

OHIO COASTAL MANAGEMENT PROGRAM POLICY 12 – WETLANDS

IT IS THE POLICY OF THE STATE OF OHIO TO PROTECT, PRESERVE AND MANAGE WETLANDS WITH THE OVERALL GOAL TO RETAIN THE STATE'S REMAINING WETLANDS, AND, WHERE FEASIBLE, RESTORE AND CREATE WETLANDS TO INCREASE THE STATE'S WETLANDS RESOURCE BASE BY:

- A. REGULATING ACTIVITIES IN WETLANDS THROUGH THE ENFORCEMENT OF OHIO WATER QUALITY STANDARDS FOR ANY ACTIVITY THAT MAY RESULT IN ANY DISCHARGE INTO WETLANDS AND OTHER WATERS OF THE STATE (O.R.C. 6111.03(O), O.R.C. 6111.03(P), O.A.C. 3745-1-05, 3745-1-50 TO 54 AND 3745-32);**
- B. REGULATING ACTIVITIES IN ISOLATED WETLANDS THROUGH THE ENFORCEMENT OF STATE ISOLATED WETLAND PERMITS (O.R.C. 6111.02, 6111.021, 6111.022, 6111.023, 6111.024, 6111.025, 6111.026, 6111.027, 6111.028, and 6111.029);**
- C. PROVIDING LEADERSHIP AND TAKING ACTION TO MINIMIZE ADVERSE EFFECTS TO WETLANDS IN CARRYING OUT ODNR RESPONSIBILITIES, AND, TO THE EXTENT ALLOWED BY LAW, AVOIDING UNDERTAKING CONSTRUCTION, PERMITTING ACTIVITIES, OR PROVIDING FINANCIAL ASSISTANCE FOR CONSTRUCTION THAT MAY DIRECTLY OR SECONDARILY DEGRADE OR DESTROY THE NATURAL AND BENEFICIAL FUNCTIONS OF WETLANDS (ODNR DIRECTIVE - WETLANDS);**
- D. ACQUIRING WETLANDS OR INTEREST IN WETLANDS AND THE BUFFER LANDS THAT MAY BE NEEDED FOR THEIR PROTECTION; RESTORING AND MANAGING PREVIOUSLY CONVERTED OR DEGRADED WETLANDS; AND PROVIDING ASSISTANCE TO PRIVATE OWNERS FOR WETLANDS RESTORATION AND MANAGEMENT;**
- E. COOPERATING WITH THE OLD WOMAN CREEK NATIONAL ESTUARINE RESEARCH RESERVE, THE OHIO SEA GRANT COLLEGE PROGRAM AND OTHER INSTITUTIONS IN EDUCATION AND RESEARCH. THE STATE WILL ENCOURAGE WETLANDS RESEARCH AND PRIORITIZE FUNDING ASSISTANCE FOR RESEARCH THAT ENHANCES COASTAL MANAGEMENT; AND**
- F. PROVIDING INFORMATION ON WETLANDS RESOURCES AND TECHNICAL ASSISTANCE TO ORGANIZATIONS AND INDIVIDUALS REQUESTING HELP IN WETLANDS CONSERVATION PROJECTS; AND**
- G. DEVELOPING A STATEWIDE WETLAND RESTORATION AND MITIGATION STRATEGY.**

Authorities and Administration

- A. All coastal area wetlands fall within the jurisdiction of the U.S. Army Corps of Engineers (COE) in regulating activities under the Rivers and Harbors Act of 1899 (Section 10) and/or the CWA (Section 404). The scope of the state's authority under Section 401 of the CWA and Ohio water pollution control laws is coterminous with that of the COE and covers all surface waters within the coastal area, including wetlands. However, state water pollution control law extends the state's authority to require a state water quality certification for all applicants for any federal license or permit to conduct any activity that may result in any discharge into the waters of the state (O.R.C. 6111.03(P)). "Waters of the state" include wetlands (O.A.C. 3745-32-01(N)). "Wetlands" are defined in state regulations as "areas where the water table is at, near, or above the land surface long enough each year to support the growth of water dependent vegetation and to result in the formation of characteristic wet soil types. These include marshes, swamps, bogs and similar areas" (O.A.C. 3745-32-01(O)).

Ohio has developed wetland water quality standards (See Appendix K). This rule-making was a joint effort of Ohio EPA and the ODNR. The basic structure of the wetland standards is to assign one designated use to all jurisdictional wetlands. Under OAC 3745-1-53, all of these surface water bodies receive the "wetland" use designation. The OAC Rule 3745-1-51 also contains narrative criteria, composed of goal statements that support the wetland use designation. Numeric chemical criteria for the wetland use, in OAC Rule 3745-1-52, apply to point source discharges. Those discharges are held to the warmwater habitat aquatic life use chemical criteria. For wetland discharges this criteria needs to be met at the Aend of pipe≡.

The wetland antidegradation provisions found in OAC Rule 3745-1-54, have a tiered system of protection. A wetland under review is placed into one of three antidegradation categories. These categories are based on a wetland's relative functions and values, sensitivity to disturbance, rarity and the ability to adequately mitigate for its loss through wetland restoration or creation.

Category 1 wetlands are those which support minimal wetland functions. Wetlands assigned to Category 1 do not provide critical habitat for threatened or endangered species or contain rare, threatened or endangered species. Category 1 wetlands are likely to be hydrologically isolated, have low species diversity, be dominated by non-native species in the plant community and have no significant wildlife habitat or use. Category 1 wetlands would have limited potential for reestablishment of lost wetland functions. Typical Category 1 wetlands would include wetlands that are acidic ponds created on mined lands, those wetlands that have little or no plants, and wetlands that are hydrologically isolated and comprised primarily of invasive, opportunistic plant species such as purple loosestrife (*Lythrum salicaria*), reed canary grass (*Phalaris arundinacea*) and giant reed (*Phragmites australis*).

Category 2 wetlands are those which support moderate hydrological, habitat, recreational and other wetland functions. Wetlands assigned to Category 2 are likely to be dominated by native species but generally would not have habitat for rare, threatened or endangered species.

Category 2 wetlands could be wetlands that are degraded but still have a reasonable potential for reestablishing lost wetland functions.

Category 3 wetlands are those that support superior wetland functions. Wetlands assigned to Category 3 would typically have high levels of biodiversity, a high proportion of native species or other high functional values. Category 3 wetlands might include wetlands which contain or provide habitat for threatened or endangered species, high quality forested wetlands, including old growth forested wetlands, mature forested riparian wetlands, vernal pools and wetlands which are scarce regionally or statewide including bogs and fens.

OAC Rules, 3745-1-05 and 3745-1-54, establish criteria for determining when the Director of Ohio EPA can allow a lowering of water quality in wetlands and what is appropriate mitigation for those impacts. OAC Rule 3745-1-05 identifies Category 1 wetlands as Limited Resource Waters and Category 2 and Category 3 wetlands as General High Quality Waters.

In order for an applicant to impact a Category 1 wetland the applicant must show that alternatives to impacting the wetland have been considered. Unavoidable wetland impacts must be minimized by replacing the storm water and some water quality functions on-site. The impacted Category 1 wetlands must then be mitigated for at a ratio of one and a half acres of wetland mitigation for every acre of wetland destroyed (1.5:1). This mitigation can occur anywhere within the same U.S. Army Corps of Engineers District. Ohio is divided into four of these districts which are based on drainage areas.

Category 2 wetlands require that the applicant has considered all alternatives to their destruction. For unavoidable impacts the applicant must demonstrate that they have minimized the acreage of wetland impacts. The applicant must then demonstrate that the proposed lowering of water quality is necessary for important social and economic development. Applicants must demonstrate that they can successfully mitigate for their project by restoring or creating wetlands of equal or higher quality than those being impacted. Approved wetland impacts must be mitigated on-site (within a one mile radius) if there exists a high likelihood of success for such an endeavor. If the applicant can demonstrate that on-site mitigation is not practicable then mitigation can occur anywhere within the same watershed, or a grouping of thirty-seven watersheds comprising Ohio. Mitigation ratios for Category 2 wetland impacts range from 1.5:1 to 2.5:1, with higher ratios required for off-site mitigation and for replacement of forested wetlands.

Approved impacts to Category 3 wetlands must meet all of the demonstrations required for impacts to Category 2 wetlands. Additionally, for Category 3 wetland impacts to be approved, the applicant must show that there is a public need for their project. Again, approved impacts must be mitigated for by restoration or creation of wetlands of equal or higher quality than those being impacted. Mitigation ratios for Category 3 wetlands range from 2:1 to 3:1 with higher ratios for off-site mitigation and for impacts to forested systems.

OAC Rule 3745-1-54 also singles out a subset of Category 3 wetlands, those that are scarce either regionally or statewide, where only temporary disturbances of water quality can be

authorized. This subset includes such wetland ecosystems as bogs, fens and other wetland systems that are high quality and rare.

OAC Rule, 3745-1-05 allows the Director to designate surface waters with outstanding ecological or recreational values as Outstanding National Resource Waters. Amendments to OAC Rule 3745-1-05 address review requirements for some wetlands designated Outstanding National Resource Waters. Disturbances to the water quality of wetlands and other surface waters designated as Outstanding National Resource Waters can only be authorized if they are short-term.

As well as providing mitigation for impacted Category 2 and Category 3 wetlands, the applicant must always replace the storm water and some water quality functions on-site. Peak post-development rates of surface runoff cannot exceed peak pre-development surface runoff rates on the project site. Retention or detention structures built on-site to accommodate this requirement must also incorporate chemical water quality improvement measures to the maximum extent practicable.

All approved wetland mitigation projects must be protected in perpetuity and are subject to a five year monitoring program under OAC Rule 3745-1-54. The monitoring includes information on hydrology, plants, soils and chemical water quality. The monitoring includes submittal of an annual report by the applicant and a third year site visit by Ohio EPA staff. The applicant is responsible to undertake any recommendations made by Ohio EPA to improve the mitigation wetlands. At the end of the five year monitoring period, if they can show that the mitigation is successful, the applicant is released from any further monitoring requirements.

The discharge of dredged or fill material or the creation of any obstruction or alteration is prohibited in wetlands unless the Director, Ohio EPA, determines that the activity will (1) not interfere with the attainment or maintenance of water quality standards, and (2) not result in a violation of any applicable provision of the CWA, including: (a) effluent limitations described in Section 301; (b) water quality related effluent limitations as described in Section 302; (c) water quality standards and implementation plans as described in Section 303; (d) national standards of performance as described in Section 306; or (e) toxic and pretreatment effluent standards as described in Section 306. Notwithstanding an applicant's demonstration that these criteria are met, the director may deny an application for a Section 401 certification if the director finds that the discharge or obstructions or alterations will result in adverse long- or short-term impact on water quality (O.A.C. 3745-32-05).

There are water quality certification exemptions. No Section 401 water quality certification need be obtained if the discharge of dredged or fill material is part of the construction of a federal project specifically authorized by Congress, provided the effects of such discharge are included in an environmental impact statement submitted to Congress prior to the actual discharge (O.A.C. 3745-32-03).

The director may impose terms and conditions as a part of the Section 401 water quality certification that are necessary to ensure compliance with the applicable laws and to ensure adequate protection of water quality (O.A.C. 3745-32-05(C)). Also, prior to the issuance of a water quality certification or prior to, during or after the discharge of dredged or fill material, to ensure adequate protection of water quality, the director may require that the applicant perform various environmental quality tests (O.A.C. 3745-32-05(D)). The director may revoke a Section 401 water quality certification if the director concludes at any time that any applicable laws or regulations have been or are likely to be violated (O.A.C. 3745-32-06). Section 401 certifications are issued, modified, revoked or denied and may be challenged in accordance with the provisions of the rules of procedure of the Ohio EPA, Chapter 3745-47 of the Administrative Code (O.A.C. 3745-32-07). Procedural rules require public notice regarding such Ohio EPA actions; public notice is given when the agency begins consideration of issuance of Section 401 certification.

In reviewing applications for water quality certification, Ohio EPA solicits input from ODNR and the U.S. Fish and Wildlife Service. ODNR may provide comments or data regarding fish and wildlife impacts, biological and other natural resources, and potential effects upon resources or uses of concern to ODNR. Ohio EPA receives and incorporates in its administrative record comments and recommendations submitted by ODNR and the Fish and Wildlife Service to the Corps of Engineers (COE). Comments by ODNR are submitted in part to express the views of the state regarding the conservation of fish and wildlife resources in accordance with the Fish and Wildlife Coordination Act and other applicable laws and regulations.

State authority provides increased protection of wetlands beyond controls over activities under the COE's Section 10/404 permit authority. State law provides that the Director, Ohio EPA may certify or deny certification to any applicant for a federal license or permit to conduct any activity that may result in a discharge into the waters of the state (O.R.C. 6111.03(P)). Further, O.A.C. 3745-32-02 sets forth the specific requirements that a Section 401 water quality certification is required to obtain the following: (1) a permit from the COE pursuant to Section 10 of the Rivers and Harbors Act; (2) a permit from the COE pursuant to Section 404 of the Clean Water Act; (3) a permit from the COE under both Section 10 and 404; and (4) any other federal permit or license that may result in any discharge to waters of the state.

In addition, increased protection of wetlands beyond the scope of the COE's authority is realized through the state's water pollution law and regulations. As an illustration, in December, 1996, the COE published the final rule for the administration of its nationwide permit program regulations. The Corps' permits are not valid until the state certifies that the discharge does not violate the state's water quality standards. Ohio EPA denied water quality certification for nationwide permits 17 – discharges associated with hydropower projects and 21 – surface coal mining activities.

Also, state water quality certification has imposed general and specific conditions on many nationwide general permits. A list of Ohio EPA's water quality certification exceptions to Section 404 Nationwide Permits is provided in Appendix K.

The Environmental Review Appeals Commission (ERAC), an appellate review board, separate and distinct from the Ohio EPA (see Chapter 4, Section 1), has ruled that the director's action of issuing water quality certification to an applicant with the condition that a portion of a wetland not be filled is reasonable and lawful because wetlands are waters of "exceptional ecological significance" within the meaning of O.A.C. 3745-1-05 and are therefore subject to the antidegradation policy of Ohio's water quality standards (EBR 79-42, 8/30/79). This decision construing Ohio EPA regulations has been sustained on appeal to the Franklin County Court of Appeals and the Ohio Supreme Court.

- B. Ohio House Bill 231, effective July 17, 2001, mandates regulation of dredge and fill impacts to isolated wetlands and requires appropriate mitigation. Ohio EPA now regulates isolated wetlands deemed non-jurisdictional by the U.S Army Corps of Engineers as a result of SWANCC v. U.S. Army Corps of Engineers (O.R.C. Sections 6111.02, 6111.021, 6111.022, 6111.023, 6111.024, 6111.026, 6111.027, 6111.028, and 6111.029). The law also gave the Director of the Ohio Department of Natural Resources authority to establish a list of approved wetland mitigation banks and to establish and operate wetland mitigation banks under O.R.C. 6111.025. The state isolated wetland permit law and the approved wetland mitigation bank list (August 2001) are included in Appendix K.
- C. Above and beyond the state's water pollution control laws, Section 401 implementing regulations and review guidelines, ODNR's Directive on Wetlands (1999 revision to the 1989 Policy Statement) "establishes a framework for the Ohio Department of Natural Resources' (ODNR) planning, land management and development; all regulation and financial assistance; water resources development, nonpoint source management and other cooperative programs, technical assistance and consultation; and external communication of departmental directives, procedures and policies."

ODNR follows this published wetlands directive in providing input to Section 404 permitting by the Corps of Engineers and Section 401 certification actions by Ohio EPA. Implementing provisions of ODNR's wetlands policy includes the following: requiring wetlands conservation measures in the planning of water resources developments and capital improvements projects; prioritizing funding for wetlands acquisition and protection; requiring that ODNR's regulatory programs be administered in a manner that avoids unnecessary wetlands damages and losses; and directing land managing divisions to act affirmatively to preserve and enhance wetlands. (Appendix K contains the full text of ODNR's Directive on Wetlands.)

- D. It is the policy of the OCMP to seek increased dedicated public funding for wetlands restoration, enhancement and management. This includes financial assistance such as tax abatements and other incentives for private owners when long-term benefits to the general public interest will be realized. Coastal wetlands are protected by acquisition of land interests under various programs. ODNR has the authority to appropriate property for specific uses and purposes on behalf of any division in the department (O.R.C. 1501.01).

The Division of Natural Areas and Preserves (DNAP) administers the State Nature Preserve Program (O.R.C. 1517.05) to protect and manage outstanding examples of Ohio's natural heritage. Private owners may sell or donate qualifying wetland areas to the division. Alternatively, they may dedicate their wetland properties to the preserve system or maintain these wetlands as natural areas under the Ohio Natural Landmarks Program.

The Division of Wildlife (DOW) protects wetlands by acquiring and managing lands as wildlife areas. DOW has the authority to acquire and manage lands and waters or their surface rights for the specific purpose of fish and wildlife management, preservation, propagation, and protection, nongame recreational pursuits, public fishing and hunting grounds and preservation of the flora and fauna (O.R.C. 1531.06).

ODNR also protects wetlands by acquiring and operating lands as state parks. The Division of Parks and Recreation (DPR) acquires and manages these lands for public protection and use (O.R.C. 1541.02). Similarly, Ohio's park district agencies may acquire lands for the conservation of the natural resources of the state (O.R.C. 1545.11).

Many independent organizations and private interests acquire and protect wetlands. Their management and preservation efforts for various conservation and recreation purposes assure the continued protection of important wetland areas.

The National Wetlands Priority Conservation Plan provides a process for identifying wetlands that should receive priority attention for federal or state acquisition. The 1993 Statewide Comprehensive Outdoor Recreation Plan (SCORP) published by ODNR, REALM, consistent with the National Plan, highlights the importance of wetlands to outdoor recreation. Under this plan, ODNR is increasing funding from a variety of sources for the acquisition and restoration of wetlands. Lake Erie area wetlands are given a high priority in the Ohio Wetlands Priority Conservation Plan due to declining wetland types within the ecoregion, their high degree of public benefit and their vulnerability to development.

Many programs assist coastal wetlands acquisition by ODNR, the U.S. Fish and Wildlife Service, local governments and independent organizations. Coastal wetlands conservation grants (Coastal Wetlands Planning, Protection and Restoration Act, Title III, Public Law 101-646) are utilized by ODNR and DNAP for the acquisition of wetlands and buffer lands at high priority sites (e. g., aquatic habitats associated with coastal barrier land forms). Federal Land and Water Conservation Fund Act grants are used for both state and local wetlands conservation projects. ODNR's Ohio Wetlands Priority Conservation Plan, developed under the SCORP, assigns high priority to the acquisition-protection of coastal area wetlands. In the past ten years, ODNR's Division of Wildlife and its many partners have protected, restored and enhanced approximately 13,000 acres of Lake Erie wetlands under the North American Waterfowl Management Plan (NAWMP). ODNR's DNAP has expanded the Sheldon Marsh State Nature Preserve by 75 acres in the past three years and plans a 311-acre addition to the Mentor Marsh State Nature Preserve with a coastal wetlands conservation grant, supplemented by the state's income tax refund checkoff program.

Wetlands acquisition and restoration projects under the NAWMP are assisted through federal matching funds originating through the North American Wetlands Conservation Act (P.L. 101-233, as amended). The investment is multiplied through the agreements and partnerships entered into by DOW and a variety of conservation organizations, businesses and governmental agencies.

DNAP also cooperates in partnership projects with other agencies and independent organizations and private landowners to acquire, protect and restore wetlands that serve as outstanding examples of Ohio's natural heritage. Wetlands are also being inventoried, restored and enhanced on existing public lands in state parks and other areas.

Public/private partnerships are essential to accomplishing the state's wetlands conservation objectives. The first project in the NAWMP's Lake Erie Marshes focus area, in cooperation with the Winous Point Shooting Club, resulted in the designation of the 2,400-acre Muddy Creek Bay as a waterfowl refuge. This bay is the most concentrated staging area for black ducks on the continent. On a smaller scale, partnership projects for wetlands restoration on private lands are also important. DOW assists landowners with the restoration of small isolated wetlands that are vitally important to waterfowl and other migratory and wetland dependent wildlife. The Lake Erie Marshes focus area of the NAWMP is of the highest priority for restoration projects with private landowners. Through 1995, DOW had assisted in the restoration of more than 650 acres of previously drained privately owned wetlands.

The Division of Soil and Water Conservation works cooperatively with the U.S.D.A. Natural Resources Conservation Service to provide additional incentives for wetland protection on privately owned lands under the federal Wetlands Reserve Program (WRP). The WRP is focused chiefly on wetlands in agricultural production, providing cash payments to property owners for permanent conservation easements on wetland property and cost-sharing for restoration. The DSWC has provided piggy-back funding for the WRP targeted at riparian wetlands. This policy of assisting in paying down the costs of the permanent easement has allowed the state to receive enhanced federal funding for more set-asides. As a result, nearly 3,100 acres of wetlands were protected in the state during the first year of the WRP. Approximately 250 acres were in coastal counties, and the protection of more than 500 additional acres in riparian areas of the Maumee River watershed is expected to enhance water quality in the Lake Erie basin. The Division has set aside nearly \$600,000 in NatureWorks funds to expand the use of this program to help achieve the state's nonpoint source water quality goals.

The OCMP will promote increased financial, technical and cooperative assistance for private owners to promote long-term wetlands protection and management.

- E. In partnership with the Ohio Sea Grant College Program, the OCMP strives to increase the usefulness of wetlands research to state and local decision makers and improving coastal management. The Lake Erie Protection Fund program may provide assistance for research and coastal wetlands restoration projects, with a particular emphasis on projects that may benefit wetlands restoration and management elsewhere in the coastal area and Great Lakes system. Public education and outreach are mutual objectives for which these programs strive to maximize existing resources.

One of the premier locations for wetlands research and education on Lake Erie and the entire Great Lakes is the Old Woman Creek State Nature Preserve and National Estuarine Research Reserve (OWC-NERR). A memorandum of agreement between the OWC-NERR and the OCMP formalizes an institutional linkage intended to maximize the benefits of the use of the OWC-NERR for long-term scientific research, monitoring and educational programs. Assessing the impact of nonpoint sources of pollution in the watershed of the NERR is a high priority for research and is intended to be useful to other geographic locations in the coastal area.

- F. A broad network of individuals and institutions provides information and technical assistance on wetland issues ranging from acquisition-protection projects and strategies to mitigation options, research, education, inventorying, and wetlands restoration and development. The OCMP endeavors to maintain effective linkages and networks to maximize the resources that may be devoted for coastal wetland conservation purposes. The Ohio Sea Grant College Program and member institutions provide information generated from wetlands research. Information on wetlands protection through state and federal regulatory authority is readily available from Ohio EPA, Division of Surface Water. ODNR's DOW manages the statewide wetlands inventory and provides a wide range of technical assistance for planning and management purposes. The Lake Erie Geology Group of the Division of Geological Survey also provides technical assistance on the hydrology and geology of coastal wetlands. The OWC-NERR cooperates with the OCMP by interacting to disseminate information on wetlands and related coastal management issues and acting as a clearinghouse for information and policy on coastal management issues. DNAP's Natural Heritage Database inventory may contain information on high-quality wetland communities. This information is available to the public and local government for planning purposes. DNAP may also provide technical assistance on the protection of these areas and on the restoration of natural wetland communities.
- G. ODNR & Ohio EPA have secured a U.S. EPA grant to develop a statewide wetland restoration and mitigation strategy. This effort will include identification of high quality wetlands to be designated Outstanding National Resource Waters and to receive the corresponding high level of protection. Undoubtedly, one element of this plan will be an emphasis to restore and protect valuable Lake Erie coastal wetland systems.