

Appendix 4: Overview of Stream/Wetland Regulations

According to the federal Clean Water Act, anyone who wishes to discharge dredged or fill material into the waters of the U.S., must obtain a Section 404 permit from the U.S. Army Corps of Engineers (Corps) and a Section 401 Water Quality Certification (WQC) from the state. The Corps will also require a Section 10 permit if the fill is located in a navigable water.

Section 404 Permits

Section 404 of the Clean Water Act requires approval prior to discharging dredged or fill material into the waters of the United States. Typical activities requiring Section 404 permits are:

- Depositing of fill or dredged material in waters of the U.S. or adjacent wetlands.
- Site development fill for residential, commercial, or recreational developments.
- Construction of revetments, groins, breakwaters, levees, dams, dikes, and weirs.
- Placement of riprap and road fills.

Waters of the United States

Waters of the United States includes essentially all surface waters such as all navigable waters and their tributaries, all interstate waters and their tributaries, all wetlands adjacent to these waters, and all impoundments of these waters.

“*Wetlands*” are areas characterized by growth of wetland vegetation (bulrush, cattails, rushes, sedges, willows, pickleweed) where the soil is saturated during a portion of the growing season or the surface is flooded during some part of most years. Wetlands generally include swamps, marshes, bogs, and similar areas.

The landward regulatory limit for non-tidal waters (in the absence of adjacent wetlands) is the *ordinary high water mark*. The ordinary high water mark is the line on the shores established by the fluctuations of water and indicated by physical characteristics such as:

- a clear natural line impressed on the bank;
- shelving;
- changes in the character of the soil;
- destruction of terrestrial vegetation;
- the presence of litter and debris;
- or other appropriate means that consider the characteristics of the surrounding areas.

Navigable Waters

Navigable waters are defined as waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate or foreign commerce up to the head of navigation. Section 10 and/or Section 404 permits are required for construction activities in these waters. A complete list is available from the Army Corps of Engineers District Office.

Section 401 Water Quality Certification

The 401 Water Quality Certification (WQC) is required from Ohio EPA prior to the Corps approval of a Section 404 permit. Essentially these permitting processes work in tandem and include much of the same information. The 401 WQC requires an anti-degradation analysis investigating three alternatives: preferred alternative, minimum degradation alternative, and non-degradation alternative. The preferred alternative would include impacts that allow the applicant to develop the property in a preferred development plan. The minimum degradation alternative must minimize the impacts to water resources while still allowing the project to be constructed in an economically viable fashion. The non-degradation must propose a site development plan, which includes zero impacts to surface waters of the state. 401 WQC will be reviewed with varying levels of scrutiny based on the amount of impacts and quality of water resources. For example, a public need must be demonstrated to allow for impacts to category 3 wetlands, but this review is not necessary for impacts to category 1 or 2 wetlands. Fees are required at application and for review of Ohio 401 Water Quality Certification applications.

Two types of 404 permits can be used in the State of Ohio, depending on the amount of linear feet of stream, linear feet of shoreline or acres of wetland proposed to be impacted. The types of permits include Individual Permits and Nationwide Permits. Some areas of the U.S. also have Regional Permits, but none currently exist in Ohio.

Individual Permits

Individual permits are issued following a full public interest review of an individual application for a Department of the Army permit. A public notice is distributed to all known interested persons. After evaluating all comments and information received, final decision on the application is made.

The permit decision is generally based on the outcome of a public interest balancing process where the benefits of the project are balanced against the detriments. A permit will be granted unless the proposal is found to be contrary to the public interest. Processing time usually takes 60 to 120 days unless a public hearing is required or an environmental statement must be prepared.

Individual permits will require an individual 401 WQC from the Ohio EPA including a full antidegradation review.

Nationwide Permits

A nationwide permit is a form of general permit, which authorizes a category of activities throughout the nation. Nationwide Permits are for certain types of projects that are similar in nature and cause minimal degradation to waters of the state. These permits substantially expedite the permitting process. These permits are valid only if the conditions applicable to the permits are met. If the conditions cannot be met, an individual permit will be required.

Ohio EPA has pre-granted Section 401 Water Quality Certifications to Nationwide Permits with general and specific conditions. To determine if your project qualifies for Nationwide Permits coverage, or requires an individual Section 401 WQC from Ohio EPA, applicants should contact the Corps first to discuss the project.

Isolated Wetland Permits

In January 2001, the United States Supreme Court Decision in the case of Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers stated that the Corps

did not have authority to regulate isolated wetlands under Section 404 of the Clean Water Act. Prior to that ruling, the Corps regulated activities in all streams and wetlands through the issuance of 404 Permits.

As a result of this decision, the Ohio EPA adopted emergency rules in April of 2001 to establish a state-permitting program, but these rules were effective for only ninety days. On July 17, 2001, Governor Bob Taft signed House Bill 231 into law. The bill establishes a permanent permitting process for isolated wetlands. The Army Corps of Engineers has maintained the authority to determine whether a wetland is determined to be isolated. If the determination by the Corps is that the wetland is isolated, applicants must contact the Ohio EPA to determine the correct level of Isolated Wetland Permit. More information can be found on the Ohio EPA web site.

Pre-Application Consultation

Applicants are encouraged to contact the Corps of Engineers and the Ohio EPA for proposed work in waters of the state. By discussing all information prior to application submittal, the application will be processed more efficiently. If an applicant is unsure if an application is required, the Corps will provide an official determination as to the need for a Department of the Army permit upon request.

Contacts for Ohio EPA and Army Corps of Engineers

Ohio EPA, 401 Water Quality Certifications

Randy Bournique
122 S. Front Street
P. O. Box 1049
Columbus, Ohio 43216-1049
(614) 644-2013
Randy.Bournique@epa.state.oh.us
www.epa.state.oh.us/dsw/401/401section.html

For Questions about the Ohio Rapid Assessment Method, contact John Mack at the above address or at (614) 644-3076, John.Mack@epa.state.oh.us

U.S. Army Corps of Engineers, Section 404 Permits

Buffalo District
1776 Niagara Street
Buffalo, NY 14207-3199
FAX (716) 879-4310
<http://www.lrb.usace.army.mil/orgs/reg/index.htm>

Louisville District
Attention: Regulatory Branch, OP-F
P.O. Box 59
Louisville, KY 40201-0059
Phone: (502) 315-6733
<http://www.lrl.usace.army.mil/>

Huntington District
502 Eighth Street
Huntington, WV 25701
(604) 529-5210
<http://www.lrh.usace.army.mil/or/permits/>

Pittsburgh District
William S. Moorhead Federal Building
1000 Liberty Avenue
Pittsburgh, PA 15222
<http://www.lrp.usace.army.mil/or/or-f/permits.htm>

Definitions Associated with 404/401 and Isolated Wetland Permits

Isolated Wetlands – per OAC 3745-1-50

“Hydrologically isolated wetlands” means 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 one hundred year “floodplain” as that term is defined in this rule; and
- (3) Have no contiguous hydric soil between the wetland and any surface water of the state.

Ordinary High Water Mark

Landward regulatory limit for non-tidal waters (in the absence of adjacent wetlands). Line on the shores or river banks established by the fluctuations of water and indicated by physical characteristics such as:

- a clear natural line impressed on the bank;
- shelving;
- changes in the character of the soil;
- destruction of terrestrial vegetation;
- the presence of litter and debris;
- or other appropriate means that consider the characteristics of the surrounding areas.

Navigable Waters

Waters that have been used in the past, are now used, or are susceptible to use as a means to transport interstate or foreign commerce up to the head of navigation. Section 10 and/or Section 404 permits are required for construction activities in these waters. A complete list is available in the District Office.

Ohio Rapid Assessment Method (ORAM)

Method which allows an applicant to assess the quality of the wetland without completing detailed vegetative or hydrologic analyses. The outcome of applying this method is the categorization of wetlands as either Category 1, 2 or 3. The Ohio EPA reviews categorization of wetlands. The current manual is ORAM Version 5.0.

Waters of the State

“Surface waters of the state” or “water bodies” mean all streams, lakes, reservoirs, ponds, marshes, wetlands or other waterways which are situated wholly or partially within the boundaries of the state, except those private waters which do not combine or effect a junction with natural surface or underground waters. Waters defined as sewerage system, treatment works or disposal system in section 6111.01 of the Revised Code are not included.

Wetlands – Effective 12/30/2002, Per OAC 3745-1-02

“Wetlands” means those areas that are inundated or saturated by surface or ground water at a frequency and duration that are sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. “Wetlands” includes swamps, marshes, bogs, and similar areas that are delineated in accordance with the 1987 United States Army Corps of Engineers wetland delineation manual and any other procedures and requirements adopted by the United States army corps of engineers for delineating wetlands.

Wetland Categories – Per, OAC 3745-1-54(C)

Category 1 Wetlands

- a) support minimal wildlife habitat, and minimal hydrological and recreational functions as determined by an appropriate wetland evaluation methodology acceptable to the director. Wetlands assigned to category 1 do not provide critical habitat for threatened or endangered species or contain rare, threatened or endangered species.
- b) Wetlands assigned to category 1 may be typified by some or all of the following characteristics: hydrologic isolation, low species diversity, a predominance of non-native species (greater than fifty per cent areal cover for vegetative species), no significant habitat or wildlife use, and limited potential to achieve beneficial wetland functions.
- c) may include, but are not limited to, wetlands that are acidic ponds created or excavated on mined lands without a connection to other surface waters throughout the year and that have little or no vegetation and wetlands that are hydrologically isolated and comprised of vegetation that is dominated (greater than eighty per cent areal cover) by species including, but not limited to: *Lythrum salicaria*; *Phalaris arundinacea*; and *Phragmites australis*.

Category 2 Wetlands

- a) support moderate wildlife habitat, or hydrological or recreational functions as determined by an appropriate wetland evaluation methodology acceptable to the director or his authorized representative.
- b) 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 reestablishing lost wetland functions.

Category 3 Wetlands

- a) support superior habitat, or hydrological or recreational functions as determined by an appropriate wetland evaluation methodology acceptable to the director or his authorized representative.
- b) may be typified by some or all of the following characteristics: high levels of diversity, a high proportion of native species, or high functional values.
- c) may include, but are not limited to: 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 including, but not limited to, bogs and fens.

Wetland Delineation

Process utilized to determine the areal extent and boundaries of a jurisdictional wetland. Currently, the 1987 U.S. Army Corps of Engineers Manual details the procedures for performing a wetland delineation. The results of a wetland delineation are reviewed by the Army Corps of Engineers.