

PLEASE NOTE:

- The following model wetland setback ordinance is recommended as part of a community's management program for flood control, erosion control, ground water recharge, and water quality protection.*
- This model ordinance is designed to be comprehensive AND MUST BE TAILORED TO THE SPECIFIC NEEDS OF EACH COMMUNITY. Text throughout the model indicates decision points with a Δ symbol. To ensure an informed dialogue on wetland setbacks, it is also IMPORTANT THAT COMMUNITIES DEVELOP A MAP OF POTENTIAL WETLAND SETBACKS. Please contact that Chagrin River Watershed Partners, Inc. (CRWP) for assistance in tailoring this model to your community's needs.*
- Certain activities in wetlands have traditionally been managed at the state and federal levels and this model is designed to interface with these programs.*
- Throughout this model duties and authorities are provided for the ACommunity. In implementing this ordinance, these duties and authorities should be assigned to specific departments.*
- PLEASE CONTACT CRWP (440-975-3870) TO CONFIRM THAT YOU ARE WORKING WITH THE MOST CURRENT VERSION OF THIS MODEL.*

ESTABLISHMENT OF WETLAND SETBACKS

Whereas, wetlands protect the public health and safety of the [*community*] by:

1. Reducing peak flood flows, storing flood waters, and maintaining stream flow patterns.
2. Minimizing streambank erosion by reducing runoff volume and velocity.
3. Protecting ground water quality by filtering pollutants from storm water runoff.
4. Recharging groundwater reserves.
5. Maintaining surface water quality by minimizing sediment pollution from streambank erosion, and trapping sediments, chemicals, salts, and other pollutants from flood waters and storm water runoff, and,
6. Providing habitat for aquatic and terrestrial organisms, many of which are on Ohio's Endangered and/or Threatened Species listings; and,

Whereas, wetlands cannot continue to provide these functions unless protected from the effects of fluctuations in storm water flow; urban pollutants; disposal of fill or dredged materials; and other impacts of land use change; and,

Whereas, replacement of the public health and safety benefits of wetlands including flood control, erosion control, ground water recharge, and water quality protection, if possible, will require significant public expenditure; and,

Whereas, the State of Ohio has lost over 90 percent of its original wetlands and significant wetland acreage has been lost or degraded in Northeast Ohio due to draining, dredging, filling, excavating, and other acts; and,

Whereas, there are watershed-wide efforts to minimize flooding and streambank erosion in the *[watersheds to which community belongs]* watershed and to protect and enhance the water resources of the *[major watercourses to which community drains]* and its tributaries and *[community]* recognizes its obligation as part of these watersheds to minimize flooding and streambank erosion by controlling runoff and flood waters within its borders; and,

Whereas, the *[community]* is required by the National Flood Insurance Program to take steps to reduce the potential for flood damage or loss within special flood hazard areas; and,

Whereas, studies undertaken by independent scientific bodies recommend minimum widths for wetland setbacks; and,

Whereas, the Council of the *[community]* has reviewed and adopted recommendations for wetland setbacks, and the Council finds that in order to minimize encroachment on wetlands and the need for costly engineering solutions to control flooding and erosion and to protect residents; to protect and enhance the scenic beauty of the *[community]*; and to preserve the character of the *[community]*, the quality of life of the residents of the *[community]* and corresponding property values, it is necessary and appropriate to regulate the construction of structures and uses within a wetland setback surrounding Ohio EPA Category 2 and 3 wetlands in the *[community]*; and,

Whereas, Article XVIII, Section 3 of the Ohio Constitution grants municipalities the legal authority to adopt land use and control measures for promoting the peace, health, safety, and general welfare of its citizens; and,

Λ ***The authority to implement this regulation differs between incorporated and unincorporated areas in Ohio. The specific authorities invoked must be modified by the legal counsel of the implementing community.***

Whereas, 40 C.F.R. Parts 9, 122, 123, and 124, referred to as NPDES Storm Water Phase II, require designated communities, including the *[community]*, to develop a Storm Water Management Program to address the quality of storm water runoff during and after soil disturbing activities.

Λ ***Remove this whereas clause if your community is not designated under the NPDES Phase II regulation.***

Now, therefore, be it ordained by the Council of the *[community]*, State of Ohio,

SECTION 100.01: PUBLIC PURPOSE

- A. It is hereby determined that the wetlands within the Community contribute to the health, safety, and general welfare of the residents of the Community. The specific purpose and intent of this regulation is to regulate uses and developments within wetland setbacks that would impair the ability of wetlands to:
 - 1. Minimize flood impacts by absorbing peak flows, slowing the velocity of flood waters, regulating stream base flows, and maintaining stream flow patterns.
 - 2. Minimize streambank erosion by reducing runoff volume and velocity.
 - 3. Protect groundwater quality by filtering pollutants from storm water runoff.
 - 4. Recharge groundwater reserves.
 - 5. Protect surface water quality by minimizing sediment pollution from streambank erosion, and trapping sediments, chemicals, salts, and other pollutants from flood waters and storm water runoff.
 - 6. Provide habitat for aquatic and terrestrial organisms, many of which are on Ohio=s Endangered and/or Threatened Species listings.
 - 7. Benefit the Community economically by minimizing encroachment on wetlands and the need for costly engineering solutions, such as retention/detention basins and rip rap, to protect structures and reduce property damage and threats to the safety of watershed residents; and by contributing to the scenic beauty and environment of the Community, thereby preserving the character of the Community, the quality of life of residents of the Community, and corresponding property values.

- B. The following regulation has been enacted to protect these services of wetlands by providing reasonable controls governing structures and uses within wetland setbacks around Ohio EPA Category 2 and 3 wetlands within the Community.

SECTION 100.02: APPLICABILITY, COMPLIANCE & VIOLATIONS

- A. This regulation shall apply to all lands that are within the jurisdiction of the Community and that border Ohio EPA Category 2 and 3 wetlands as defined in this regulation.

- A. *This model applies wetland setbacks to lands surrounding Ohio EPA Category 2 and 3 wetlands. In implementing wetland setbacks, communities must have the flexibility to maintain the flood control, erosion control, and water quality protection services of wetlands while ensuring reasonable use of properties impacted by the setback. To accomplish this, planning commissions and boards of zoning appeals must have the ability to EXAMINE THE COMBINED IMPACT OF ALL SETBACKS C side yard, rear yard, wetland, etc C on existing lots and on subdivision lot yields and to ADJUST ALL OF THESE REQUIREMENTS TO REASONABLY MAINTAIN LOTS AND SUBDIVISION YIELDS. In many cases these adjustments can be made to setbacks other than the wetland setback with less impact of public health and safety.*
- B. No approvals or permits shall be issued by the Community without full compliance with the terms of this regulation where applicable.
- C. Any person who shall violate any section of this regulation shall be guilty of a misdemeanor of the [*degree determined by the community*] degree and, upon conviction thereof, shall be subject to punishment as provided in [*appropriate code*] and shall be required to restore the wetland and the wetland setback through a restoration plan approved by the Community.

SECTION 100.03: CONFLICTS WITH OTHER REGULATIONS & SEVERABILITY

- A. Nothing within this regulation shall be construed to conflict with the Clean Water Act or Ohio Revised Code 6111.03 et seq.
- B. Where this regulation imposes a greater restriction upon land than is imposed or required by any other provision of law, regulation, contract, or deed, the provisions of this regulation shall control.
- C. This regulation shall not limit or restrict the application of other provisions of law, regulation, contract, or deed, or the legal remedies available thereunder, except as provided in Section 100.03(A) and (B) of this regulation.
- D. If any clause, section, or provision of this regulation is declared invalid or unconstitutional by a court of competent jurisdiction, validity of the remainder shall not be affected thereby.

SECTION 100.04: DEFINITIONS

For the purposes of this regulation, the following terms shall have the meaning herein indicated:

- A. OHIO EPA CATEGORY 2 WETLANDS: Those wetlands classified by the Ohio

Environmental Protection Agency (Ohio EPA) as Category 2 wetlands under OAC 3745-1-54 (C)(2), in accordance with generally accepted wetland functional assessment methods acceptable to the U.S. Army Corps of Engineers and Ohio EPA at the time of application of this regulation.

- B. OHIO EPA CATEGORY 3 WETLANDS: Those wetlands classified by the Ohio EPA as Category 3 wetlands under OAC 3745-1-54(C)(3), in accordance with generally accepted wetland functional assessment methods acceptable to the U.S. Army Corps of Engineers and Ohio EPA at the time of application of this regulation.
- C. COMMUNITY: Throughout this regulation, this shall refer to the *[community]* or its designated representative.
- D. IMPERVIOUS COVER: Any surface that cannot effectively absorb or infiltrate water. This may include roads, streets, parking lots, rooftops, and sidewalks.
- E. INTERMITTENT STREAM: A natural channel that may have some water in pools but where surface flows are non-existent or interstitial for periods of one week or more during typical summer months.
- F. NOXIOUS WEED: Any plant species defined by the Ohio Department of Agriculture as a “noxious weed” and listed as such by the Department. For the purposes of this regulation, the most recent version of this list at the time of application of this regulation shall prevail.
- G. PERENNIAL STREAM: A natural channel that contains water throughout the year except possibly during periods of extreme drought.
- H. SOIL AND WATER CONSERVATION DISTRICT: An entity organized under Chapter 1515 of the Ohio Revised Code referring to either the Soil and Water Conservation District Board or its designated employees, hereinafter referred to as the *[county]* SWCD.
- I. SOIL DISTURBING ACTIVITY: Clearing, grading, excavating, filling, or other alteration of the earth’s surface where natural or human made ground cover is destroyed and which may result in, or contribute to, erosion and sediment pollution.
- J. SUBSTANTIAL DAMAGE: Damage of any origin sustained by a structure whereby the cost of restoring the structure to its before damaged condition would be equal to, or would exceed, 50% of the market value of the structure before the damage occurred.
- K. WATERCOURSE: Any natural, perennial, or intermittent, channel, stream, river, or brook.

- L. WETLAND: Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions, including swamps, marshes, bogs, and similar areas. (40 CFR 232, as amended). Wetlands shall be delineated by a site survey approved by the Community using delineation protocols accepted by the U.S. Army Corps of Engineers and the Ohio EPA at the time of application of this regulation. If a conflict exists between the delineation protocols of these two agencies, the delineation protocol that results in the most inclusive area of wetlands shall apply.

In reviewing this wetland delineation, the Community may consult with a representative of the Ohio Environmental Protection Agency, Division of Surface Water; the U.S. Army Corps of Engineers; the [County] Soil and Water Conservation District; or other technical experts as necessary. Any costs associated with such consultations may be assessed to the applicant or their designated representative.

- M. WETLAND SETBACK: Those lands within the Community that fall within the area defined by the criteria set forth in Section 100.05 of this regulation.

SECTION 100.05: ESTABLISHMENT OF WETLAND SETBACKS

- A. Wetland setbacks are established as follows:

1. A minimum of 120 feet surrounding all Ohio EPA Category 3 Wetlands.
2. A minimum of 75 feet surrounding all Ohio EPA Category 2 Wetlands.

- Λ *The above minimum setback widths are based on the best professional judgment of natural resource management professional and planners, using information on wetland functions and related setback widths nationwide.*

- B. The following conditions shall apply in wetland setbacks:

1. Wetland setbacks shall be measured in a perpendicular direction from the defined wetland boundary.
2. Except as otherwise provided in this regulation, the wetland setback shall be preserved in its natural state and shall be established prior to any soil disturbing activities.

- Λ *As structured here, this model will enable communities to control the filling of their*

high quality wetlands. CRWP recommends this model to ensure the sustainability of high quality wetlands and to provide a mechanism through which interested communities may catalog their wetland resources and communicate the flood control, erosion control, and water quality protection benefits these resources provide. A community's effort to control impacts on high quality wetlands will be strengthened by a natural resource study establishing the specific public health and safety benefits of these wetlands.

SECTION 100.06: PROCEDURE

- A. Upon filing a request for approval of a preliminary plat or building permit, the applicant or their designated representative shall retain a qualified professional to survey the proposed development site for wetlands. If no wetlands are found, the applicant or their designated representative shall submit a letter with the preliminary plat or permit application verifying that a qualified professional has surveyed the site and found no wetlands. If wetlands are found, the following procedures shall be followed:
1. A qualified professional shall determine the presence of Ohio EPA Category 2 or 3 wetlands on the proposed development site using the latest version of the Ohio Rapid Assessment Method for wetland evaluation approved at the time of application of this regulation. Acceptance of this determination shall be subject to approval by the Community. In the course of this approval, the Community may consult with a representative of the Ohio Department of Natural Resources; the Ohio EPA; the *[County]* Planning Commission; the *[County]* Soil and Water Conservation District; or other technical experts as necessary. Any costs associated with such consultations may be assessed to the applicant or their designated representative.
 2. If Ohio EPA Category 2 or 3 wetlands are located on the proposed development site, the applicant or their designated representative shall delineate these wetlands and the wetland setback in conformance with Section 100.06(A)(2) of this regulation. The applicant or their designated representative shall identify all delineated wetlands and their associated setbacks on all subdivision plans, land development plans, and/or permit applications submitted to the Community.
 - a. Wetlands shall be delineated by a site survey approved by the Community using delineation protocols accepted by the US Army Corps of Engineers and the Ohio EPA at the time of application of this regulation. If conflict exists between the delineation protocols of these two agencies, the delineation protocol that results in the most inclusive area of wetland shall apply.

- b. Wetland setbacks shall be delineated through a metes and bounds survey subject to approval by the Community.
 - c. In the course of approval of the delineation of wetlands and their associated setbacks, the Community may consult with a representative of the Ohio Department of Natural Resources; the Ohio EPA; the *[County]* Planning Commission; the *[County]* Soil and Water Conservation District; or other technical experts as necessary. Any costs associated with such consultations may be assessed to the applicant or their designated representative.
- 3. Prior to any soil disturbing activity, the applicant or their designated representative shall delineate wetland setbacks on the development site, and such delineation shall be maintained throughout construction.
 - 4. No approvals or permits shall be issued by the Community prior to delineation of wetland setbacks in conformance with this regulation.
- B. Upon completion of an approved subdivision, land development, or other improvement, wetland setbacks shall be permanently recorded on the plat records for the Community.
 - Λ *In many communities these records are maintained at the County level. Communities should tailor this language to fit local procedures while ensuring that each new owner of an area subject to a wetland setback is aware of that setback.*

SECTION 100.07: USES PERMITTED IN WETLAND SETBACKS

- A. Open space uses that are passive in character shall be permitted in wetland setbacks, including, but not limited to, the following:
 - 1. Recreational Activity. Passive recreational uses, as permitted by federal, state, and local laws, such as hiking, fishing, hunting, picnicking, and similar uses.
 - 2. Removal of Damaged or Diseased Trees. Damaged or diseased trees may be removed.
 - 3. Revegetation and/or Reforestation. Wetland setbacks may be revegetated and/or reforested.
- B. No use permitted under this regulation shall be construed as allowing trespass on privately held lands.

SECTION 100.08: USES PROHIBITED IN WETLAND SETBACKS

Any use not authorized under this regulation shall be prohibited in wetland setbacks. By way of example, the following uses are specifically prohibited, however, prohibited uses are not limited to those examples listed here:

- A. Construction. There shall be no structures of any kind.
- B. Dredging or Dumping. There shall be no drilling, filling, dredging, or dumping of soil, spoils, liquid, or solid materials, except for noncommercial composting of uncontaminated natural materials and except as permitted under Section 100.07 of this regulation.
- C. Roads or Driveways. There shall be no roads or driveways.
- D. Motorized Vehicles. There shall be no use of motorized vehicles of any kind.
- E. Disturbance of Natural Vegetation. There shall be no disturbance of the natural vegetation, except for such conservation maintenance that the landowner deems necessary to control noxious weeds; for such plantings as are consistent with this regulation; for such disturbances as are approved under Section 100.07 of this regulation; and for the passive enjoyment, access, and maintenance of landscaping or lawns existing at the time of passage of this regulation. Nothing in this regulation shall be construed as requiring a landowner to plant or undertake any other activities in wetland setbacks.
- F. Parking Lots. There shall be no parking lots or other human made impervious cover.
- G. New Surface and/or Subsurface Sewage Disposal or Treatment Areas. Wetland setbacks shall not be used for the disposal or treatment of sewage except in accordance with [County] District Board of Health regulations [*check with appropriate Board of Health for exact language*] at the time of application of this regulation.

SECTION 100.09: NON-CONFORMING STRUCTURES OR USES IN WETLAND SETBACKS

- Λ *Many communities have existing code for non-conforming structures or uses. In such cases, this section should either be replaced by or reference that existing code so as not to conflict with existing procedures for dealing with non-conforming structures or uses.*
- Λ *It is important to note that only that portion of an existing structure or use that is in the wetland setback is non-conforming with the provisions of this regulation.*

- A. A non-conforming use, existing at the time of passage of this regulation and within a wetland setback, that is not permitted under this regulation may be continued but shall not be changed or enlarged unless changed to a use permitted under this regulation.
- B. A non-conforming structure, existing at the time of passage of this regulation and within a wetland setback, that is not permitted under this regulation may be continued but shall not have the existing building footprint or roofline expanded or enlarged.
- C. A non-conforming structure or use, existing at the time of passage of this regulation and within a wetland setback, that has substantial damage and that is discontinued, terminated, or abandoned for a period of six (6) months or more may not be revived, restored, or re-established.

SECTION 100.10 VARIANCES WITHIN WETLAND SETBACKS

- A. The Community may grant a variance to this regulation as provided herein. In determining whether there is unnecessary hardship or practical difficulty such as to justify the granting of a variance, the Community shall consider the potential harm or reduction in wetland functions that may be caused by a proposed structure or use.
- B. In making a determination under Section 100.10(A) of this regulation, the Community may consider the following:
 - 1. The soil type and natural vegetation of the parcel.
 - 2. The extent to which the requested variance impairs the flood control, erosion control, water quality protection, or other functions of the wetland or wetland setback. This determination shall be based on sufficient technical and scientific data.
 - 3. The degree of hardship this regulation places on the applicant or their designated representative and the availability of alternatives to the proposed activity.
 - 4. Soil-disturbing activities permitted in the wetland setback through variances should be implemented to minimize clearing to the extent possible and to include Best Management Practices necessary to minimize erosion and control sediment.
 - 5. The presence of significant impervious cover, or smooth vegetation such as maintained lawns, in the wetland setback compromises its benefits to the Community. Variances should not be granted for asphalt or concrete paving in the wetland setback. Variances may be granted for gravel driveways when necessary.

SECTION 100.11: BOUNDARY INTERPRETATION & APPEALS PROCEDURE

- A. When an applicant or their designated representative disputes the boundary of a wetland setback, the applicant or their designated representative shall submit evidence to the Community that describes the boundary, the applicant's or their designated representative's proposed boundary, and justification for the proposed boundary change.
- B. The Community shall evaluate all materials submitted and shall make a written determination within a reasonable period of time not to exceed sixty (60) days, a copy of which shall be submitted to the applicant or their designated representative. If during this evaluation the Community requires further information, it may require that this be provided by the applicant or their designated representative. In the event that the Community requests such additional information, the sixty (60) day limit on the Community's review shall be halted until such information is provided by the applicant or their designated representative.

In evaluating these materials, the Community may consult with a representative of the Ohio Department of Natural Resources; the Ohio EPA= the *[County]* Planning Commission; the *[County]* Soil and Water Conservation District; or other technical experts as necessary. Any costs associated with such consultations may be assessed to the applicant or their designated representative.

- C. Any party aggrieved by any such determination, or other decision or determination under this regulation, may appeal to the Board of Zoning Appeals under the provisions of Section (*cite existing Board of Zoning Appeals section*).

SECTION 100.12: INSPECTION OF WETLAND SETBACKS

- A. The delineation of wetland setbacks shall be inspected by the Community:
 - 1. Prior to soil-disturbing activities authorized by the Community under a subdivision, land development plan, and/or building permit. The applicant or their designated representative shall provide the Community with at least two (2) working days notice prior to starting such soil-disturbing activities.
 - 2. Any time evidence is brought to the attention of the Community that uses or structures are occurring that may reasonably be expected to violate the provisions of this regulation.

The following individuals participated in the development of this wetland setback model:

- t Dan Donaldson, District Administrator, Lake Soil and Water Conservation District.
- t Kyle Dreyfuss-Wells, Associate Director, Chagrin River Watershed Partners, Inc.

- t Theresa Hudson, U.S. Army Corps of Engineers.
- t John Mack, Ohio Environmental Protection Agency, Division of Surface Water.
- t Mark Majewski, Vice President, Northstar Planning and Design, Inc.
- t Mick Micacchion, Ohio Environmental Protection Agency, Division of Surface Water.
- t Paul Novak, Geologist, U.S. Environmental Protection Agency Region V, Cleveland Office.
- t Jim Storer, District Conservationist, Natural Resource Conservation Service assisting the Cuyahoga Soil and Water Conservation District.

References

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Dahl, T.E., 1990. *Wetlands Losses in the United States 1780's to 1980's*. U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. Information on wetland loss in Ohio based on National Wetlands Inventory. The Ohio Wetlands Inventory places wetland loss at 88% however this is believed to be an over estimation of the amount of wetlands preserved because of the use of remote sensing data and information on hydric soils.

U.S. Environmental Protection Agency, 1993. *National Wetlands and Urban Stormwater: Potential Impacts and Management*. Office of Wetlands, Oceans and Watersheds, Wetlands Division, Washington D.C.

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