

COMMON QUESTIONS:

STATE WETLAND REGULATORY PROGRAMS



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PREFACE

This guide is designed for state agencies, local government officials, land trust staff, federal agencies, and others interested in state wetland regulatory programs. A selected bibliography and list of websites provide the reader with more information concerning specific subjects.

This guide was prepared by Jon Kusler and Jeanne Christie, Association of State Wetland Managers (ASWM). It draws upon a series of studies prepared by the ASWM pertaining to state wetland programs including the preparation of a report: Status and Trends in State Wetland Regulatory Programs.

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<http://www.epa.gov/glnpo/ecopage/photo/wetlands/wetland05.htm>*

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COMMON QUESTIONS: STATE WETLAND REGULATORY PROGRAMS

Which states regulate activities in wetlands?

A. It is difficult to summarize state regulation of activities in wetlands.

All states regulate some activities in wetlands pursuant to “public water”, dam safety, floodplain regulation, river regulation, pollution control, shoreland zoning, coastal zone management, wetland, critical area, sediment control, stormwater, or other statutes. But, the goals of these efforts and the issue considered by the regulations are typically quite narrow (e.g., dam safety, flood hazard reduction, pollution control). Agriculture, public roads and many activities which may damage or destroy wetlands are typically not regulated. In addition, regulations often apply to some but not all wetlands. Statutes typically require a permit from a state agency only for specified activities (e.g., fills) in particular types of areas (e.g., coastal zone, shoreland areas).

Regulations also overlap. For example, Wisconsin and many other states directly regulate activities in “public” waters which include many wetlands. Wisconsin also sets standards for local regulation of wetlands in some other areas pursuant to a “shoreland” zoning act. In addition, the state regulates activities in wetlands pursuant to water quality statutes. It also regulates some activities pursuant to dam safety statutes, floodplain zoning statutes, and sanitary codes. Finally, it regulates some pursuant to an explicit wetland regulatory statute.

Summarization of state programs becomes even more difficult when the degree of implementation is considered. For example, many states such as California and Washington have theoretically broad authority to regulate activities in wetlands pursuant to water pollution control statutes but few have staffed and funded more than minimal programs.

As examined in more detail below, all twenty eight coastal and Great Lake states regulate at least some activities in coastal and estuarine wetlands directly or set standards for local regulation. Twenty-four states regulate at least some activities in inland wetlands directly or set standards for local regulations although this number is not definitive as suggested below. State regulation of inland and coastal wetlands is strongest through out the nation for navigable waters and adjacent wetlands. It is strongest in the Northeast, Midwest, along the Pacific coast, and in a portion of the South. It is weakest for isolated and partially isolated freshwater wetlands. It is particularly weak in much of the Midwest, the inland portion of the West, and the South. Both coastal and inland wetland regulations vary greatly in terms of their coverage. These regulations are described in greater depth below.



*Less protection is provided for
freshwater wetlands*

Which states regulate activities in coastal and estuarine wetlands?

A. As indicated above, all coastal and Great Lake states – a total of twenty-eight states – provide some measure of control over activities in coastal and wetlands although this control is particularly limited in some states such as Texas and Mississippi. Maine, New Hampshire, Massachusetts, New York, Rhode Island, Connecticut, Maryland, Georgia, Texas and Mississippi have adopted coastal wetland regulatory statutes. Some states such as Alaska, Washington, Oregon, Massachusetts, Connecticut, Rhode Island,

North Carolina, South Carolina, Louisiana, Michigan, Wisconsin, Minnesota, Ohio, Alaska, Hawaii, Indiana, Florida, Pennsylvania and California also regulate at least some



States broadly regulate coastal/estuarine wetlands

coastal wetlands pursuant to coastal zone, “shoreline”, “public waters”, “wetland” or broader land planning and regulatory statutes (e.g., land planning in Hawaii and critical area in Florida) with some overlap with the coastal wetland regulatory statutes. Illinois also regulates public activities in the Great Lakes and other wetlands (Vermont may be added to this list if Lake Champlain is considered a “coastal” water). All coastal states also provide some measure of state control over federal permitting in coastal wetlands with programs established pursuant to Section 401 of the Water Pollution Control Amendments and Coastal Consistency requirements of the Coastal Zone Management Act.

Which states regulate activities in inland (freshwater) wetlands?

A. Most states provide some regulation of structures and fills in larger lakes and streams (waters) pursuant to public water, dam safety, or pollution control statutes. Many of the coastal states provide some measure of regulation of inland wetlands within regulated “coastal” zones which are quite large in states like North Carolina and South Carolina. However, many other coastal states regulate only narrow coastal areas and the freshwater wetlands they contain pursuant to coastal zone statutes.

Twenty-four states provide more specific regulation of freshwater wetlands although the scope of coverage varies greatly. Sixteen states regulate a broad range of activities in freshwater wetlands directly or establish standards for local regulation of freshwater wetlands through an explicit freshwater, “nontidal” or other wetland regulatory statutes. States which directly regulate freshwater wetlands through such statutes include Maine, Rhode Island, New Hampshire, New York, Vermont, Connecticut, New Jersey, Virginia, Florida, Maryland, Minnesota (some wetlands), Michigan, Wisconsin, Indiana, Ohio and Oregon. In addition, Pennsylvania broadly regulates freshwater wetlands through a public water statute. North Carolina utilizes a pollution control statute. Other states such as Nebraska, California, Washington, Texas, and Tennessee are exercising some measure of control over activities in freshwater wetlands through water quality protection statutes.

Maine, Vermont, Washington State, Michigan, Minnesota, Wisconsin, Florida, Oregon, Massachusetts, Connecticut, Florida, and Maryland also establish state standards for local regulation of freshwater wetlands with some direct regulation if local governments fail to regulate consistent with state standards pursuant to freshwater wetland, shoreland or shoreline zoning acts.

In addition, a number of states regulate activities in freshwater wetlands which are included in broader sensitive or critical areas through special statutes. Examples include New Jersey (Hackensack Meadowlands, Pinelands); New York (the Adirondacks); California and Nevada (Lake Tahoe Commission), and Florida (Keys, Big Cypress).

Finally, states provide some measure of control over federal Section 404 permits through Section 401 water quality programs. These efforts are generally limited to activities regulated pursuant the Section 404 program but are broader in a few states (e.g., North Carolina).

How many states regulate wetlands cooperatively with local governments? Do state regulations preempt local regulations?

A. Except for New Jersey, and to a lesser extent Virginia, all states with wetland regulations also encourage local government wetland regulations. These include many states with direct state regulation of coastal and/or freshwater wetlands such as Maine, New Hampshire, Vermont, Rhode Island, New York, Maryland, Virginia, Florida, Minnesota, Michigan, Illinois, Washington, Oregon, and Alaska. They also include states with state-supervised local regulations such as Oregon and Wisconsin. Only New Jersey has preempted local wetland regulations and regulates wetlands directly at the state level although this is also true, to some extent, in Virginia.



How many states have adopted regulations to fill the gaps created by the U.S. Supreme Court SWANCC decision?

A. Only Ohio, Wisconsin, and Indiana have adopted remedial wetland statutes. Legislative proposals have been made in Illinois and New York. In addition, a number of states have tightened pollution control regulations to address the gaps including Nebraska, Ohio, South Carolina, North Carolina, Texas, Washington, and California.

Does the definition of “wetland” used by state regulatory programs coincide with the federal Section 404 definition?

A. In general, state wetland definitions approximate but do not coincide with the federal Section 404 definition for “wetland” although many states regulate essentially the same areas. Many states list characteristics plant species in their definitions. A number of coastal states provide elevation criteria measured in relationship to mean high tide in their definitions. Connecticut uses soils to define freshwater wetlands.

What are the goals of state wetland regulations?

A. In general, state wetland statutes and regulations establish broad goals which include the protection of wetland habitat values, flood storage, wave retardation, pollution control, fisheries and other functions and values.

Have many states adopted a “no net loss” goal?

A. Many states have adopted explicit no net loss of functions, values, and acreage goals such as New Jersey and Maryland. Most states also set forth state flood loss reduction and other public welfare goals in addition to protection of wetland functions and values.

Do states apply a case-by-case permitting approach to wetland protection?

A. In general, yes. States typically require individual permits for specified activities in specified types of wetlands. However, several states such as Massachusetts and Connecticut have also authorized state agencies to adopt maps and “orders” for specific wetlands. These order procedures more closely resemble local zoning and establish more specific, detailed standards for permitted and prohibited activities. A few states like New Jersey and Virginia have adopted “general permits” for minor activities in wetlands which allow landowners and others to undertake specified activities without seeking an individual permit providing they comply with the overall provisions of the general permit.

Do states exempt activities from regulation?

A. Many state wetland regulatory programs partially exempt drainage and agriculture. Some states such as Washington only regulate activities in wetlands within a certain distance of lakes, streams, and the coasts. Some states such as New York place size limitations on regulating activities within freshwater wetlands such as 12.4 acres in New York.

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Have any states created specialized, area-wide regulations for complexes of wetlands?

A. Several states have created area wide regulatory entities to manage specific complexes of wetlands. These include the New Jersey Hackensack Meadowlands Commission and the San Francisco Bay Commission. In addition, state legislatures have created many broader special area management entities for areas which contain large numbers of wetlands such as the New York State Adirondack Park, the New Jersey Pinelands Commission, the Florida Critical Areas Commission (such as the Keys), and the Lake Tahoe Commission.

How many states have adopted Section 401 regulations?

A. Apparently all states have adopted Section 401 programs which allow them to approve, disapprove or conditionally approve federal permits such as Section 404 permits. The specifics including the staffing of the programs vary greatly. Many states have defined state waters to include wetlands or issued specific wetland water quality standards pursuant to water pollution control statutes such as Ohio, Wisconsin, Washington, and North Carolina.

How many states have adopted CZM coastal consistency procedures?

A. Apparently all states with coastal zone management program have adopted CZM coastal consistency procedures.

Have many states “assumed” the Section 404 program? What does this mean?

Only New Jersey and Michigan have “assumed” the Section 404 program although more than fifteen states have investigated potential assumption. Pursuant to such “assumption”, the state rather than the U.S. Army Corps of Engineers (Corps) issues wetland regulatory permits under their own state statutes for most activities in freshwater wetlands which are not navigable by the federal standards of navigability. However, the Corps continues to issue permits for activities in coastal and many riverine and lakeshore wetlands which are adjacent to waters which are navigable in fact. This considerably limits the scope of state programs.

The Section 404 state assumption program is administered by the U.S Environmental Protection Agency (EPA). EPA provides overall program oversight on state programs to insure compliance with federal standards. However, much of the day-to-day state/federal coordination occurs with the Corps which continues to issue permits for wetlands adjacent to navigable waters and their tributaries.

Why have not more states assumed the Section 404 program?

A. Many states have investigated assumption but have decided not to apply for assumption for a number of reasons. First, many states have not adopted sufficiently comprehensive wetland regulations which would qualify them for state assumption. State regulations must equal or exceed federal regulations. Second, states have not wished to spend the additional funds for administration and enforcement of state wetland regulations. Third, states have found that State Programmatic Permits, issued by the Corps, offer a more flexible approach for sharing permitting responsibilities with the federal government than the state assumption program. Many have applied for programmatic permits. See discussion below. Fourth, a state achieves only limited control over activities in wetlands with state assumption because the Corps continues to regulate activities in traditionally navigable waters.

What is a state “programmatic” permit?

A. The Clean Water Act authorizes the Corps to issue “general” permits on a state, regional, or nationwide basis for categories of activities which the Corps has determined will cause only minimal adverse environmental effects. The Corps has interpreted this authority to allow it to issue to states state programmatic permits.

Such state programmatic permits allow states to issue permits for a broad range of activities in wetlands in lieu of direct permitting by the Corp pursuant to Section 404 where state regulations equal or exceed federal regulations. Many states have sought programmatic permits which would not qualify for state assumption (see above) because general permits allow states to regulate certain traditionally navigable waters and do not require states to comprehensively regulate wetlands.

A state “general permit” issued by the Corps to a state divides permitting responsibilities between the state and the Corps. The Corps continues to regulate some activities in navigable water and activities with major impacts. The state directly regulates activities with minor impacts. The Corps and the State jointly review some activities with moderate impact.

Wisconsin, Minnesota, Maine, New Hampshire, Rhode Island, Connecticut, Maryland, Florida, Pennsylvania, and Oregon are among the states which have been granted state programmatic permits by the Corps whereby the state regulates in place of the Corps at least a portion of the wetlands which are subject to Section 404 regulation.

How many states have adopted joint permit processing procedures with the U.S. Army Corps of Engineers?

A. Many states such as Alaska, Wisconsin, Minnesota, Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Oregon, Florida, and Pennsylvania have adopted joint wetland permit processing procedures with the Corps as part of direct state regulatory programs or cooperative state/local regulatory efforts.

Have states mapped their wetlands?

A. Freshwater wetland statutes in Maryland, New Jersey, and New York require wetland mapping prior to regulation of wetlands. A number of other states have prepared their own wetland maps including Massachusetts, Wisconsin, and Connecticut. Most other states rely on federal, National Wetland Inventory maps.

Have states authorized the use of mitigation banks?

A. At least twenty-one states have adopted mitigation bank statutes or regulations which authorize the state to establish banks or to issue guidance for the establishment of banks. These include Indiana, Iowa, Louisiana, New Jersey, Oregon, Pennsylvania, Texas, Virginia, Washington, Wisconsin, North Dakota, New Hampshire, Arkansas, West Virginia, Tennessee, North Carolina, Maryland, Nebraska, Maine, Colorado, and California. Several state natural resource agencies such as Maryland, New Jersey, and California have established state mitigation banks for use by individuals seeking permits to alter wetlands. State transportation agencies have established mitigation banks for their own use in many other states such as North Carolina and Minnesota. South Carolina, Texas, North Carolina, California, and have adopted guidance for private wetland mitigation banks.

Have states developed their own wetland assessment procedures?

A. Many states such as Wisconsin, Minnesota, New Hampshire, Connecticut, and Oregon developed rapid wetland assessment procedures in the 1980s and early 1990s which resembled, in many respects, the WET (Wetland Evaluation Technique) developed by the Corps. More recently, some states such as Washington, Alaska, Utah, Oregon, and California have investigated or developed Hydrogeomorphic Method models. However, such methods have not been applied for regulatory purposes. Many states are also in the process of developing biocriteria for wetland water quality standards including Wisconsin, Minnesota, New York, Vermont, Maine, Ohio, Indiana, and Nebraska. Wisconsin and Ohio are applying such criteria in regulatory permitting or review programs. Florida is the only state which has formerly adopted a wetland assessment procedure which must be applied on all state regulatory permits.

Have states developed model ordinances and other guidance materials for local governments?

A. Many states such as Wisconsin, Minnesota, Maryland, Pennsylvania, Virginia, and Indiana, and Michigan have developed model wetland protection ordinances to assist local governments.

Have state wetland regulations been upheld by the courts?

A. Yes, state wetland regulations have been broadly and consistently upheld by the courts. No court has held a state wetland statute invalid. Courts have also broadly upheld state denial of permits, providing some economic use remains for whole parcels. See J. Kusler, Wetland Regulations in the Courts.

Do states provide tax incentives for regulated wetlands?

A. Most states have adopted statutes which reduce the property taxes on regulated wetlands. Some of these statutes are contained in wetland statutes; others in broader open space and property tax legislation. In general, assessors are to assess wetlands at existing use rather than potential (developed) use value.

Where can I go to get more information on state programs?

A. See selected bibliography and web pages listed below.



SUGGESTED READINGS

Association of State Wetland Managers. 1993. Classification of Wetlands for Regulatory Purposes. Berne, New York.

Kusler, J. 1994. State Wetland Regulation: Status of Programs and Emerging Trends. Association of State Wetland Managers. Berne, N.Y.

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Silverberg, S. and M. Dennison. 1993. Wetlands and Coastal Zone Regulation and Compliance. Wiley Press. New York, New York.

Want, W. F. 2004 update. The Law of Wetland Regulation, Clark Boardman Callaghan

World Wildlife Fund. 1992. Statewide Wetlands Strategies: A Guide to Protecting and Managing the Resource. Island Press, Covelo, California

SUGGESTED WEB SITES

<http://www.aswm.org/propub/statepartnership.pdf>

Addressing the Gaps: A Federal, State, Tribal and Local Partnership for Wetland Regulation

<http://www.aswm.org/swp/theSWANCCdecision9.pdf>

Kusler, J. 2004. The SWANCC Decision; State Regulation of Wetlands to Fill the Gap.

http://www.floods.org/NoAdverseImpact/FLOODPLAIN_REG_IN_COURTS_112603.pdf

Kusler, J. 2003 update. State and Local Regulations in the Courts.

www.lawguru.com/ilawlib/1.htm

Internet Law Library.

<http://www.hq.org/torts.html>

HierosGamos, Tort Law. Comprehensive law and government portal.

<http://www.statelocalgov.net/index.cfm>

State and Local Government on the Net. Many, many sites listed state-by-state.

<http://www.epa.gov/docs/epacfr40/find-aid.info/state/>

EPA links to state environmental laws. State/federal programs described state-by-state. Good list of links.

http://www.law.cornell.edu/topics/state_statutes.html

Legal Information Institute. State laws by topic.

<http://www.law.cornell.edu/opinions.html>

Legal Information Institute. State Courts - by Jurisdiction. Links to individual states and courts and full text of decisions.

<http://www.epa.gov/owow/wetlands/restore/links>

U.S. Environmental Protection Agency. River Corridor and Wetland Restoration. Wetlands Restoration Links by State and Local Governments.

<http://www.cicacenter.org/swift.html>

Construction Industry Compliance Assistance. State Wetlands Information Tool (SWIFT).



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<http://www.aswm.org/brochure/state.pdf>