WATERWAY PERMITS MANUAL

CHAPTER 1

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CHAPTER 1. INTRODUCTION

1.1 INTRODUCTION TO WATERWAY PERMITS

The Ohio Department of Transportation (ODOT) Office of Environmental Services (OES), Waterway Permits Unit (WPU) has developed this Waterway Permits Manual in order to provide clear and consistent information and guidance on the regulations that protect surface waters, the agencies that regulate surface waters, and how to obtain the appropriate approvals to impact these waters. This manual focuses on ODOT transportation projects and is presented from that scope. While this manual may be a useful tool for some private sector or other government-sponsored projects that require waterway permits, the purpose of this manual is to cover waterway permitting based on ODOT Project Development Process (PDP) for transportation-related projects.

The goals of this manual are as follows:

- Streamline the waterway permitting processes.
- Increase understanding of the relevant laws, regulations, policies, and procedures that govern waterway permit issues common to ODOT projects.
- Provide a connection between ODOT's PDP and the waterway permitting process.
- Provide a framework for the coordination of information between agencies, ODOT, consultants, and others on waterway permit issues.
- Provide guidelines for preparing waterway permit applications and wetland and stream mitigation plans in a consistent and efficient manner.

A glossary of relevant terms is located in Appendix A. In order to deliver consistent and streamlined results, OES-WPU manages all aspects of surface water permitting for ODOT projects and provides the sole point of contact for these matters. A list of contact information for OES-WPU staff and useful internet resources related to permitting can be found on the Ohio Dept. of Transportation’s website.

Note: The use of “waterway permits” in this manual refers to permits issued under a number of regulatory programs required to impact surface waters of the U.S. and of the State of Ohio. This manual does not discuss permits relating to waste water, stormwater, floodplains, conservancy districts, or spill containment or response.
1.2 RELEVANT ENVIRONMENTAL LAWS, DECISIONS, AND AGREEMENTS

A permit is an authorization to perform a regulated activity in a specific manner. Permits are products of environmental laws and the primary means by which regulatory agencies ensure compliance with environmental regulations.

ODOT has entered into agreements with certain regulatory agencies to expedite coordination on ODOT projects, while remaining in compliance with specific regulations. Additionally, Section 121.17 of the Ohio Revised Code (ORC) requires directors of state departments to cooperate and coordinate their operational needs amongst each other.

ODOT projects involving waterway permits abide by the following primary environmental laws, decisions, and agreements:

**Clean Water Act (33 USC 1251)**

The Clean Water Act (CWA) is the principal federal law that protects our nation’s waters, including lakes, rivers, aquifers, wetlands, and coastal areas. Formerly referred to as the Federal Water Pollution Control Act of 1972, the law’s ultimate goal is to maintain the chemical, physical, and biological integrity of the nation’s waters. The CWA requires that states establish water quality standards and assess state water quality based on these standards. Specifically, sections 401 and 404 of the CWA pertain to the discharge of materials into surface waters, including wetlands.

**Section 404**

Section 404 of the CWA is jointly administered by U.S. Army Corps of Engineers (USACE) and U.S. Environmental Protection Agency (US EPA). Under Section 404 of the CWA, USACE authorizes discharge(s) of dredged or fill material into waters of the U.S. The definition of ‘waters of the U.S.’ has evolved based on multiple court cases as well as new legislation. Authorization for projects which propose to impact waters of the U.S. is dictated by the 404 permit process, which encompasses general permits and Individual Permits (IPs). General permits include Nationwide Permits (NWPs) and Regional General Permits (RGPs) that have been pre-approved for use associated with specific activities. General Permits provide relief from some of the administrative burden associated with permit processing. The USACE district, which has jurisdiction over where the activities will occur, issues the RGP. The ODOT RGP for transportation projects is discussed in Chapter 2.2 and Chapter 2.3.
**Section 404(f)** exempts some activities from regulation. These activities include maintenance (but not construction) of drainage ditches, transportation structures, and many ongoing farming and silviculture practices. Section 404 (f)(1)(B) allows for the discharge of dredged or fill material for the purpose of maintenance, including emergency reconstruction of recently damaged parts of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, and bridge abutments or approaches, and transportation structures. Regulations on this maintenance exemption, which are provided in 33 CFR 323.4(a)(2), include recapture provisions that can cause exempted activities to fall back under 404 regulation. For example, the exemption does not allow any modification that changes the character, scope, or size of the original fill design. Also, any emergency reconstruction must commence within a reasonable period of time after damage occurs in order to qualify for this exemption. Finally, any discharge of dredged and/or fill material into waters of the U.S., incidental to any of the exempt activities, must have a permit if it is part of an activity that directly affects the water of the U.S. (i.e. reducing flow or altering its overall size or extent).

**Section 401**

Section 401 of the CWA is administered by Ohio Environmental Protection Agency (Ohio EPA). In Ohio, anyone (including private citizens, federal, state, and local agencies) who wishes to discharge dredged or fill material into waters of the U.S. must obtain a Section 401 Water Quality Certification (WQC) issued by Ohio EPA. The applicant must demonstrate that activities will comply with Ohio Water Quality Standards and other provisions of federal and state law and regulations regarding conventional and non-conventional pollutants, new source performance standards, and toxic pollutants. The certification process can require an anti-degradation alternatives analysis, including evaluation of multiple alternatives.

A Section 401 WQC must be granted by the State of Ohio before a Section 404 and/or Section 10 permit can be granted by USACE. Individual 404 permits are issued when project impacts exceed thresholds utilized for general permits; these permits are usually required for significant impacts. However, for most discharges that will have only minimal adverse effects, USACE utilizes general permits to authorize projects. These general permits include NWPs and RGPs, which have specific requirements tailored to various categories of activities (for example, bank stabilization or linear transportation projects). Ohio EPA grants Section 401 WQCs for projects covered under NWPs/RGPs. NWPs are intended to expedite the permitting process; however, their provisions, along with Ohio EPA’s state conditions, have grown increasingly complex. Since NWPs and
RGPs are revised every five years by USACE, awareness of the current requirements and the expiration of these permits is especially important.

On the state level, the Ohio EPA Section 401 WQC program is authorized by ORC Section 6111.03(P). Ohio Administrative Code (OAC) Chapter 3745-32 outlines the 401 application process and the criteria for decision by the Director of Ohio EPA, with OAC 3745-32-02 stating that a 401 WQC is required when a project must obtain a permit from USACE under Section 10 of the Rivers and Harbors Act, Section 404 of the CWA, both Sections 10 and 404, or any other federal permit or license to conduct an activity which may result in any discharge to waters of the state. OAC 3745-1, Ohio’s Water Quality Standards, (including OAC 3745-1-05, the Anti-Degradation Rule) includes application requirements and public participation procedures. OAC 3745-1-50 through 3745-1-54 describes Ohio EPA’s Wetland Water Quality Standards and discusses wetland mitigation requirements.

**ODOT’s Regional General Permit (RGP)**

The RGP authorizes certain transportation projects pursuant to Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the CWA. The RGP has two distinct sections A and B, which essentially mirror the 2017 NWP 14 (linear transportation projects) and 2017 NWP 3 (maintenance). Both sections incorporate temporary construction, access, and dewatering (NWP 33). Limitations and thresholds for the RGP are different than the NWPs. Implementation and use of the RPG is further discussed in Chapter 2.2 and Chapter 2.3. In practice, the RGP essentially takes the place of ODOT’s most commonly used NWPs and provides ODOT with a more streamlined permitting process. The RGP can provide greater flexibility for authorizing routine maintenance and small linear transportation projects and provides project managers with additional permitting options, which can eliminate delays and reduces administrative paperwork.

The current RGP was issued by the USACE Huntington District on October 24, 2014 and the RGP expires October 24, 2019. Ohio EPA granted its Section 401 certification to the RGP, with applicable special conditions, on July 6, 2014. On August 4, 2014, ODNR’s Office of Coastal Management provided conditional concurrence with the Federal Consistency Coastal Determination.
Rivers and Harbors Act of 1899

Section 9 of the Rivers and Harbors Act states that construction of bridges or causeways performed in or over Navigable Waters of the U.S. must be authorized by the U.S. Coast Guard (USCG) through the issuance of bridge permits or permit amendments. Such bridges are regulated under Section 9 to control horizontal and vertical clearances for commercial navigation. A Section 401 Water Quality Certification or waiver is required by USCG before the agency can issue a Section 9 permit. For a list of Ohio waterways regulated under Section 9, see Chapter 6.3 of this document.

Section 10 of the Rivers and Harbors Act, administered by USACE, requires a Section 10 permit or Letter of Permission for any fill activity (temporary or permanent) below the ordinary high water mark (OHWM) in a Section 10 waterway. This also includes dredging operations within Section 10 waters. Links to lists of Section 10 waters in Ohio are provided in Chapter 4.4 of this document. Using the same process and application, a Section 10 permit can typically be authorized through a NWP or RGP. However, a Notice to Navigation (NTN) is typically required to be coordinated with the USACE district office as a special condition of the Section 10 permit. A NTN allows the agency to maintain the navigational integrity of waterways when an applicant is seeking to conduct certain types of work in navigation channels and certain segments of Section 10 waterways.

Section 408 of the Rivers and Harbors Act authorizes USACE to grant permission to alter, occupy, or use a USACE civil works project (i.e. federal project) if the activity will not go against public interest nor impair the usefulness of the project. All ODOT activities over or within a federal project must be coordinated with the USACE Huntington District. This include activities above OHWM that do not directly affect the navigation channel. Federal projects are typically located within Navigable Waters of the US, but can include other structures, such as flood walls and levees. Links to USACE navigation charts are located in Appendix G of this document, which illustrate the location of the waterways that are considered Federal projects. Coordination for Section 408 includes submitting a Section 408 Request Form. USACE Regulatory can authorize an ODOT project with a Section 408 Permission.

Isolated Wetland Law

Ohio EPA to reviews projects impacting hydrologically-isolated wetlands under ORC 6111.021 through 6111.028 and develops two permits with three levels of review for fill activities in such waters.
Hydrologically-isolated wetlands are defined in OAC 3745-1-50(T) as those wetlands which:

1. have no surface water connection to a surface water of the state.
2. are outside of, and not contiguous to, any 100-year floodplain (as defined in ORC 1521.01).
3. have no contiguous hydric soil between the wetland and any surface water of the state.

Note that while the definition of an isolated wetland, as outlined in the OAC, is still in rule, the 2015 Clean Water Rule has redefined jurisdictional waters and is outline in Section 1.6 of this manual.

There are two types of isolated wetland permits (IWP): **General Isolated Wetland Permit: Level One Review** and **Individual Isolated Wetland Permit: Level Two Review and Level Three Review**. A Level One Review is associated with the General Isolated Wetland Permit and is designed to be a relatively simple review process for projects with minimal impacts. Level Two and Level Three Reviews are associated with the Individual Isolated Wetland Permit and are more complicated permits for projects with a greater degree of impacts. The level of review is based on the acreage to be filled and the quality of the wetland involved. The Ohio General Permit for Filling Category 1 and Category 2 Isolated Wetlands was reauthorized on April 10th, 2017 and will expire April 9th, 2022.

### National Environmental Policy Act of 1969

The **National Environmental Policy Act (NEPA)** requires all federal agencies and their designees to disclose and consider the environmental implications of proposed actions. Based upon the use of federal money through FHWA and the need for federal waterway permits through USACE, ODOT is required by NEPA to document the environmental impact of its transportation projects and to provide opportunity for public participation throughout project development. NEPA establishes levels of analysis that may involve a Categorical Exclusion (CE), Environmental Assessment (EA), or Environmental Impact Statement (EIS), and result in a Finding of No Significant Impact (FONSI) or Record of Decision (ROD). The NEPA process is enforced by regulations of the Council on Environmental Quality (CEQ). When waterway permits are obtained or required for a project, the permit or the requirement to obtain applicable permits are documented as environmental commitments within the final environmental document in order to detail compliance with applicable environmental laws. These permits and their conditions are then regarded as environmental commitments under NEPA.
On December 28, 2015 ODOT and FHWA executed a MOU for the NEPA assignment program. This means that the Federal Highway Administration (FHWA) has assigned ODOT some FHWA NEPA responsibilities for environmental review, consultation, or other actions required under federal environmental law that pertain to the review or approval of specific highway, railroad, public transportation, and multimodal projects. The assigned responsibilities are subject to the same procedural and substantive requirements as previously applied to FHWA.

**Discharge of Dredged Material**

Mechanized land clearing, ditching, draining, and stream channelization have long been problematic under the CWA because of confusion over whether the excavation and spilling of debris associated with these activities constitutes discharge of dredged materials into wetlands or other waters of the U.S. The Tulloch Rule, issued in 1993 by US EPA and USACE, revised the definition of "discharge of dredged material" to include the incidental fallback of any excavated materials that occurs during dredging operations. A 1998 court decision, however, found that US EPA and USACE lacked authority under the CWA to regulate such activities if said activity results in only "incidental fallback" (the redeposit of small volumes of dredged material). In May 1999, US EPA and USACE issued a final rule modifying the definition of "discharge of dredged material" in response to the Court’s finding and to ensure compliance with the court’s decision.

US EPA and USACE proposed further rule revisions that were finalized and implemented in April 2001 (Tulloch II). The new rule (65 Fed. Reg. 4550) clarified the types of activities that are likely to result in a discharge of dredged material subject to Section 404 of CWA. The final rule modified the definition of "discharge of dredged material" by clarifying what types of activities US EPA and USACE believe typically result in regulated discharges, based on the nature of the equipment and agency experience. The rule indicated that US EPA and USACE regard the use of mechanized earth moving equipment to conduct land clearing, ditching, channelization, in-stream mining, or other earth-moving activity in waters of the U.S. as resulting in a discharge of dredged material, unless project-specific evidence shows that the activity results in only "incidental fallback."

On December 30 2008, USACE and US EPA published a new final rule (33 CFR 323) in response to a court order that invalidated the January 17, 2001 amendments (known as “Tulloch II”) to the regulatory definition of "discharge of dredged material.” This final rule deleted language from the regulation that was invalidated by a court order. The rule outlines several examples where a discharge results in a "redeposit" subject to regulation.
The rule specifically excludes "incidental fallback" as fill without defining the term, and reinstates the regulations following the May 10, 1999 amendments with one exception: the “grandfather” provision, which exempted a limited class of discharges from 404 permit requirements which was removed by Tulloch II and is not reinstated in the final rule.

As with the 1999 rule, determining when a particular redeposit of dredged material is subject to CWA jurisdiction will involve a case-by-case evaluation, consistent with the act and governing case law.

The May 10, 1999 definition of “discharge of dredged material” includes:

1. Except as provided below in paragraph (2), the term discharge of dredged material means any addition of dredged material into, including redeposit of dredged materials other than incidental fallback within, the water of the U.S. The term includes the following:
   i. The addition of dredged material to a specified discharge site located in waters of the U.S.
   ii. The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area.
   iii. Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into water of the U.S. which is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation.

2. The term discharge of dredged material does not include the following:
   i. Discharges of pollutants into water of the U.S. resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to Section 402 of the CWA, even though the extraction and deposit of such material may require a permit from USACE or applicable state.
   ii. Activities that involve only the cutting or removing of vegetation above ground (e.g., mowing, rotary cutting, and chain sawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.
   iii. Incidental fallback.
ODOT undertakes numerous projects that involve excavation of material from waters of the U.S. Given the nuances of understanding when excavation can be considered to result in fill, all excavation activities should be carefully reviewed for compliance with the CWA under the processes discussed in this document.

**Relevant Case Law**

The following court cases have affected the regulatory programs administered under Section 404 of the CWA, specifically related to the jurisdictional status of waters of the U.S. Although recent developments have proposed changes to the interpretation and implementation of what constitutes a water of the U.S., a review of significant court cases provides important information for understanding these recent changes to federal rules.

**SWANCC Decision**

In January 2001, the U.S. Supreme Court decided the *Solid Waste Agency of Northern Cook County (SWANCC) vs. U.S. Army Corps of Engineers* case. SWANCC, a consortium of Chicago municipalities, selected an abandoned sand and gravel pit as a solid waste disposal site. The bottom of the pit contained excavation trenches that became permanent seasonal ponds and wetlands. Since the operation called for filling in some of the ponds and wetlands, SWANCC applied for a Section 404 permit from USACE. The permit was denied.

Section 404 of the CWA authorizes USACE to issue permits for the discharge of dredged or fill material into waters of the U.S. USACE defined its authority over hydrologically-isolated wetlands, such as those at the SWANCC site, through its 1986 Migratory Bird Rule, which states that Section 404 extends to intrastate waters that provide habitat for migratory birds. The *SWANCC decision* held that USACE exceeded its statutory authority by using the Migratory Bird Rule to assert CWA jurisdiction over isolated wetlands. The Court’s decision is strictly limited to waters that are non-navigable, isolated, and intrastate. USACE still regulates isolated wetlands that support interstate commerce, but the SWANCC decision prohibits USACE from using the Migratory Bird Rule to determine the interstate commerce connection. One impact of the SWANCC decision was that isolated wetlands were no longer protected in many states, including Ohio. To regulate isolated wetlands in Ohio, Ohio EPA proposed a 90-day emergency rule in April 2001, with House Bill 231 subsequently signed into law in July 2001 (see ORC 6111.021 through 6111.028).
Rapanos v. United States

*Rapanos v. United States*, 547 U.S. 715 (2006, referred to as *Rapanos*), was a United States Supreme Court case that challenged the CWA. Rapanos was the first major environmental case heard by the newly appointed Chief Justice John Roberts and Associate Justice Samuel Alito. The Supreme Court heard the case on February 21, 2006 and issued a decision on June 19, 2006. While five justices agreed to void rulings against the plaintiffs, who wanted to fill their wetlands to build a shopping mall and condos, the court was split over further details, with the four more conservative justices arguing in favor of a more restrictive reading of the term "Navigable Waters" than the four more liberal justices. Justice Kennedy did not fully join either position.

Carabell v. United States Army Corps of Engineers

There was also a related case known as *Carabell v. United States Army Corps of Engineers* that was consolidated and reviewed with the Rapanos case. June Carabell sought a permit to construct condominiums on approximately 16 acres of wetlands, but the permit was denied by USACE. Carabell took the issue to the courts, arguing that the federal government did not have jurisdiction to deny the permit. After losing in the Federal District Court and the Sixth Circuit Court of Appeals, Carabell appealed to the United States Supreme Court. Both the Rapanos and Carabell cases resulted in US EPA and USACE reevaluating how jurisdiction is determined for potential waters of the U.S. Following these court cases, the agencies released a memorandum (June 6, 2007) regarding new procedures for jurisdictional determinations. The agencies followed this with a superseding memorandum (December 2, 2008) that further refined and defined new procedures for jurisdictional determinations.


Under the Obama Administration, the US EPA and the USACE published a final rule defining the scope of waters protected under the Clean Water Act, considering the statute, science, Supreme Court decisions in U.S. v. Riverside Bayview Homes, Solid Waste Agency of Northern Cook County v. USACE (SWANCC), Rapanos v. United States (Rapanos), and the agencies' experience and technical expertise. This final rule reflected consideration of the extensive public comments received on the proposed rule. The rule was to ensure protection for the nation's public health and aquatic resources and increase CWA program predictability and consistency by clarifying the scope of "waters of the United States" protected under the Act.
On February 28, 2017, the Trump Administration issued Executive Order EO 13778 entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule" directing EPA and the USACE to review and rescind or revise the 2015 Rule. In July of 2017 the US EPA provided notice of a two-step process that would 1. Repeal the 2015 Rule and 2. Revise the definition of WOTUS.

On January 31, 2018, the US EPA and USACE finalized a rule adding an applicability date to the 2015 Rule defining “waters of the United States.” The 2015 Rule would not be applicable until February 6, 2020. In August 16, 2018 the U.S. District Court for the District of South Carolina found that the Trump administration improperly suspended the 2015 Clean Water Rule. On December 11, 2018 the US EPA and the USACE proposed a new draft definition of "waters of the United States" that clarifies federal authority under the Clean Water Act.

**Current WOTUS Definition for Ohio**

Pursuant to the order of the U.S. District Court for the District of South Carolina, as of August 2018 the 2015 Clean Water Rule is now in effect in 22 states (including Ohio), the District of Columbia, and the U.S. territories. While the litigation continues, the agencies are complying with the district court’s order and implementation issues that arise are being handled on a case-by-case basis. The definition of "waters of the United States" applicable in the remaining 28 states is the definition promulgated in 1986/1988, implemented consistent with subsequent Supreme Court decisions and guidance documents.

**Endangered Species Act of 1973 (ESA)**

The purposes of the [Endangered Species Act (ESA)](https://www.whitehouse.gov) are to protect federally endangered and threatened species and to provide a means to conserve their ecosystems. The ESA requires all federal agencies to work towards recovery of threatened and endangered species and their habitats. The law requires that federal agencies consult with USFWS to ensure that the federal agency’s actions are not likely to jeopardize the continued existence of any endangered or threatened species, nor destroy or adversely modify critical habitat for those species. The law is administered by the Department of Interior via USFWS and through the Department of Commerce via the National Marine Fisheries Service. ODOT ensures compliance with the Act for federal aid projects by performing ecological coordination with USFWS, per relevant agreements (see [ODOT’s Ecological Manual](https://www.ohio.gov)).
Fish and Wildlife Coordination Act (16 USC 662(a))

The Fish and Wildlife Coordination Act mandates that whenever the waters or channel of a body of water are modified by a department or agency of the U.S., or any entity under federal permit, the department or agency shall first consult with USFWS and with the head of the agency exercising administration over the wildlife resources of the state (ODNR). This consultation must include where the construction will occur with emphasis placed on the conservation of wildlife resources. ODOT performs ecological coordination, in accordance with this Act, as described in ODOT’s Ecological Manual and relevant agreements.

2016 Ecological MOA

This Memorandum Of Agreement (MOA) is a multi-agency agreement that was signed and executed by ODOT, ODNR, and USFWS in order to expedite coordination for NEPA Categorically Excluded projects by reducing the amount of routine data collection and paperwork. The MOA applies to projects that are considered to have minimal impacts to stream and wetland resources. Projects that will likely receive authorization under the USACE NWP Program or RGP may be authorized under this MOA. The MOA does not apply to projects that will likely require an Individual 404 permit from USACE, Individual 401 WQC from Ohio EPA, and/or an Individual Isolated Wetland Permit from Ohio EPA. Projects that do not meet the conditions of the MOA require project-specific ecological coordination with ODNR and USFWS. Ecological coordination under this MOA satisfies the coordination requirements of the Fish and Wildlife Coordination Act (16 USC 662(a)) and Section 7 of the Endangered Species Act of 1973 (16 USC 1531-1534 [refer to ODOT’s Ecological Manual for further information]).

Coastal Zone Management Act of 1972

The Coastal Zone Management Act (CZMA) is a federal law that requires all federal actions that are likely to affect any land or water use or natural resource of the coastal area to be consistent with the state’s coastal management program. Federal consistency provisions in the CZMA are designed to bring federal actions into compliance with the Ohio Coastal Management Program. The CZMA authorizes the Coastal Zone Management Program, a state-federal partnership administered by the National Oceanic and Atmospheric Administration (NOAA), to sustain coastal communities, coastal ecosystems, and improve government efficiency.
Ohio Coastal Management Law of 1988

The Coastal Management Law of 1988 requires ODNR to implement the Ohio Coastal Management Program (OCMP) in cooperation with other state agencies and local governments. The Coastal Management Act mandates cooperation of other state agencies to carry out the program. OCMP implements the federal consistency provisions of CZMA. The designated coastal zone management area includes portions of the nine Ohio counties that border Lake Erie. The ODOT Ecological Manual provides the process for obtaining coastal consistency. Waterway permits cannot be issued for a project until that project has obtained coastal zone consistency.

As a part of USACE’s 404 NWPs, ODNR must complete a review of the NWP Program to determine whether the NWPs are consistent with OCMP. ODNR concurred with USACE’s consistency determination for the 2012 NWPs with some additional special conditions for some of the permits (provided all state permits, licenses, leases, and approvals are obtained for the project). See Chapter 1.6 for a detailed discussion on the CZM, NWPs, and RGPs.

Wild & Scenic Rivers Act

The Wild & Scenic Rivers Act is a federal law that mandates certain rivers of the nation to possess outstanding scenic, recreational, geological, fish and wildlife, historic, cultural, or other similar values. These rivers shall be preserved in free-flowing condition, and their immediate environments shall be protected for the benefit and enjoyment of present and future generations. Projects that propose to place fill in these resources require, at a minimum, pre-construction notification to USACE. In Ohio, there are a total of 212.9 miles of river designated under this Act, including portions of Big and Little Darby Creeks, Little Beaver Creek, and the Little Miami River.

Ohio Wild, Scenic, and Recreational River Act

The Ohio Wild, Scenic, and Recreational River Act led to the creation of Ohio’s state scenic rivers system, which is administered by ODNR-Division of Watercraft. ORC Section 1547.82 states the following:

“...no state department, state agency, or political subdivision shall build or enlarge any highway, road, or structure or modify or cause the modification of the channel of any watercourse within a wild, scenic, or recreational river area outside the limits of a municipal corporation without first having obtained approval of the plans for the highway, road, or structure or channel modification from the director of natural...
resources or his representative. The court of common pleas having jurisdiction, upon petition by the director, shall enjoin work on any highway, road, or structure of channel modification for which such approval has not been obtained.”

Further clarification of ODNR jurisdictional boundaries to administer Section 1547.82 can be found in ORC Section 1547.81. Projects that propose to place fill in these resources require, at a minimum, pre-construction notification to USACE. A map of Ohio designated scenic rivers can be found here. It is important to note that ODNR’s interpretation of what constitutes a “channel” for the purposes of the Ohio Wild, Scenic, and Recreational River Act may not necessarily align with USACE’s limit of jurisdiction (area below the OHWM).

**Scenic Rivers MOA**

This MOA is 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. It is referred to as the “Scenic River MOA,” and establishes the responsibilities of ODNR and ODOT in coordinating intrastate review of projects within 1,000 feet of a state-designated scenic river. The agreement facilitates and enhances coordination efforts by identifying the ODOT District Environmental Coordinator and the ODNR Regional Scenic River Manager as their respective agency points of contact for coordination.

**National Flood Insurance Act, Flood Disaster Protection Act, and National Flood Insurance Reform Act**

In 1968, Congress established the National Flood Insurance Program (NFIP) as part of the National Flood Insurance Act. This program is administered by the Federal Emergency Management Agency (FEMA). The purpose of the NFIP is to enable property owners in participating communities to purchase flood insurance. The program was designed to provide relief to flood victims and lower the cost of federal disaster relief. The NFIP was broadened in 1973 by the Flood Disaster Protection Act and further modified in 1994 by the National Flood Insurance Reform Act. See Chapter 1.6 for further information regarding Floodplain Coordination.
1.3 ENVIRONMENTAL PERMITTING AGENCIES

United States Army Corps of Engineers (USACE)

Under authority of Section 404 of the CWA and Section 10 of the Rivers and Harbors Act, USACE administers the federal permitting program related to dredge and fill activities within waters of the U.S. USACE has been involved in regulating dredge and fill activities in the nation’s waters since 1899. As a result of several laws and judicial decisions in the 1960s and 1970s, the regulatory authority of the agency evolved from one that focused primarily on navigation (Section 10 of the Rivers and Harbors Act) to one that considers an array of public interest factors related to activities regulated under Section 404 of the CWA. USACE has jurisdiction over all waters of the United States. In general, USACE’s jurisdiction occurs at or below the Ordinary High Water Mark (OHWM) or at the wetland/upland boundary.

The Section 404 permitting program regulates the discharge of dredged or fill material into waters of the U.S. and is administrated by USACE. Responsibilities of the program include: conducting jurisdictional determinations (including isolated vs. non-isolated wetland determinations); making IP decisions; verifying projects’ coverage under NWP conditions; developing policy and guidance; reviewing compensatory mitigation projects required by Section 404 permits; and enforcing Section 404 conditions. In evaluating 404 permit applications, USACE must follow the 404(b)(1) guidelines developed by US EPA.

Permits required by Section 10 of the Rivers and Harbors Act are administered by USACE. USACE reviews applications for projects involving any fill activity (temporary or permanent) below the OHWM in a Section 10 waterway. This includes dredging operations within the Section 10 limits that result in discharges greater than incidental fallback. USACE also ensures the integrity of navigation through issuing Notice to Navigation (NTN) to mariners. For any project in Section 10 waters shown on USACE navigation charts, USACE requires that a NTN, two weeks prior to the start of work, is submitted to the appropriate USACE district for distribution to entities with navigational interests in that waterway.

Permits and authorizations required by Section 408 of the Rivers and Harbors Act are administered by the USACE Huntington District. USACE reviews requests to alter a federal project for all work above and below the OHWM of a navigation channel within a USACE civil works project (also known as federal projects). USACE Huntington District
will authorize projects with a Section 408 Permission. Federal projects are indicated on the USACE Navigation Charts.

There are three USACE Districts with jurisdiction in Ohio: Buffalo District (Lake Erie basin), Pittsburgh District (Mahoning River basin, some Ohio River tributaries), and the Huntington District (Muskingum, Hocking, Scioto, the majority of Ohio River tributaries, and Little and Great Miami river basins). However, the Huntington District is the lead USACE district in Ohio and reviews all ODOT projects through a field office located in Columbus, Ohio. This office is referred to as the Ohio Regulatory Transportation Office (ORTO). ORTO works exclusively on 404 permits, 404 compliance, jurisdictional determinations, Section 10 permits, and mitigation review for all ODOT-Let, ODOT-Let Local Public Agency (LPA), and state-funded highway operations projects statewide regardless of USACE district boundaries. The ORTO is also responsible for streamlining initiatives such as working with ODOT on RGPs, process improvements, and guidance documents. Note: a fourth USACE District, Louisville District, is located in Ohio but only reviews and approves Section 408 Permissions and Section 10 permits. ORTO is the lead for all other waterway permit actions.

For local let projects with federal funds that go through ODOT’s NEPA process, the LPA has the option of utilizing ODOT’s waterway permit process, which includes review and processing applications through ORTO. LPAs that choose not to utilize ODOT’s permit process must coordinate with the appropriate USACE office and procure permits on their own. For more information about ODOT’s waterway permit process for LPAs, see Waterway Permitting Guidance for LPAs on ODOT’s Waterway Permits website.

The USACE Huntington District is the lead district in Ohio for all applicants. For ODOT projects, Huntington District Headquarters manages all non-compliance and CWA violations and not the ORTO.

Ohio Environmental Protection Agency (Ohio EPA)

Section 401 of the federal CWA requires state agencies to evaluate projects that will result in the discharge of dredged or fill material into waters of the U.S. to determine whether the discharge will violate the state’s water quality standards. Any person who wishes to place dredged or fill material into wetlands, streams, or lakes must apply for an Individual Section 401 WQC unless the project meets the Ohio EPA conditions of the applicable Nationwide Permits. Ohio EPA’s 401/Wetland Section is responsible for reviewing applications and issuing 401 Water Quality Certifications for projects that impact waters
of the U.S., including streams, lakes, wetlands, and jurisdictional ditches. Ohio EPA reviews the Section 404 NWPs and the RGP issued by USACE and grants Section 401 WQC to those permits. These 401 WQC conditions are included within the NWPs and RGP as additional requirements that must be met by the permittee.

House Bill 231, passed in response to the SWANCC decision, established a law and process for Ohio EPA to regulate and review projects impacting hydrologically isolated wetlands. Three levels of permitting were created for fill activities in such waters. For more information on Isolated Wetland permitting, see Chapter 2.11.

Ohio EPA has also developed numerous methodologies for evaluating the biological and ecological integrity of streams and wetlands within the state. These assessments, including the Ohio Rapid Assessment Method for Wetlands v. 5.0 (ORAM), and the Headwater Habitat Evaluation Index (HHEI), Headwater Macroinvertebrate Field Evaluation Index (HMFEI), and Qualitative Habitat Evaluation Index (QHEI) for streams are used to assign quality classifications to aquatic resources. These classifications are regularly utilized to determine the level of compensatory mitigation that may be needed for impacts to waters of the U.S. See Chapter 7 for more information on compensatory mitigation.

Environmental Permitting Agencies Overview

**USACE** – administers Section 404 of the Clean Water Act and Section 10 of the River and Harbors Act, which regulates dredge and fill activities within waters of the U.S. and Section 10 waterways, respectively. USACE also administers Section 408 of the Rivers and Harbors Act, which regulates all work within a USACE civil works project.

**Ohio EPA** – administers the Water Quality Certification program under Section 401 of the Clean Water Act and the isolated wetland program under Ohio’s isolated wetland law (ORC 6111).

**USCG** – administers Section 9 of the Rivers and Harbors Act by issuing bridge permits for activities over or in Navigable Waterways.

**US EPA** – conducts administrative and scientific oversight of the Section 404 program under the Clean Water Act; retains ability to comment on and veto 404 permits; reviews Environmental Assessments and Environmental Impact Statements under NEPA.
U.S. Coast Guard (USCG)
Under Section 9 of the Rivers and Harbors Act, USCG regulates activities in or over Navigable Waters. USCG has the authority to require a bridge permit and can issue or deny bridge permits or permit amendments for projects involving construction of bridges or causeways installed in or over Navigable Waters. Section 9 Bridge Permits are primarily utilized to control horizontal and vertical clearances for commercial navigation in waters designated as Navigable Waters. USCG also reviews demolition plans for bridge deconstruction projects over Section 9 waters to ensure safety and maintenance of river traffic before, during, and after a bridge is removed.

USCG districts are based on large watersheds. Most of Ohio lies within the 8th Coast Guard District, which is headquartered in St. Louis, Missouri. The northern portion of Ohio above the 41st parallel is under the jurisdiction of the 9th Coast Guard District headquartered in Cleveland.

U.S. Environmental Protection Agency (US EPA)
Section 404 of the CWA allows US EPA to: review and comment on Individual 404 permit applications; evaluate specific cases; determine scope of geographic jurisdiction; approve and oversee state assumption of the 404 program; jointly determine jurisdiction of certain resources with the USACE; and identify activities that are exempt from regulation under Section 404. Using the Section 404(b)(1) guidelines, US EPA develops and interprets the environmental criteria used by USACE in evaluating 404 permit applications. US EPA can also veto 404 permit decisions by USACE and may take enforcement action against unauthorized activities. In addition to its roles within the waterway permitting process, US EPA also reviews Environmental Assessments and Environmental Impact Statements under NEPA.

1.4 Aquatic Resources Subject to Waterway Permits
Under the CWA, USACE has authority to regulate waters of the U.S. Waters of the U.S. include all interstate waters such as lakes, rivers, streams, jurisdictional ditches, and non-isolated wetlands. Waters of the U.S. also include Navigable Waters of the U.S. A detailed definition of waters of the U.S. and further explanation of the jurisdictional limits of streams, lakes, and wetlands can be found in 33 CFR 328.

The current definition of waters of the U.S., which encompasses aquatic resources regulated by the federal government, has a long and complex regulatory and legal history.
In May 2015, US EPA and USACE established a new rule that provides a revised definition of these waters. The agencies based this rule on a comprehensive review of available science related to the interconnected nature of the nation’s surface waters. Federal courts placed a stay on this revised definition on October 9, 2015, preventing USACE and US EPA from adopting the new waters of the U.S. rule while it is in review. In August 2018, the U.S. District Court of South Carolina found that the Trump administration improperly suspended the rule, and the court set aside suspension nationwide, allowing the rule to take effect in 22 states, including Ohio.

To officially determine whether a given body of water is subject to regulation as waters of the U.S., USACE performs a jurisdictional determination (JD). A JD typically consists of a site survey and/or document review that precisely identifies the limits of water resources located on a project site that are under federal jurisdiction or regulation. The JD process identifies wetlands, streams, ditches, lakes, and similar areas that fall under CWA jurisdiction. ODOT projects often include multiple types of aquatic resources that can trigger multiple regulatory requirements involving several agencies. This section will briefly discuss the jurisdictional limits and regulatory requirements of specific aquatic resources as they relate to ODOT projects.

Streams

Ordinary High Water Mark

The USACE regulatory jurisdictional limit on streams and other bodies of water begins at the elevation known as the ordinary high water mark (OHWM). OHWM is defined in 33 CFR 328.3(e) as:

“That line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.”

The frequency and duration at which water must be present to develop an OHWM has not been established for the USACE regulatory program. To determine if an OHWM is present, USACE evaluates each situation on a case-by-case basis using professional judgment and criteria listed in 33 CFR 328.3(e). USACE has also issued a Regulatory Guidance Letter on determining the OHWM.
Perennial, Intermittent, and Ephemeral Streams

Regulatory requirements may vary based on the flow regime in a stream. Flow regime can be characterized as perennial, intermittent, or ephemeral. The following hydrological terms are used in 404/401 permitting to describe the flow regime in a stream channel:

- **Perennial Stream** – A stream that has flowing water year-round during a typical year. The water table is located above the streambed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

- **Intermittent Stream** – A stream that has flowing water during certain times of the year, when groundwater provides for stream flow. During dry periods, intermittent streams may not have flowing water. Precipitation is a supplemental source of water for stream flow. An intermittent stream is ordinarily dry for more than three months per year.

- **Ephemeral Stream** – A stream with flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Aquatic Life Use Designations

Ohio is one of only a few states that has incorporated aquatic life use designations into its water quality standards. These use designations, listed in OAC 3745-1, are based on three biological indices that measure the populations and diversity of fish and macroinvertebrates living in a stream. Essentially, a waterway’s biological diversity and/or sensitivity determines the quality it is assigned. Examples of aquatic life use
designations include the following: Modified Warmwater Habitat (streams with extensive and irretrievable physical habitat modifications, such as channelization, impoundment, or acid mine drainage); Warmwater Habitat (the typical warmwater assemblage of aquatic organisms); and Exceptional Warmwater Habitat (waters that support unusual and exceptional assemblages of aquatic organisms). Refer to ODOT’s Ecological Manual Section 2.2.1.1 for further information on streams.

Other use designation categories that can have permitting implications include Water Supply, Recreation, and State Resource Water. Water Supply use designations include Public Water Supply, Agricultural Water Supply, and Industrial Water Supply. Recreation use designations are Bathing Waters, Primary Contact Recreation, and Secondary Contact Recreation. A State Resource Water is a designation of High Quality Waters described in OAC 3745-1-05(A)(10), which includes Superior High Quality Water, Outstanding Resource Water, and Outstanding High Quality Water. Impacts to these waters are prohibited under most NWPs/RGP, with NWP 3 and RGP B as exceptions to this limitation. The use designation of a water proposed to be impacted should always be investigated to ensure impacts to these resources are not prohibited or restricted, as this designation can have impacts on the permit and therefore project schedule.

OAC 3745-1-01 requires all water bodies to have use designations. Existing use designations (defined in OAC 3745-1-07) and the level of water quality necessary to protect existing uses shall be maintained and protected. There may be no degradation of water quality that results in either a violation of the applicable water quality criteria for the designated uses, unless authorized by a water quality standard variance issued in accordance with OAC 3745-33-07, or the elimination or substantial impairment of existing uses. The Director of Ohio EPA shall, pursuant to paragraph (A)(6) of OAC 3745-1-07, prohibit increased concentrations of specific regulated pollutants that are incompatible with the attainment or restoration of the designated use. Existing wetland uses, as defined in OAC 3745-1-53, shall be maintained and protected in accordance with OAC 3745-1-50 to 3745-1-54.

Current stream use designations in Ohio are inadequate to classify small headwater streams, which are the most abundant stream type in Ohio. Ohio EPA has developed procedures to evaluate the quality of Primary Headwater Habitat Streams which have drainage areas of less than one square mile. ODOT uses these tools to assign preliminary use designations to headwater streams. Future Ohio EPA rules will determine how headwater streams will be regulated in Ohio.
Stream Eligibility Determination Process

In addition to the OHWM, flow regime, and aquatic life use designations, the Ohio EPA’s stream eligibility web map is a tool used to determine the appropriate level of permitting. With the issuance of the 2017 nationwide permits by USACE, Ohio EPA introduced additional criteria to determine if a project is eligible for nationwide permit 401 certification. This new nationwide permit eligibility process is outlined in the 401 certifications of the 2017 NWP in Appendix C. Eligibility will be determined for each single and complete project based on the web map managed by Ohio EPA. The map spatially defines eligibility for coverage under NWP and will result in three potential outcomes.

- **Eligible**- If all impacted streams within the project area are located outside of the map shading the project is eligible for a NWP. No additional information is needed.

- **Possibly eligible**- If any impacted stream within the project area falls within the yellow shading on the map, the project is possibly eligible and additional information is needed. Additional information includes collect pH values and perform a QHEI or a HHEI. See the Appendix C flow chart located in the NWP. Once the additional information is collected the project will be either eligible or ineligible for a NWP.

- **Ineligible**- If any impacted stream within the project area fall within the purple shading on the map, the project is ineligible for a NWP and an individual 401 WQC or Director’s Authorization must be obtained. See Chapter 5.2 of this manual for more information on the Director’s Authorization process.

To determine the appropriate outcome for your project, the project boundary must be overlaid on the web map or the geographic information can be downloaded into a software program. This stream eligibility determination projects applies to NWPs 4, 6, 7, 12, 13, 14, 15, 16, 18, 22, 23, 25, 29, 30, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 45, 51, 53, and 54. NWP 3 is exempt from the Ohio EPA stream eligibility process, nor does it apply to the current 2014 RGP.

**Wetlands**

An area is considered to be a wetland if it has the appropriate hydrology, soils, and vegetation to meet wetland criteria as defined in the 1987 USACE Wetland Delineation Manual and applicable Regional Supplements. Wetlands generally include swamps, marshes, bogs, wet meadows, and similar areas. The identification and extent of any given wetland area must be delineated by a wetland scientist. See Section 2.2.1.2 of the Ecological Manual for more information on wetland delineations.
Wetlands are waters of the U.S. and regulated by USACE and Ohio EPA through Sections 404 and 401 of the CWA. In order to determine if a wetland is under the jurisdiction of USACE or Ohio EPA, USACE makes a jurisdictional determination (JD) to officially assess a site for the presence or absence of a wetland, identify the wetland boundaries, and determine if the wetland is jurisdictional or isolated. Isolated wetlands are regulated by Ohio EPA’s Isolated Wetland Permit Program (ORC 6111). Jurisdictional wetlands are regulated by both USACE’s 404 Permit Program and Ohio EPA 401 Water Quality Certification Program, with USACE acting as the lead regulatory agency.

Section 401 and 404 of the CWA requires the assessment of the function and quality of wetlands in order to determine whether to permit the destruction, alteration, or degradation of a wetland, and to determine the appropriate level of mitigation that should be required. Wetland quality and vegetation community (forested vs. non-forested) are significant factors to consider during the waterway permitting process; they both play a major role in determining the appropriate level of mitigation that will be required to compensate for the loss of wetland habitat.

In Ohio, definitions of wetland quality are provided in OAC 3745-1-54 (c)(1).

- **Category 1** wetlands support minimal wildlife habitat, and minimal hydrological and recreational functions as determined by an appropriate wetland evaluation methodology acceptable to the director of Ohio EPA. Wetlands assigned to category 1 do not provide critical habitat for threatened, or endangered species, or contain rare, threatened, or endangered species.

- **Category 2** wetlands may include but are not limited to: wetlands dominated by native species but generally without the presence of, or habitat for, rare, threatened or endangered species; and wetlands which are degraded but have a reasonable potential for re-establishing lost wetland functions.

- **Category 3** wetlands may include wetlands which contain or provide habitat for threatened or endangered species; high-quality forested wetlands, including old growth forested wetlands and mature forested riparian wetlands; vernal pools; and wetlands which are scarce regionally and/or statewide (i.e. bogs and fens).

Refer to ODOT’s Ecological Manual Section 2.2.1.2 for further information on wetlands and assessment methodology utilized to determine wetland quality and category.
Other Aquatic Resources

Navigable Waters
As described in 33 CFR 329, Navigable Waters of the U.S. are waters of the U.S. that are presently used, have been used in the past, or may be susceptible to use in transporting interstate or foreign commerce. Once USACE or USCG determines that a waterbody is navigable, the determination of navigability cannot be removed by subsequent actions or events that would eliminate or impede the waterbody’s navigable capacity. Navigable Waters of the U.S., including ponds, lakes, ditches, reservoirs, and shipping channels, are subject to permits required for certain activities pursuant to Section 9, Section 10, and/or Section 408 of the Rivers and Harbors Act of 1899. Links to lists of Section 10 and Section 9 waters in Ohio are provided in Chapter 4.4 of this document. Links to the Navigation Charts (which include the civil works projects) are located in Appendix G.

Open Water
Areas of open water can include parts of streams, ponds, or lakes where an OHWM is present and where vegetation is either non-emergent, sparse, or absent. While both wetlands and open waters are considered waters of the U.S., they may be treated differently by USACE for permitting and mitigation purposes. Note: ponds, lakes, and reservoirs are subject to waterway permits. Refer to ODOT’s Ecological Manual Section 2.2.1.4 for further information on these resources.

Ditches
Ditches are long, narrow, man-made channels typically constructed for the purposes of providing drainage or irrigation. ODOT projects will commonly encounter ditches constructed along an existing roadway, or intersect ditches constructed through agricultural fields and other land uses. While some ditches may be considered jurisdictional waters of the U.S., either as jurisdictional captured streams or jurisdictional ditches, a majority of ditches found within ODOT project study areas will likely be considered non-jurisdictional ditches, or in some circumstances, non-jurisdictional conveyances; these ditches are not subject to CWA regulations.

Ditch Descriptions
The common meaning for the term “ditch” can encompass water conveyances that range from grassy swales to captured streams. All ditches possess a constructed defined channel and convey water for at least a minimal period of time. In Ohio, most ditches function to provide drainage from an area (roadway, agricultural field, or residential area) during and
shortly after a rain event; however, ditches may also have been constructed to provide irrigation to an area.

Providing and maintaining adequate roadway drainage is an important aspect of roadway design and construction. However, for the purposes of determining ecological impacts and obtaining the appropriate waterway permits, ODOT is also concerned with the potentially jurisdictional nature of existing ditches. The following terms and descriptions, taken primarily from the waters of the U.S. rule, describe the types of ditches that can be encountered within an ODOT project study area.

- **Non-jurisdictional ditch** – These constructed features function to drain the landscape but are not RPW and do not possess an OHWM. In addition, these ditches do not possess a captured stream and were not constructed in a hydric soil unit for the purpose of draining a wetland at the time of construction. Typical examples of these types of ditches range from grassy swales to ditches with sufficient hydrology to become fully vegetated with hydrophytes (fully vegetated ditches are considered to be lacking an OHWM). While these ditches are not considered jurisdictional waters of the U.S., they can occasionally act as a non-jurisdictional conveyance for an abutting or adjacent wetland. Any construction or maintenance activities involving these non-jurisdictional ditches are exempt from 404 regulations and currently do not need to be addressed under waterway permits.

- **Jurisdictional ditch** – These features are constructed entirely on roadway right-of-way and function to drain the roadway and adjacent landscape. Jurisdictional roadway ditches are RPWs with an OHWM (not fully vegetated) or were constructed in a hydric soil unit for the purpose of draining a wetland at the time of construction. The maintenance (restoration to the original configuration) of these drainage ditches is exempt from regulation (as specified in 33 CFR 323.4(a)(3)), however, projects involving impacts to these ditches in the form of widening, deepening, or relocation must be authorized through the waterway permitting process.

- **Captured stream** – These ditches (possessing a defined channel and an OHWM) often originate outside of the roadway right-of-way and flow into the right-of-way, thus becoming captured within the roadway ditch. Secondary source information, including soil surveys and topographic mapping, can be used to determine the presence of streams that have been excavated or relocated into a ditch. These streams often appear as a “blue line” on USGS 7.5-minute topographic mapping. Some of these streams are named. Caution should be used when referencing this
information, however, since many of the smaller “blue line” drainage ditches and drainage flow lines on soil survey mapping do not possess an OHWM in the field and would not be considered to be a tributary. Once it has been established that a tributary has been relocated or excavated within the roadway ditch, the ditch should be considered a tributary regardless of whether it possesses an OHWM. Small streams captured in the roadway ditch system often lose their OHWM due to maintenance or may become fully vegetated due to a wide configuration.

In addition to non-jurisdictional and jurisdictional ditches, the following jurisdictional waters can also be found within or adjacent to the roadway ditch system.

- **Wetland** – Roadway ditches can occasionally form wetlands due to a lack of maintenance (aggraded ditch profiles or clogged culverts) or by their design (such as a fade-away ditch line). In these circumstances, flow through the ditch has become impeded in such a way that it results in the formation of a jurisdictional wetland. For this characterization to apply to a site, the area of the wetland boundary must extend more than an insignificant amount beyond the configuration of the ditch. Portions of the ditch abutting the wetland should be delineated as part of the wetland. Wetlands formed in this way should be characterized and assessed as wetlands rather than ditches. Sections of ditch flowing into or out of the wetland area should be separately characterized to determine if they are potentially jurisdictional or not.

- **Petition ditch** – The term petition ditch refers to historically channelized watercourses that were constructed or improved in accordance with Ohio’s petition ditch laws. Referred to as “petitioned ditches,” these waterways are often modified streams, with clearly defined channels and OHWMs. Petitioned ditches can be found across the state, but are most commonly encountered in northwest Ohio, where ditching was necessary to drain the Great Black Swamp for agriculture. While petitioned ditches may be subject to an abbreviated antidegradation review by Ohio EPA when being maintained or improved under the ditch laws, this abbreviated review does not apply to impacts to petitioned ditches that are not implemented in accordance with the ditch laws (such as a roadway project). Petitioned ditches encountered within an ODOT project study area should be individually evaluated to determine if they meet the characteristics of a stream, wetland, or ditch, regardless of the “petition ditch” designation.
A flowchart in ODOT's Ecological Manual Section 2.2.1.3 has been developed to aid in characterizing roadside ditches on ODOT projects. The flowchart was developed based on guidance provided by USACE Huntington District and past experiences on ODOT projects. The guidance is only intended for use in characterizing and documenting roadway ditches within ODOT project study areas. In all cases, USACE will make the final determination as to whether a ditch is considered a jurisdictional water of the U.S.

**OES Stream and Jurisdictional Ditch Clean-Out Guidance**

OES Guidance for In-water Work with no Temporary Fill (including Stream and Jurisdictional Ditch Cleanout) is found within ODOT's internal Highway Operations Environmental checklist summarizes the limitations for clean-out activities in streams and jurisdictional ditches. Most simple debris removal projects should not require coordination with the resource agencies. However, before any clean-out activity occurs, the proposed work should be evaluated against the established limitations and conditions.

**1.5 ODOT- OES - WATERWAY PERMITS UNIT’S (WPU) ROLE**

OES is responsible for guiding transportation projects through ODOT's PDP by providing interdisciplinary review and ensuring compliance with all local, state, and federal environmental laws and regulations. OES develops policy and direction for integrating environmental decisions into ODOT projects. OES staff also educates and trains ODOT and agency personnel, consultants, and the public on the State and Federal government's environmental requirements as they pertain to transportation. OES is comprised of two sections: Environmental Policy/Cultural Resources; and Ecological/Waterway Permits/Environmental Site Assessment.

The WPU reviews ODOT projects that impact aquatic resources subject to waterway permit requirements and determines and carries projects to the appropriate level of permitting based on the type of work and quantity of proposed impacts. WPU is responsible for review (and occasionally as resources allow, preparation of) of all waterway permit applications. WPU develops and/or reviews all stream and wetland mitigation proposals associated with ODOT projects. Once permit applications have been submitted to the regulatory agencies, WPU handles all subsequent communication, coordination, and negotiation of the necessary permits with USACE, US EPA, Ohio EPA, and USCG.
During the final permit coordination with the regulatory agencies, WPU regularly negotiates waterway permit conditions that place additional requirements or restrictions on ODOT or its contractors. In order to ensure that projects remain in compliance with the requirements of the regulatory agencies and the permits issued for a project, all waterway permit conditions are incorporated into the construction plan package as Special Provisions for implementation during project construction. See Chapter 3.3 for more information on Special Provisions.

The WPU, along with district environmental and construction staff, is also responsible for ensuring that contractors remain in compliance with all waterways permit conditions during the construction of ODOT-Let and ODOT-Let LPA projects. Should a contractor violate the conditions of a waterways permit, WPU will work closely with the District Environmental Coordinator to ensure proper consultation with the regulatory agencies and that the appropriate corrective actions are implemented.

The WPU is responsible for the permitting and associated mitigation for ODOT-Let and ODOT-Let LPA projects. Waterway permits and associated mitigation for Local-Let projects are the responsibility of the local project sponsor or their agent; however, upon request, the WPU will facilitate the waterway permit process for federally-funded Local-Let projects. For more information about the ODOT Local let permitting process refer to the Waterway Permitting Guidance for LPAs.

A list of WPU contacts and internet resources can be found on the Ohio Dept. of Transportation website.

1.6 PREREQUISITES FOR PERMIT APPLICATIONS
This section provides an overview of the processes that may need to be completed—or documentation that may need to be provided—prior to the start of the permitting process.

USACE Jurisdictional Determination/Isolated Wetland Determination
For notifying projects (projects requiring a permit application submittal) the USACE will require a jurisdictional determination (JD) to identify all regulated waters of the U.S. within a project area. The JD will allow ODOT to identify which aquatic resources are subject to regulation under Sections 404 and 401 of the CWA and which are considered exempt from these federal regulations. JDs are typically conducted for level two ESR projects once the NEPA alternative has been identified. For projects requiring a level one
ESR the JD is typically issued at the time of permit authorization. The JD is requested by and coordinated through ODOT’s Eco Unit. During the JD, USACE will evaluate all aquatic resources on a project site, including streams, ponds, lakes, reservoirs, wetlands, and ditches.

JDs are not required for projects that do not impact potential isolated wetlands and will meet a non-notifying general permit (i.e., projects that meet a NWP/RGP without a permit application submittal).

During the JD site visit, USACE will establish its regulatory authority over streams by confirming the presence and location of an OHWM in the channel. Roadside drainage ditches, including those with apparent wetland characteristics, may or may not be subject to USACE jurisdiction (see Chapter 1.4). USACE has the final say on the jurisdictional status of ditches. Once a JD has been provided by USACE it is valid for five years.

When assessing wetlands during the JD process, USACE considers whether the appropriate hydrology, soils, and vegetation exist to meet the wetland criteria, as defined in the 1987 USACE Wetland Delineation Manual and applicable Regional Supplement. USACE may also define the extent of the area to be regulated. For any wetland, the regulatory jurisdiction (for USACE and/or Ohio EPA for isolated wetlands) begins at the wetland/upland boundary. Activities that occur outside the wetland/upland boundary are not subject to regulation under Section 404 and 401 of the CWA.

During a JD site visit, USACE will also identify wetlands that are hydrologically isolated. A wetland will be determined isolated if it does not exhibit any of the following:

- located in whole or part within 100 feet of the OHWM of a traditional navigable water, interstate water, territorial sea, an impoundment of a jurisdictional water, or a tributary, as defined by the 2015 Clean Water Rule.
- located in whole or in part in the 100-year floodplain and that are within 1,500 feet of the OHWM of a traditionally navigable water, interstate water, the territorial seas, and impoundment, or a tributary, as defined by the 2015 Clean Water Rule.
- located in whole or in part within 1,500 feet of the high tide line of a traditional navigable water or the territorial seas and water located within 1,500 feet of the OHWM of the Great Lakes.
Since the Clean Water Rule was reinstated, isolated wetlands are much less common on Ohio’s landscape. If ODOT requests a preliminary JD for a project, all waters within the project area will be automatically classified as jurisdictional. Isolated wetlands (see Chapter 2.11) are regulated by Ohio EPA’s Isolated Wetland Permit Program (ORC 6111). The Isolated Wetland Permit application requires a JD from USACE that identifies the presence of isolated wetlands.

**Ecological Coordination**

For every ODOT-Let, ODOT-Let Local project, and Local Let project ecological coordination is completed by OES to meet NEPA interagency coordination requirements, Endangered Species Act requirements, Fish and Wildlife Coordination Act requirements, and to provide pre-application coordination for any necessary waterway permits. This coordination process is completed during the Preliminary Engineering Phase of a project and is a prerequisite for making a permit determination. Permit determination materials that are sent to OES prior to or with early coordination materials are not processed because an accurate permit determination cannot be made until impacts to other resources (e.g., threatened and endangered species, scenic rivers) are quantified and any modifications resulting from agency feedback have been incorporated.

The necessary coordination materials are described in ODOT’s Ecological Manual and are not described herein. In all cases, OES initiates the coordination with the agencies after receiving coordination materials from the district. The resulting comments from the agencies are added to EnviroNet as evidence of coordination; all comments must be addressed appropriately in the document.

The level of ecological coordination required typically corresponds to the level of waterway permitting (i.e., NWP/RGP vs. IPs). The anticipated level of waterway permitting often dictates what type of ecological coordination will occur.

**Note:** ecological coordination does not serve as a permit determination. There is usually refinement and further advancement in project design that can occur between the ecological coordination and permit determination actions.
Per ODOT’s Ecological Manual, ecological coordination, if required, will be one of the following ecological survey report (ESR) document types:

- **Level 1 Ecological Survey (Document type: Level 1 ESR)** – These projects typically involve minor amounts of impacts to aquatic resources and often meet the criteria for lower level waterway permits (i.e., NWP, RGP, IWP Level 1).

- **Level 2 Ecological Survey (Document type: Level 2 ESR)** – These projects typically involve large amounts of impacts to aquatic resources and often result in higher levels of required waterway permits (i.e., Individual 404 permit, Individual 401 WQC, IWP Level 3).

- **Level 3 Ecological Survey (Document type: Preliminary Draft ESR, Draft ESR, and Final ESR)** – These projects typically involve large amounts of impacts to aquatic resources and often result in higher levels of required waterway permits (i.e., Individual 404 permit, Individual 401 WQC, IWP Level 3).

**Ohio Scenic Rivers, ODNR, Scenic River Approval**

Chapter 1.2 provides background information on the origin of ODNR’s Scenic Rivers Program and the laws that created the program. ODOT is responsible for obtaining the proper approval on projects that impact scenic rivers in accordance with [ORC 1547.82](https://codes.ohio.gov/R1547/). For Federal Aid projects, coordination with the appropriate scenic rivers staff is required during the agency coordination stage, in order to satisfy the requirements set forth in NEPA.

ODOT will initiate agency coordination with ODNR for comments and will solicit comments again for final ODNR Scenic Rivers approval prior to submission of waterway permit applications or permit determination request. The Scenic Rivers approval is required prior to construction for all projects that cross or lie within 1,000' of a State Scenic River. ODOT is responsible for obtaining Scenic River approval for all projects utilizing ODOT’s NEPA process, regardless of let type.

For emergency, minor maintenance, and exempt projects on or near Ohio’s State Scenic Rivers, there is a [Memorandum of Agreement between ODNR and ODOT](https://www.ohiodot.oh.gov/Docs/Memorandum_of_Agreement.pdf) that covers the coordination/approval process. This agreement is titled 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). The agreement was signed on
August 4, 2014. This MOA streamlines the coordination and approval process for ODOT projects on state scenic rivers. See ODOT’s Ecological Manual Section 3.5.1 for further information on this MOA.

Projects that do not meet the Scenic Rivers MOA will require a project-specific approval. Refer to ODOT’s Ecological Manual Section 3.5.1 for further information on project-specific approvals. See ODNR’s website for more information regarding the Scenic Rivers Program and a map linked to detailed information regarding each State Scenic River.

**Section 7 of the National Wild and Scenic Rivers Act**

The Wild and Scenic Rivers Act established a system of National Wild and Scenic Rivers to protect selected rivers and their surrounding environment. This legislation was enacted by Congress on October 2, 1968 to balance development on certain rivers with the protection of the free-flowing condition of others in order to protect water quality of those rivers for vital national conservation purposes. The National Scenic Rivers in Ohio are state administered rivers.

Section 7 of the National Scenic Rivers Act protects listed rivers from Water Resource Projects (WRP). These projects are defined as any projects that will impact the rivers’ bed or bank below the OHWM. Included in this definition are projects that include bank stabilization, temporary or permanent fills, bank or channel shaping or dredging, placing temporary or permanent structures in the stream channel (dams, piers, or abutments), or any other type of in-stream work. This act prohibits the federal government through loan, grant, or license/permit to construct any WRP that would have a direct and adverse effect on a National Scenic River.

The act also prohibits the construction or support in any project above or below a Scenic River or on any tributary to a Scenic River that would invade the area or unreasonably diminish the Outstanding Recreational Values (ORVs) present in the area on the date of designation. For state administered rivers, the National Park Service (NPS) reviews projects to determine whether the projects had direct and adverse effects on the river.

This Section 7 Determination officially occurs after USACE is notified of the project through a PCN or Individual 404 permit application. USACE is the party who will then request the final Section 7 approval from the NPS. This is very late in the PDP and could cause numerous problems if NPS has not seen the project up to this point. To avoid this scenario, OES initiates a preliminary Section 7 determination with NPS based on
information received before the permit process begins. If the preliminary review determines that the project will not have a direct and adverse effect on the Scenic River or will not invade or unreasonably diminish the Scenic River, then the final determination will state the same if there are no changes to the project (including design, timing, construction practices, or mitigation measures). If it is found during this preliminary stage that there will be a direct and adverse impact, then changes to the project can be made to correct these issues prior to the application submittal to USACE.

ODOT’s Ecological Manual provides a discussion of Section 7 Review/Determination and how ODOT intends to handle applying for and receiving preliminary Section 7 Determinations. The preliminary Section 7 Determination is handled during the NEPA process much like ecological coordination. For ODOT waterway permits, determination is considered a prerequisite to submitting a permit application to USACE. Ideally, an applicant would want to have a preliminary determination of no direct and adverse impact to include with the permit application for review by USACE. This would shorten the permit review process and accelerate USACE’s coordination efforts with NPS, since a preliminary Section 7 determination has already been made.

In addition, the preliminary Section 7 determination provides a window of time to resolve any differences (prior to submitting a permit application to USACE) with NPS, should a direct and adverse impact determination be made. Submission of the PCN (or 404 IP application) to USACE must include the preliminary Section 7 determination and any supporting information documenting resolution of comments, environmental commitments, and mitigation. USACE then requests the final Section 7 approval directly from NPS. USACE cannot approve the 404 permit until the Final Section 7 determination is approved by NPS. Refer to ODOT’s Ecological Manual Section 3.5.2 and Section 7 flowchart for further information. Additional information on National Wild and Scenic Rivers can be found here.

**Floodplain Coordination**

Floodplain coordination is important to the waterway permitting process because conditions contained within the NWPs/RGP have stipulations concerning Federal Emergency Management Agency (FEMA) mapped/regulated 100-year floodplains. NWP General Condition 10 and RGP General Condition 10 state that the activity must comply with applicable FEMA-approved state and local management floodplain requirements. NWP Regional General Condition 6g and RGP General Condition 28(b)(6) state that all PCNs must include a copy of the application Floodplain Insurance Rate Map (FIRM). In
some instances, USACE may ask for evidence of coordination and/or approvals from the Local Floodplain Administrator (LFA) when FEMA-regulated floodplains are involved with the project.

Chapter 1.2 provides background on the laws that resulted in floodplain management and regulation. In 1968, Congress established the National Flood Insurance Program (NFIP) as part of the National Flood Insurance Act. This program is administered by the FEMA. The purpose of the NFIP was to enable property owners in participating communities to purchase flood insurance. It was designed to provide relief to flood victims and lower the cost of federal disaster relief. The NFIP was broadened in 1973 by the Flood Disaster Protection Act and further modified in 1994 by the National Flood Insurance Reform Act. Current floodplain management evolved out of these laws.

FEMA has supported the program with large-scale hazard identification and mapping efforts that are responsible for identifying regulated floodplains. The boundary maps, insurance rate maps, and floodway maps that have resulted identify areas that are susceptible to flooding, known as the FEMA regulatory floodplain. For regulatory purposes, the FEMA-mapped 100-year flood has become the accepted national standard in establishing the regulatory floodplain (known as the mapped 100-year regulatory floodplain, Special Flood Hazard Area (SFHA), or sometimes referred to as designated/regulatory floodway). The 100-year flood is defined as the flood event that has a 1% chance of occurring in any given year or, on average, occurs once in a 100-year period. The term floodplain is defined in ORC 1521.01 as the area adjoining any river, stream, watercourse, or lake that has been or may be covered by flood water.

In Ohio (per ORC 1521.13), ODNR, Division of Soil and Water Resources, Floodplain Management Program oversees floodplain management and regulations. However, according to FEMA, local communities are ultimately responsible for regulating development or encroachments in the designated floodplain. ODNR has informed all cities, counties, and local communities that they are required to monitor and regulate floodplains per FEMA requirements and the various laws that have been enacted. ODNR provides guidance in regulating activities in the FEMA-mapped floodplains to local communities. Each local community has a LFA who has been charged with overseeing his/her respective community’s program.
As a general rule, the following two guidelines apply:

1. Encroachment is not allowed within a designated floodway, unless it is demonstrated that the proposed encroachment would not result in an increase in flood levels during the occurrence of the 100-year base flood discharge.
2. An encroachment on any area mapped on a flood insurance study as an area of special flood hazard (Zones A, A1-A30 and/or AE) will cause no more than a one foot rise in the natural 100-year base water surface elevation (note: the LFA may have more stringent criteria than the general rule for their specific purposes).

Floodplain coordination with the LFA should occur during the NEPA process and should be included within the NEPA document. Note: floodplain coordination does not need to be completed prior to NEPA approval. Typically, the ODOT District Environmental Coordinator, ODOT District Hydraulic Engineer, or Project Manager will coordinate information with the LFA for their review and comment. The floodplain coordination should result in answers to the following questions:

1. Does the project occur within a FEMA designated and/or regulated floodplain?
2. Does the LFA see any fundamental problems with the project?
3. Will the LFA, and the local community, have a floodplain permit that needs to be obtained? If the local community requires a floodplain permit, then the respective ODOT district will be responsible for complying with the conditions of the permit.

ODNR has provided guidance to ODOT that state agencies do not need to obtain the floodplain permit (for more information, see Section 1005.1.3 of ODOT’s Location and Design Manual), but must demonstrate compliance with the conditions of the permit. Some communities do not have an actual permit and will clear the project with a formal letter.

ODNR’s Floodplain Management website contains a list of Ohio Floodplain Administrators. One-hundred-year floodplains are identified through the existing FEMA Flood Insurance Rate Maps or FEMA-approved local floodplain maps. Floodplain maps are available from FEMA.

**Cultural Resources**

Section 106 of the National Historic Preservation Act (NHPA) of 1966 requires federal agencies to consider the effects of their actions on historic properties. In addition, if a federal nexus is created (e.g., federal funding, transfer of ownership, licensing, or federal permits), Section 106 will apply to the project. For all 404 permit applications submitted
to USACE, ODOT provides documentation to demonstrate compliance with Section 106 requirements. For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places (NRHP), the 404 application must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Agency coordination with State Historic Preservation Office (SHPO) must be included in the application. The USACE District Engineer will consider any comments from SHPO concerning the proposed activity's compliance with Section 106 requirements and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

As part of the Section 106 process, ODOT/FHWA must consider the effect of the project on historic properties. Pursuant with ODOT’s 2017 Programmatic Agreement projects that have minimal potential to affect historic properties may be cleared by ODOT. Projects with the potential to affect historic properties must be coordinated with the SHPO regarding the project’s effect on those historic properties. In addition, ODOT must consult with the public, local public agencies, and other parties such as museums, historic preservation organizations, Native American Indian tribes, and archaeological organizations.

Historic properties are divided into five categories for the NRHP: sites, buildings, structures, objects, or districts significant in American history, architecture, archaeology, engineering, or culture at a national, state, or local level. The criteria used to determine the significance of cultural resources are called the National Register Evaluation Criteria. Cultural resources that meet one or more of the four National Register Evaluation Criteria and retain sufficient integrity to convey their historic significance are eligible for inclusion in the NRHP. See the OES Cultural Resources Manual for an overview of the National Register, the National Register Evaluation Criteria, and a discussion of integrity. Section 106 requirements apply to all properties that are included in the NRHP and to those determined eligible for inclusion in the NRHP based on the National Register Evaluation Criteria and guidance on integrity.

The OES Cultural Resources Section establishes procedures and guidelines for following Section 106 requirements and implementing the regulations at 36 CFR Part 800. Refer to the ODOT Cultural Resources Manual for more information. The results of cultural resources coordination and documentation will be required to be completed prior to issuance of any federal permit. For waterway permits, cultural resources coordination is
a prerequisite for obtaining a 404 permit, whether that be a NWP, a RGP, or an Individual 404 permit. The reason for cultural resources coordination is twofold:

1. ODOT must complete Section 106 requirements because federal funds and approvals are required.
2. USACE must document that Section 106 requirements have been fulfilled by the permit applicant prior to it being able to authorize a project as a federal permitting agency.

For all 404 permit applications submitted to USACE, ODOT provides documentation to demonstrate compliance with Section 106 requirements. For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the 404 application must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property. Agency coordination with SHPO must be included in the application. The USACE District Engineer will consider any comments from SHPO concerning the proposed activity's compliance with Section 404, 106 requirements and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

**Coastal Zone Management**

The Coastal Zone Management Act of 1972 (CZMA) (see background on coastal zone laws in Chapter 1.2) requires that all federal actions likely to affect any land or water use or natural resource along coastal areas, must be consistent with the state's coastal management program. ODNR implements the Ohio Coastal Management Program (OCMP) in cooperation with other state agencies and local governments. The OCMP implements the federal consistency provisions of the CZMA and promotes the wise management of those land and water uses that have direct and significant impacts upon the Lake Erie coastal area. The federal consistency provisions of the CZMA bring federal actions into compliance with approved state coastal management programs and also increase state and local participation in federal decision making. If an ODOT project is within the coastal management area, but not covered by the ODNR consistency letters, that project must be coordinated with ODNR to obtain a coastal consistency certification. The coastal consistency certification may include project specific conditions. A project which has a project specific consistency certification must have that certification included in the waterway permit application. See ODOT’s [Ecological Manual Section 3.5.6](#) for further information.
All ODOT construction, maintenance, and operational activities in the Lake Erie coastal management area must be consistent with the OCMP. Projects that directly affect Lake Erie or its tributaries, within the zone of lake level influence, are to be coordinated to ensure that related concerns are properly resolved.

ODNR completed its review of the 2017 USACE NWP Program to determine whether their use is consistent with the OCMP. ODNR concurred with USACE’s consistency determination for the following NWPs (provided all state permits, licenses, leases, and approvals are obtained for the project):

1, 2, 4, 5, 6, 8, 9, 10, 11, 16, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 39, 40, 41, 42, 43, 45, 48, 49, and 50.

ODNR imposed specific conditions on the following NWPs: 3, 7, 12, 13, 14, 15, 17, 36, 38, and 51. Activities which are not included in the ODNR concurrence of the NWPs must obtain a project-specific CZMA consistency determination. On July 2, 2014, ODNR-Office of Coastal Management provided conditional concurrence with the Federal Consistency Determination for the current RGP.

In May 2005, ODOT and ODNR developed a Memorandum of Understanding (MOU) to streamline the Coastal Zone Consistency Certification Process. The MOU is currently being updated and will be available at a future date. The 2005 MOU should be utilized until it is officially replaced.

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**Prerequisites for Permit Applications**

Depending on the type of project and the water resource impacts being proposed, the following items may be required for permit applications.

- **Jurisdictional Determination (USACE)**
- **Ecological Coordination (various agencies)**
- **Ohio Scenic Rivers Approval (ODNR)**
- **Section 7, National Wild and Scenic Rivers Act Approval (NPS)**
- **Floodplain Coordination (local administrator)**
- **Cultural Resources Coordination (SHPO)**
- **Coastal Zone Management Consistency Approval (ODNR)**
- **Stream and/or Wetland Mitigation Proposal (OES)**
Stream and Wetland Mitigation

ODOT projects requiring waterway permits may require some form of compensatory stream and/or wetland mitigation. The process of seeking out stream/wetland mitigation opportunities, especially for major projects, should begin prior to the drafting of waterway permit applications and is therefore considered a prerequisite for waterway permitting. See Chapter 7 of this manual for further information regarding ODOT’s procedure for mitigation.

1.7 ODOT’s Project Development Process (PDP)

ODOT's PDP is a framework for projects that establishes scope of work and deliverables and provides for an integrated, multi-disciplined decision-making process. The PDP forms the basis for legally defensible actions by ODOT within NEPA. In 2011, ODOT revamped the PDP to minimize project processing time, reduce costs in the face of dwindling revenue, and to better balance risk during project development. The primary goal of the new PDP was to allow project managers to develop what is needed for a project to move forward and balance potential NEPA work items against project-specific details. The PDP merges design and NEPA.

The new PDP is a five-phased process. A project is moved through these phases utilizing one of five paths, depending on the complexity of the project. Regardless of path, the project is initiated via the Project Initiation Package. During an on-site review of the project area conducted in the Planning Phase of the PDP, ODOT district staff will recognize the presence of surface waters that may require permitting to impact. See the PDP website for more information.

OES personnel, district environmental staff, and/or prequalified consultants are responsible for completing required documents and tasks related to waterway permitting throughout the PDP. For example, completion of the ESR, estimating impacts, drafting and submitting of the permit application, and the receipt of the permits are all individual tasks within the phases in each path.

Note: not all projects will require completion of every task outlined in Table 1.
Table 1: Project Development Process and Waterway Permitting Related Tasks

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<tr>
<th>PDP PHASE</th>
<th>WATERWAY PERMITTING RELATED TASKS</th>
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| Planning             | - Conduct literature and field review of project study area to identify potential environmental issues (streams, wetlands, threatened or endangered species habitat)  
- Draft the project’s purpose and need statement |
| Preliminary Engineering | - Perform initial ecological field studies of project alternatives for inclusion in Alternative Evaluation Report |
| Environmental Engineering | - Conduct fieldwork for ecological resources for the preferred alternative  
- Prepare permit determination request and issuance of a permit determination  
- Complete initial coordination with natural resource regulatory agencies (ODNR, USFWS, USACE, Ohio EPA)  
- Evaluate stream and/or wetland mitigation opportunities  
- Prepare and submit permit applications (404, 401, Section 10, Section 9, Section 408, Isolated wetlands)  
- Prepare and submit a permittee-responsible compensatory mitigation plan  
- Commence work on any required compensatory mitigation |
| Final Engineering/ROW | - Ensure that any required mitigation work is underway prior to initiation of construction and impacts  
- Review of Stage 3 design plans to confirm that all applicable environmental commitments and waterway permit Special Provisions are included, as applicable |
| Construction         | - Attend pre-construction, progress, and post-construction meetings to discuss environmental commitments and compliance, and permit requirements, as needed  
- Completion of any required mitigation monitoring and submission of annual reports to USACE and/or Ohio EPA. |

1.8 WATERWAY PERMITS AND THE DESIGN-BUILD PROCESS

The design-build process combines the design and construction of a project into one contract and typically results in faster project delivery than the traditional design-bid-build process. The designing firm and construction contractor become a team, working concurrently on the design and construction phases of a project, to expedite delivery. The time savings in design-build projects is realized by eliminating the lead time necessary to contract a designer, and then accept bids from contractors to build the design. Projects proceed from design to construction much faster through implementation of the single design-build contract.
Additionally, since the designer and contractor work in tandem, the contractor's changes can be incorporated in the design phase, eliminating the need for costly and time-consuming changes during construction. This benefit also allows ODOT to estimate project costs early in the PDP, allowing for more effective budget planning.

The design-build approach presents unique challenges for the waterway permits process, especially when a project requires IPs. With a design-build project, the designer and contractor must be granted the flexibility to develop a project according to the conditions of the site, safety, design standards, and transportation demands. Since a significant portion of the design occurs after the project sells, the ecological studies and waterway permits must occur early in the design process with minimal design details. In order to allow the design-build team the flexibility that defines this project approach, environmental impacts must be conservatively estimated as a “worst case scenario” even though the degree of impacts initially estimated will not likely be the final result of the project.

Challenges arise when demonstrating avoidance and minimization and fulfilling mitigation requirements for projects requiring Individual 404 and 401 permits. OAC 3745-1-05 and Section 404(b)(1) of the CWA requires the applicant to address avoidance and minimization of streams and wetlands in a project area. ODOT must demonstrate avoidance and minimization for the on-site and off-site alternatives discussed in the 401 application. The on-site alternative will typically need more detail and discussion on avoidance and minimization than the off-site alternative. Therefore, ODOT must limit the design-build team’s flexibility, typically to a minimal extent, in order to secure the 401 and 404 permits.

The method by which ODOT can exercise some limitations on the design-build team occurs by creating “no work” zones that the contractor must avoid under all circumstances. These “no work” zones must be established for the project scope so that the design-build teams bidding on a project understand the expectations and limitations of the project. Avoidance of the “no work” zones are included in the environmental commitments, special provisions, and conditions of the waterway permits.

Mitigation requirements are a result of the degree of avoidance and minimization established for the selected alternative. Stream and wetland mitigation is often significantly over estimated in order to satisfy the design-build process, which can result in a more costly and challenging mitigation effort. The development of the mitigation plan
must begin early in the process in order to complete a final mitigation plan for receipt of 404 and 401 permit approvals, thereby allowing construction to commence on schedule. While the total quantity of stream and wetland impacts permitted will not likely be affected by the project, with impacts essentially being over mitigated, the resource agencies will not allow mitigation to be refunded for design-build projects.

OES, the design consultant, and environmental consultant must work cooperatively to determine what resources can be avoided and/or minimized to establish “no work” zones. After determining “no work” zones, final impacts can be calculated and the amount of required mitigation can be determined. If scoped to complete waterway permit applications for a design-build project, contact OES to set up a permit strategy meeting.

1.9 CONSULTANT PREQUALIFICATION AND EVALUATION

Prequalification of environmental services is one component of ODOT’s qualifications-based selection process. Only consultants who are prequalified are eligible to be selected to work on environmental projects. These environmental disciplines have specialized documentation requirements and are a part of the interdisciplinary expertise approach to transportation decision making described in ODOT’s transportation process manuals and guidelines. Waterway permits is a discipline where ODOT requires consultants to be prequalified.

ODOT’s "Consultant Prequalification Requirements and Procedures" provide detailed information on all of the department’s prequalification disciplines and submittal format and requirements. Guidance for environmental consultant prequalification can be found in the above link.

Documents prepared by consultants will be evaluated by the WPU using ODOT’s Consultant Evaluation Process. This process evaluates a consultant’s work with respect to waterway permit applications and permit authorizations from the agencies.

Consistent poor performance may jeopardize the prequalification status of the consultant. As discussed in Chapter 1.1, one of the primary goals of the manual is to provide guidelines for preparing waterway permit applications in a consistent manner so as to prevent such occurrences.