

**Contaminated Sediments External Advisory Group**  
**November 16, 2015 Meeting Follow-up**  
**Ordinary High Water Mark**

- 1. The Army Corps of Engineers (ACOE) and the State of Wisconsin definition for ordinary high water mark (OHWM) may differ. Need to clearly identify the differences in definition so everyone has a clear understanding.**

ACOE jurisdiction entails "navigable waters of the U.S." within Rivers and Harbors Act (RHA) jurisdiction (as defined by 33 CFR part 329)

<http://www.nap.usace.army.mil/Portals/39/docs/regulatory/regs/33cfr329.pdf>

And "waters of the U.S." within Clean Water Act (CWA) jurisdiction (as defined by 33 CFR part 328)

<http://www.nap.usace.army.mil/Portals/39/docs/regulatory/regs/33cfr328.pdf>

The ACOE does not use the term OHWM for any regulatory or jurisdictional purposes. For the ACOE purposes, stream channels are identified for Clean Water Act purposes as features on the landscape through which water flows for sufficient frequency and duration each year to produce an OHWM. Per the ACOE, "The OHWM is the line on the shore or bank established by the fluctuations of water and indicated by physical characteristics such as a clear natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris and other physical characteristics." For ACOE regulatory purposes, channels that do not have an OHWM are not waters of the United States.

The State of Wisconsin has codified the term Ordinary High Water Mark based on case law<sup>1</sup> [*Diana Shooting Club v. Hustig*, 156 Wis. 261 (1914); *Polebitzke v. John Week Lbr. Co.*, 163 Wis. 322 (1916)] under NR 300 Wis. Admin. Code series, which uses a portion of the same case law definition and defines OHWM as "means the point on the bank or shore up to which the presence and action of water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation or other easily recognized characteristic".

The State of Wisconsin has codified the term "Navigable waters" or "navigable waterway" under s 30.01(4m) Wis. Statutes which means "any body of water which is navigable under the laws of this state". The term "navigable waterway" is further defined in Administrative Code NR 310.03(5) and NR 325.03(7) which means "any body of water with a defined bed and bank that is navigable under Wisconsin law. In Wisconsin a body of water is navigable if it is capable of floating on a regularly recurring basis the lightest boat or skiff used for recreation or any other purpose. **Note:** This incorporates the definition at s. [30.01\(4m\)](#), Stats., and current case law, which requires a watercourse to have a bed and banks, *Hoyt v. City of Hudson*, 27 Wis. 656 (1871), and requires a navigable waterway to float on a regularly recurring basis the lightest boat or skiff, *DeGayner & Co., Inc. v. DNR*, [70 Wis. 2d 936](#) (1975); *Village of Menomonee Falls v. DNR*, [140 Wis.2d 579](#) (Ct. App. 1987)."

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<sup>1</sup> "By ordinary high-water mark is meant the point on the bank or shore up to which the presence and action of the water is so continuous as to leave a distinct mark either by erosion, destruction of terrestrial vegetation, or other easily recognized characteristic. And where the bank or shore at any particular place is of such a character that it is impossible or difficult to ascertain where the point of ordinary high-water mark is, recourse may be had to other places on the bank or shore of the same stream or lake to determine whether a given stage of water is above or below ordinary high-water mark."

**2. The OHWM can change over time. Need to outline a process for updating OHWM delineations.**

Upon receipt of a request for Declaratory Ruling under s. 221.41 Wis. Stats. the department has the ability to make a formal OHWM determination. However staff frequently make informal determinations on a case-by case basis to ascertain jurisdiction for the purposes of determining what permit authority certain projects may fall under. Typically in these situations if the applicant disagrees with the OHWM determination, then they can seek a formal determination under Declaratory Ruling for the location.

**3. DNR tracking/recording of the OHWM.**

Currently state law requires the department to publish navigability determinations and OHWM on our website.

[30.102\(1\) \(1\)](#) NAVIGABILITY DETERMINATION AND ORDINARY HIGH-WATER MARK IDENTIFICATION. If the department makes a determination that a waterway is navigable or is not navigable or identifies the ordinary high-water mark of a navigable waterway, the department shall publish that information on the department's internet web site. Any person may rely on the information posted under this section as being accurate. This section does not restrict the ability of a person to challenge the accuracy of the information posted under this section.

Currently limited information is available on our department Surface Water Data Viewer (SWDV). Choose layer "Permits and Determinations".

Surface Water Data Viewer  
<http://dnr.wi.gov/topic/surfacewater/swdv/>