Memorandum of Agreement
Between
The Ohio Department of Transportation,
The Ohio Department of Natural Resources, and
The United States Fish and Wildlife Service
For
Interagency Coordination
For
Projects Which Require Consultation Under the
Endangered Species Act, Impact State Listed
Species, and/or Modify Jurisdictional Waters
2016
Agreement Number: 19394
(Supersedes Agreement No. 16472)
I. **PREAMBLE**

This Memorandum of Agreement (MOA) between the Ohio Department of Transportation (ODOT), the Ohio Department of Natural Resources (ODNR), and the U.S. Fish and Wildlife Service (USFWS) has been prepared to establish standardized coordination procedures for:

1. projects requiring consultation under the Endangered Species Act of 1973 (ESA) (as amended, 16 U.S.C. 1531 et seq.);
2. projects that will result in the modification of federally jurisdictional waters as required by the Fish and Wildlife Coordination Act (16 USC 662(a));
3. and projects with the potential to impact state endangered or threatened plant and animal species protected under Ohio Revised Code (ORC) Chapters 1518, 1531, and 1533 including, without limitation, projects that have the potential to harm mussels protected under ORC Section 1533.324.

Below is a brief recital of the acts and regulations pertaining to this Ecological Coordination MOA.

- The Endangered Species Act of 1973 (16 USC 1531-1534) prohibits the take of federally threatened or endangered species. Section 7 of the ESA requires Federal agencies to consult with the U.S. Fish and Wildlife Service (USFWS) when a project “may affect” a listed species to insure that any action authorized, funded or carried out by the Federal agency is not likely to jeopardize the continued existence of listed species or adversely modify their critical habitat.

- The Fish and Wildlife Coordination Act (16 USC 662(a)) enacted in 1946 and amendments require consultation with the USFWS and the fish and wildlife agencies of States where the "waters of any stream or other body of water are proposed or authorized, permitted or licensed to be impounded, diverted . . . or otherwise controlled or modified" by any agency under a Federal permit or license. Consultation is to be undertaken for the purpose of "preventing loss of and damage to wildlife resources."

- Laws and rules pertaining to listing and protection of State endangered plants as included in ORC Chapter 1518 and OAC 1501: 18-1 and prohibit the willful impact ("root up, injure, destroy, remove, or carry away") "from public highways, public property, or waters of the state, or on or from the property of another, without the written permission of the owner, lessee, or other person entitled to possession, any endangered or threatened plant."

- Laws and rules pertaining to the listing and protection of wildlife as included in ORC Chapters 1531, and 1533 and OAC 1501:31-23 and specifically restrict the take (which includes “killing,” “wounding,” or “attempt to kill or capture”) of wildlife “threatened with statewide extinction.”

- ORC Section 1533.324 prohibits the take (which includes “killing,” “wounding,” or “attempt to kill or capture”) of mussels within Ohio “or sale of mussels taken in Ohio.”

Under the Memorandum of Understanding between Federal Highway Administration (FHWA) and ODOT, signed December 11, 2015, ODOT is assigned FHWA's responsibilities pursuant to the Surface Transportation Project Delivery Program, otherwise known as NEPA assignment. ODOT is responsible for all of FHWA's actions and responsibilities under this agreement. This includes, but is not limited to, FHWA’s Endangered Species Act Section 7 responsibilities for both informal and formal consultations and compliance with the Fish and Wildlife Coordination Act. ODOT is not responsible for FHWA's responsibilities on projects that cross state or international borders, as those responsibilities will not be assigned to ODOT and remain with FHWA.

II. **AGREEMENT**

The purpose and intent of this MOA is to standardize and streamline the coordination and consultation processes between ODOT, USFWS, and ODNR for transportation infrastructure projects, thereby increasing the efficiency and timeliness of the process in a manner that is consistent and compliant with the applicable laws and regulations discussed in the Preamble. As such, the signatories to this ecological coordination MOA concur that the following actions, processes, and commitments should be followed during coordination and consultation efforts undertaken to meet the coordination requirements of informal and formal consultation under ESA section 7(a)(2) and the Fish and Wildlife Coordination Act. Furthermore,
ODNR concur that these actions, processes, and commitments may be followed to assure that projects are evaluated in compliance with ORC Chapters 1518, 1531, and 1533.

This MOA outlines the general process and timeframes that will be followed. The USFWS and ODNR can request additional consultation or coordination efforts and documentation to ensure compliance with the aforementioned laws, or any other relevant and applicable Federal or State laws and regulations. Additionally, nothing in this MOA supersedes or replaces the coordination requirements or responsibilities set forth in state and federal laws, rules, and regulations, or the requirements of any future agreements or programmatic consultations that are established among the parties. Further, it is the parties’ intent that nothing in this MOA supersedes or replace the following agreements, any future revisions to these agreements, or future agreements:

- the MOA between ODOT and ODNR on the Scenic Rivers Program (Agreement number 11323);
- the Memorandum of Understanding (MOU) between ODOT and ODNR on the Ohio Coastal Management Program (Agreement Number 13225);
- the Programmatic Agreement between ODOT, FHWA, ODNR and the National Park Services for Interagency Coordination for Highway Projects Which Involve Section 6(f) Land and Water Conservation Funds;
- the Framework Programmatic Biological Opinion on the Ohio Department of Transportation’s Federal-Aid Highway Program for the Federally Endangered Indiana Bat (Myotis sodalis) and Federally Threatened Northern Long-eared Bat (Myotis septentrionalis) dated February 29, 2016; and
- the Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), and Federal Transit Administration (FTA) Range-wide Programmatic Informal Consultation for Indiana Bat and Northern Long-eared Bat; and
- the U.S. Fish and Wildlife Service’s (USFWS) January 5, 2016, intra-Service Programmatic Biological Opinion (BO) on the final 4(d) rule for the Northern Long-eared Bat.

Nothing in this MOA nullifies or supersedes the authority of the USFWS or ODNR to regulate or enforce applicable laws or rules under their respective jurisdictions.

This ecological coordination MOA is applicable to all federal-aid projects that are implemented with oversight by ODOT and/or FHWA. This includes both ODOT projects and Local Public Agency projects receiving federal funding administered by ODOT. This MOA establishes amongst the signatories: the process for coordination and consultation, the standard commitments pertaining to ecological resource impact avoidance and minimization, and the established coordination and informal consultation timeframes on ODOT transportation infrastructure projects.

A. Ecological Resource Investigations

To determine the appropriate process to follow under this MOA, ODOT will initiate and conduct ecological investigations on all projects that have the potential to result in impacts to federally jurisdictional waters, isolated wetlands regulated under ORC 6111, federal or state listed species or designated critical habitat, or unionid mussels, following the guidance provided in the current version of the ODOT Ecological Manual or subsequent revisions. At a minimum, each ecological resource investigation will include the following.

1. A literature review of the project area will be performed to determine the potential presence of federal and state listed species, federally jurisdictional waters, isolated wetlands, USFWS or ODNR managed lands, known streams possessing mussel populations, or any other known sensitive ecological features. The literature survey will determine if the project is within the range of any state

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1 Current (2014) or subsequent applicable versions of the ODOT Ecological Manual are available from the ODOT Office of Environmental Services.
or federally listed species (endangered, threatened, proposed for federal listing, federal candidate, and state potentially threatened), and any federally proposed or designated critical habitat, by:

a. reviewing existing species distribution information provided to ODOT by ODNR through a data sharing agreement and/or range maps for species in Ohio provided by ODNR including, but not limited to a query of the Ohio Natural Heritage database or future manifestations of these data; and

b. reviewing the most recent USFWS list of the known ranges of federally listed species within Ohio by County and the locations of designated critical habitat; and

c. reviewing the most current version of the Ohio Mussel Survey Protocol\(^2\), or subsequent revisions, to determine the presence and classification of any streams listed within the protocol, and the known potential for a stream to possess populations of mussels, including federally listed mussel species.

2. A field review of each project area will be conducted to document, delineate, and characterize ecological resources located within the project area including (if applicable):

a. jurisdictional waters of the U.S. and isolated wetlands;

b. state or federally listed species, including suitable habitat and federally designated critical habitat (in accordance with applicable ODNR and/or USFWS guidance/protocols);

c. unionid mussels (in accordance with the methods outlined in the Ohio Mussel Survey Protocol); and

d. unique, rare, or high quality natural communities.

3. Appropriate documentation will be prepared commensurate to the project type (as defined in section B.) in accordance with the ODOT Ecological Manual (refer to section C.), and will be submitted to the USFWS and/or ODNR as appropriate (as discussed in section B.)

B. Consultation Processes

This MOA outlines ODOT’s processes for investigating and documenting:

- projects that require no coordination or consultation based on the absence of ecological resource impacts;
- projects that only have minimal impacts to waters and are programmatically coordinated through interagency concurrence with this MOA (without further project-specific notification);
- and projects that require notification (grouped or individually) due to more substantial impacts to ecological resources.

Projects utilizing this MOA will follow the coordination and consultation processes outlined below.

1. Ecologically Exempt Projects – These project types will not impact any of the ecological resources covered by the laws referenced in the Preamble, will not require coordination or consultation under Section 7 of the ESA or the Fish and Wildlife Coordination Act, and should not result in any activities that violate ORC Chapters 1518 and 1531, or Section 1533.324. Many of the project actions associated with Ecologically Exempt Projects will not have the potential to impact ecological resources. Those that do, will be subject to an ecological resource investigation of the project

\(^2\) Current (April 2015) or subsequent applicable versions of the Ohio Mussel Survey Protocol are available from the ODNR Division of Wildlife
area (following section A) to confirm the absence of impacts. Due to the absence of impacts to ecological resources, these types of project actions will not require consultation with USFWS or ODNR, or the preparation of an Ecological Survey Report (ESR)\(^3\) in accordance with the ODOT Ecological Manual. However, documentation that the project action will not impact ecological resources will be included in the NEPA documentation prepared for the project and/or the project file. Ecologically Exempt Projects can include any construction activities or actions that will not impact:

a. waters of the U.S.; or
b. isolated wetlands; or
c. federally listed species or critical habitat; or
d. state listed species; or
e. unionid mussels.

2. **Non-Notifying Projects** – These project types will have minimal impacts to waters of the U.S. or isolated wetlands, and will not impact state or federally listed species or unionid mussels based on an ecological resource investigation of the project area (following section A.). Non-Notifying Projects will not require coordination or consultation under Section 7 of the ESA, and should not result in any actions that violate ORC Chapters 1518 or 1531, and ORC Section 1533.324. It is agreed upon by all signatories of this MOA that the procedures outlined in this agreement will fulfill the coordination requirements of the Fish and Wildlife Coordination Act for all projects that meet the conditions of the Non-Notifying Project type. Providing that the project is implemented in a manner that meets all of the conditions described below, the project will not require specific notification or coordination.

a. Projects that do not require notification to ODNR must meet all of the following conditions:

i. impacts to waters of the U.S. must meet the conditions necessary to be authorized under the U.S. Army Corps of Engineers (USACE) Nationwide Permit (NWP) program or the 404 Regional General Permit for the State of Ohio, Department of Transportation (RGP) without the need for an Individual 401 Water Quality Certification; and/or

ii. impacts to isolated wetlands must meet the conditions necessary to be authorized under the Ohio Environmental Protection Agency (OEPA) Level 1 or Level 2 General Isolated Wetland Permit; and

iii. the project will not require a specific-species survey protocol approval from ODNR; and

iv. the project will not likely result in any impact to state listed species and/or unionid mussels.

b. Projects that do not require notification to USFWS must meet all of the following conditions:

i. the project will not require a project-specific species survey protocol approval from USFWS; and

ii. the project will have “no effect” on any federally listed species or designated critical habitat; and

iii. the project will not impact streams where the presence of federally listed mussel species is expected (designated as Group 2 or 4 in the most current version of the Ohio Mussel

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\(^3\) See description of ESR in section C.1.
Survey Protocol).

ODOT agrees to conduct a full ecological investigation, and to prepare an ESR (or equivalent appropriate documentation) in accordance with the ODOT Ecological Manual, to document that these conditions have been met. This documentation will be included in the ODOT project file and discussed in the NEPA document prepared for the project.

3. Notifying Projects – Based on an ecological resource investigation of the project area (following section A.), projects that will have more than minimal impacts to waters of the U.S. or isolated wetlands, and/or will result in an impact to state listed species, and/or will result in an impact to unionid mussels (including the relocation of mussels), will require notification and consultation with ODNR. Furthermore, projects that “may affect” a federally listed species or federally designated critical habitat will require notification and consultation with the USFWS.

   a. The following conditions apply to projects that will require notification.

      i. Projects that include any of the following conditions will require notification to ODNR:

         1. impacts that will require either an Individual 404 permit or an Individual 401 Water Quality Certification; or

         2. impacts that will require an OEPA Level 3 Isolated Wetland Permit; or

         3. conditions that will require a specific-species survey protocol approval from ODNR; or

         4. likely impacts to a state listed species; or

         5. likely impacts to unionid mussels.

      ii. Projects that include any of the following conditions will require notification to USFWS:

         1. conditions that will require a species-specific survey protocol approval from USFWS; or

         2. a determination that the project “may affect” a federally listed species or designated critical habitat.

   b. The following consultation processes will be implemented on Notifying Projects to ensure consistency in the preparation of project documentation, project coordination, agency review, and agency comments and/or concurrence.

      i. Species-Specific Survey Protocol Approval – During the course of conducting a general ecological survey within a project area, it may be necessary to obtain ODNR and/or USFWS approval to conduct species-specific surveys for state or federally listed species, or to conduct a full mussel survey in accordance with the Ohio Mussel Survey Protocol. In these circumstances, any necessary survey approvals or permits will be obtained before conducting the surveys. The degree of coordination and consultation after completion of these surveys will be based on the results of the surveys and the anticipated level of impact or effect to the species or mussel populations present. The following process will be implemented to determine the extent of coordination and consultation that will be conducted on projects requiring these types of surveys.

         1. If the results of a species-specific survey indicate that:

            a. a state or federally listed species, federally designated critical habitat, or mussel population is present, or is likely to be present, within the project area, and the
project “may affect” a federally listed species or designated critical habitat, or impact state listed species or mussels; or

b. no state or federally listed species or mussel populations are detected, or are not likely to be present within the project area, and the project will have “no effect” on federally listed species and/or will not impact state listed species or mussels, however, conditions B.3.a i.1. or B.3.a.i.2 apply; then

the survey report will be coordinated in conjunction with an ESR following either the grouped consultation process (section B.3.b.ii.) or the individual consultation process (section B.3.b.iii.), whichever is appropriate.

2. If the results of the surveys indicate that:

a. no state or federally listed species or mussel populations are detected, or are not likely to be present within the project area; and

b. the project will have “no effect” on federally listed species or designated critical habitat or will not impact state listed species or mussels; and

c. the project does not include any other conditions in section B.3.a. that would require coordination or consultation; then

the species-specific survey report or mussel survey report will be coordinated with ODNR and/or USFWS to present the results, without the need to submit an ESR. With the exception of the requirement to coordinate the species or mussel survey report, this type of project would otherwise be considered Non-Notifying under section B.2. of this agreement. An ESR (or equivalent appropriate documentation) will be included in the ODOT project file for projects of this nature, and discussed in the NEPA document prepared for the project, but would not be coordinated with USFWS or ODNR.

ii. **Grouped Consultation** - Projects that include impacts that do not exceed any of the following thresholds will be grouped into a single submittal notification from ODOT to ODNR and USFWS. Grouped consultation will occur on a monthly basis as needed. The grouped consultation process will include a single notification for all projects in the submission, a table summarizing all of the projects included in the submission, and project-specific ESRs and consultation documents that have been prepared for each project or action. The Level 1 ESR will be the typical document that will be coordinated to provide the project details, ecological resource inventory, and impact assessment during the grouped consultation process. However, under some circumstances a Level 2 ESR may be used for this process. Additional studies or supporting supplemental documentation or reports, including but not limited to documents noted in sections C.2. and C.3., will also be provided when warranted. The following conditions outline the maximum level of project impact that will allow for the use of the grouped consultation process.

1. The following conditions apply to projects that will be grouped for coordination with ODNR:

a. the project will not result in impacts to waters of the U.S. that require an Individual 404 permit or an Individual 401 Water Quality Certification; however,

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4 Consultation documents submitted to the USFWS will include the most recent version of the *ODOT and USFWS Transportation Infrastructure Project Consultation Summary Form* (referred to as the Project Consultation Summary Form).
b. the project may result in impacts to isolated wetlands that will require the need to obtain an OEPA Level 3 Isolated Wetland Permit from OEPA, and/or

c. the project may result in an adverse impact on state listed species; and/or

d. the project may result in impacts to unionid mussels.

2. For the purpose of conducting informal ESA Section 7 consultation with USFWS, any project that “may affect, but is not likely to adversely affect” any federally listed species or designated critical habitat, but will not require an Individual 404 permit or an Individual 401 Water Quality Certification, may be included in a grouped consultation notification to the USFWS.

iii. Individual Consultation – The individual consultation process will include the submission of a project-specific notification for the project, a project-specific ESR, and any other consultation documents that have been prepared for the action. Additional studies or supporting supplemental documentation, including but not limited to documents noted in sections C.2., C.3., and C.4., will be provided when warranted.

1. The following conditions outline the level of project impact that will initiate the use of the project-specific consultation process:

   a. Individual project consultation with ODNR will be conducted on any project that requires an Individual 404 permit or an Individual 401 Water Quality Certification.

   b. Individual project consultation with USFWS will be conducted on any project that:

      i. a determination of “may affect, likely to adversely affect” has been made for any federally listed species or designated critical habitat, thereby requiring formal consultation with USFWS; or

      ii. a determination of “may affect, not likely to adversely affect” has been made for any federally listed species or critical habitat; however, the project will require an Individual 404 permit or an Individual 401 Water Quality Certification.

2. Consultation packages used during the individual consultation process will include the appropriate ESR as described in section C. ESRs will be sent to the USFWS and ODNR and comments received will be considered during the selection of alternatives (when applicable), addressed in the NEPA document for the project, and may result in project-specific environmental commitments.

   Additional documentation for projects requiring formal consultation will be provided in accordance with the requirements of a Programmatic Biological Opinion (PBO) for a federally listed species (if applicable), or through the submission of a Biological Assessment (BA).

C. Consultation Package Contents for Notifying Projects

ODOT will prepare Ecological Survey Reports (ESR), unionid mussel survey and/or relocation reports, species-specific survey reports, and BAs, as necessary, to summarize the results of the ecological resource investigations and to coordinate and consult with ODNR and USFWS. Following are descriptions of the documents that may be used during consultation.

1. Ecological Survey Report - ODOT has developed three levels of ESRs, (Level 1, Level 2, and Level 3) for the documentation and coordination of various ODOT transportation projects that impact
ecological resources. The level of ecological survey and reporting is determined by the ecological resources present in the project area, the relative quality of the resources identified, and the expected severity of the impacts to those resources based on the proposed work type. Each level of report includes documentation, delineation, and assessment forms needed to identify and characterize ecological resources within a project study area. The data collected are intended to provide a basic inventory of the fauna, flora, and water resources present within the vicinity of the project, and to allow for impact prediction based on the known design parameters for the project. These ESRs will be the primary documents for coordinating a project with ODNR, and along with the Project Consultation Summary Form, for requesting technical assistance and initiating informal consultation with the USFWS. ESRs will be prepared following the format and content discussed in the most recent edition of the ODOT Ecological Manual, and will only be prepared by experienced individuals that meet the ODOT Consultant Prequalification Requirements and Procedures for conducting Ecological Surveys.

a. At a minimum, ESRs submitted to ODNR and USFWS will include the following:

i. General Project Information including the project name (County, Route, and Section), the ODOT Project Identification number (PID), the study area size, the report author, the date(s) of field work, adequate project location mapping including the location on a 7.5 minute topographic quadrangle (with quadrangle name), the coordinates of the project (Latitude and Longitude in decimal degrees), the Hydrologic Unit Code (HUC), and a description of the project. The project description will include a discussion about the project study area and important aspects of the proposed work (type of transportation infrastructure improvement/repair, etc.) providing as much relevant detail as is available at the time of the survey.

ii. Completed standardized data tables and discussions documenting the results of the literature and field reviews will be included for each ecological resource. Information will be provided on land cover as well as the presence of streams, wetlands, other waters of the U.S., unionid mussels, federally listed species, state listed species, and suitable habitats and/or federally designated critical habitat for listed species.

1. If any portion of the known range of a federally listed species occurs within the county of a proposed project, that species will be listed in the ESR, and a discussion of suitable habitat or potential impacts to the species will be included for each project.

2. A list of any state threatened or endangered animal species that are of specific concern to ODNR, and whose know ranges include the area of the proposed project (as determined by information provided to ODOT by ODNR via a data sharing agreement) will be listed and addressed in the ESR.

iii. A preliminary estimation of impacts to each resource. The description of the impacts to aquatic resources will include linear feet and/or acreage of impact, and an explanation of the type of impact (e.g. temporary fill, rock channel protection, addition of piers or abutments, fill from grading, etc.) to the extent that it is known at the time of consultation. In the absence of detailed plans, the project scope will be reviewed to determine the greatest area of potential disturbance, and the maximum potential impact to ecological resources necessary to complete the project. If a population of unionid mussels has been identified within the project area, the report will indicate if impacts are anticipated. The description of impacts to federal and state listed species will include a description of impacts to suitable habitat, and a description of impacts to any individuals or populations of these species if they are found within the project area. An effect determination will be

5 Current (2014) or subsequent revisions to the ODOT Consultant Prequalification Requirements and Procedures are available from ODOT Office of Consultant Services.
made for each federally listed species. An estimate of the likelihood of impact will be determined for state listed species. Impacts expected to each species will be discussed for each project with records or encounters. Any project that will impact a state listed species may require additional species-specific surveys per section C.2.

b. The following discussion summarizes the three levels of ESRs prepared by ODOT, and when they may be applicable.

i. Level 1 ESR – The Level 1 ESR is typically used to document projects that have minimal potential for substantial impacts to the environment. Project impacts may involve stream crossings, bank stabilization, and/or minor wetland fills, that can be authorized under the USACE NWP program or the RGP, and/or the OEPA Level 1 or 2 Isolated Wetland Permit. Given their size and scope, these types of projects would not likely include any feasible alternatives or alternatives analysis.

ii. Level 2 ESR – The Level 2 ESR is typically used for projects that include stream channelization, widening, deepening, relocations, new structures on new locations, or other extensive long-term modifications of ecological habitats in the vicinity of the proposed project. The Level 2 ESR is used for projects that will require an individual 404 and/or 401 permit and/or an OEPA Level 3 Isolated Wetland Permit. These types of projects may be on new alignment segments, may substantially impact sensitive ecological resources (e.g. high quality waters or scenic rivers), and may involve multiple alternatives within a project area and a detailed alternatives analysis.

iii. Level 3 ESR – The level 3 ESR will be used for projects which involve impacts to multiple wetlands and streams, could have considerable impacts to terrestrial habitats, and will require the investigation of one or more project corridors. These types of transportation projects often produce adverse ecological impacts and require an alternatives analysis. The Level 3 ESR will result in the preparation of three separate reports:

1. Level 3 Preliminary Draft ESR - The Level 3 Preliminary Draft ESR incorporates secondary source literature review studies and appropriate field reconnaissance studies at the corridor level to identify the ecological resources within each corridor (there are no impact estimates associated with this report). The Level 3 Preliminary Draft ESR will be used (along with other information gathered on environmental resources, public opinion, geotechnical data, and design criteria) to help identify multiple feasible project alternatives for further study.

2. Level 3 Draft ESR - The Level 3 Draft ESR incorporates detailed ecological studies that have been done on the alternatives. The report compares alternatives and addresses avoidance and minimization of potentially significant ecological impacts. Field studies conducted for the Level 3 Draft ESR must identify, delineate, and assess all water resources within the alternative alignments. The studies must also characterize and assess all terrestrial and aquatic wildlife, vegetative communities, listed species, and listed species habitat within each alternative

3. Level 3 Final ESR - The Level 3 Final ESR is prepared to update, refine, and summarize all ecological resources and impacts associated with the preferred alternative selected for a project.

2. Species-Specific Report – Specific surveys and reports may be required for state or federally listed species on a case by case basis. These surveys often require a qualified and permitted individual to prepare and receive approval of a study plan from the appropriate resource agency (USFWS and/or ODNR) before conducting the survey. Following the survey, a report will be generated discussing the presence or probable absence of a species from the proposed project
area. Additional reporting will also be required for species relocations and/or monitoring that are
done as part of a project to minimize impacts to a species.

3. **Unionid Mussel Survey Report** – A mussel survey or reconnaissance report will be prepared, in
accordance with the most recent version of the *Ohio Mussel Survey Protocol*, for:

   a. any projects that will impact streams with the potential to provide habitat for populations of
      unionid mussels;

   b. any project for which evidence of mussels is detected within a stream or watercourse that will
      be impacted by a project; or

   c. any project that will impact a stream or watercourse that is known to provide habitat for
      populations of federally listed mussel species.

Reports will also be completed in accordance with the *Ohio Mussel Survey Protocol* for any mussel
relocations that are done as part of a project to minimize impacts to mussels. The survey work
associated with the reports will be completed by individuals that meet the qualifications in the *Ohio
Mussel Survey Protocol*.

4. **Biological Assessment (BA)** – The BA is a document prepared by ODOT/FHWA that contains
information concerning federally listed and proposed species, and federally designated and
proposed critical habitat, which may be present in the action area. The document includes the
evaluation of potential effects of the action on such species and habitat. It is understood that:

   a. programmatic BAs and associated PBOs will be followed, and associated reporting
      coordinated, when applicable;

   b. project-specific BAs will be prepared for any project that is “likely to adversely affect” a federally
      listed species or federally designated critical habitat, and for which a PBO is not applicable.

**D. Comments and Environmental Commitments**

ODOT commits to the following procedures and conditions:

1. ODOT will follow the *Ohio Mussel Survey Protocol* when conducting reconnaissance and/or full
mussel surveys on all streams 10 square miles or greater in drainage area that will be impacted by
a project, with the following exceptions.

   a. If the results of a reconnaissance survey determines that mussels are not present in the study
      area, the survey will not be coordinated with ODNR for review unless the project also meets
      one of the conditions listed under section B.3.a. for Notifying Projects. In cases where the
      project is considered Non-Notifying, and a reconnaissance survey does not detect the
      presence of mussels, ODOT will include the *Ohio Mussel Habitat Assessment Form* in the
      project file, and the results in the NEPA document prepared for the project per section B.2. of
      the agreement. ODOT will also make a copy of the *Ohio Mussel Habitat Assessment Form*
      available to ODNR.

   b. On projects that involve the replacement or repair of an existing bridge or culvert structure on
      existing alignment, minor bank stabilization, or scour repair (with no feasible alternatives), a
      mussel relocation may be conducted at the time of the reconnaissance survey on non-listed
      streams and Group 1 streams where only populations of common mussels that are habitat
      generalists (as included in Appendix H of the *Ohio Mussel Survey Protocol*) are found during
      the reconnaissance. This relocation can be conducted without the need for site specific prior
      notification if all of the following conditions apply:
i. a thorough reconnaissance survey on a Group 1 or a non-listed stream in Appendix A of the Ohio Mussel Survey Protocol detects only species noted in Appendix H of the protocol; and

ii. the surveyor is either state or federally permitted to conduct mussel surveys in accordance with the protocol.

The mussel relocation and reporting will be completed following all of the conditions of the current Ohio Mussel Survey Protocol, with the exception of the need for prior notification. Due to the presence of only common mussels that are habitat generalists, and the lack of listed species, relocations conducted in these situations will be valid for a period of two years from the date of relocation.

2. In-water work, defined as the placement or removal of temporary or permanent fill materials below the Ordinary High Water Mark, cannot take place in the following stream types during the following restricted periods. Requests for waivers from these in-water work restriction periods will be made outside of this agreement following ODNR Policy 56 or an equivalent agreed upon waiver request process. The in-water work restriction periods for ODOT projects are as follows:


If the project involves in-water work that will hinder the passage of salmonids through the use of construction causeways or other fills that fully span the river, the in-water work restriction period will apply to the following streams: Arcola Creek (entire reach), Ashtabula River (Hadlock Rd. to mouth), Ashtabula Harbor, Big Creek (Grand River drainage basin Girdled Road to mouth), Cold Creek (entire reach), Conneaut Creek (entire reach), Conneaut Harbor, Cowles Creek (entire reach), Ellison Creek (Grand River drainage basin entire reach), Euclid Creek (entire reach), Grand River (dam at Harpersfield Covered Bridge Park just upstream of the S.R. 534 bridge to mouth)/Fairport Harbor, Indian Creek (entire reach), Kellogg Creek (Grand River drainage basin entire reach), Mill Creek (Grand River drainage basin entire reach), Paine Creek (Grand River drainage basin from Paine Falls to mouth), Rocky River (Cedar Point Rd. (East Branch/West Branch confluence) to mouth), Smokey Run (Conneaut Creek RM 3.5 entire reach), Turkey Creek (entire reach), Vermilion River (dam at Wakeman upstream of the S.R. 20/60 bridge to mouth), Wheeler Creek (entire reach), Whitman Creek (entire reach).

b. Native Brook Trout streams 9/15 – 6/30

In-water work restrictions periods will apply to the following streams with populations of wild native brook trout: Aurora Branch of the Chagrin River (RM 0.38 to mouth), Chagrin River (Chagrin Falls to mouth), Corporation Creek (Chagrin River RM 0.27 entire reach), Gulley Brook (Chagrin River RM 5.54 entire reach), Rocky River (above Cedar Point Rd), Ward Creek (Chagrin River RM 1.0 entire reach).

c. Percid streams 3/15 – 6/30

In-water work restrictions periods will apply to the following Percid streams: Great Miami River (dam south of New Baltimore to mouth), Hocking River (lower section), Huron River (from the East Branch/West Branch confluence to Lake Erie), Little Miami River (lower section), Maumee River (split dam at Mary Jane Thurston State Park and Providence Park in Grand Rapids to mouth), Maumee Bay, Muskingum River (Devola Dam No. 2 off S.R. 60 north of Marietta to mouth), Ohio River (entire reach), Portage River (entire reach), Sandusky River (Ballville Dam off River Road in Fremont to mouth, and extending upstream from the Ballville Dam if it is subsequently removed), Sandusky Bay, Scioto River (lower section), Toussaint River (entire reach).
d. Other streams

In-water work restrictions periods will apply to the following other streams: Cold/cool water equivalent (Class 3) primary headwater streams (watershed ≤ 1 mi²) that support fish populations; Exceptional Warmwater Habitat streams; Coldwater Habitat Streams; Warmwater Habitat streams with watershed ≥ 20 mi²; streams with aquatic Threatened and Endangered species; Lake Erie and Bays. Special conditions (such as the occurrence of aquatic threatened or endangered species) may mandate local variation of restrictions.

e. Streams with no in-water work restriction periods

No in-water work restrictions will be necessary on Non-native/Introduced Salmonid streams if the in-water work allows for the continued passage and migration of Salmonids through the use of construction causeways that only partially span the waterway (the restrictions for “Other streams” must be checked for applicability). Additionally, the following stream types do not require any in-water work restriction periods: Cold/cool water equivalent (Class 3) primary headwater streams (watershed ≤ 1 mi²) that do not support fish populations; Warmwater equivalent, Modified Warmwater equivalent, and Limited Resource Water equivalent (Class II and Class I) primary headwater habitat streams; Warmwater Habitat streams <20 mi² without T&E species; Modified Warmwater Habitat; Limited Resources Waters; and Limited Warmwater Habitat.

3. Written permission will be obtained outside of this MOA for any necessary in-stream blasting from the Chief of ODNR's Division of Wildlife in accordance with ORC Section 1533.58.

4. Projects located within flood plains will comply with necessary flood plain criteria. Those projects in FEMA designated flood plains will be coordinated with the appropriate resource managers outside of this MOA in accordance with ORC 1521.13(B) and the Ohio Department of Transportation Floodplain Management Guidelines.6

5. Project impacts that require the implementation of stream or wetland mitigation will do so outside of this MOA in accordance with current Clean Water Act requirements as regulated by the US Army Corps of Engineers and Ohio EPA regulations (33 CFR parts 325 and 332 and 40 CFR part 230, and OAC 3745-01-54), and Ohio isolated wetland law (ORC 6111.027).

6. A review for Coastal Zone consistency in accordance with the Coastal Zone Management Act (16 USC 1456, et seq. and implementing regulations, 15 CFR 930, et seq.), the Ohio Revised Code 1506.03, the Memorandum of Understanding Between the Ohio Department of Natural Resources and the Ohio Department of Transportation (No.13225), or any subsequent revisions to the agreement, will be performed outside of this MOA for any projects that occur within the Coastal Management Zone along Lake Erie in Wood, Ottawa, Lake, Sandusky, Erie, Lorain, Cuyahoga, Lake, or Ashtabula Counties.

7. Projects that occur within 1,000 feet of any state designated wild, scenic or recreational river will be coordinated outside of this MOA in accordance with Memorandum of Agreement Between the Ohio Department of Transportation and the Ohio Department of Natural Resources (Division of Watercraft) For Project Coordination On Ohio’s State Wild, Scenic and Recreational Rivers (Agreement Number: 11323), or subsequent revisions to the agreement, to comply with ORC, Section 1547.82.

8. Impacts to lands owned by ODNR will be evaluated and coordinated outside of this MOA in accordance with Section 4(f) of the Department of Transportation (DOT) Act of 1966 and Section 6(f) of the Land and Water Conservation Act. The Programmatic Agreement Between the State of Ohio and the U.S. Department of the Interior, Office of Water and the U.S. Army Corps of Engineers, refers to this agreement.

6 The current (February, 2016) ODOT Floodplain Management Guidelines is referred to within this MOA. Subsequent applicable revisions to the ODOT Floodplain Management Guidelines will also apply to this agreement.
Ohio, Department of Transportation, Federal Highway Administration, State of Ohio, Department of Natural Resources, and National Park Service For Interagency Coordination For Highway Projects Which Involve Section 6(f) Land and Water Conservation Fund Properties, or subsequent revisions to the agreement, will be followed when applicable.

9. The specifications set forth in the most current version of ODOT’s Construction and Material Specifications (CMS)\(^7\), Supplemental Specifications (SS)\(^8\), Location and Design (L&D) Manual Volume 2\(^9\), and Hydraulic Standard Construction Drawings\(^10\) will be used to ensure adequate erosion and sediment control during and following construction that is compliant with applicable regulations.

10. When applicable per the ODOT L&D Manual Volume 2, new culverts on new alignments will be installed with depressed culvert inverts to convey the bankfull discharge design. Depressed culvert inverts should produce a natural channel bottom within the culvert that should be continuous with the adjacent channel sections, providing a substrate that will allow for the free passage of aquatic fauna. Where appropriate and feasible as a mitigative technique, the use of this design will also be applied to the replacement of existing culverts.

11. On projects with impacts to aquatic resources, all aquatic resources indicated on the plans shall be demarcated in the field as per ODOT SS 832 and the applicable waterway permits special provisions prior to site disturbance. This will be done to ensure that only permitted stream and wetland impacts will occur, and that the remainder of the aquatic resources on the site will be avoided. Within riparian areas, only the vegetated buffer minimally necessary for construction will be removed for the project. Materials utilized in, or adjacent to, aquatic resources for temporary or permanent fill or bank protection shall consist of suitable material free from toxic contaminants in other than trace quantities. Broken asphalt is specifically excluded. Chromated Copper Arsenate (CCA), and other pressure treated lumber shall not be used in structures that are placed in aquatic resources. Furthermore, an oil spill kit will be located within 150 feet of any equipment working in a stream or wetland. The oil spill kit shall be maintained for the life of the construction contract.

12. Where appropriate and feasible as a mitigative technique, ODOT will use vegetated riprap and other bioengineering techniques for stream bank stabilization and/or slope repair. When applicable, native vegetation will be used in the construction of these features.

13. Per ODOT CMS (107.10), the creation of staging areas, the storage of materials and equipment, and the borrowing or wasting of materials will not occur in areas labeled as environmental resource areas. Additionally, all properties to be utilized by the Contractor outside the project right-of-way will be cleared for all environmental resource impacts prior to the beginning of work by the Contractor. Should the areas proposed for use by the Contractor outside the project right-of-way limits contain environmental resources, all environmental clearances and permits will be obtained by the Contractor prior to the beginning of work.

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\(^7\) The current (January 1, 2016) ODOT Construction and Materials Specifications (CMS) and associated item numbers are referred to within this agreement. Subsequent applicable revisions to the CMS will also apply to this agreement.

\(^8\) The current (January 1, 2014) Supplemental Specification (SS) 832 is referred to in this agreement, and available from the ODOT Office of Construction Management. Subsequent applicable revisions to the SS 832 will also apply to this agreement.

\(^9\) The current (July 17, 2015) Location and Design (L&D) Manual, Volume 2 is referred to in this agreement, and available from the ODOT Office of Hydraulic Engineering. Subsequent applicable revisions to the L&D Manual Volume 2 will also apply to this agreement.

\(^10\) The current (July 17, 2015) Hydraulic Standard Construction Drawings are referred to in this agreement, and are available from the ODOT Office of Hydraulic Engineering. Subsequent applicable revisions to the Hydraulic Standard Construction Drawings will also apply to this agreement.
14. Per ODOT CMS (104.04), all areas of disturbed ground occupied by the Contractor in connection with the work (with the exception of cultivated fields) will have suitable vegetative cover established by seeding and mulching according to CMS (Item 659). When appropriate conditions apply, ODOT will consider the use of native grasses and wildflowers for revegetating disturbed areas according to CMS (Item 659.09) or similar seed mixes composed of native herbs and grasses.

15. When practicable and applicable to a project, ODOT will work collaboratively with federal and state agencies on the protection, restoration, enhancement and best habitat management practices for migratory birds.

16. Prior to the removal of bridge structures over waterways, the underside will be carefully examined for the presence of birds and bats. ODOT will coordinate or consult with ODNR and/or USFWS as appropriate should any birds or bats be found nesting or roosting, respectively, on the underside of the bridge.

17. ODOT will address comments received from USFWS and ODNR in the following ways:
   a. The comments will be referenced and addressed in the NEPA process for the specific project.
   b. When necessary and/or appropriate, ODOT will respond directly to USFWS and/or ODNR with additional justification, information, commitments for avoidance, minimization, and mitigation.
   c. Comments, recommendations, and requirements received from USFWS and ODNR that become project-specific environmental commitments will be incorporated into the project plans, and/or the project special provisions, and/or the environmental commitment tracking system, to ensure implementation of the commitments.

E. Monitoring Process for Non-Notifying Projects

USFWS or ODNR can request a quality assurance review (QAR) of projects that met the Non-notifying Project type (B.2.) at any time during the implementation of this agreement. The purpose of the review would be to verify that projects that have been determined by ODOT to meet the conditions of the Non-notifying Project type do not include specific issues of concern to USFWS or ODNR that have been overlooked. Concerns identified through the QAR process could result in the development or removal of conditions noted in B.2.

F. Consultation Timeframes

ODNR and USFWS will adhere to the following timeframes to review and provide comments on a project once they have received a project consultation package from ODOT.

1. ODNR will review, request additional information, or provide comments within 30 calendar days of receipt of a project consultation package for a Notifying Project type.

2. USFWS will review, request additional information, or provide comments or concurrence within 30 calendar days of receipt of a project consultation package for a Notifying Project type that is being coordinated informally under the ESA, or that is being coordinated utilizing an applicable Programmatic Consultation11, with the following noted exception.

   On projects that meet the programmatic concurrence outlined in the Framework Programmatic  

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11 Unless other timeframes are specified in the Programmatic Consultation’s Biological Opinion and/or agreements.
Biological Opinion on the Ohio Department of Transportation’s Federal-Aid Highway Program for the Federally Endangered Indiana Bat (*Myotis sodalis*) and Federally Threatened Northern Long-eared Bat (*Myotis septentrionalis*), and that will not affect any other federally listed species or critical habitat, the USFWS will notify ODOT with any requests for additional information within 30 calendar days. If the USFWS does not notify ODOT of any concerns within 30 calendar days of receipt of the project consultation form, the programmatic concurrence on the effect determinations for the Indiana and northern long-eared bats applies, and ODOT will proceed with project development.

3. USFWS will follow applicable timeframes as required by Section 7(b) of the ESA on any projects requiring formal consultation that are not included in an applicable Programmatic Consultation (see F.2.).

It is understood by all parties, that any project-specific comments received by ODOT within 30 days of the coordinated consultation package submission will be addressed individually and incorporated into the project documentation. No NEPA document will be processed until the 30 day time period has elapsed, or ODOT receives a response or concurrence to a consultation submission for a Notifying Project type.

G. Expiration, Modification, and Termination

This agreement will remain valid unless and until a signing party has a concern with the use of this agreement and notifies the other parties in writing.

This ecological coordination MOA shall commence on the last date of the signatures set forth below and shall remain in effect until terminated by either USFWS, ODNR, or ODOT, with 30 days advanced written notice to the other parties. This MOA shall be reviewed by all parties within 5 years of the anniversary date of the commencement of this MOA or as needed. If any party determines the need to amend, modify, or otherwise change the terms and conditions set forth herein, the parties shall schedule a meeting for the purpose of revising this MOA. Such meetings shall be set within 30 days of any notice identifying a need for revision. Should the parties agree to modification of the MOA, then an amendment shall be drawn, approved, and executed in the same manner as the original agreement.

Any party to this MOA may request that it be amended or administratively modified to reflect changes, whereupon the parties shall consult to consider such an amendment. If the parties agree to amend this MOA, then the parties may amend the agreement with new signatures and dates after all necessary reviews are completed. The term of the agreement shall remain unchanged unless expressly stated in the amended MOA.

Minor changes may be made through appropriate clarification guidance to better refine the processes contained herein by agreement among the specified parties. These types of minor procedural changes will not require re-execution of the MOA.

Any person executing this MOA in a representative capacity hereby agrees that he/she has been duly authorized by his/her principal to execute this MOA on such principal’s behalf.

Participating Agency signatures are located on pages 16 through 18.
OHIO DEPARTMENT OF TRANSPORTATION

Timothy M. Hill, Administrator, Office of Environmental Services  
3/11/16

Approved: 

Jerry Wray, Director  
3/10/16
U.S. FISH & WILDLIFE SERVICE

Dan Everson, Area Supervisor

3-18-2014 (date)