

PART 2, CHAPTER 10

AQUATIC PRESERVES AND OUTSTANDING FLORIDA WATERS

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PART 2, CHAPTER 10

AQUATIC PRESERVES AND OUTSTANDING FLORIDA WATERS

10.1 OVERVIEW

Pursuant to **23 United States Code (U.S.C.) § 327** and the implementing Memorandum of Understanding (MOU) executed on December 14, 2016, the Florida Department of Transportation (FDOT) has assumed and Federal Highway Administration (FHWA) has assigned its responsibilities under the **National Environmental Policy Act (NEPA)** for highway projects on the State Highway System (SHS) and Local Agency Program (LAP) projects off the SHS (**NEPA** Assignment). In general, FDOT's assumption includes all highway projects in Florida which source of federal funding comes from FHWA or which constitute a federal action through FHWA. **NEPA** Assignment includes responsibility for environmental review, interagency consultation and other activities pertaining to the review or approval of **NEPA** actions. Consistent with law and the MOU, FDOT will be the Lead Federal Agency for highway projects with approval authority resting in the Office of Environmental Management (OEM).

FDOT is required to assess potential project impacts on aquatic preserves and Outstanding Florida Waters (OFWs). This chapter provides guidance and procedures on how these assessments are completed, coordinated and documented during project development.

10.1.1 Aquatic Preserves

An aquatic preserve is defined as “an exceptional area of submerged lands and its associated waters set aside for being maintained essentially in its natural or existing condition,” **Section 258.37, Florida Statutes (F.S.)**. The Florida Legislature, through the **Florida Aquatic Preserve Act of 1975 (Act), Sections 258.35 – 258.394 and 258.40 - 258.46, F.S.**, set aside state-owned submerged lands with exceptional biological, aesthetic and scientific value as aquatic preserves. The Board of Trustees of the Internal Improvement Trust Fund through the Florida Department of Environmental Protection (FDEP) Division of State Lands is responsible for the implementation, administration and enforcement of the **Act**, including the adoption of rules for management of aquatic preserves as found in **Chapter 18-20, Florida Administrative Code (F.A.C.)**.

Most of the aquatic preserves are located along the coast and involve marine or estuarine environments with the exception of a few aquatic preserves which are located inland. Many of the aquatic preserves are associated with state or federal parks and refuges. Generally, aquatic preserves designated under **Chapter 258, F.S.**, are also considered OFWs under **Rule 62-302.700(2)(f), F.A.C.** ([Section 10.1.2](#)).

10.1.2 Outstanding Florida Waters

Section 403.061(27), F.S., grants FDEP rulemaking authority to establish a special category of water bodies within the State, to be designated as OFWs, which shall be worthy of special protection because of their natural attributes. Most OFWs are open water areas managed by the state or federal government as parks, including wildlife refuges, preserves, marine sanctuaries, estuarine research reserves, certain waters within state or national forests, scenic and wild rivers, Special Waters OFWs, or aquatic preserves.

10.2 PROCEDURE

10.2.1 Determine Involvement with Aquatic Preserves and/or Outstanding Florida Waters

It is the responsibility of the District to determine whether a project is located in, over, or adjacent to a designated aquatic preserve and/or OFW.

If the project was not screened in the Efficient Transportation Decision Making (ETDM) Environmental Screening Tool (EST) ([ETDM Manual, Topic No. 650-000-002](#)), the location of aquatic preserves and OFWs in relation to the project may be determined by referring to:

1. A list of aquatic preserves and a link to a map of their locations provided in [Figure 10-1](#). It may be necessary to confirm this determination by referencing **Chapter 258, F.S.**
2. A list of the OFWs provided in **Rule 62-302.700, F.A.C.** This list includes an identification of all OFWs by County. Some examples of OFWs include aquatic preserves, National Seashores, waters in National Parks, State Parks and specially designated areas.
3. Aquatic preserve or OFW data layers stored in the Florida Geographic Data Library that can be accessed through the EST independent of running an ETDM screening event.

If further assistance is needed, the District should contact the FDEP Environmental Technical Advisory Team (ETAT) member.

For projects that were screened in the EST, aquatic preserve and OFW data as well as ETAT comments are provided in the Special Designations section of the **Programming Screen Summary Report** ([ETDM Manual, Topic No. 650-000-002](#)). This includes Geographic Information System (GIS) data and applicable maps that identify the proximity of the proposed action to aquatic preserves or OFWs. ETAT comments on the Special Designations issue should identify any potential impact to the resources. Comments by FDEP are especially important. It may also be helpful to review ETAT comments on other issues such as Wetlands and Surface Waters and Water Quality and Quantity.

10.2.1.1 Projects not in an Aquatic Preserve or Outstanding Florida Water

When a project is not located in, over, or adjacent to an aquatic preserve or OFW, it should be documented as follows:

Type 2 Categorical Exclusion (Type 2 CE): The Aquatic Preserve and Outstanding Florida Waters section of the **Type 2 Categorical Exclusion Determination Form, Form No. 650-050-11** should specify that the project is not in an aquatic preserve or OFW.

Environmental Assessment (EA) and Environmental Impact Statement (EIS): The Aquatic Preserve and Outstanding Florida Waters section of an EA or EIS should state that the project is not in an aquatic preserve or OFW.

State Environmental Impact Report (SEIR): “NoInv” should be marked in the appropriate issue in the **State Environmental Impact Report Form, Form No. 650-050-43**. A note should be included on the Supporting Information line that states “The project is not in an aquatic preserve or Outstanding Florida Water.”

10.2.1.2 Projects in Aquatic Preserves

Coordination with FDEP is needed if potential impacts to an aquatic preserve have been identified [e.g., sovereign submerged lands, right of way (ROW), in-water work]. Once ROW requirements have been defined, arials depicting alternatives with ROW located within the boundary of an aquatic preserve should be submitted to FDEP for review and comment. They should be addressed to:

Director, Florida Coastal Office
Florida Department of Environmental Protection
3900 Commonwealth Blvd.
Mail Station 235
Tallahassee, FL 32399-3000

A letter requesting a FDEP response within a period of thirty days should accompany the arials. This letter must contain the following standard statement for federal projects:

The environmental review, consultation, and other actions required by applicable federal environmental laws for this project are being, or have been, carried out by FDOT pursuant to 23 U.S.C. § 327 and a Memorandum of Understanding dated December 14, 2016 and executed by FHWA and FDOT.

If a determination is made that the project will have no impact after coordination with FDEP, provide documentation according to [Section 10.2.1.2.1](#). If there is an impact, document according to [Section 10.2.1.2.2](#).

Projects that are located in an aquatic preserve must also be identified in the ***Water Quality Impact Evaluation Checklist, Form No. 650-050-37*** according to [Part 2, Chapter 11, Water Quality and Stormwater](#).

10.2.1.2.1 Documentation of Projects Without Impacts

For Type 1 CE projects located in an aquatic preserve, which will have no impact on the aquatic preserve, a copy of the FDEP coordination letter(s), if applicable, should be uploaded into the project file in the StateWide Environmental Project Tracker (SWEPT), or the issue is addressed during the acquisition of the Environmental Resource Permit (ERP) ([Section 10.2.2](#)).

For a Type 2 CE, EA, EIS, or SEIR project located in an aquatic preserve, which will have no impact on the aquatic preserve, the following standard statement is included in the Aquatic Preserves and Outstanding Florida Waters section of the Environmental Document.

This project is included in the (Name of Aquatic Preserve). After coordination with the Florida Department of Environmental Protection, it has been determined that the project will not have an impact on the (Name of Aquatic Preserve).

Any coordination with FDEP should be discussed in the Environmental Document and coordination letters should be referenced in the document and included in the project file in SWEPT.

Type 2 CE: The standard statement above should be included in the Aquatic Preserves and Outstanding Florida Waters section of the ***Type 2 Categorical Exclusion Determination Form, Form No. 650-050-11***. The FDEP coordination letter(s) should be included in the project file.

EA and EIS: Include the above standard statement in the Aquatic Preserve and Outstanding Florida Waters section of the Environmental Document. Discussion of coordination with FDEP in the Comments and Coordination section should be consistent with the Aquatic Preserve and Outstanding Florida Waters section and a copy of FDEP coordination letter(s) should be placed in the Appendix.

SEIR: Place an "X" in the "No" column in the Environmental Analysis section of the SEIR. Include the above standard statement in the Aquatic Preserves and Outstanding Florida Waters section of the document. Provide justification of the decision in the Supporting Information column and supplement with attachments as necessary to substantiate the impact determination. Correspondence with FDEP should be referenced in the SEIR and included in the project file.

10.2.1.2.2 Documentation of Projects with Impacts

For a Type 1 CE, impacts to an aquatic preserve would be addressed during permitting. For a Type 2 CE, EA, EIS, or SEIR project located in an aquatic preserve, which will

impact the aquatic preserve, the following areas should be assessed and included in the Aquatic Preserves and Outstanding Florida Waters section of the Environmental Document.

1. Identify the aquatic preserve affected and show the location of that part of the project that may affect the aquatic preserve on a figure or map.
 - a. Discuss the extent of potential impacts to the aquatic preserve.
 - b. Assess the impacts that the proposed project will have on the aquatic preserve.
 - c. Discuss why there is no practicable alternative to locating the project outside the aquatic preserve.
 - d. Identify all measures to minimize harm to the aquatic preserve.
 - e. Identify permits needed and appropriate permitting agencies.
 - f. Provide results of coordination with appropriate agencies having jurisdiction over the aquatic preserve and address any ETAT comments.

Type 2 CE: Document the results of the assessment in the Aquatic Preserves and Outstanding Florida Waters section of the ***Type 2 Categorical Exclusion Determination Form, Form No. 650-050-11***. Provide supplemental information and coordination letter(s) in the project file in SWEPT.

EA and EIS: A copy of the FDEP coordination letter(s) and any other correspondence should be placed in the Appendix. In addition, discussion of coordination with FDEP in the Comments and Coordination section should be consistent with the Aquatic Preserve and Outstanding Florida Waters section.

SEIR: In the Environmental Analysis section of the SEIR, place an "X" in the appropriate column indicating the level of impact. If an issue exists but the project will alter it in a positive manner, mark the column indicating "ENHANCE." If there is a potential for substantial impact, mark the column "YES". Provide justification of decision in the Supporting Information column and supplement with attachments as necessary to substantiate the impact determination. Correspondence with FDEP should be referenced in the SEIR and included in the project file.

10.2.1.2.3 Section 4(f) Applicability

Generally aquatic preserves and OFWs are not protected by **Section 4(f)** since the primary purpose, unless designated, is not for recreation or wildlife or waterfowl refuges. See [Part 2, Chapter 7, Section 4\(f\) Resources](#) for more information on **Section 4(f)** applicability. The District should determine if there are multiple-use public land holdings per **23 CFR § 774.11(d)** within the aquatic preserve or OFW. **Section 4(f)** applies to only those portions of the aquatic preserve or OFW, which are designated by Statute or identified in the official management plan for the aquatic preserve or OFW and determined

through coordination with the Official with Jurisdiction (OWJ) as functioning or planned for park or recreational purposes or as wildlife and waterfowl refuges or which are significant historic sites. In addition, the significance of those portions shall be made by the OWJ over the aquatic preserve or OFW of those portions considered protected by **Section 4(f)**. OEM has the sole responsibility for determining if **Section 4(f)** applies.

10.2.1.3 Projects in an Outstanding Florida Water

For Type 1 CE projects located in an OFW, a copy of the FDEP coordination letter(s), if applicable, should be placed in the project file in SWEPT, or the issue is addressed during acquisition of the ERP.

For Type 2 CE, EA, EIS, and SEIR projects located in an OFW, the following should be assessed and included in the Aquatic Preserves and Outstanding Florida Waters section of the Environmental Document.

1. Identify the OFW and provide a map or figure showing how it relates to the project
2. Address any ETAT comments
3. Identify potential impacts to OFWs that can be evaluated prior to permitting, including potential alternative and treatment strategies.

Type 2 CE: This information should be included in the Aquatic Preserves and Outstanding Florida Waters section of the **Type 2 Categorical Exclusion Determination Form, Form No. 650-050-11**. Provide supplemental information and correspondence with FDEP in the project file in SWEPT.

EA and EIS: Include any correspondence with FDEP in the Appendix. In addition, discussion of coordination with FDEP in the Comments and Coordination section should be consistent with the Aquatic Preserves and Outstanding Florida Waters section.

SEIR: In Section 3.C.2, Environmental Analysis, of the **State Environmental Impact Report Form, Form No. 650-050-43** place an "X" in the appropriate column indicating the level of impact. If an issue exists but the project will alter it in a positive manner, mark the column indicating "ENHANCE." If an issue exists but there is little or no impact, mark the column indicating "NO." If there is a potential for substantial impact, mark the column "YES". Provide justification of decision in the Supporting Information column and supplement with attachments as necessary to substantiate the impact determination. Correspondence with FDEP should be referenced in the SEIR and included in the project file.

Projects that are located in an OFW must also be identified in the **Water Quality Impact Evaluation Checklist, Form No.650-050-37**, according to [Part 2, Chapter 11, Water Quality and Stormwater](#).

10.2.2 Project Permitting

Generally, FDEP and the Water Management Districts cannot issue permits for direct pollutant discharges to OFWs, which would lower ambient (existing) water quality, significantly degrading OFWs (Anti-degradation Requirement).

Pursuant to **Rule 62-4.242, F.A.C.**:

(2)(a.) No Department permit or water quality certification shall be issued for any proposed activity or discharge within an Outstanding Florida Waters, or which significantly degrades, either alone or in combination with other stationary installations, any Outstanding Florida Waters, unless the applicant affirmatively demonstrates that:

(2)(a)1. *[does not apply to FDOT projects]*

(2)(a) 2. The proposed activity of discharge is clearly in the public interest, and either

a. A Department permit for the activity has been issued or an application for such permit was complete on the effective date of the Outstanding Florida Water designation; or

b. The existing ambient water quality within Outstanding Florida Waters will not be lowered as a result of the proposed activity or discharge, except on a temporary basis during construction for a period not to exceed thirty days; lowered water quality would occur only within a restricted mixing zone approved by the Department; and, water quality criteria would not be violated outside the restricted mixing zone. The Department may allow an extension of the thirty-day time limit on a construction-caused degradation for a period demonstrated by the applicant to be unavoidable and where suitable management practices and technology approved by the Department are employed to minimize any degradation of water quality.

Please note the use of “Department” in **Rule 62-4.242** above means the FDEP, rather than FDOT. Projects located in OFWs receive a greater level of scrutiny by the state environmental regulatory agencies during ERP permitting. Where project impacts are proposed within an OFW, the applicant must provide reasonable assurance that the project is “clearly in the public interest.” (**Section 373.414, F.S.**) This is determined by balancing each of the following criteria as listed in **Rules 62-330.301 and 62-330.302, F.A.C.**

1. Whether the activities will adversely affect public health, safety or welfare or the property of others;

2. Whether the activities will adversely affect the conservation of fish and wildlife, including endangered or threatened species or their habitats [will not result in harm to named listed wildlife species [**Rule 62-330.302(1), F.A.C.**].
3. Whether the activities will adversely affect navigation or flow of water or cause harmful erosion or shoaling;
4. Whether the activities will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
5. Whether the activities will be of a temporary or permanent nature;
6. Whether the activities will adversely affect or will enhance significant historical and archaeological resources (under provisions of **Section 267.061, F.S.**); and
7. The current condition and relative value of functions being performed by areas affected by the proposed activities.

In order to meet permitting requirements, there is generally a greater emphasis on minimization and avoidance of jurisdictional areas designated as OFWs. For more information on permitting requirements please see [Part 1, Chapter 12, Environmental Permits](#). Commitments and commitment monitoring are addressed in [Procedure No. 650-000-003, Project Commitment Tracking](#) and [Part 2, Chapter 22, Commitments](#).

10.3 REFERENCES

Chapter 18-20, F.A.C., Florida Aquatic Preserves

Chapter 62-25, F.A.C., Regulation of Stormwater Discharge

Chapter 62-302.700, F.A.C., Special Protection, Outstanding Florida Waters,
Outstanding National Resource Waters

Chapter 62-330, F.A.C., Environmental Resource Permitting

Chapter 62-4.242, F.A.C., Antidegradation Permitting Requirements; Outstanding
Florida Waters; Outstanding National Resource Waters; Equitable Abatement

FDOT. Efficient Transportation Decision Making Manual. Topic No. 650-000-002.
<http://www.fdot.gov/environment/pubs/etdm/etdmmanual.shtml>

Memorandum of Understanding Between FHWA and FDOT Concerning the State of
Florida's Participation in the Surface Transportation Project Delivery Program
Pursuant to 23 U.S.C. 327, December 14, 2016.
<http://www.fdot.gov/environment/pubs/Executed-FDOT-NEPA-Assignment-MOU-2016-1214.pdf>

Section 258, Part II, F.S., Aquatic Preserves

Section 403.061, F.S., Subsection (27)

10.4 FORMS

[State Environmental Impact Report Form, Form No. 650-050-43](#)

Type 2 Categorical Exclusion Determination Form, Form No. 650-050-11*

[Water Quality Impact Evaluation Checklist, Form No. 650-050-37](#)

*To be completed in [SWEPT](#)

10.5 HISTORY

Part 2, Chapter 19, Aquatic Preserves: 3/15/2004, 11/08/2007, 1/11/2011

Part 2, Chapter 21, Outstanding Florida Waters: 3/15/2004, 11/8/2007, 1/11/2011

8/9/2016: Combined Aquatic Preserves and Outstanding Florida Waters chapters into one chapter, 6/14/2017: NEPA Assignment and re-numbered from Part 2 Chapter 19

AQUATIC PRESERVES

1. Fort Clinch State Park
2. Nassau River - St. Johns River Marshes
3. Pellicer Creek
4. Tomoka Marsh
5. Mosquito Lagoon
6. Banana River
7. Indian River - Malabar to Vero Beach
8. Indian River - Vero Beach to Fort Pierce
9. Jensen Beach to Jupiter Inlet
10. Loxahatchee River - Lake Worth Creek
11. Biscayne Bay
12. Biscayne Bay – Cape Florida to Monroe County Line
13. North Fork: St. Lucie
14. Yellow River Marsh
15. Fort Pickens State Park
16. Rocky Bayou State Park
17. St. Andrews State Park
18. St. Joseph Bay
19. Apalachicola Bay
20. Alligator Harbor
21. St. Martins Marsh
22. Matlacha Pass
23. Pine Island Sound
24. Cape Romano - Ten Thousand Islands
25. Lignumvitae Key
26. Coupon Bight
27. Lake Jackson
28. Pinellas County
29. Estero Bay
30. Cape Haze
31. Wekiva River
32. Rookery Bay
33. Cockroach Bay
34. Gasparilla Sound - Charlotte Harbor
35. Terra Ceia
36. Guana River Marsh
37. Big Bend Seagrasses
38. Boca Ciega Bay
39. Rainbow Springs
40. Lemon Bay
41. Oklawaha River

Detailed information on Aquatic Preserves: <https://floridadep.gov/fco/aquatic-preserve>
Map showing locations of Aquatic Preserves: <https://ca.dep.state.fl.us/mapdirect/?focus=conpro>

Figure 10-1 Aquatic Preserves