



ENVIRONMENTAL  
LAW • INSTITUTE®

## **State Wetland Protection**

*Status, Trends, & Model Approaches*

*A 50-state study by the  
Environmental Law Institute*

*With support from the  
U.S. Environmental Protection Agency*

2008

# **Appendix: State Profiles**

# Montana

## I. Overview

Montana has lost approximately 27 percent of its naturally occurring wetlands since the early 1800s, primarily due to conversion for cropland.<sup>1</sup> Although wetlands and riparian areas cover less than four percent of the state's land, they provide habitat for 60 percent of amphibian, bird, reptile, and mammal species of greatest conservation need.<sup>2</sup> Montana's sparse population and expansive area present unique challenges for the state's small wetland staff.

The primary form of wetland regulation at the state level is water quality certification under Clean Water Act (CWA) §401. The state is implementing a pilot program to track wetland acreage in three watersheds and makes extensive use of public-private partnerships to enhance wetland protection.

## II. Regulatory Programs

### *Wetland definitions and delineation*

The definitions of "state waters" and "surface waters" in Montana's Water Quality Act do not explicitly include wetlands, but broadly cover "bodies of water." "State waters" include any "body of water, irrigation system, or drainage system, either surface or underground."<sup>3</sup> "Surface waters" mean "any waters on the earth's surface including, but not limited to, streams, lakes, ponds, and reservoirs; and irrigation and drainage systems discharging directly into a stream, lake, pond, reservoir or other surface water."<sup>4</sup>

Montana delineates wetlands in accordance with the criteria outlined in the U.S. Army Corps of Engineers 1987 *Wetlands Delineation Manual*.<sup>5</sup>

### *§401 certification*

Montana utilizes §401 certification as its primary form of state-level wetland regulation. The §401 program is administered by the Montana Department of Environmental Quality (MDEQ). For wetlands that have a surface water component, state water permits are used in conjunction with §401 permits.<sup>6</sup> MDEQ makes very few formal certifications each year because §401

---

<sup>1</sup> United States Geological Survey, *National Summary on Wetland Resources*, at [http://water.usgs.gov/nwsum/WSP2425/state\\_highlights\\_summary.html](http://water.usgs.gov/nwsum/WSP2425/state_highlights_summary.html) (last modified Mar. 7, 1997).

<sup>2</sup> Montana Watercourse, *Water Facts for Montana*, at <http://www.mtwatercourse.org/waterfacts.htm> (last visited July 26, 2007).

<sup>3</sup> The term does not include (i) ponds or lagoons used solely for treating, transporting, or impounding pollutants; or (ii) irrigation waters or land application disposal waters when the waters are used up within the irrigation or land application disposal system and the waters are not returned to state waters. MONT. CODE ANN. § 75-5-103(29)(a)-(b).

<sup>4</sup> Water bodies used solely for treating, transporting or impounding pollutants are not considered to be surface water. MONT. ADMIN. R. § 17.30.602(32).

<sup>5</sup> ENVTL. LAB., WETLANDS RESEARCH PROGRAM TECHNICAL REPORT Y-87-1, CORPS OF ENGINEERS WETLANDS DELINEATION MANUAL (U.S. Army Corps of Engineers 1987), available at <http://www.mvn.usace.army.mil/ops/regulatory/wlman87.pdf>

<sup>6</sup> Personal Communication with Jeff Ryan, Mont. Dep't of Env'tl. Quality (July 25, 2005).

certification is usually waived on projects that cause minimal impact or projects that require a 318 permit, a short-term permit for turbidity, from the MDEQ.<sup>7</sup> Between 200 and 250 authorizations with conditions are issued per year; virtually all applications are approved. Approval decisions are based on a combination of quantitative methodology, qualitative assessment, and best professional judgment. The overall size of a wetland and water body, as well as a project's impact on erosion, are all important considerations.<sup>8</sup>

### ***Organization of state agencies***

Montana administers its §401 program out of the MDEQ office in Helena. Approximately one-half of a full-time equivalent (FTE) is involved in §401 certification and monitoring and assessment, and one FTE coordinates the grant program and non-regulatory conservation strategy.<sup>9</sup> In addition, a three-year grant supports one FTE to develop a database to track wetland losses and gains in three pilot watersheds and provide information and GIS support. The same three-year grant also supports an FTE at the Montana Natural Heritage Program (MNHP) to develop National Wetland Inventory maps from 2005 aerial imagery with hydrogeomorphic modifiers for the same pilot watersheds.<sup>10</sup>

Annual funding is approximately \$400,000, mostly derived from competitive U.S. Environmental Protection Agency (EPA) 104(b)(3) grants and matched by general state appropriations.<sup>11</sup> The §401 certification program is supported mostly by EPA 319 funds (approximately \$30,000 per year).<sup>12</sup> A one-time three-year grant funds the special wetland tracking project.<sup>13</sup> The enforcement program within MDEQ has 14 FTEs and an annual budget of approximately \$1 million; however, it should be noted that these resources are devoted to all types of environmental enforcement, not just wetlands.<sup>14</sup>

### ***Nationwide and general permits***

MDEQ staff review nationwide permits (NWP) approximately every five years.<sup>15</sup> The state does not impose regional conditions for NWPs. Montana also has general permits for certain activities, such as wastewater.<sup>16</sup>

### ***Mitigation***

Montana does not have regulations, policies, or legislation that guide wetland mitigation. A Mitigation Banking Review Team does operate in the state.<sup>17</sup> The voluntary Montana Wetlands

---

<sup>7</sup> Turbidity permits may include, but are not limited to, wetlands. Ryan, *supra* note 6. See also MONT. CODE ANN. § 75-5-318.

<sup>8</sup> Ryan, *supra* note 6.

<sup>9</sup> Personal Communication with Lynda Saul, Mont. Dep't of Env'tl. Quality (July 14, 2005).

<sup>10</sup> Personal Communication with Lynda Saul, Mont. Dep't of Env'tl. Quality (Apr. 20, 2007).

<sup>11</sup> Saul, *supra* note 9.

<sup>12</sup> Personal Communication with Jeff Ryan, Mont. Dep't of Env'tl. Quality (Sept. 19, 2005).

<sup>13</sup> Saul, *supra* note 10.

<sup>14</sup> Personal Communication with John Arrigo, Mont. Dep't of Env'tl. Quality (July 26, 2005).

<sup>15</sup> Saul, *supra* note 9.

<sup>16</sup> Ryan, *supra* note 6.

<sup>17</sup> A recent prospectus submitted to the U.S. Army Corps of Engineers for a private wetland mitigation bank in the Blackfoot Valley, near Ovando, Montana, prompted the Corps to request the formation of a Mitigation Banking Review Team (MBRT). The MBRT is comprised of federal and state agencies that have an interest in wetland protection, including MDEQ. Ryan, *supra* note 12.

Legacy partnership worked with its partners to develop an in-lieu fee program that was administered by Montana Fish, Wildlife and Parks (MFWP). Under mutual agreement, MFWP and the Corps terminated the in-lieu fee program in January 2007, with fees on account to be expended by June 2008. To date, stream mitigation guidelines have yet to be issued for public comment by the Corps' Helena Regulatory office. (*See V. Restoration and Partnerships.*)

### ***Compliance and enforcement***

Enforcement actions under the state's water quality laws apply but are not specific to wetlands.<sup>18</sup> Under Montana law, it is unlawful to cause pollution in state water.<sup>19</sup> MDEQ only enforces the statutes if it can document pollution and if "state water" is affected.<sup>20</sup> The definition of "state water" does not include wetlands, so MDEQ only considers the presence of surface water or groundwater in determining whether "state water" has been polluted.

Violations of state water quality laws may result in administrative penalties of up to \$10,000 per day or civil penalties of up to \$25,000 per day, with each day constituting a separate violation.<sup>21</sup> Montana law allows for criminal penalties of \$25,000 per day of violation and one year of imprisonment. Subsequent convictions are punishable with \$50,000 per day of violation and two years of imprisonment.<sup>22</sup> However, violations of the state's water quality laws seldom result in criminal penalties. MDEQ resolves many cases with an administrative order on consent and a settlement penalty. If an alleged violator is recalcitrant, MDEQ will issue orders that require corrective action or compliance and assess a penalty. If a party fails to comply with the administrative order, the case will be elevated to district court to seek injunctive relief with civil penalties. To combat defendants who refuse to pay or dissolve themselves, MDEQ has authority to hire a collection agency to collect unpaid penalties and fees.<sup>23</sup>

### ***Tracking systems***

Montana does not have a state system for tracking permits or mitigation. With the assistance of a grant from EPA, the state established and is implementing a pilot program to track net loss and gain of wetland acreage in three watersheds through a wetland inventory using remote sensing. The three-year program began in January 2006.<sup>24</sup>

## **III. Water Quality Standards**

Montana's water quality standards, anti-degradation policy, and designated uses are not specific to wetlands.<sup>25</sup> General water quality criteria are narrative, chemical, and biological<sup>26</sup> and recognize that "certain state waters are of such environmental, ecological, or economic value that

---

<sup>18</sup> MONT. CODE ANN. §§ 75-5-601 to 641.

<sup>19</sup> *Id.* §§ 75-5-605.

<sup>20</sup> Personal Communication with John Arrigo, Mont. Dep't of Env'tl. Quality (July 20, 2005).

<sup>21</sup> MONT. CODE ANN. § 75-5-631.

<sup>22</sup> *Id.* § 75-5-632.

<sup>23</sup> Arrigo, *supra* note 20.

<sup>24</sup> Saul, *supra* note 9; Personal communication with Randy Apfelbeck, Mont. Dep't of Env'tl. Quality (Mar. 29, 2007).

<sup>25</sup> *Id.*

<sup>26</sup> MONT. CODE ANN. § 75-5-301.

the state should, upon a showing of necessity, prohibit, to the greatest extent practicable, changes to the existing water quality of those waters.”<sup>27</sup>

#### **IV. Monitoring and Assessment**

The MDEQ employs several assessment methodologies for wetlands. The state currently has landscape-level and rapid assessments and has explored the development of a bioassessment focused on vegetation, birds, and amphibians. Stream assessment methodologies consist of a qualitative stream reach assessment, water chemistry sampling, and a bioassessment with a focus on invertebrates and algae. Landscape assessments include geographic information system (GIS) models for conducting risk assessments that are based on land use activities. During the summer of 2005, MDEQ worked with the Gallatin Local Water Quality District and Montana Watercourse, a nonprofit program that focuses on education and citizen volunteer monitoring, to assist in evaluating and refining wetland rapid assessment and bird assessment protocols.<sup>28</sup> *Montana Wetland Rapid Assessment Guidebook (Version 2.0)* was published in December 2005. It outlines the Montana Rapid Assessment Methodology for assessing wetland condition and is designed for field technicians.<sup>29</sup> In 2005, the state partnered with the MNHP to use rapid assessments along with their amphibian surveys in watersheds to identify sites for wetland protection and restoration. Results will be published on the MNHP website.<sup>30</sup> The primary purposes for conducting these assessments are local watershed management, identification of wetland restoration priorities, and general ambient assessment.<sup>31</sup>

MDEQ also works closely with MNHP and universities in developing monitoring and assessment methodologies. Other partners, including the U.S. Department of Agriculture’s Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service, and EPA, provide technical review.<sup>32</sup> Montana also hopes to work with local governments and volunteers to help collect wetland data, recommend priorities for wetland and water quality monitoring and assessment programs, and assist in the dissemination of information.

In December 2006, MDEQ published a document titled *Integrating Wetland Inventory, Assessment, and Monitoring into Local Watershed Plans and Montana’s State Water Monitoring and Assessment Strategy* in recognition of the important role that local management agencies, watershed groups, and state agencies play in protecting wetlands. The document includes: a description of various inventory, assessment, and monitoring tools and procedures that MDEQ and others in the state have developed; a scientific literature review for additional guidance; and strategies for incorporating wetlands inventory, assessment, and monitoring into watershed

---

<sup>27</sup> *Id.* § 75-5-315.

<sup>28</sup> Personal Communication with Randy Apfelbeck, Mont. Dep’t of Env’tl. Quality (Sept. 20, 2005).

<sup>29</sup> See RANDY APFELBECK & ERIN FARRIS, MONT. DEP’T OF ENVTL. QUALITY, MONTANA WETLAND RAPID ASSESSMENT GUIDEBOOK (VERSION 2.0) (Dec. 2005), available at <http://deq.mt.gov/wqinfo/Wetlands/FnlDrftGdebkRAMDEC05.pdf>.

<sup>30</sup> Personal Communication with Randy Apfelbeck, Mont. Dep’t of Env’tl. Quality (Apr. 20, 2007); Saul, *supra* note 10.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

planning and Montana's water quality programs.<sup>33</sup> The state also is involved in providing input and identifying leveraging opportunities for the 2011 national wetlands monitoring and assessment remap project.<sup>34</sup>

## V. Restoration and Partnerships

The Montana Wetlands Legacy Partnership (MWL) is a voluntary, incentive-based partnership that focuses on wetland conservation on public and private land. MWL provides a point of contact for landowners looking for technical and financial assistance from federal, state, tribal, and local governments, as well as private conservation organizations including land trusts.<sup>35</sup>

MWL partners developed the In-Lieu-Fee Aquatic Resource Mitigation Program agreement between the Corps, MDEQ, and MFWP.<sup>36</sup> MFWP managed the funds through 2006. MFWP then terminated the program because insufficient funds were generated to ensure long-term monitoring and protection of the sites and to establish an in-lieu fee coordinator within MFWP. In-lieu fees on account with MFWP will be put towards one or more mitigation projects in the upper Missouri watershed where many of the fees were collected. Projects, under agreement with the Corps, must be completed before June 2008. MFWP also will be responsible for monitoring per Corps' requirements.<sup>37</sup>

## VI. Education and Outreach

Montana has been developing a proactive wetland outreach and education program since the 1990s. Outreach has included public service television and radio spots about the importance and value of wetlands; targeted outreach material for landowners, local government planning officials, wetland pond owners, developers, and the regulated community; and numerous community meetings addressing local wetland issues (e.g., wetlands and water rights, West Nile Virus, and threatened and endangered species). The state has also partnered with local governments experiencing rapid growth and land use changes to conduct wetland mapping and

---

<sup>33</sup> RANDY APFELBECK, MONT. DEP'T OF ENVTL. QUALITY, INTEGRATING WETLAND INVENTORY, ASSESSMENT, AND MONITORING INTO LOCAL WATERSHED PLANS AND MONTANA'S STATE WATER MONITORING AND ASSESSMENT STRATEGY (2006), available at [http://deq.mt.gov/wqinfo/Wetlands/Str\\_%20Wtld\\_%20Ass\\_Fin.pdf](http://deq.mt.gov/wqinfo/Wetlands/Str_%20Wtld_%20Ass_Fin.pdf).

<sup>34</sup> Saul, *supra* note 10.

<sup>35</sup> Saul, *supra* note 9.

<sup>36</sup> Payment to the ILF program were one option for satisfying §404 mitigation requirements, as well as for settling some enforcement cases. Participants in the program typically included landowners, commercial and residential developers, transportation organizations, and others. Fees were calculated on a per-acre basis to include all costs of planning, design, and construction, and costs for acquisition or permanent protection of the site through easements. ILF funds were used to restore, enhance, and protect aquatic habitats and resources throughout the state, which may include land acquisition, purchase of permanent easements, purchase of water rights, in-stream flow leasing, development of mitigation and monitoring plans, physical mitigation and monitoring, long-term management of mitigation parcels, and covering of administrative costs for the ILF program. Programmatic goals included the protection of 50,000 acres of ecologically important wetlands, riparian areas, and associated uplands annually. Personal communication with Tom Hinz, Mont. Wetlands Legacy (Sept. 8, 2005).

<sup>37</sup> Personal communication with Tom Hinz, Mont. Wetlands Legacy (Apr. 5, 2007).

classification and capacity building so that local governments can better manage and protect local wetland resources.<sup>38</sup>

Montana's Natural Resource Information System, in cooperation with the Montana Wetlands Council, started the Montana Wetlands Information Clearinghouse in 1997. This website provides the public information on Montana's wetlands including maps, brochures, and photos as well as links to wetland information throughout the country.<sup>39</sup> State staff hope to update the website in the near future.<sup>40</sup>

The Montana Watercourse is a statewide education and outreach program that provides information, tools, and resources on water resources.<sup>41</sup> The program specifically includes wetlands and also addresses the role of wetlands within watersheds. The Montana Watercourse operates grant-based projects that target all water users, including local governments, developers, landowners and citizens.<sup>42</sup> Volunteer water quality monitoring and educator kits are two examples of projects conducted by Montana Watercourses.<sup>43</sup> They also are conducting a series of very well attended realtor workshops aimed at providing wetland education to those interfacing with new landowners moving to Montana and new small ranchers and hobby farmers to protect and restore wetlands and other aquatic resources. The state will continue to work closely with the Montana Watercourse and local governments in disseminating information about wetland resources in the future. MDEQ recently began to work with Montana Watercourse and other volunteers to assist in evaluating and developing wetland rapid assessment and bird assessment protocols.<sup>44</sup> The state will continue to work closely with the Montana Watercourse and local governments in disseminating information about wetland resources in the future.<sup>45</sup>

## VII. Coordination with State and Federal Agencies

With goals "to build a wetland conservation program to achieve no overall net loss of Montana's remaining wetland base, in terms of quantity and quality; to conserve, restore, enhance and create wetlands where feasible; and to increase Montana's wetland resource base,"<sup>46</sup> the *Conservation Strategy for Montana's Wetlands 1997* is being proactively implemented as funding and other opportunities become available.<sup>47</sup> The strategy lists the following objectives: (1) improve the wetlands knowledge base by completing a wetland inventory for Montana; (2) provide resources to support wetland protection, including information and education, technical

---

<sup>38</sup> Personal Communication with Lynda Saul, Mont. Dep't of Env'tl. Quality (Sept. 20, 2005).

<sup>39</sup> Natural Resource Information System, *Montana Wetlands Information Clearinghouse*, at <http://nris.mt.gov/wis/wetlands/index.asp> (last visited July 26, 2007).

<sup>40</sup> Saul, *supra* note 10.

<sup>41</sup> Montana Watercourse, *About Us*, at <http://www.mtwatercourse.org/AboutUs/aboutus.htm> (last updated Mar. 29, 2007).

<sup>42</sup> Saul, *supra* note 9.

<sup>43</sup> Apfelbeck, *supra* note 28.

<sup>44</sup> Saul, *supra* note 10.

<sup>45</sup> Apfelbeck, *supra* note 28.

<sup>46</sup> MONT. WETLANDS COUNCIL, DRAFT MONTANA WETLANDS CONSERVATION STRATEGY (1997), available at <http://nris.state.mt.us/wis/strategymain.html>.

<sup>47</sup> Saul, *supra* note 9.

assistance, and funding; and (3) encourage voluntary conservation on private land.<sup>48</sup> Local, tribal, state, and federal government agencies, as well as agricultural community representatives, biology- and environment-based conservation groups, consultants, land trusts, industry (e.g., mining, wood products) representatives, real estate/development interests, the recreation/sportsman community, educational representatives, and other water- and wetland-related organizations were active participants in developing the strategy. State, tribal, and federal groups and non-government entities are members of the Montana Wetland Council, a forum that promotes cooperative wetland resource management in the state and is implementing the strategy. The council meets three times per year.<sup>49</sup> The existing strategy is being evaluated and in January 2007, the Montana Wetland Council began a year-long strategic planning process to develop a ten-year strategic framework for wetlands conservation and restoration in Montana. Extensive public outreach is ongoing for that effort and a strategic planning team is working with a consultant to complete the project.<sup>50</sup>

State and federal agencies also coordinate regularly to discuss §404 permit applications that involve impacts to aquatic resources. Meetings are generally held every two to three weeks, and projects discussed are typically larger, more controversial projects.<sup>51</sup> The Montana wetland monitoring and assessment program has held several workgroup meetings since 2002 to solicit input from federal, tribal, and state agencies. The state has also coordinated closely with the MNHP to develop an efficient and effective monitoring and assessment strategy that meets multiple objectives and that could be implemented jointly by several state and federal agencies. The program has also coordinated with the Montana Department of Transportation and USDA Natural Resource Conservation Service to provide wetland assessment training.<sup>52</sup> Federal agencies are also key partners in the MWL, providing voluntary incentive programs to willing landowners for wetland restoration and protection.<sup>53</sup>

## **VIII. Acronyms and Abbreviations**

CWA – Clean Water Act  
EPA – U.S. Environmental Protection Agency  
FTE – Full-Time Equivalent  
GIS – Geographic Information System  
MBRT – Mitigation Banking Review Team  
MDEQ – Montana Department of Environmental Quality  
MFWP – Montana Fish, Wildlife and Parks  
MWL – Montana Wetlands Legacy  
NWP – Nationwide Permit

---

<sup>48</sup> MONT. WETLANDS COUNCIL, *supra* note 46.

<sup>49</sup> Personal Communication with Lynda Saul, Mont. Dep't of Env'tl. Quality (Sept. 14, 2005).

<sup>50</sup> Saul, *supra* note 10.

<sup>51</sup> Ryan, *supra* note 12.

<sup>52</sup> Apfelbeck, *supra* note 28.

<sup>53</sup> Saul, *supra* note 10.