

Appendix 2-C

Federal Statutes and Regulations

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2.C.1 Introduction

The following sections provide a general overview of federal statutes and regulations applicable to highway drainage in Michigan. These are intended for reference only. Prior to relying upon this information, confirm the information is current and has not been rescinded or superseded by subsequent statutes or regulations. In some instances, consultation with an attorney may be necessary to ensure compliance with applicable statutes and regulations.

2.C.2 Environmental

- National Environmental Policy Act [[42 U.S.C. § 4321 et seq.](#)]
 - The National Environmental Policy Act of 1969 (NEPA) establishes the continuing policy of the federal government to use all practicable means and measures “to foster and promote the general welfare, ... create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.” [42 U.S.C. § 4331]. To achieve this goal, NEPA creates a requirement for federal agencies to consider the environmental impacts of their actions before undertaking them. [42 U.S.C. § 4332(C)].
 - Section 102(2)(C) of NEPA requires federal agencies to develop a detailed statement on proposals for major federal actions significantly affecting the quality of the human environment. [42 U.S.C. § 4332(2)(C)]. Environmental impact statements address items including “the environmental impact of” and “alternatives to” the proposed action. [Id.] FHWA implements NEPA according to the Council on Environmental Quality (CEQ) NEPA regulations at 40 CFR Part 1500 et seq. and the FHWA-FRA-FTA joint regulations at 23 CFR Part 771.
- Clean Water Act [[33 U.S.C. §§ 1251-1387](#)]
 - Almost every project involving work or activities in rivers is subject to the Clean Water Act (CWA) of 1972, which is administered by the U.S. Environmental Protection Agency (USEPA) in coordination with state governments. The CWA is the primary federal statute governing protection of the Nation’s surface waters. Engineering of highways in the river environment is often subject to Section 404 of the CWA, which regulates the discharge of dredged or fill material in waters of the United States, including wetlands. [33 U.S.C. § 1344]. This includes the use of dredged or fill material for development, water resource projects, and infrastructure development (e.g., roads, bridges, etc.). The U.S. Army Corps of Engineers (USACE) handles the day-to-day administration and enforcement of the Section 404 program, including issuing permits. In circumstances where Section 404 is triggered, permit applicants also obtain a Section 401 certification from the state in which the discharge of dredged or fill material originates. [13 U.S.C. § 1341]. The Section 401 certification assures that materials discharged to waters of the U.S. will comply with relevant provisions of the CWA, including water quality standards. In addition, Section 402 of the CWA establishes the National Pollutant Discharge Elimination System (NPDES) Program [33

- U.S.C. § 1342]. The NPDES Program requires a permit for discharges of pollutants into waters of the United States, including storm water discharges. Section 404 of the CWA (33 U.S.C. 1344) prohibits the unauthorized discharge of dredged or fill material into waters of the United States, including navigable waters; such discharges require a permit. The term "discharges of fill material" means the addition of rock, sand, dirt, concrete, or other material into the waters of the United States incidental to construction of any structure. The USACE has granted a Nationwide General Permit and regional permits for 26 categories of certain minor activities involving discharge of fill material. Under the provisions of 33 CFR 330.5(a)(15), fill associated with construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, temporary construction, and access fills are authorized under the Nationwide Section 404 Permit providing such fill has been permitted by the U.S. Coast Guard (USCG) under Section 9 of the River and Harbor Act of 1899 as part of the bridge permit. Therefore, formal application of the USACE for a Section 404 Permit is not required unless the bridge approach embankment is located in a wetland area contiguous to said navigable stream. The USACE has Section 404 regulatory authority over streams the USCG has placed in the "advance approval" category. This category of navigable streams is defined as navigable in law but not actually navigated other than by logs, log rafts, rowboats, canoes, and motorboats. Notably, this regulation does not apply to the actual excavation or "dredging of material," provided this material is not reintroduced into any regulated waterway including the one from which it was removed.
- Michigan has authorization from the federal government to administer Section 404 of the federal CWA in most areas of the state, where only a state permit from EGLE is required for wetlands, lakes and streams. Michigan's program operates under a Memorandum of Agreement with USEPA, to ensure it is consistent with federal requirements. There are Section 10 navigable waters, including the Great Lakes and connecting channels, where the USACE maintains Section 404 jurisdiction, and where wetlands, lakes and streams permits are required from both EGLE and USACE.
 - Section 404 of the CWA (33 U.S.C. 1344) requires any applicant for a permit for any activity that may affect the quality of waters of the United States to obtain water quality certification from EGLE.
 - Endangered Species Act [[16 U.S.C. §§ 1531-1544](#)]
 - Highway engineering projects have the potential to impact federally listed fish, wildlife, and plants. The purposes of the Endangered Species Act of 1973 (ESA) include conserving "the ecosystems upon which endangered species and threatened species depend" and providing "a program for the conservation of such endangered species and threatened species." [16 U.S.C. § 1531]. It is the policy of Congress that all federal agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of the ESA [Id.]. The U.S. Fish and Wildlife Service (USFWS) and the NOAA National Marine Fisheries Service (NMFS) administer the ESA. The USFWS and NMFS conduct consultations

- with the lead federal agency when a proposed project may affect federally endangered or threatened species. USFWS or NMFS involvement in a project depends on the affected species and the nature and extent of anticipated impacts (direct and indirect) to that species and its designated critical habitat. If anticipating a “take” of a federally listed species, USFWS or NMFS will issue a biological opinion, the terms and conditions of which are binding on the lead federal agency. [16 U.S.C. § 1536.]
- Wild and Scenic Rivers Act [[16 U.S.C. § 1271 et seq.](#)]
 - This Act establishes a policy to preserve designated rivers “in free-flowing condition” and to protect “their immediate environments ... for the benefit and enjoyment of present and future generations.” [16 U.S.C. § 1271]. Section 7(a) provides that “no department or agency of the United States shall assist by loan, grant, license, or otherwise in the construction of any water resources project that would have a direct and adverse effect on the values for which such river was established.” [16 U.S.C. § 1278(a)]. A water resources project is “any dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act ... or other construction of developments which would affect the free-flowing characteristics of a Wild and Scenic River or Study River.” [36 CFR § 297.3]. “Federal assistance means any assistance by an authorizing agency including, but not limited to, ... [a] license, permit, or other authorization granted by the Corps of Engineers, Department of the Army, pursuant to the Rivers and Harbors Act of 1899 and Section 404 of the CWA (33 U.S.C. § 1344).” [Id.]
 - Fish and Wildlife Coordination Act [[16 U.S.C. §§ 661-666c](#)]
 - The Fish and Wildlife Coordination Act (FWCA) requires adequate consideration for the “conservation, maintenance, and management of wildlife resources” whenever the “waters of any stream or other body of water are impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose ... including navigation and drainage, by any department or agency of the United States.” [16 U.S.C. § 663(a)]. This generally includes consultation with the USFWS, the NMFS, and state wildlife agencies for activities that affect, control, or modify waters of any stream or bodies of water to minimize the adverse impacts of such actions on fish and wildlife resources and habitat. This consultation is generally incorporated into the process of complying with Section 404 of the CWA, NEPA, or other federal permit, license, or review requirements.
 - Migratory Bird Treaty Act [[16 U.S.C. § 703 et seq.](#)]
 - The protection of all migratory birds is governed by the Migratory Bird Treaty Act (MBTA) [16 U.S.C. §§ 703-712], which generally prohibits the take of any migratory bird or any part, nest, or eggs of any such bird. [16 U.S.C. § 703(a)]. Under the MBTA, it is illegal to “take, kill, possess, transport, or import migratory birds or any part, nest, or egg of any such bird” unless authorized by a valid permit from the USFWS. [Id.]. The regulation 50 CFR § 10.13 includes a list of migratory birds protected by the MBTA.

2.C.3 Historic and Archeological Preservation

- National Historic Preservation Act [[54 U.S.C. § 300101 et seq.](#)]
 - River highway engineering projects are often subject to the National Historic Preservation Act of 1966 (NHPA). Section 106 of the NHPA (commonly called “Section 106”) requires federal agencies to consider the impacts on historic properties of projects that they carry out, approve, or fund. [54 U.S.C. § 306108]. The implementing regulations for the Section 106 process are found in 36 CFR Part 800. Those regulations provide that federal agencies, in consultation with the Advisory Council on Historic Preservation, the State Historic Preservation Officers (SHPO), and certain other interested parties, identify and assess adverse effects to historic properties and seek ways to avoid, minimize, or mitigate those effects. [36 CFR § 800.4-800.6]. Under Section 106, “historic property” is defined as any prehistoric or historic district, site, building, structure, or object included in, or eligible to be included in, the National Register of Historic Places [36 CFR § 800.16(l)(1); refer to 54 U.S.C. § 300311 and § 302102]. The responsibilities of SHPOs are set forth at 54 U.S.C. § 302303. In addition to Section 106, Section 4(f) of the U.S. Department of Transportation Act of 1966 [23 U.S.C. § 138 and 49 U.S.C. § 303] requires that the FHWA not approve the use of historic sites for a project unless there is no prudent and feasible alternative and the project incorporates all possible planning to minimize harm, or any impacts to historic sites are determined to be de minimis. The FHWA’s regulations for implementation of Section 4(f) are found at 23 CFR part 774.

2.C.4 Land and Water Usage

- Rivers and Harbors Act of 1899 [[33 U.S.C. § 401 and §403](#)]
 - River and coastal highway engineering projects are subject to Section 9 [33 U.S.C. § 401] and Section 10 [33 U.S.C. § 403] of the Rivers and Harbors Act of 1899. Section 9 of this Act restricts the construction of any bridge, dam, dike, or causeway over or in U.S. navigable waterways. Except for bridges and causeways under Section 9 [33 U.S.C. § 401], the USACE is responsible for maintaining the standards set by and for issuing permits under the Rivers and Harbors Act. Authority to administer Section 9, applying to bridges and causeways, was redelegated to the USCG under the provisions of the Department of Transportation Act of 1966.
- Flood insurance and construction in flood hazard areas
- National Flood Insurance Act of 1968 [[42 U.S.C. § 4001 et seq.](#)]
 - The National Flood Insurance Act of 1968 instituted the National Flood Insurance Program (NFIP) to help indemnify and reduce impacts associated with floods. The NFIP adopted the area subject to a 1% chance or greater of being flooded in any given year (also known as the 100-year flood) as the standard, or base flood, for mapping floodplains. [See, e.g., 44 CFR § 9.4].

- The area inundated by the 100-year flood determines the Special Flood Hazard Area (SFHA) on Flood Insurance Rate Maps (FIRMs) developed by Federal Emergency Management Agency (FEMA) and used to determine flood insurance rates for structures. [See, e.g., 44 CFR § 59.1, which defines “area of special flood hazard”]. FEMA implements the NFIP using its regulations found in Title 44 of the CFR.
- The FHWA's policies require projects to be consistent with the Standards and Criteria in the NFIP, where appropriate. [23 CFR § 650.115(a)(5)]. To assist state DOTs in complying with this policy, the FHWA developed coordination procedures for Federal-aid highway projects with encroachments in NFIP-regulated floodplains. FEMA agreed to these procedures by signing a 1982 Memorandum of Understanding with the FHWA.
 - Relevant sections under Title 44 CFR (Emergency Management Assistance) Chapter I, Subchapter B include:
 - Part 59 – General Provisions
 - Part 60 – Criteria for Land Management and Use
 - Part 65 – Identification and Mapping of Special Hazard Areas
 - Part 70 – Procedure for Map Correction
 - Coastal zone management
 - [Coastal Zone Management Act of 1972](#)
 - [Coastal Barrier Resources Act of 1982](#)
 - [44 CFR § 59.1](#) for definitions
 - General Bridge Act of 1946 [[33 U.S.C. §§ 525-533](#)]
 - The General Bridge Act of 1946 requires the location and plans of bridges and causeways across the navigable waters of the United States be submitted to and approved by the USCG prior to construction. [33 U.S.C. § 525]. The USACE may also impose conditions relating to maintenance and operation of the structure. [Id.]. The General Bridge Act of 1946 is cited as the legislative authority for bridge construction in most cases. Although the General Bridge Act of 1946 originally provided authority for issuing bridge permits to the USACE, subsequent legislation transferred these responsibilities from the USACE to the USCG.
 - Transportation Act of 1966 [[Public Law 89-670](#)]
 - The Transportation Act of 1966 transferred the USCG to USDOT. One of USCG's newly assigned duties was to issue bridge permits. This, along with the Rivers and Harbors Act and General Bridge Act, made the USCG responsible for ensuring that bridges and other waterway obstructions do not interfere with the navigability of waters of the United States without express permission of the United States Government. Subsequent legislation amended 23 U.S.C. § 144 to provide certain exceptions to USGC's authority

under 33 U.S.C. § 401 and 33 U.S.C. § 525 for bridges constructed, reconstructed, rehabilitated, or replaced using Federal-aid funds. [23 U.S.C. § 144(c)(2)].

- National Culvert Removal, Replacement, and Restoration Grants Program ([49 U.S.C. §§ 6703](#)].
 - The National Culvert Removal, Replacement, and Restoration Grant program established an annual competitive grant program to award grants to eligible entities for projects for the replacement, removal, and repair of culverts or weirs that would meaningfully improve or restore fish passage for anadromous fish.

2.C.5 Transportation

- Department of Transportation Act (80 Stat. 941, 49 U.S.C. 1651 et seq.).
 - This Act established the Department of Transportation and set forth its powers, duties, and responsibilities to establish, coordinate, and maintain an effective administration of the transportation programs of the Federal Government.
- [Title 23 U.S.C.](#) relevant sections and [rules](#) include:
 - Section 109 – Standards: It is the intent of Congress that federally funded projects to resurface, restore, and rehabilitate highways shall “be constructed in accordance with standards to preserve and extend the service life of highways and enhance highway safety.” [23 U.S.C. § 109(n)].
 - Section 116 - Maintenance: Preventive maintenance is eligible for federal assistance under Title 23 if a State Department of Transportation (DOT) can demonstrate that it is a “cost-effective means of extending the useful life of a Federal-aid highway.” [23 U.S.C. § 116(e).]
 - Section 119 - National Highway Performance Program [NHPP]: The NHPP allows the FHWA to provide Federal-aid funds for “[c]onstruction, replacement ..., rehabilitation, preservation, and protection (including ... protection against extreme events) of bridges on the National Highway System.” [23 U.S.C. § 119(d)(2)(B)].
 - Section 133 - Surface Transportation Block Grant [STBG] Program: The STBG program allows the FHWA to provide Federal-aid funds for protection of “bridges (including approaches to bridges and other elevated structures) and tunnels on public roads” including “painting, scour countermeasures, seismic retrofits, impact protection measures, security countermeasures, and protection against extreme events.” [23 U.S.C. § 133(b)(10)].
 - Section 134 - Metropolitan Transportation Planning: In the context of metropolitan transportation planning, Congress has found that it “is in the national interest ... to encourage and promote the safe and efficient

management, operation, and development of surface transportation systems ... within and between States and urbanized areas” including taking “resiliency needs” into consideration. [23 U.S.C. § 134(a)(1)].

- Section 144 - National Bridge and Tunnel Inventory and Inspection Standards: Section 144 requires the FHWA to maintain an inventory of bridges and tunnels on public roads both “on and off Federal-aid highways.” [Id. at (b)]. The FHWA is also required to “establish and maintain inspection standards for the proper inspection and evaluation of all highway bridges and tunnels for safety and serviceability.” [Id. at (h)(1)(A).]
- Section 176 - PROTECT Program: The Promoting Resilient Operations for Transformative, Efficient, and Cost-Saving Transportation (PROTECT) program allows the FHWA to provide grants for resilience improvements through (i) formula funding distributed to states, (ii) competitive planning grants, and (iii) competitive resilience improvement grants. [23 U.S.C. § 176(b)]. Eligible activities under the PROTECT program include, among others, “resurfacing, restoration, rehabilitation, reconstruction, replacement, improvement, or realignment of” certain existing surface transportation facilities and “the incorporation of natural infrastructure.” [23 U.S.C. §§ 176(c)(1) and 176(d)(4)(A)(ii)(II)].
- Section 503 - Research and Technology Development and Deployment: In carrying out certain highway and bridge infrastructure and research and development activities, the FHWA must “study vulnerabilities of the transportation system to ... extreme events and methods to reduce those vulnerabilities.” [23 U.S.C. § 503(b)(3)(B)(viii)].
- Federal-Aid Highway Acts (23 U.S.C. 101 et seq.): The Federal-Aid Highway Acts provide for the administration of the Federal-Aid Highway Program. Proposed Federal-aid projects must be adequate to meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance and must be designed and constructed according to standards best suited to accomplish these objectives and to conform to the needs of each locality.
- Federal-Aid Highway Act of 1970 (84 Sta. 1717, 23 U.S.C. 109 (h)): This Act provided for the establishment of general guidelines to ensure that possible adverse economic, social, and environmental effects relating to any proposed Federal-aid project have been fully considered in developing the project. In compliance with the Act, the Federal Highway Administration issued process guidelines for the development of environmental action plans. These guidelines are contained in the Federal-Aid Highway Program Manual, Volume 7, Chapter 7, Section 1 (FHPM 7-7-1), and in 23 CFR 795 et seq.

- Federal-Aid Highway Act of 1966 (80 Stat. 766), amended by the Act of 1970 (84 Stat. 1713), 23 U.S.C. 109 (g): This Act required the issuance of guidelines for minimizing possible soil erosion from highway construction. In compliance with these requirements, the Federal Highway Administration issued guidelines which are applicable to all Federal-aid highway projects. These guidelines are included in FHPM 6-7-1-1, 6-7-3-1, and 6-7-3-2. Regulatory material is found in 23 CFR 650.201.
- 23 CFR 450.206 Resiliency Planning (refer to HEC-16, 2023): Scope of the statewide and nonmetropolitan transportation planning process [23 CFR 450.206]. State DOTs must “carry out a continuing, cooperative, and comprehensive statewide transportation planning process that provides for consideration and implementation of projects, strategies, and services that will ... improve the resiliency and reliability of the transportation system...” [23 CFR 450.206(a)].
- 23 CFR 515 Asset Management (refer to HEC-16, 2023): Asset Management Plans [23 CFR 515]. Part 515 establishes processes that a state DOT must use to develop a transportation asset management plan (TAMP). Two notable provisions include:
 - Section 515.7(b). “A State DOT shall establish a process for conducting life-cycle planning for an asset class or asset sub-group at the network level (network to be defined by the State DOT). As a State DOT develops its life-cycle planning process, the State DOT should include future changes in demand; information on current and future environmental conditions including extreme weather events, climate change, and seismic activity; and other factors that could impact whole of life costs of assets.”
 - Section 515.7(c). “A State DOT shall establish a process for developing a risk management plan. This process shall, at a minimum, produce the following information: (1) Identification of risks that can affect condition of NHS pavements and bridges and the performance of the NHS, including risks associated with current and future environmental conditions, such as extreme weather events, climate change, seismic activity, and risks related to recurring damage and costs as identified through the evaluation of facilities repeated damaged by emergency events carried out under part 667 of this title.”
 - In addition, BIL Section 11105 amended 23 U.S.C. Section 119(e)(4) to require state DOTs to consider extreme weather and resilience as part of the life-cycle planning and risk management analyses within a TAMP (FHWA, 2022c).

- [23 CFR 625](#) Design Requirements (refer to HEC-16, 2023): Design Standards [23 CFR 625]. Part 625 describes structural and geometric design standards.
 - Section 625.3(a)(1) and § 625.4(b)(3). The FHWA, in cooperation with SDOTs, has approved the American Association of State Highway and Transportation Officials (AASHTO) Load and Resistance Factor Design (LRFD) Bridge Design Specifications. Based on the FHWA's approval, certain National Highway System (NHS) projects are required to follow those Specifications, including sections related to hydrology, hydraulics, and bridge scour.
 - Section 625.3(a)(2). Non-NHS projects are required to follow state DOT standard(s) and specifications on drainage, bridges, and other topics.
- [23 CFR 650](#) Design Standards for Interstate Highways (refer to HEC-16, 2023): Location and Hydraulic Design of Encroachments on Flood Plains [23 CFR Part 650, Subpart A]. One of the FHWA's important river-related regulations, 23 CFR Part 650, Subpart A sets forth policies and procedures for location and hydraulic design of highway encroachments in base (1% chance) floodplains. Section 650.111 sets forth requirements for location hydraulic studies to identify the potential impact of the highway alternatives on the base floodplain; these studies are commonly used during the NEPA process. The regulations prohibit significant encroachments on base floodplains unless the FHWA determines that such encroachment is the only practicable alternative. [23 CFR 650.113(a)]. This finding must be included in the NEPA documents for a project and supported information including the reasons for the finding and alternatives considered. The procedures also provide minimum standards for Interstate Highways, set freeboard requirements to account for debris and scour, and require highway encroachments to be consistent with certain established design flood standards for hydraulic structures, including standards from FEMA and state and local governments related to administration of the National Flood Insurance Program (NFIP). [23 CFR 650.115(a)]. Notably, the policies and procedures in this Subpart apply to encroachments in all base floodplains, not just the floodplains regulated by the FEMA in the NFIP. [23 CFR 650.107]. Additionally, the Subpart incorporates a requirement for project-by project risk assessments or analyses. [23 CFR 650.115(a)(1)]. Notable sections include:
 - Section 650.103 [Policy]. This section states that “it is the policy of the FHWA (a) To encourage a broad and unified effort to prevent uneconomic, hazardous or incompatible use and development of the Nation's flood plains, (b) To avoid longitudinal encroachments, where practicable, (c) To avoid significant encroachments, where practicable, (d) To minimize

impacts of highway agency actions which adversely affect base floodplains, (e) To restore and preserve the natural and beneficial floodplain values that are adversely impacted by highway agency actions, (f) To avoid support of incompatible floodplain development, (g) To be consistent with the intent of the Standards and Criteria of the National Flood Insurance Program, where appropriate, and (h) To incorporate “A Unified National Program for Floodplain Management” of the Water Resources Council into FHWA procedures.” [23 CFR 650.103]

- Section 650.115 [Hydraulic Design Standards]. This regulation applies to all Federal-aid projects, whether on the NHS or Non-NHS. Federal, state, local, and AASHTO standards may not change or override the design standards set forth under § 650.115 — although certain state and local standards must also be satisfied under that section. That section requires development of a “Design Study” for each highway project involving an encroachment on a floodplain. [23 CFR 650.115(a)].
- Section 650.117 [Content of Design Studies]. This regulation requires studies to contain the “hydrologic and hydraulic data and design computations.” [23 CFR 650.117(b)]. As both hydrologic and hydraulic factors and characteristics lead to scour formation, data and computations applicable to scour are required to be provided as well. Project plans are required to show the water surface elevations of the overtopping flood and base flood (i.e., 100-year flood) if larger than the overtopping flood [23 CFR 650.117(c)]. National Bridge Inspection Standards [[23 CFR 650 Subpart C](#)]. This regulation implements requirements of [23 U.S.C. § 144](#). In addition to the inspection and inventory requirements, the regulation specifically focuses on scour at bridges.
- Bridge Replacement, Rehabilitation, Preservation, Protection, and Construction Program (or Bridge Formula Program) (Division J, title VIII, Highway Infrastructure Program heading, paragraph (1)). The Bridge Formula Program provides funding to help repair approximately 15,000 highway bridges. In addition to providing funds to states to replace, rehabilitate, preserve, protect, and construct highway bridges, the Bridge Formula Program has dedicated funding for Tribal transportation facility bridges as well as “off-system” bridges, which are generally locally owned facilities not on the Federal-aid highway system.

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