one season of the year and that flow for more than a few days each time could be included.
- If the Scalia approach is advanced and the state regulations for the 401 are revised to match this opinion, the steps the Division has taken to implement offsite mitigation may need to be reworked or revised. This process was written into law to state, “pursuant to a permit issued under sections 401 and 404 of the ‘Federal Water Pollution Control Act’...” If some waters are no longer waters of



the US, with no 401 or 404 permits required to be issued, the Division will be required to address other mechanisms for providing for offsite mitigation.

- One additional consequence to be mindful of is how the Scalia opinion may affect federal and state threatened and endangered species. If activities in streams are no longer being regulated through the 404 and potential the 401 (if statute is revised to reflect the federal decision) then what kind of coordination/work will be done to ensure these species are absent from these waters prior to any type of mining affectment?
- The Division feels that the NPDES program (402 permit), which of course is administered by the OEPA, should not be severely impacted, based on these statements in the Scalia Opinion:
  - “Respondents and their amici urge that such restrictions on the scope of ‘navigable waters’ will frustrate enforcement against traditional water polluters under 33 U. S. C. §§1311 and 1342. Because the same definition of ‘navigable Waters’ applies to the entire statute, respondents contend that water polluters will be able to evade the permitting requirement of §1342(a) simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters. See Tr. of Oral Arg. 74.75. That is not so.”
  - “Though we do not decide this issue, there is no reason to suppose that our construction today significantly affects the enforcement of §1342, inasmuch as lower courts applying §1342 have not characterized intermittent channels as ‘waters of the United States.’ The Act does not forbid the ‘addition of any pollutant directly to navigable waters from any point source,’ but rather the ‘addition of any pollutant to navigable waters.’ §1362(12)(A) (emphasis added); §1311(a).”
  - “Thus, from the time of the CWA’s enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream likely violates §1311(a), even if the pollutants discharged from a point source do not emit ‘directly into’ covered waters, but pass ‘through conveyances’ in between.”
- The Division would continue to operate under the auspices of Surface Mining Control and Reclamation Act (SMCRA), the Ohio Revised Code, and the Ohio Administrative Code. Under these laws and regulations, definitions of perennial, intermittent, and ephemeral streams are stipulated; the protection of perennial and intermittent streams is addressed; and the protection or replacement of waters, including perennial streams, with legitimate uses is required. Unlike some other state agencies, where the Clean Water Act (CWA) directly applies, the Division is immediately responsible for implementing SMCRA, which independently has provisions for addressing and protection streams and wetlands, for protecting water uses and users, for protecting land use that relies upon the availability of water, and protecting the overall hydrologic balance. Therefore, absent CWA requirements, SMCRA provisions would still apply, unless changes were made to SMCRA (unlikely) and subsequently to applicable state law and regulations.